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

A Study and Strategy Paper
prepared for AEGC
by Rachel Burgess
with the support of GIZ

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CONTENTS

TABLES AND FIGURES

ACRONYMS

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

ASEAN POLICY DOCUMENTS

ACAP	ASEAN Competition Action Plan 2025

PART I: EXECUTIVE SUMMARY

Background

At the time of completing this Study, nine out of the ten AMS had enacted competition laws. During the ASEAN Competition Conference in November 2019, Cambodia made a commitment to passing its competition law in 2020.

The AEC Blueprint 2016-2025 refers to both harmonisation and convergence of ASEAN competition laws. It is not clear what is meant by these terms and whether they are intended to be used interchangeably, but it seems unlikely that this is the case. 'Convergence' may be considered a softer approach to achieving consistency, compared with the stricter approach required by 'harmonisation'. ASEAN would benefit from further discussion on the different outcomes intended (if any) by these terms. This Study concludes that much can be achieved through a softer approach and therefore focusses on 'convergence'.

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

Scope and methodology

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

(i) Provides a comprehensive overview of the commonalities and differences of the substantive competition rules in ASEAN;
(ii) Identifies possible areas to prioritise for convergence and supporting arguments; and
(iii) Makes initial recommendations on strategic options regarding the way forward, for consideration of the AEGC in the short to medium term.

Due to time constraints, the Study was limited to a **desk review only** of the **substantive provisions** of the AMS laws. The Study includes an initial benchmarking of the AMS laws against the **existing Regional Guidelines** (noting that these are due for mid-term review in 2020). In addition, the Study considers the **institutional arrangements** of the AMS competition regulators and the **legislative provisions that support regional convergence**. These latter provisions are important as key steps towards convergence can be achieved through soft law (such as guidelines on a regional or national level), cooperation and coordination between the AMS competition regulators. The Study **excludes** a review of the procedural provisions in the laws, the unfair trading provisions (where they exist), the implementing regulations, the available

guidelines and case law. The Study has been drafted in a way that a review of these excluded matters can (and should) be added at a later date.

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

Key findings

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

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

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

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

Institutional structures across the AMS differ considerably with varying budgets and resources which impacts on the ability to employ an adequate number of appropriately skilled staff. This in turn will have a potential impact on the number and types of cases each regulator can pursue. Many regulators have appointed **Commissioners that**

hold other government positions, which affects the time available to focus on competition issues and the perceived autonomy of the institution. The potential overlaps in competition jurisdiction with **sector regulators** could result in divergent interpretations within the jurisdiction and therefore increases the likelihood of divergence across the region.

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

Area feasible for convergence

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

The Study identifies short term priorities as those that could have an immediate impact on regional convergence. Advantage needs to be taken of the rare (and potentially limited) opportunity to influence government, the judiciary, lawyers, academics, business and consumers in relation to their views on competition law. Recommended short term priorities focus on developing 'regional' policy objectives (perhaps in the Regional Guidelines review), creating Regional Guidelines on Cooperation, developing consistency in relation to merger review (within the constraints of the existing merger laws), and Guidelines on the AMS cartel provisions to seek to align interpretation of the laws and practices.

Medium term priorities have also been identified in the Study. These focus on AMS guidelines to explain their anti-competitive agreements and abuse of dominance provisions, seeking to achieve greater convergence through interpretation.

Proposed next steps

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

(1) The Study should be tested against the working practices and understanding of the AMS regulators. It should be expanded to include a review of implementing regulations, guidelines and available caselaw. It will also be critical to complete a 'commonalities and differences' study for the procedural provisions of the ASEAN competition laws.

(2) A conference dedicated to discussing convergence (and potential divergence), attended by representatives from each jurisdiction (regulators, academics, lawyers, economists). This would be highly beneficial to further research.

(3) The AEGC may wish to prepare a publication that explains the similarities (whilst acknowledging the differences) between the AMS laws, as a first step to reassuring businesses operating in the region.

PART II: INTRODUCTION

As part of their commitments under the AEC, nine AMS have already enacted dedicated competition laws, with Cambodia expected to follow shortly[1]. However, the national competition regimes in ASEAN are at varying stages of maturity.

The introduction of multiple separate laws on competition gives rise to inevitable differences which will need to be understood. The AEGC has recognised the necessity and benefits of aligning competition rules across the region[2]. Initiative 5.1 of ACAP is to "identify commonalities and differences across national competition laws in ASEAN" with Outcome 5.1.1 being to assess "commonalities and differences in competition legislations". Further, ACAP Initiative 5.2 is to "develop a strategy for regional convergence on CPL matters" with Outcome 5.2.1 being the development of a "strategy paper on areas feasible for regional convergence".

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

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

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

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

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

[1] The commitment to enact its Competition Laws by early 2020 was reiterated by Minister of Commerce of Cambodia Pan Sorasak at the 8th ASEAN Competition Conference on 18 November 2019 as reported in https://asean.org/cambodia-hosts-8th-asean-competition-conference/?highlight=cambodia-hosts-8th%20-asean-competition-conference (accessed 13 January 2020)

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

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

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

- Preamble of the ACAP – Page 4: "Both deliverables [i.e. the ASEAN Regional Guidelines on Competition Policy and the Handbook on Competition Policy and Law in ASEAN for Business] could form the basis for a more comprehensive comparative review of competition regimes in ASEAN, and subsequently for charting the course for enhanced regional cooperation and **convergence**."

- Commentary under Strategic Goal 3 : Regional Cooperation arrangements on CPL are in place (page 10) "The external factors driving this [i.e. regional cooperation] are worldwide trends towards increased **convergence** of competition rules on the one hand, and international, case-related coordination efforts among jurisdiction on the other."

- Commentary under Strategic Goal 5: Moving towards greater harmonisation of competition policy and law in ASEAN (page 13): "…whilst recognising that one size does not fit all and differences might continue to exist for a number of valid reasons, the ASEAN is also committed to promoting similarities and **convergence** and eliminating contradictions."

- Initiative 5.2 – Develop a strategy for regional **convergence** on CPL matters. Outcomes 5.2.1 – "Strategy Paper on areas feasible for regional **convergence** developed by 2018" (page 13).

- Under the Implementation Schedule of the ACAP (page 31) Strategic Goal 5 (supra),
    - Initiative 5.1: Identify commonalities and differences across national competition laws in ASEAN.
    - Outcome 5.1.1: Commonalities and differences in competition legislations assessed by 2017.
    - Outcome 5.1.2: Recommendations on substantive as well as procedural standards in CPL enforcement for ASEAN by 2018.
      This indicator serves to substantiate the discussion on the **possible convergence** of competition legislations across ASEAN.
    - Initiative 5.2: Develop a strategy for regional convergence on CPL matters.
    - Outcome 5.2.1: Strategy paper on areas feasible for **regional convergence** developed by 2018.

Convergence may be considered a softer approach to achieving consistency, compared with the stricter approach required by 'harmonisation'. ASEAN would

benefit from further discussion on the different outcomes intended (if any) by the use of these differing terms.

1.1 International perspective

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

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

Both these points warrant further research and consideration.

1.2 Regional perspective

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

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

1.3 Extra-territorial application of the laws

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

[3] OECD, *Challenges of International Cooperation in Competition Law Enforcement*, 2014, OECD: Paris. Available at https://www.oecd.org/competition/challenges-international-coop-competition-2014.htm, accessed 20 July 2019.
[4] OECD, *Review of the Recommendation concerning Effective Action against Hard Core Cartels*, 2019, DAF/COMP(2019)13, p 5

Six of the AMS laws contain express provisions that make it clear their laws operate extra-territorially (Brunei Darussalam, Cambodia, Malaysia, Philippines, Singapore and Vietnam)[5]. Indonesia is able to apply its law extra-territorially if the foreign company conducts economic activities in Indonesia[6]. Lao PDR also focusses on operations in the jurisdiction[7]. The laws in Myanmar and Thailand are silent on this issue.

This analysis is supported by the Self-Assessment[8] with the exception that Thailand indicates in its Self-Assessment response that its laws do apply extra-territorially. This was subsequently identified as incorrect.

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

1.4 Steps towards regional cooperation

In 2018, important steps towards regional cooperation were taken in the form of the Regional Cooperation Framework ('RCF'), establishment of the ASEAN Competition Enforcers Network (ACEN) and creation of the Virtual ASEAN Competition Research Centre[9].

The RCF, endorsed by the ASEAN Economic Ministers but not binding on the AMS, sets out general objectives, principles and possible areas of cooperation in relation to the development, application and enforcement of competition laws. The ACEN was created to "facilitate cooperation on competition cases in the region and to serve as a platform to handle cross-border cases" and the Virtual Research Centre acts as a repository for research articles on ASEAN Competition Law, profiles of researchers and academics with interests in competition law and policy in the region and research collaboration opportunities on competition in ASEAN[10].

2. A closer look at the ASEAN competition landscape

2.1 ASEAN competition policy objectives

The desire to introduce competition law across ASEAN by 2015 was first set out in the AEC Blueprint 2008-2015. Nine out of the ten AMS achieved this goal ahead of the establishment of the AEC in December 2015. The AEC Blueprint 2016-2025 then

[5] Section 10 Brunei law; Art 3 Cambodia law; Section 3(2) Malaysia law; Section 3 Philippines law; Section 33 Singapore law; Art 1 Vietnam law
[6] Art 1 Para 5, Indonesia Law
[7] Article 6 Lao PDR law
[8] [8] A self-assessment questionnaire was completed by the nine existing AMS during 2019. The results of this self-assessment are not publicly available.
[9] See post entitled "ASEAN establishes Competition Enforcers' Network, Regional Cooperation Framework, and Virtual Research Centre at https://asean.org/asean-establishes-competition-enforcers-network-regional-cooperation-framework-virtual-research-centre/?highlight=asian%20establishes%20competition%20enforcers%20network, accessed 13 January 2020
[10] AEGC Media Release: https://asean-competition.org/read-news-asean-establishes-competition-enforcers-network-regional-cooperation-framework-and-virtual-research-centre, accessed 21 January 2020

emphasised the need for operational and effective competition law and policy (CPL). The strategic measures set out in the Blueprint included:

(a) Effectively implementing CPL in all AMS based on international best practices and agreed upon ASEAN guidelines;
(b) Achieving greater harmonisation of CPL in ASEAN by developing a regional strategy on convergence[11]; and
(c) Continuing to enhance CPL in ASEAN taking into account international best practices[12].

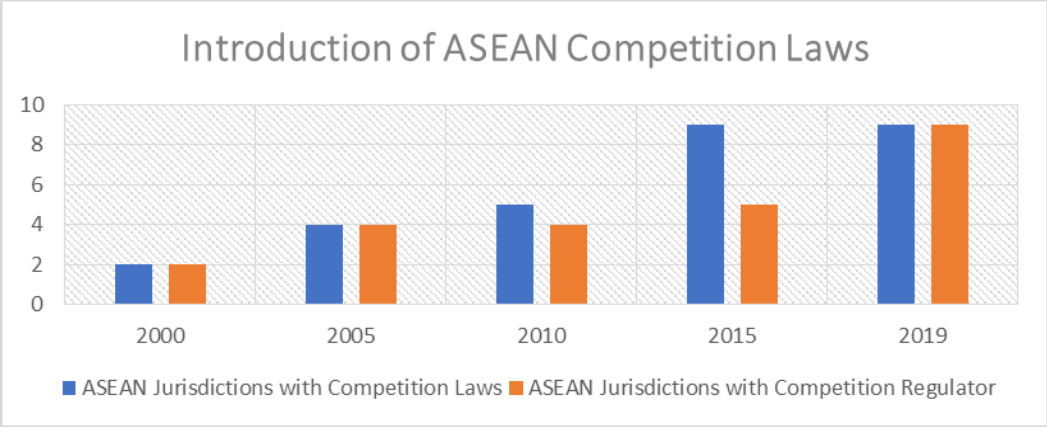
Subsequently, ACAP 2025 was adopted. ACAP recognises that convergence can only be achieved after the introduction, and enforcement, of competition laws and policies[13]. Importantly, it also recognises that the laws across the AMS are different (and may remain different for many valid reasons). Nevertheless, ACAP commits to promoting the 'similarities and convergence and eliminating contradictions'[14].

The benefits of harmonisation are noted to include creating a seamless policy environment for goods, services and capital to move around freely without barriers; allowing companies to operate and allocate their resources in the most efficient ways possible; enhancing transparency and predictability of the investment climate; and facilitating regional cooperation with regard to competition law enforcement (under Strategic Goal 3)[15].

2.2 Competition law development and implementation across ASEAN

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

Figure 1: Introduction of ASEAN Competition Laws and Regulators



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

[11] The terminology 'harmonisation' and 'convergence' are used in the ASEAN Economic Blueprints. The terms are not synonyms and are not intended to be used interchangeably. The AEGC seeks to achieve regional convergence, not harmonisation, at this point in time which is consistent with the ACAP and its Implementation Schedule.
[12] ASEAN Secretariat, *ASEAN Economic Community Blueprint (2015-2025)*, Jakarta: ASEAN Secretariat, 2015, paragraph B1, pp 12-13.
[13] ASEAN Secretariat, *ASEAN Competition Action Plan 2016-2025*, Jakarta: ASEAN Secretariat, 2015, p 8
[14] Id.
[15] Id.

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

Table 1: Status of Competition Law and Regulator Development

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

Source: Compiled by Rachel Burgess and Dominique Ogilvie (ACCC) for presentation at ANU Law and Justice Community of Practice from various sources based on best information available as at November 2018. Updated by Rachel Burgess, January 2020.

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

3.1 Aim

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

(i) Firstly, provide a comprehensive overview of commonalities and differences of the prevalent (substantive) competition rules in ASEAN;

(ii) Secondly, identify possible areas to be prioritised for convergence and outline the main arguments supporting the suggestions;

(iii) Thirdly, make initial recommendations on strategic options regarding the way forward, for consideration by the AEGC in the short to medium term.

3.2 Structure

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

(i) The Study begins with an outline of the policy objectives identified in the ASEAN Regional Guidelines and the individual national competition laws[16].

(ii) The analysis then proceeds on the basis of the three pillars of competition law – anti-competitive agreements (including cartels, other horizontal agreements and vertical agreements), abuse of dominance and merger control. Each of these pillars is considered by comparing and contrasting the text of the laws, as well as any recommendations set out in the ASEAN Regional Guidelines. The Self-Assessment[17] responses provided by the AMS are also incorporated to the extent relevant.

(iii) The institutional arrangements in each of the AMS are considered by reference to both the competition regulator and any sector regulators with competition law jurisdiction.

(iv) As regional convergence will depend to a large extent on the ability of the AMS to cooperate and coordinate in relation to competition law enforcement, the Study includes an analysis of key provisions that will allow cooperation to take place, such as the treatment of confidential information.

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

3.3 Methodology

There was a limited timeframe available to complete this Study. Given the desire to complete with a high degree of quality, the scope has been kept concise, but written to allow for additional details to be added at a later stage. The Study is intended as the first step towards a regional discourse on competition law convergence in ASEAN.

The Study has been completed as a **desk study only** and concentrates only on the **substantive provisions** of the AMS laws dealing with cartels, other anti-competitive agreements, abuse of dominance and mergers, with an initial benchmarking against the existing Regional Guidelines. The laws on which the desk study has been undertaken are set out below:

[16] The ASEAN Regional Guidelines were developed in 2010 and are due to be reviewed in 2020, especially in light of advancement in the digitalisation of economies of AMS and the adoption of Competition Laws by almost all the AMS and increasing cross-border issues emanating over the last ten years. Given that this is likely to take place in 2020, this Study may need review following this activity.

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

Table 2: Laws Reviewed during Study

Jurisdiction	Title	Version
Brunei Darussalam	Competition Order 2015	Enactment version
Cambodia	Draft Law on Competition of Cambodia	Version 5.7 (based on Draft Khmer Version of 25 June 2019)
Indonesia	Law No. 5 of 1999 Concerning The Prohibition of Monopolistic Practices and Unfair Business Competition	Enactment version, English Translation
Lao PDR	Law on Competition No. 60/NA	Enactment version, English Translation
Malaysia	Competition Act 2010	Enactment version (English)
Myanmar	The Pyidaungsu Hluttaw Law No.9, 2015	Enactment version, English Translation
Philippines	Philippine Competition Act	Enactment version (English)
Singapore	Competition Act (Chapter 50B)	Version in force from 16/5/2018
Thailand	Trade Competition Act B.E.2560	Enactment version, translated into English by the OTCC
Vietnam	Law No: 23/2018/QH14	Enactment version, English Translation

An initial assessment of the leniency, dawn raids, sanctions and confidential information provisions has been included but further detailed research should be undertaken as part of the recommended review of the ASEAN competition law procedural provisions. The Study **excludes** an assessment of the 'unfair trading provisions' as well as the procedural provisions, such as the Decision-making process. The Study also does not compare the ASEAN provisions with international good practices and **excludes** a review of the implementing regulations, the available guidelines and case law. Occasional references to case law and guidelines throughout the Study are provided by way of example only. It is recommended that this further research is undertaken in the near future in order to ensure a comprehensive review of the ASEAN competition laws and also to obtain an accurate understanding of the manner in which the AMS regulators, courts and appellate bodies are interpreting and applying those laws. This will be critical to convergence.

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

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

PART III: COMPARATIVE ANALYSIS OF COMPETITION LAWS IN ASEAN

1. Goals of competition laws

1.1 ASEAN Regional Guidelines[18]

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

> "The most commonly stated objective of competition policy is the promotion and the protection of the competitive process. Competition policy introduces a 'level-playing field' for all market players that will help markets to be competitive. The introduction of a competition law will provide the market with a set of 'rules of the game' that protects the competition process itself, rather than competitors in the market. In this way, the pursuit of fair or effective competition can contribute to improvements in economic efficiency, economic growth and development and consumer welfare."[19]

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

> "Economic efficiency refers to the effective use and allocation of the economy's resources. Competition tends to bring about enhanced efficiency, in both a static and a dynamic sense, by disciplining firms to produce at the lowest possible cost and pass these cost savings on to consumers, and motivating firms to undertake research and development to meet customer needs." (paragraph 2.2.1.1)

> "Economic growth and development: Economic growth – the increase in the value of goods and services produced by an economy – is a key indicator of economic development… Competition may bring about greater economic growth and development through improvements in economic efficiency…" (paragraph 2.2.1.2)

> "Consumer welfare: Competition policy contributes to economic growth to the ultimate benefit of consumers, in terms of better choice (new products), better quality and lower prices. Consumer welfare protection may be required in order to redress a perceived imbalance between the market power of consumers and producers…" (paragraph 2.2.1.3)

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

> "the integration of national markets and promotion of regional integration, the promotion or protection of small businesses, the promotion of technological advancement, the promotion of product and process innovation, the promotion of industrial diversification, environment protection, fighting inflation, job creation, equal

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

[19] ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy*, Jakarta: ASEAN Secretariat, 2010, paragraph 2.2.1

treatment of workers according to race and gender or the promotion of welfare of particular consumer groups.[20]

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

1.2 Policy Objectives in AMS Competition Laws

Most of the AMS contain competition policy objectives in their laws (Singapore and Thailand do not). The main objectives identified in the Regional Guidelines – promotion and protection of competition, fair competition, economic efficiency, economic growth and development, and consumer welfare feature prominently (see Table 2). Additional policy objectives identified by each of the AMS are reflective of their stages of economic development (for example, Article 4 Lao PDR law sets out the 'State Policy on Competition' and includes the State creating conditions for and enhancing the capacity of SMEs to participate in fair competition).

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

Table 3: AMS Policy objectives[21]

	Economic efficiency	Economic growth and development	Consumer welfare	Fairness	Promotion and protection of competition
Brunei Darussalam	✓	✓	✓	-	✓
Cambodia	✓	-	✓	✓	✓
Indonesia	✓	-	People's welfare	✓	✓
Lao PDR	-	✓	✓ Protect interests of State and businesses as well as consumers	✓	✓
Malaysia	-	✓	✓	-	✓
Myanmar	-	✓	✓	✓	✓

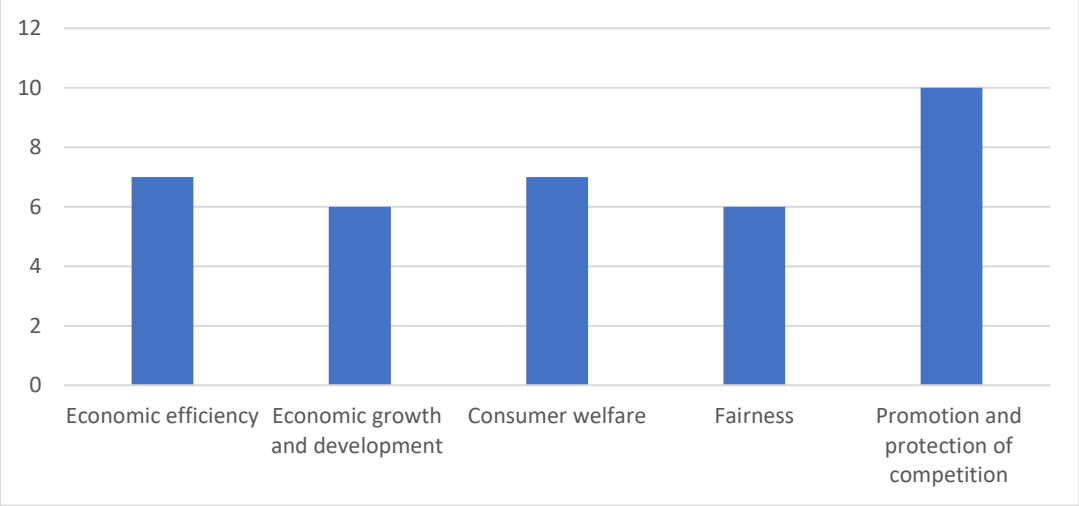
[20] Ibid., paragraph 2.2.3

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

	Economic efficiency	Economic growth and development	Consumer welfare	Fairness	Promotion and protection of competition
			Public interests also considered		
The Philippines	✓	✓	✓	✓	✓
Singapore	✓	-	-	-	✓
Thailand	✓	-	✓	-	✓
Vietnam	✓	✓	Consumer interests and social welfare	✓	✓

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

Figure 2: AMS Policy Objectives



1.3 AMS Self-Assessment

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

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

Thailand listed its objectives as:

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

1.4 Initial Conclusions on Commonalities and Differences: Policy Objectives

Gerber (2013) argues:

> "Goals are the focal point of the convergence strategy. If all competition law systems move towards acceptance of the same set of goals, convergence at this level can be expected to lead towards convergence in outcomes and thereby generate an increasingly uniform normative framework for global competition. Statements of goals perform symbolic functions, and they are an important part of the convergence picture. Nevertheless, the official statements about the goals of competition law often do not represent the objectives actually pursued by decision makers."[22]

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

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

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

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

2. Cartel enforcement in ASEAN

2.1 Why focus on cartels?

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

> "Economic harm from cartels is very substantial. Between 1990 and 2016, nominal affected sales by international hard core cartels exceeded USD 50 trillion. Gross cartel overcharges exceeded USD 1.5 trillion."[23]

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

> "this increase in cross-border trade will inevitably lead to an increase in both cross-border cartels and cross-border mergers.[24]"

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

> "This is especially so as many competition laws apply an 'effects test' which widens the application of the laws to conduct that takes place outside of their jurisdiction, but has an *effect* in the jurisdiction. The incidences of this occurring will increase as trade across ASEAN increases.[25]"

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

2.2 ASEAN Regional Guidelines

The Guidelines recommend that the AMS:

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

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

[23] OECD, *Review of the Recommendation concerning Effective Action against Hard Core Cartels*, 2019, DAF/COMP(2019)13, p 5
[24] Burgess, R and S. Dorai Raj. *Towards an ASEAN Regional Cooperation Agreement on Competition Law*, paper presented at ASEAN 2025: Towards Increased Trade, Investment and Competition Policy and Law in the Southeast Asia Region conference, Universitas Pelita Harapan, Indonesia, 25 July 2019 (publication forthcoming)
[25] Id.

> "AMS 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." (paragraph 3.2.2).

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

> "an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce."[26]

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

> "'Price fixing' involves fixing either the price itself or the components of a price such as a discount, establishing the amount or the percentage by which prices are to be increased, or establishing a range outside which prices are not to move.
>
> 'Bid-rigging' includes cover bidding to assist an undertaking in winning the tender. An essential feature of the tender system is that tenderers prepare and submit bids independently.
>
> 'Market sharing' involves agreements to share markets, whether by territory, type or size of customer, or in some other ways.
>
> 'Limiting or controlling production or investment' involves agreements which limit output or control production, by fixing production levels or setting quotas, or agreements which deal with structural overcapacity or coordinate future investment plans." (paragraphs 3.2.2.1- 3.2.2.4)

2.3 ASEAN Cartel Provisions

All of the AMS include a prohibition against cartels and all of the jurisdictions expressly include price fixing, market sharing and limiting or controlling production and all (except Singapore) specifically list bid-rigging (see Table 3). Although Singapore does not expressly include bid-rigging in its law, it has been recognised in its Guidelines on Section 34 Prohibition and by the Competition Appeal Board as being conduct that is a 'by object' breach of section 34[27].

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

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

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

Table 4: ASEAN Cartel Provisions

	Price fixing	Bid-Rigging	Market Sharing	Limiting or controlling production
Brunei Darussalam	Section 11(2)(a)	Section 11(2)(f)	Section 11(2)(c)	Section 11(2)(b)
Cambodia	Art 8(1)	Art 8(5)[28]	Art 8(3) and (4)	Art 8(2)
Indonesia	Art 5	Art 22	Art 9	Art 11
Lao PDR	Art 21(1)	Art 21(8)	Art 21(2)	Art 21(3)
Malaysia	Section 4(2)(a)	Section 4(2)(d)	Section 4(2)(b)	Section 4(2)(c)
Myanmar	Section 13(a)	Section 13(g)	Section 13(e)	Section 13(f)
Philippines	Section 14(a)(1)	Section 14(a)(2)	Section 14(b)(2)	Section 14(b)(1)
Singapore	Section 34(2)(a)	No express provision	Section 34(2)(c)	Section 34(2)(b)
Thailand	Section 54(1)	Section 54(3)	Section 54(4)	Section 54(2)
Vietnam	Art 11(1)	Art 11(4)	Art 11(2)	Art 11(3)

Source: Author's analysis based on review of laws

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

2.3.1 Scope of application of the law

The Regional Guidelines state:

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

[28] Note that Cambodian law only covers bid rigging in the context of private procurement contracts.

The AMS use different terminology to determine to whom their respective competition laws apply. Brunei Darussalam and Singapore use 'undertaking'[29]; Lao PDR, Malaysia and Vietnam use 'enterprise'[30], the Philippines uses 'entity'[31]; Cambodia uses 'persons'[32]; Indonesia uses 'business actors'[33]; Myanmar uses 'businessman' (although Article 13 applies only to 'person')[34] and Thailand uses 'business operator'[35].

The difference in terminology used will not be as important as the difference in interpretation of those terms. In particular, it will be important to distinguish between the jurisdictions that apply their law to the wider concept of 'economic' activities (such as sporting associations or trade associations who do not normally seek a profit) and those that limit the application of their laws to 'commercial' (profit-making) activities only. This will have an impact on the ability of jurisdictions to prosecute cartels. For example, in Malaysia, the application of the law is limited to those engaged in commercial activities[36] which has affected the MyCC's ability to pursue the trade associations involved in early cartel activity (although the law was enforced against *members* of the trade associations).

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

2.3.2 Agreement and/or concerted practice

The Regional Guidelines state:

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

Some of the AMS jurisdictions have elected to expressly extend the application of their competition laws to 'concerted practices': Brunei Darussalam[37], Malaysia[38],

[29] Defined in section 2 of Brunei Darussalam and paragraph 2(1) of Singapore law as capable of carrying on commercial or economic activities relating to goods or services.
[30] Not defined in Lao PDR law; Defined in section 2 Malaysia law as any entity carrying on commercial activities relating to goods or services and includes a single economic entity; Not defined in Vietnam law but see Article 2 for definition of 'Applicable Entities'.
[31] Defined in section 4(h) Philippines law with link to those engaged directly or indirectly in economic activity and expressly includes 'those owned or controlled by government'.
[32] Defined in Art 4(11) Cambodia law by reference to carrying on 'business activities regardless of profit or non-profit, registered or non-registered'.
[33] Defined in Art 1 Indonesia law as "business actors shall be any individual or business entity, either incorporated or not incorporated as legal entity, established and domiciled or conducting activities within the jurisdiction of the state of the Republic of Indonesia, either individually or jointly based on agreement, conducting various business activities in the field of economy".
[34] Businessman is defined in Art 2 Myanmar law to include organisations
[35] Defined in section 5 Thai law by reference to sellers, producers and buyers
[36] Section 2 Malaysia law
[37] Section 11 Brunei law applies to concerted practices, which is defined in section 2
[38] Section 2 Malaysia law defines agreement to expressly include 'concerted practices'

Philippines[39], Singapore[40]. Cambodia has included a definition of agreement that would seem intended to include the concept of 'concerted practice'[41]. The laws in the remaining jurisdictions (Indonesia, Lao PDR, Myanmar, Thailand and Vietnam) do not include any reference to concerted practices. Vietnam defines 'agreement in restraint of competition' to mean 'an act of agreement between the parties in any form'[42] and in practice, the NCC has advised that the law is enforced against all anti-competitive agreements (both implicit and explicit ones).

The inclusion or otherwise of 'concerted practices' across the AMS laws will have an impact on convergence. The experience in Australia has been that conduct that would arguably have constituted a 'concerted practice' under European law did not satisfy Australia's requirement of an 'agreement, arrangement or understanding'[43]. This has resulted in a recent amendment to Australia's cartel laws to include 'concerted practices'. Across ASEAN, cross-border conduct that may not amount to an agreement may escape liability in those jurisdictions that do not have a prohibition against 'concerted practices'.

2.3.3 Per se versus object and effect

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

The words 'per se' are expressly used in the Philippines legislation (in relation to price fixing and bid rigging only)[44]. A number of other jurisdictions use the 'object or effect' terminology (Singapore, Brunei Darussalam, Malaysia[45] and the Philippines in relation to market sharing and limiting production). As noted by Maximiano (2019), "[i]t is not clear whether the 'object' component is intended to apply as equivalent to a 'per se' (as in the US) or more akin to the European standard"[46].

Vietnam has advised that it treats the hardcore cartel offences (bid rigging[47], price fixing, market sharing and limiting production) as per se illegal.

In the remaining jurisdictions, neither the words 'per se' nor 'object or effect' are used. Indonesia and Thailand have informally advised that the 'per se' test is applied to cartels (in the case of Indonesia, only to price fixing) but the legislative drafting in the

[39] Section 4(b) Philippines law defines agreement to expressly include 'concerted action'
[40] Section 34 Singapore law expressly applies to 'concerted practices'
[41] Art 4(2) Cambodia law refers to direct or indirect coordination where that coordination has the object or effect of influencing the conduct of one or more persons in a market or disclosing a course of conduct which a person has decided to adopt or is contemplating adopting.
[42] Article 3(4) Vietnam law
[43] See, for example, *ACCC v Australian Egg Corporation* [2017] FCAFC 152
[44] Section 14(a) Philippine Competition Act 2015
[45] Note Section 4(2) Malaysia Competition Act *deems* cartels to have the object of significantly preventing, restricting or distorting competition
[46] Maximiano, Burgess and Wouter, *Promoting Regional Convergence in ASEAN Competition Laws*, in Paulo Burnier da Silveira and William Kovacic (eds) *Global Competition Enforcement: New Players, New Challenges*. Kluwer Publishing, 2019, p 240
[47] Both horizontal and vertical bid rigging agreements

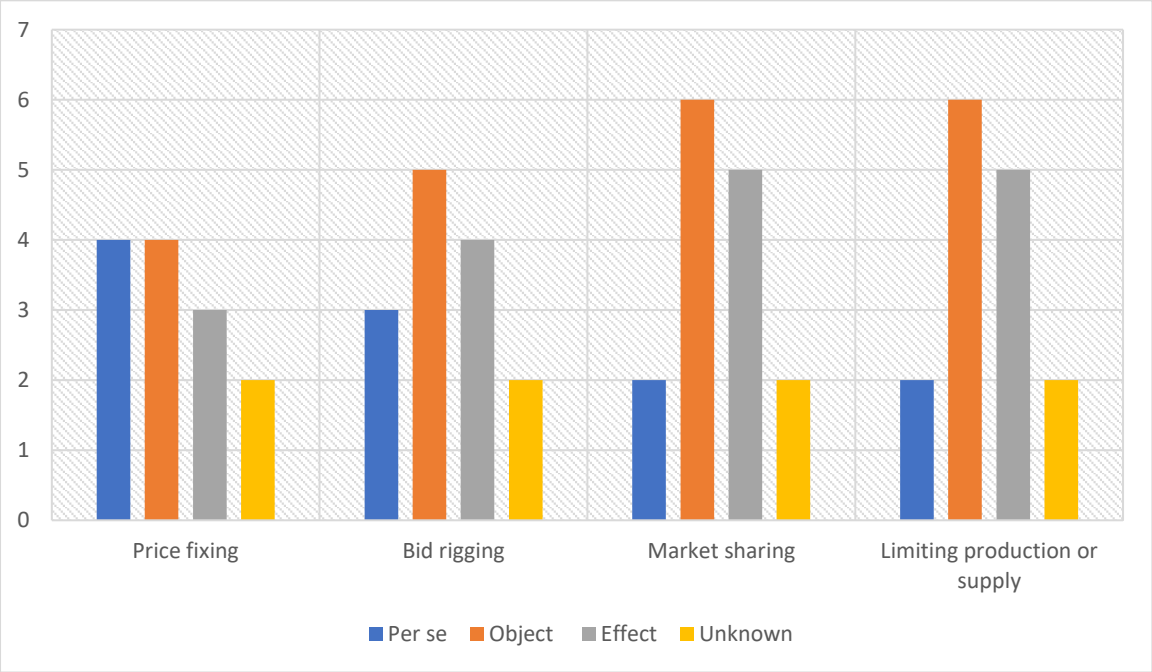
remaining jurisdictions (Cambodia, Lao PDR and Myanmar) leaves the question entirely open as to which standard will be applied[48].

Table 5: Per Se versus Object and Effect

	Price fixing			Bid-Rigging			Market Sharing			Limiting or controlling production		
	Per se	*Object*	*Effect*	*Per se*	*Object*	*Effect*	*Per se*	*Object*	*Effect*	*Per se*	*Object*	*Effect*
Brunei Darussalam		✓	✓		✓	✓		✓	✓		✓	✓
Cambodia	?			?			?			?		
Indonesia[49]	✓				✓	✓		✓	✓		✓	✓
Lao PDR	?			?			?			?		
Malaysia		Deemed			Deemed			Deemed			Deemed	
Myanmar		✓	✓		✓	✓		✓	✓		✓	✓
Philippines	✓			✓				✓	✓		✓	✓
Singapore		✓	✓		✓	✓		✓	✓		✓	✓
Thailand[50]	✓			✓			✓			✓		
Vietnam	✓			✓			✓			✓		

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

Figure 3: Per se versus object/effect



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

The question in practice will be whether there is any real distinction between the 'per se' and the 'object' threshold as they are applied in the AMS. In Europe, Article 101 of

[48] Maximiano (2019), p 240
[49] Based on Indonesia's review of the draft Study. (The author had been previously informally advised by KPPU during informal discussions in July 2019 that bid rigging was also considered 'per se'.)
[50] As advised by OTCC staff during informal discussions, September 2019

the TFEU applies an 'object' test. In that context, object restrictions have been applied to mean:

> "that an agreement is presumed to be anti-competitive unless the cartelists can demonstrate efficiencies. This burden is extremely high, so the object test can be argued to be in effect similar to a per se test"[51].

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

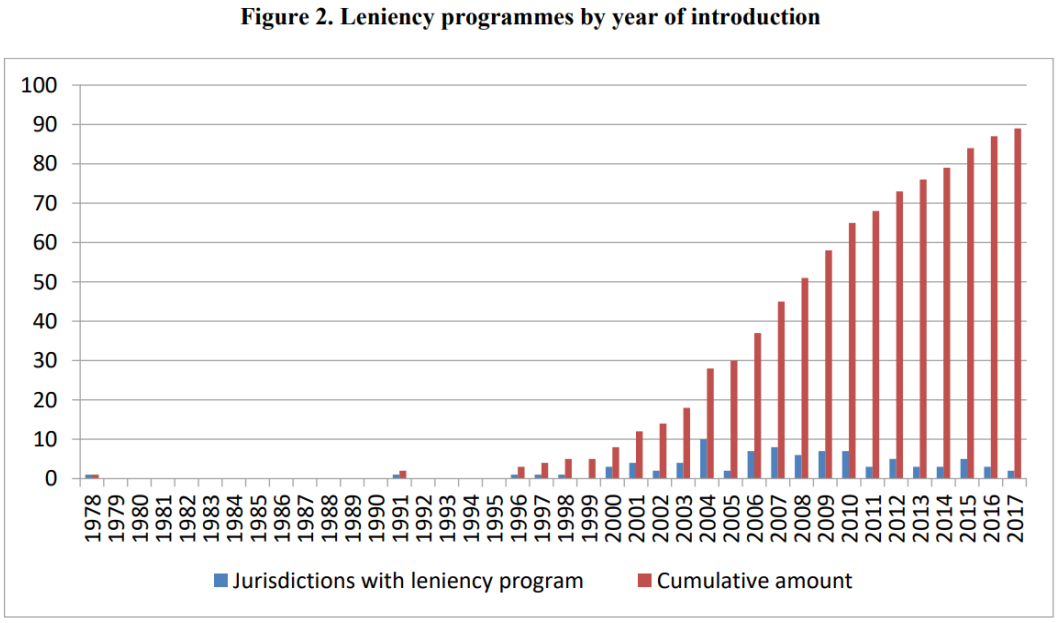
For those jurisdictions where the object/effect tests have been included, there is an opportunity for additional clarity around how those tests will be applied to be outlined in Guidelines. For example, will efficiencies be relevant to the object test or is it to be treated as equivalent to a 'per se'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

2.3.4 Leniency

It is well recognised that a leniency program is an important tool used by competition agencies to detect hardcore cartels (the growth in leniency programmes around the world has been significant – a recent OECD report notes that in 2000 only 6 programmes were in operation, compared with 89 programmes now in existence around the world. All OECD member countries have a leniency programme in place and consider it to be "the most effective tool for detecting and punishing cartels'[52].

[51] Maximiano (2019), p 240
[52] OECD (2019), *Review of the 1998 OECD Recommendation concerning effective action against hard core cartels*, available at http://www.oecd.org/daf/competition/oecd-review-1998-hard-core-cartels-recommendation.pdf, accessed 2 October 2019, page 11

Figure 4: Leniency programmes by year of introduction[53]



Source: OECD research

The Regional Guidelines provide:

> "AMSs may introduce a leniency programme targeted at undertakings who have participated in cartel activities and therefore are liable for infringing the prohibition against anti-competitive agreements, but who would nevertheless like to come clean and provide the competition regulatory body or other law enforcement body with evidence of the cartel." (paragraph 6.9.1)

The existence (or not) of a well-utilised leniency regime will have a significant impact on the ability of the AMS competition agencies to enforce their competition laws, particularly in relation to cross-border cartels:

> "A consistent approach to leniency across ASEAN will be important if cross-border cartels are to be prosecuted and if competition authorities are to be able to cooperate effectively and efficiently. For this they need to avoid conflicting requirements. An inconsistent approach will risk convergence as cartelists may forum shop for the most favourable leniency regimes."[54]

Currently, Brunei Darussalam, Malaysia, the Philippines, Singapore and Vietnam have an operational leniency regime that applies in relation to hard core cartels. The laws of Cambodia, Lao PDR and Myanmar allow for a leniency regime but the programmes are not yet in force. Indonesia is currently seeking amendments to the law to allow for a leniency regime. Thailand does not have legislative provision for a leniency regime, nor does it have a leniency regime in place[55].

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[53] OECD (2019), *Review of the 1998 OECD Recommendation concerning effective action against hard core cartels*, available at http://www.oecd.org/daf/competition/oecd-review-1998-hard-core-cartels-recommendation.pdf, accessed 2 October 2019, page 16

[54] Maximiano (2019), pp 240-241

[55] It may be possible for the OTCC to introduce a leniency programme through its power under section 17(3) to impose guidelines to maintain free and fair competition. Singapore does not have a specific legislative power to establish a leniency programme but the CCCS sets out its policy on lenient treatment in its *Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016*.

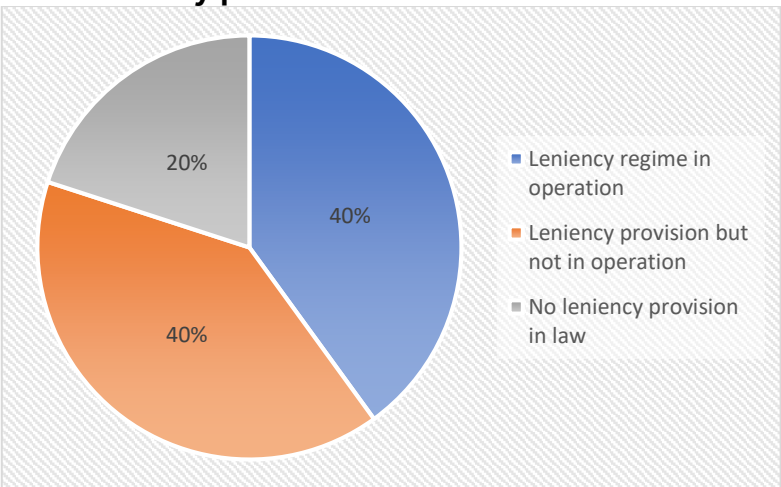
In Myanmar and Vietnam, the ability to grant leniency appears to apply more widely than hardcore cartel offences. (In Myanmar, leniency applies to section 13 and in Vietnam, leniency applies to Article 12, both of which are wider than hardcore cartels). In Lao PDR, the potential scope of the leniency regime is unclear; while in Cambodia the intention seems to be only to apply the leniency provisions to hardcore cartels.

Table 6: Leniency programmes

	Legislative provision	Operational leniency programme
Brunei Darussalam	✓ Section 44	✓[56]
Cambodia	✓ Art 17	×
Indonesia	× (Legislative amendment pending)	×
Lao PDR	✓ Art 62	×
Malaysia	✓ Section 41	✓[57]
Myanmar	✓ Section 8(p) and 52[58]	×
Philippines	✓ Section 35	✓[59]
Singapore	× No legislative provision for leniency	✓[60]
Thailand	×	×
Vietnam	✓ Article 112 (clemency)	×

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

Figure 5: AMS with leniency provisions



[56] Leniency regime in operation from 1 January 2020, as advised by Competition Commission of Brunei Darussalam. Available at www.ccbd.gov.bn
[57] Available at https://www.mycc.gov.my/guidelines/guidelines-leniency-regime, accessed 2 October 2019
[58] See also Chapter X, Myanmar Competition Rules, 2017
[59] Available at https://phcc.gov.ph/leniency-application/, accessed 2 October 2019
[60] Available at https://www.cccs.gov.sg/legislation/competition-act accessed 2 October 2019

2.3.5 Sanctions: Cartels

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

The Regional Guidelines state that the AMS:

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

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

> "administrative financial penalties, civil financial penalties, periodic penalty payments, criminal sanctions, corrective orders, and contempt orders." (paragraph 6.7.4)[61].

Across ASEAN, the approach taken to sanctions for breaches of the cartel provisions has been mixed. In most cases, the sanctions are civil or administrative, with only a few regimes seeking to impose criminal penalties (see Table 7). The provisions in Myanmar appear to impose criminal sanctions on a wide range of conduct that goes well beyond hardcore cartels. Further research should be undertaken on the level of sanctions imposed in relation to cartels in comparable jurisdictions to those in ASEAN.

Table 7: Sanctions for Cartels

	Civil or administrative sanctions	Criminal sanctions
Brunei Darussalam	✓ Section 42	×
Cambodia	✓ Articles 40-46	×
Indonesia	✓ Article 47	✓ Articles 48, 49
Lao PDR	✓ Articles 73, 76, 87, 88, 90, 91	✓ Articles 92, 93
Malaysia	✓ Section 40	×
Myanmar	✓ Section 34	✓ Section 39
Philippines	✓ Sections 29, 37, 41	✓ Section 30, 41
Singapore	✓ Section 69	×
Thailand	✓ Section 72	✓ Section 72
Vietnam	✓ Chapter IX	×

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

[61] Those terms are then defined in paragraphs 6.7.4.1-6.7.4.6 *Regional Guidelines*

2.3.6 Investigation powers – Search and seizure powers

Many jurisdictions with competition law around the world have power to conduct a 'dawn raid', that is an unannounced physical search of business premises (and, in limited circumstances, personal premises or vehicles) and 'seize' documents relevant to a cartel investigation. These powers are generally considered necessary to obtain critical evidence that may otherwise be destroyed.

The Regional Guidelines state that the "AMSs may grant competition regulatory body the power to enter and search premises, land and means of transport with or without warrant" (paragraph 6.2.2).

All of the ASEAN competition laws include search and seizure powers, although there is some discrepancy between those that do, and do not, require a search warrant. The provisions in Brunei Darussalam, Lao PDR, Malaysia, Philippines, Singapore and Thailand set out relatively clearly where a warrant is required. Myanmar has advised that a warrant is required. Vietnam has advised that it has the power to require the competent authorities to utilise search powers. It is not clear whether Cambodia requires a warrant to undertake a search. Current amendments proposed to the competition law in Indonesia include the introduction of search and seizure powers.

In all cases, there is limited detail in the law itself so it is likely that further guidelines will be required.

Table 8: Search and seizure powers

	Search with warrant	Search without a warrant
Brunei Darussalam	✓ Section 38	✓ Section 37 (upon notice)
Cambodia	✓ Entry and search is permitted under Articles 21 and 22 but it is not clear whether a warrant is required	
Indonesia	Amendments being considered by government	
Lao PDR	✓ Article 68	✓ Article 68
Malaysia	✓ Section 25	✓ Section 26
Myanmar	✓ Entry, inspection and search is permitted under Section 12(c)[62]	✗
Philippines	✓ Section 12(g) gives the PCC power to undertake inspections upon order of the court.[63]	✗
Singapore	✓ Section 65	✓ Section 64 (upon notice)
Thailand	✓	✓

[62] Based on advice from MmCC
[63] Note the Rules for Inspection were approved by the Philippines Supreme Court and take effect from 16 November 2019. Available at http://sc.judiciary.gov.ph/7739/

	Search with warrant	Search without a warrant
	Section 63 (warrant required if search and seize is under the Criminal Procedure Code)	Section 63 (if the process of getting a search warrant is too slow or if documents may be removed or destroyed)
Vietnam	✓ Article 82 permits search and seizure. The NCC has power to require the competent authorities to apply the search power[64].	

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

2.4 AMS Self-Assessment

Question 6 of the Self-Assessment (the only question directly relevant to cartels) asks "Which of the following conducts are per se prohibited by the competition law?". In response to this question, Brunei Darussalam, Malaysia, Singapore, and Thailand listed 'price fixing, market sharing, bid rigging and limiting or controlling production' as per se prohibited. This suggests that Brunei Darussalam and Singapore are treating 'object' as 'per se' in relation to hard core cartels. The Philippines listed only 'price fixing and bid rigging' as 'per se' offences, which accords with their legislation. Indonesia lists 'price fixing' only as being a 'per se' offence. The response from Vietnam is unclear as it states "while bid rigging is per se prohibited, only horizontal price fixing, output restriction and market sharing are per se prohibited". Clarification should be sought on this response. In Vietnam, price fixing, output restrictions, market sharing and bid rigging are per se prohibited. The remaining jurisdictions did not answer this question.

2.5 Initial Conclusions on Commonalities and Differences: Cartel Provisions

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

That said, there are a few key points of difference that need to be considered. If addressed in the early years of operation, these differences can be managed so as not to result in a divergent approach. In some cases, convergence in the policy approach should be able to achieve the consistency required, while in other cases there may be a need for legislative changes. Cooperation and coordination between the AMS competition authorities will be key to achieving greater convergence:

(1) Consistency regarding the application of the law to 'economic' activities rather than only commercial activities. Applying the law to the wider notion of economic activities will give more scope for associations, not-for-profit organisations, and SOEs to be subject to the laws.

[64] As advised by the NCC

(2) Considering the application of the law to 'concerted practices' in those jurisdictions that do not expressly provide for this. In some cases, legislative change may not be required if the terminology used in the law can be interpreted by the courts widely enough to capture 'concerted practices'. Further research could also provide more guidance on the intended meaning of the terminology used.
(3) Clarity around the 'object' standard that is applied in some jurisdictions to determine whether it is equivalent to a 'per se' standard (as in the US) or whether it will be applied subject to an efficiencies defence (as in the EU)[65].
(4) Clarity around the standard that will be applied to cartels in the jurisdictions that are currently silent on this issue.
(5) The leniency programmes in many of the AMS are not yet developed. This presents an excellent opportunity to achieve consistency across the region. Given the likely increase in cross-border cartels, it will important that the AMS have leniency regimes that facilitate collaborative working, for example, consistent requirements that will support multiple leniency applications across multiple AMS. Further work is required in this area.
(6) Likewise, consideration should be given to adopting a consistent approach to sanctions for cartels, both in respect of civil and criminal liability. Further work is required in this area.
(7) Clarity is required around the investigation powers that allow regulators to search and seize evidence and how these powers are being used by the regulators. Understanding how each other's regimes operate will be vital to cooperation in relation to cross-border cartels. This understanding will need to take into account the fact that, due to differences in legal processes and procedures, evidence gathered pursuant to powers in one jurisdiction may not be able to be used in other jurisdictions where that evidence does not meet due process requirements.

3. Other anti-competitive horizontal agreements

3.1 ASEAN Regional Guidelines

The Regional Guidelines recommend that the AMS:

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

3.2 ASEAN Prohibitions against Anti-Competitive Horizontal Agreements

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

[65] Maximiano (2019), p 240

Table 9: Anti-competitive horizontal agreements prohibitions

	Prohibition against anti-competitive horizontal agreements
Brunei Darussalam	Section 11(1)
Cambodia	Article 8 proviso
Indonesia	Article 6, 7, 10, 13, 15 & 16
Lao PDR	Articles 20, 25, 26, 27, 28
Malaysia	Section 4(1)
Myanmar	Section 13(b), (d)
Philippines	Section 14(c)
Singapore	Section 34(1)
Thailand	Section 55
Vietnam[66]	Articles 11(5)-(11) and 12(1)-(3), 12
Source: Author's analysis based on review of laws and input from AMS	

3.2.1 Agreement and concerted practice

The discussion above in relation to the potential application of the AMS laws to 'concerted practices' is also relevant to anti-competitive horizontal agreements generally. A good example of where there may be a need for a prohibition against an anti-competitive concerted practice can be found in the recent CCCS decision *Infringement Decision against the Exchange of Commercially Sensitive Information between Competing Hotels*[67].

3.2.2 Object and effect

The Regional Guidelines state:

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

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

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

[66] Article 11(5)-(10) of the Vietnam law contains prohibitions that extend beyond hardcore cartels. Article 11(11) contains a catch all provision that covers 'other agreements causing impacts or likely to cause impacts on restraint of competition'. Article 12(3) makes it clear that agreements in restraint of competition between enterprises in the **same** relevant market (i.e. a horizontal agreement) in relation to Article 11(7), (8), (9), (10) and (11) are prohibited where they cause impact or are likely to cause significant impacts on restraint of competition in the market.

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

3.2.3 Preventing, restricting or distorting competition

The Regional Guidelines recommend that the AMS:

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

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

> "… respectively, to the elimination of existing or potential competitive activities, the artificial alteration of competitive conditions in favour of the parties of the agreement, and the reduction of competitive activities. They are meant to include all situations where competitive conditions are adversely affected by the existence of the anti-competitive agreement."(paragraph 3.2.1.5)

This terminology is expressly adopted in a number of the AMS: Brunei Darussalam (section 11), Cambodia (Article 8), Malaysia (section 4(1)) and Singapore (section 34). Similar terminology is used in Lao PDR (reduce, distort and/or prevent competition)[68], Myanmar (reduce or hinder the competition)[69], the Philippines (prevent, restrict or lessen competition), Thailand (monopolizes, reduces or restricts competition)[70] and Vietnam (excluding, reducing, misleading or preventing competition)[71]. By contrast, Indonesia does not use this type of terminology at all, but instead uses the terminology "that may cause monopoly practices and unfair competition".

3.2.4 Appreciability threshold

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

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

In the AMS to date, a divided approach has been taken: four jurisdictions expressly include an appreciability threshold in their law (Cambodia, Malaysia, the Philippines and Vietnam[72]), Singapore remains silent in its law but has adopted an 'appreciablity' threshold in its *Guidelines on the section 34 Prohibition*, while the remaining jurisdictions do not include a threshold at all (Brunei Darussalam, Indonesia, Lao PDR, Myanmar and Thailand).

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[68] Article 18. Note that Article 20 uses the different terminology of 'reduce, distort and/or impede the business competition' which may be a translation issue.
[69] Article 2(g) Myanmar law
[70] Sections 54, 55 Thai law
[71] Article 3(3) definition of 'effects of restraint of competition' Vietnam law
[72] Cambodia, Malaysia and Vietnam use 'significant' while the Philippines uses 'substantial'

3.2.5 Safe harbours

In addition to applying an appreciability threshold, some competition law jurisdictions establish 'safe harbours' which provide businesses with an indication of the regulators view of 'appreciability'. For example, the European Commission states that agreements between competitors are unlikely to appreciably restrict competition where the agreement is between competitors (actual or potential) and the combined market share of the parties is less than 10%. Where the agreement is between non-competitors, the agreement is unlikely to appreciably restrict competition where each of the parties holds a market share of less than 15%[73].

To date in ASEAN, only the regulators in Malaysia and Singapore have indicated their views on when an agreement is likely to appreciably (Singapore) or significantly (Malaysia) restrict competition in their respective Guidelines. Both those jurisdictions have set a combined market share threshold of 20% for agreements between competitors and individual markets shares of 25% for agreements between non-competitors[74].

3.2.6 Efficiencies defence

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

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

Many of the AMS competition laws recognise a defence that includes efficiency arguments: Brunei Darussalam, Cambodia, Malaysia, Philippines, Singapore, Thailand, although there is divergence as to whether consumer benefit is required. Vietnam has advised that exemptions are granted on the basis of consumer benefit. In the case of Lao PDR and Myanmar, the exemptions do not clearly refer to efficiencies but may be interpreted widely enough to allow efficiencies to be taken into account. The provisions in Indonesia do not appear to consider efficiencies as being relevant when assessing anti-competitive agreements.

3.2.7 Sanctions: Anti-competitive horizontal agreements

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

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

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

All jurisdictions allow for the imposition of financial penalties[75], many with a cap of 10% of turnover (Brunei Darussalam, Cambodia, Malaysia, Singapore, Thailand, Vietnam). Other common sanctions include:

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

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

3.3 AMS Self-Assessment

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

3.4 Initial Conclusions on Commonalities and Differences: Horizontal Agreements

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

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

(1) Consistency regarding the application of the law to 'economic' activities rather than only commercial activities.
(2) Considering the application of the law to 'concerted practices' in those jurisdictions that do not expressly provide for this.
(3) Clarity around the 'object' standard.
(4) Clarity around the standard that will be applied to anti-competitive horizontal agreements in the jurisdictions that are currently silent on this issue.

In addition, further areas for discussion include:

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

(1) Clarity around whether an 'appreciability' threshold applies in those jurisdictions that are currently silent on this issue.
(2) Considering whether it is desirable to set 'safe harbours' to provide business with certainty regarding when agreements are likely to be considered harmful to competition. Malaysia and Singapore have already identified safe harbours in their Guidelines.
(3) Considering whether an efficiencies defence should be permitted and, if so, whether there is a requirement for consumer benefit.
(4) A consistent approach to civil penalties and, in particular, the manner in which fines are calculated.

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

4. Vertical agreements

4.1 ASEAN Regional Guidelines

The Regional Guidelines recommend that the AMS:

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

4.2 ASEAN Prohibitions against Anti-Competitive Vertical Agreements

Not all of the AMS include a prohibition/s against anti-competitive vertical agreements. Brunei Darussalam and Singapore expressly exclude vertical agreements from the prohibitions against anti-competitive agreements[76]. In Lao PDR and Myanmar, the prohibitions identified in the table below could also be applied to vertical agreements but further clarification will be required as to what is intended. In the other AMS, vertical agreements are either covered by the general prohibition against anti-competitive agreements (Malaysia, the Philippines, Vietnam) or by separate prohibition/s (Cambodia, Indonesia, Thailand, Vietnam).

Table 10: Anti-competitive vertical agreements prohibitions

	Prohibition against anti-competitive vertical agreements
Brunei Darussalam	Exempt
Cambodia	Article 9
Indonesia	Articles 6, 8, 14, 15 & 16
Lao PDR	Articles 20-29
Malaysia	Section 4(1)
Myanmar	Section 13
Philippines	Section 14(c)
Singapore	Exempt
Thailand	Section 55
Vietnam	Article 11 and 12
Source: Author's analysis based on review of laws and input from AMS	

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

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

In relation to the use of "preventing, restricting or distorting competition", once again this terminology is expressly adopted in some of the AMS in relation to vertical agreements: Cambodia (Article 9), Malaysia (section 4(1)). Similar terminology is used

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

in Lao PDR (reduce, distort and/or prevent competition)[77], Myanmar (reduce or hinder the competition)[78], the Philippines (prevent, restrict or lessen competition), Thailand (monopolizes, reduces or restricts competition)[79] and Vietnam (excluding, reducing, misleading or preventing competition)[80]. Again, Indonesia does not use this type of terminology at all, but instead uses the terminology "that may cause monopoly practices and unfair competition".

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

4.2.2 *Pricing and non-pricing*

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

In the case of Malaysia and the Philippines, the general prohibition against anti-competitive agreements would cover vertical pricing and non-pricing restraints (in fact, the MyCC Guidelines on Chapter 1 Prohibition expressly refers to price and non-price restrictions[81]).

In Article 9 of the Cambodia law, a distinction is made between pricing restraints (which are prohibited) and non-pricing restraints (which are prohibited only where the agreement has the object or effect of significantly preventing, restricting or distorting competition). Indonesia, Thailand and Vietnam prohibit both pricing[82] and non-pricing[83] vertical restraints. Assuming that the provisions in Lao PDR and Myanmar are intended to apply to vertical restraints, they too cover both pricing[84] and non-pricing[85] restraints.

4.2.3 *Efficiencies arguments*

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

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

[77] Article 18 Lao PDR law. Note that Article 20 uses the different terminology of 'reduce, distort and/or impede the business competition' which may be a translation issue.
[78] Article 2(g) Myanmar law
[79] Sections 54, 55 Thai law
[80] Article 3(3) definition of 'effects of restraint of competition' Vietnam law
[81] MyCC, *Guidelines on Chapter 1 Prohibition*, pp 12-14, available at https://www.mycc.gov.my/sites/default/files/pdf/newsroom/MYCC-4-Guidelines-Booklet-BOOK1-10-FA-copy_chapter-1-prohibition001_1.pdf
[82] Indonesia law, Article 6 and 8; Thai law, section 55; Vietnam law, Article 11(1) and 12(4)
[83] Indonesia law, Articles 14, 15, 16; Thai law, section 55; Vietnam law, Article 11(2)-(11) and 12(4)
[84] Lao PDR law, Article 22; Myanmar law, Article 13(a)
[85] Lao PDR law, Articles 23-28; Myanmar law, Article 13(b)-(f)

anti-competitive restraint is not found to be anti-competitive). The inclusion of an available efficiency defence will be important for jurisdictions that prohibit anti-competitive vertical agreements to assist in avoiding Type 1 or Type 2 errors.

4.2.4 Sanctions for vertical agreements

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

4.3 AMS Self-Assessment

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

4.4 Initial Conclusions on Commonalities and Differences: Vertical Agreements

The approach taken by the AMS to anti-competitive vertical agreements immediately gives rise to a divergence issue as two of the ten AMS have excluded the application of competition law to vertical agreements (instead applying the law only to vertical restraints imposed by a dominant player). In some jurisdictions, the sanctions applicable to vertical agreements appear to include criminal liability, giving rise to the potential for a resale price maintenance agreement to be subject to criminal sanctions in some AMS but escape all liability in others (Singapore and Brunei Darussalam) unless imposed by a dominant player.

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

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

5. Abuse of dominance

5.1 ASEAN Regional Guidelines

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

> "Dominant position refers to a situation of **market power**, where an undertaking, **either individually or together with other undertakings**, is in a position to unilaterally affect the competition parameters in the relevant market for a good(s) or service(s), e.g. able to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels. AMSs may consider whether the competition laws should contain a **market share threshold test**, whether prescriptive or indicative." (paragraph 3.3.1.1) [emphasis added]

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

> "Abuse of a dominant position occurs where the dominant enterprise … **exploits** its dominant position in the relevant market or **excludes** competitors and **harms the competition process**. It is prudent to consider the **actual or potential impact of the conduct on competition**, instead of treating certain conducts by dominant enterprises as automatically abusive." (paragraph 3.3.1.2) [emphasis added]

Paragraph 3.3.2 states that the AMSs "may provide an **illustrative** list of [abusive] conduct"[86] [emphasis added] and then categorises conduct as either exploitative, exclusionary, discriminatory or relating to limiting production.

5.2 ASEAN Prohibitions against Abuse of Dominance

Across ASEAN, all AMS have included a prohibition against abuse of dominance that applies to entities that hold a dominant position in the relevant market[87].

5.1.1 Dominance, collective dominance and market share thresholds

Reflecting the Regional Guidelines, many of the AMS define dominance by reference to market power[88] (see Table 12). However, Myanmar and Singapore remain silent, choosing not to include a definition which will allow the meaning of dominance to develop through jurisprudence[89]. Lao PDR defines dominance by reference to the

[86] ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy*. Jakarta: ASEAN Secretariat, para 3.3.2
[87] Brunei Darussalam, s 21; Indonesia, Art 25(1); Lao PDR, Art 30; Malaysia, s 10; Myanmar, s 13(c); Philippines, s 15; Singapore, s 47; Thailand, s 50; Vietnam, Art 27. Note that Vietnam also contains a prohibition against abuse of a monopoly position (Art. 27)
[88] Brunei Darussalam, s 2(1); Cambodia, Art 4(6); Malaysia, s 2; Philippines, s 4(g)
[89] Note, the *CCCS Guidelines on the Section 47 Prohibition* provides guidance on how dominance would be assessed

market share threshold[90] while Thailand refers to both market share and sales revenue thresholds and the competitive situation in the market[91]. In the case of Indonesia, the definition is based on both market power and other factors, while in Vietnam, the test is based both on market power and the market share threshold[92].

In most cases, collective dominance (where more than one entity together holds the dominant position) is also explicitly provided for in the law[93].

Maximiano (2019) note that "[m]ore than half of the jurisdictions have (or will have) a presumption of dominance above a stated market share threshold, which is as low as 30% in Vietnam but as high as 60% in Malaysia and Singapore[94]. In some cases, this presumption is rebuttable (Philippines[95], Singapore (indicative)[96] and Malaysia (indicative)[97]), in others it is a prerequisite for a finding of dominance (Indonesia[98], Vietnam[99]), whilst in the remaining jurisdictions, the position is not yet clear".[100]

Table 11: Dominance

	Dominance defined			Collective dominance	Presumption of dominance	
	Market power	*Market share*	*Other*		*Rebuttable*	*Pre-requisite Effect*
Brunei Darussalam	✓	-	-	✓	-	-
Cambodia	✓	-	-	-	-	-
Indonesia	✓	-	✓	✓	-	✓ (50%)
Lao PDR	-	✓	-	✓	-	-
Malaysia	✓	-	-	✓	✓ (60%)	-
Myanmar	Not defined			-	-	-
Philippines	✓	✓[101]	-	✓	✓ (50%)	✓
Singapore	Not defined[102]			✓	✓ (60%)	✓
Thailand	✓	✓	✓	-	✓	-
Vietnam	✓	✓		✓	-	✓ (30%)

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

[90] Lao PDR law, Article 30
[91] Thai law, Section 5 definition of 'business operator with a dominant position of market power'
[92] Indonesia law, Art 1(4); Vietnam law, Art 24
[93] Only Cambodia, Myanmar and Thailand do not appear to recognise collective dominance.
[94] Indonesia law, Art 25(2); Lao PDR, to be determined by BCC; Malaysia, *Guidelines on Chapter 2 Prohibition;* Art 30; Philippines, Section 27 *PCA* and Rule 8, section 3, *Implementing Rules and Regulations*; Singapore, *Guidelines on section 47 Prohibition*; Thailand, to be determined by OTCC; Vietnam law, Art 24.
[95] Section 27 Philippine law, section 27
[96] Para 3.8 CCCS *Guidelines on Section 47 Prohibition*
[97] Para 2.14 MyCC *Guidelines on Chapter 2 Prohibition*
[98] Indonesian law, Article 25(2)
[99] Vietnam law, Article 24 Chapter IV
[100] Maximiano (2019), p 245
[101] As it is the market share of 50% that gives rise to a rebuttable presumption of dominance, the view of the PCC is that the Philippines defines dominance not solely in terms of "market power" but also "market share".
[102] Note, the *CCCS Guidelines on the Section 47 Prohibition* provides guidance on how dominance would be assessed

5.1.2 Exclusionary versus exploitative practices

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

Maximiano (2019) note that "[a]lmost all jurisdictions prohibit both exclusionary and exploitative practices… Indonesia expressly refers to exploitative and exclusionary practices in its *Guidelines on Article 25*[103]*,* as does Malaysia[104]. Singapore only refers to exclusionary practices[105].

5.1.3 Types of abuse

Jurisprudence from the developed competition regimes has determined common categories of abuse of dominance. Exclusionary abuses commonly include predatory pricing, refusal to supply, exclusivity provisions (which includes fidelity or loyalty rebates), tying/bundling, margin squeeze, and access to essential facilities. Exploitative abuses include excessive pricing, price discrimination and unfair prices[106].

In some of the AMS laws, the language used reflects commonly recognised categories of abuse. In other cases, the wording used appears intended to cover these internationally recognised abuses without using the same terminology. In a few jurisdictions, it can be difficult to reconcile the provisions with international norms without further guidance on what is intended by the terminology used[107]. Where the laws do not expressly cover certain abusive behaviours, the laws may be able to be interpreted widely enough to cover additional breaches.

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

[103] Accessed 12 February 2019 but no longer available on the KPPU website
[104] Paragraph 3.1 *Guidelines on Chapter 2 Prohibition*
[105] Maximiano (2019), p 246
[106] A discussion of exclusionary abuses with a short overview of exploitative abuses can be found in European Commission *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (2009/C 45/02), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=EN
[107] Maximiano (2019), p 246

Table 12: Exclusionary and exploitative practices

	Exclusionary practices				Exploitative practices				Catch all
	Predatory pricing[108]	*Tying/ bundling*[109]	*Refusal to supply*[110]	*Exclusivity provisions*	*Limiting production, markets, technical development*	*Monopoly/ excessive pricing*	*Price discrimination*	*Unfair pricing (high or low)*	
Brunei Darussalam	✓	✓			✓ Section 21(2)(b)		✓[111]	-	-
Cambodia	✓ (Art 10(4))	✓ (Art 10(3))	✓ (Art 10(2))	✓ (Art 10(1))	✓ (Art 10(5)) Refusing access to essential facility	-	-	-	✓
Indonesia	✓[112]	✓[113]	✓[114]	✓[115]	✓[116]	✓[117]	✓[118]	✓[119]	-
Lao PDR	✓	✓	✓	-	✓[120]	-	✓	✓	Other practices stipulated in Regulations
Malaysia	✓	✓	✓		✓[121]		✓[122]	✓[123]	-
Myanmar	✓[124]	?[125]	?[126]	✓[127]	✓[128]	-	-	-	-
Philippines	✓	✓	✓	✓[129]	✓[130]	-	✓[131]	✓[132]	-[133]
Singapore	✓	✓	✓[134]	✓[135]	✓	-	✓	-	-
Thailand	✓	✓[136]	✓[137]	✓[138]	✓[139]	-	-	✓	-

[108] Brunei Darussalam, s 21(2)(a); Indonesia law, Article 20; Lao PDR law, Arts 31(2), (33); Malaysia law, s 10(2)(f); Philippines law, s 15(a); Singapore law, s 47(2)(a); Vietnam law, Art 27(1)(a))
[109] Brunei Darussalam law, section 21(2)(d); Lao PDR law, Arts 31(4), 35; Malaysian law, s 10(2)(e); Philippines law, s 15(c), (f); Singapore law, s 47(2)(d); Vietnam law, Art 27(1)(dd)
[110] Indonesian law, Art 25(1)(c), Lao PDR law, Arts 31(3), 34; Malaysia law, s 10(2)(c); Philippines law, s 15(c); Vietnam law, Art 27(1)(e)
[111] Brunei Darussalam law, section 21(2)(c)
[112] Article 7 and 20, Indonesia law
[113] Article 15(2) Indonesia law
[114] Articles 15(1) and 24 Indonesia law
[115] Article 25(1)(c) or (a) Indonesia law
[116] Article 25(1)(b) Indonesia law
[117] Article 17 Indonesia law
[118] Article 19(d) Indonesia law
[119] Article 6 Indonesia law
[120] Art 14 Lao PDR law prohibits the imposition of obstacles that directly or indirectly create difficulties for other business operators in operating businesses such as access to finance, raw materials, information and technology.
[121] Section 10(2)(b) and (2)(g) Malaysia law which relates to purchasing scarce supply of intermediate goods
[122] Section 10(2)(d) Malaysia law
[123] Section 10(2)(a) Malaysia law
[124] 15(a) Myanmar law;
[125] 15(b) Myanmar law may be applicable, subject to how it is interpreted
[126] 15(b) Myanmar law may be applicable, subject to how it is interpreted
[127] 15(d) Myanmar law
[128] 15(c) Myanmar law
[129] 15(3) Philippines law
[130] 15(i) Philippines law
[131] 15(d) Philippines law
[132] 15(g) and (h) Philippines Law
[133] The list of unilateral conduct found in section 15 is not meant to be an exhaustive list of acts of abuse of dominance
[134] Refusal to supply and exclusive purchasing are examples of conduct that may amount to an abuse under section of the Singapore law. See Annex C of the *Guidelines on the Section 47 Prohibition*
[135] Ibid
[136] Could be covered by section 50(2) Thai law
[137] Could be covered by section 50(2) Thai law
[138] Could be covered by section 50(2) Thai law
[139] Section 50(3) Thai law

	Exclusionary practices				Exploitative practices				Catch all
Vietnam[140]	✓	✓	✓	✓[141]	✓[142]	✓[143]	✓[144]	✓[145]	✓[146]

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

5.1.4 Defences or commercial justifications

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

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

> "which have significant counterveiling benefits, such as contributing to or improving the production or distribution of goods and services, or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit." (paragraph 3.5.3)

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

In the AMS, there is a mixed approach taken in the laws to expressly recognising defences against allegations of abuse of dominance. Cambodia and Malaysia expressly recognise a 'reasonable commercial justification' defence[147]. Lao PDR includes a defence based on contribution to the country's national socio-economic development or due to national strategy and security reasons[148].

In the Philippines, section 15 contains a proviso similar to that outlined in the Regional Guidelines (and reflective of Article 101(3) TFEU) which would allow economic efficiency arguments. Brunei Darussalam and Singapore both contain an exemption for agreements with net economic benefits which also reflects the Regional Guidelines and Article 101(3) but it is only applicable to anti-competitive agreements and not abuse of dominance[149].

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[140] Note Vietnam also imposes different prohibitions against enterprises holding a monopoly position: these include all of the prohibitions against dominant players except predatory pricing. It also adds a prohibition against imposing conditions to the disadvantage of customers, unilaterally rescinding or changing signed contracts without justifiable reasons and other acts abusing a market monopoly position which are prescribed by other laws.
[141] Art 27(1)(d) or (e) Vietnam law
[142] Article 27(1)(c) Vietnam law
[143] Article 27(1)(c) and 27(2)(a) Vietnam Law
[144] Article 27(1)(d) and 27(2)(a) Vietnam law
[145] Article 27(1)(d) and 27(2)(a) Vietnam law
[146] Article 27(2)(d) Vietnam
[147] Article 11 Cambodia law (but note the conditions). This is in addition to the individual exemption provision in Article 14; Malaysia law, section 10(3)
[148] Article 46 Lao PDR law but note there is a requirement to comply with the Government's Administration and Regulations which deal with price, quantity and production plans.
[149] Note that under paragraph 4.5 of the CCCS *Guidelines on the Section 47 Prohibition*, CCCS may consider if the dominant undertaking is able to objectively justify its conduct

There are no defences provided for in relation to abuse of dominance in the remaining jurisdictions (Indonesia, Myanmar, Thailand and Vietnam[150]).

5.2.5 Sanctions for abuse of dominance

The sanctions for abuse of dominance are generally consistent with those applicable to anti-competitive horizontal (non-cartel) agreements. However, in Indonesia[151], Lao PDR[152], Myanmar[153], and Thailand[154], there is also the possibility of criminal sanctions for abuse of dominance.

5.3 State Owned Enterprises

The Regional Guidelines provide:

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

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

The approach to applying AMS laws to SOEs is not yet completely clear. In Brunei Darussalam and Singapore, all activity, agreements or conduct of the Government or any statutory body or any person acting on their behalf is exempt from competition law[155]. Singapore has stated clearly that this exclusion only applies when it is the Government and/or a statutory body participating in the market in its governmental capacity, "and not when government-linked companies ("GLCs") … engage in commercial or economic activities in any market"[156]. For the purposes of this Study, it is assumed that a similar interpretation will be taken to the provision in Brunei Darussalam. There is a limited exclusion from competition law for SOEs in Thailand where the SOEs are engaged in conduct which is "necessary for the benefit of maintaining national security, public interest, the interests of society, or the provision

[150] According to Article 28 Vietnam Competition Law 2018, the Government may control enterprises operating in state-monopolized areas with the following measures: a) Deciding buying prices, selling prices of goods, services in state-monopolized domains; b) Deciding the quantity, volume and market scope of goods, services in state-monopolized domains; c) Directing, organizing the markets related to goods, services in state-monopolized domains prescribed by this Law and other relevant laws.
[151] Article 48 Indonesia law
[152] Article 75 Lao PDR law
[153] Section 41 Myanmar law provides that anyone that violates section 15 shall be punished with imprisonment for a term not exceeding 2 years
[154] Section 72 Thai law
[155] The laws also contains an exemption in Third Sch, para (1) which exempts undertakings entrusted with operation of services of general economic interest or having character of revenue producing monopoly: Section 33(4) and Third Schedule, paragraph 1, Singapore law; Section 10(4) and Third Schedule, paragraph 1, Brunei Darussalam law
[156] CCCS, *Competition Law and State-Owned Enterprises – Contribution from Singapore*, Global Forum on Competition, DAF/COMP/GF/WD(2018)72, 30 November 2018, p 3

of public utilities"[157]. In the Philippines, the law is clearly stated to apply to SOEs[158], while in Malaysia and Vietnam[159], the law also seems intended to apply to SOEs[160]. In Indonesia, exemption may apply to the creation of designated monopolies (both SOEs and non-SOEs) that are stipulated in a law.[161] Section 8(b) of the Myanmar law states that the Commission may exempt businesses essential for the State, if necessary, suggesting that an application needs to be made to the Commission.

The position in Cambodia and Lao PDR is not yet clear[162].

5.4 AMS Self-Assessment

Question 3 asks 'Which of the following actors (including SOEs, SMEs, industry or trade associations) are exempted from the competition law? Thailand provides that SOEs are exempt in the circumstances set out in section. The Myanmar Commission may exempt businesses essential for the benefit of the State and SMEs[163]. Indonesia notes that SMEs are exempt from their law.

5.5 Initial Conclusions on Commonalities and Differences: Abuse of Dominance

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

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

(1) Although many jurisdictions test dominance by reference to 'market power', some set market share thresholds. This could be problematic to convergence where the market share thresholds operate as pre-requisites (Vietnam and Indonesia) rather than presumptions.

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[157] Section 4(2) Thai law

[158] In the Philippines, 'entity' is defined to expressly include 'those owned or controlled by government'. The definition is linked to those engaged directly or indirectly in economic activity.

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

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

[161] Article 51, Indonesia Law, based on input from ICC.

[162] In Cambodia, the prohibitions apply to 'Persons' which is defined in Article 4(11) as those carrying on business activities regardless of profit or non-profit, registered or unregistered which would seem to be able to include SOEs. However, the definition of 'Business' in Article 4(15) includes reference to where a profit is intended to be made.
In Lao PDR, the law applies to business persons which is not defined. Art 2 refers to competition among the same type of business operators. Business operation refers to the business activities regarding production, trade and services. It is not clear whether this covers SOEs however Article 4 states that "The State facilitates a free competition under by-law and does not allow any authority to impede or create barriers to competition." Does this refer to SOEs? In Myanmar, most of the prohibitions apply to businesspersons however Section 15 applies to persons. Would 'person' be wide enough to include an SOE in Myanmar?

[163] Article 8(b) Myanmar law

(2) Most, but not all, of the AMS contemplate collective dominance. It may be desirable to amend or clarify the remaining laws to make clear that collective dominance is covered in all AMS.
(3) In relation to the types of abuses that are prohibited, all jurisdictions except Cambodia cover both exclusionary and exploitative abuses. Against international norms, many of the classes of abuse seem also to be covered but it will be difficult to confirm this until the laws are applied in practice. This is an area where guidance from the competition regulators as to how they intend to apply their abuse provisions will be helpful to ensuring a consistent approach.
(4) The approach to defences for abuse of dominance cases is varied across the AMS. This could also be covered in guidance from the competition regulator.
(5) Finally, a consistent approach should be encouraged in relation to applying the abuse of dominance provisions to SOEs. As noted by Maximiano (2019):

> "SOEs commonly hold a dominant market position and can significantly affect competitiveness if not subject to the competition rules. Too diverse an approach to applying abuse provisions to SOEs across ASEAN would pose a significant risk to convergence."[164]

[164] Maximiano (2019), p 249

6. Merger control

6.1 ASEAN Regional Guidelines

The Regional Guidelines state:

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

The Guidelines provide that notification may be mandatory (where the transaction cannot be implemented until the undertakings have received merger clearance from the competition regulator[165]) or voluntary (where businesses can undertake "their own merger self-assessment, to decide if they should notify the competition regulatory body to clear the merger"[166]).

It is also recognised that not all mergers will give rise to competition concerns. As such, the Regional Guidelines suggest that AMS should consider filtering out mergers with no significant impact by setting merger thresholds. Thresholds may refer to turnover, market shares or a combination of turnover and market shares[167].

AMSs may also include:

- a standstill provision so that mergers cannot proceed until they are approved[168];
- a procedure by which the competition regulatory body is tasked to stop the merger or impose conditions on, or require commitments from, the parties[169];
- a simplified filing system for cases that appear not to raise competition concerns[170].

6.2 ASEAN Prohibitions on Merger Control

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

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

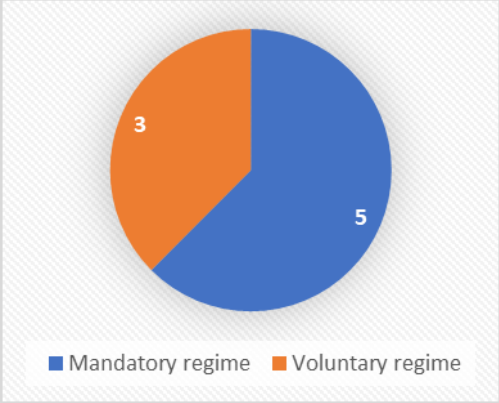
The AMS contain a mix of mandatory and voluntary notification regimes, together with a mix of ex-ante (required to be notified before the merger proceeds) and ex-post (notified after the merger has completed) regimes.

[165] ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy*. Jakarta: ASEAN Secretariat, Paragraph 3.4.2.1
[166] Ibid. Paragraph 3.4.2.2
[167] Ibid. Paragraph 3.4.3
[168] Ibid. Paragraph 3.4.3
[169] Ibid. Paragraph 3.4.4
[170] Ibid. Paragraph 3.4.5

Figure 6 shows the current position in relation to eight AMS. It can be seen that six of the eight AMS have mandatory notification regimes, with a mix of ex-ante and ex-post requirements. Indonesia's regime contains a compulsory obligation to notify (within 30 days of the merger) where the relevant threshold is exceeded, while Thailand provides a compulsory ex-post regime for mergers that may substantially reduce competition and a compulsory ex-ante regime for mergers that may cause a monopoly or dominant position in a market.

Figure 6: Mandatory versus Voluntary Merger Regimes

Voluntary regimes	
Ex-ante	Myanmar
Ex-ante or ex-post	Singapore Brunei



Mandatory regimes	
Ex-ante	Philippines Vietnam
Ex-ante or ex-post	Thailand
Ex-post	Lao PDR
Ex-post with voluntary ex-ante option	Indonesia

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

6.1.2 Notification thresholds[171]

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

(i) the definition of a merger transaction; and
(ii) whether certain notification thresholds are met.[172]

6.1.2.1 Merger transaction

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

[171] Section 6.2.2 is taken from Maximiano, Burgess and Meester, *Promoting Convergence in ASEAN Competition Laws,* in Kovacic and de Silviera (eds) "Global Competition Enforcement", Kluwer Publishing, 2019.
[172] See OECD Policy Roundtable on "Definition of Transaction for the Purpose of Merger Control Review" (2013), DAF/COMP(2013)25, p. 12.

As stated by Maximiano (2019):

> "…two types of criteria are used: "objective" numerical criteria, and "economic" criteria, which are more aligned with the mechanism through which a merger transaction might harm competition.[173] These two criteria are not mutually exclusive; some jurisdictions combine objective and economic criteria. Six out of the eight AMSs with a merger control regime have chosen for economic criteria (Brunei, Indonesia, Singapore, the Philippines, Thailand and Viet Nam)[174]. Obtaining "control" is the key criterion, but the exact interpretation of what constitutes "control", or the level of intensity of the influence, is different in some AMSs. Both Brunei[175] and Singapore[176] use the acquisition of "decisive influence over the activities of the undertaking". The Philippines refers to the ability to "substantially influence or direct the actions or decisions of an entity"[177]. Indonesia, Thailand and Viet Nam seem to adopt slightly different wording, and assess the ability to determine or influence the "enterprise's management and policies" (Indonesia[178]), "enterprise's policy, business administration, direction, or management" (Thailand[179]), or "enterprise or a business line" (Viet Nam[180]). Three of the aforementioned six AMSs with economic criteria (Indonesia, The Philippines and Singapore) have chosen to add also an objective criterion..."[181]

6.1.2.2 Thresholds

Notification thresholds commonly refer to the size of the transaction in an attempt to eliminate mergers that are not likely to have a material impact on competition. As stated by Maximiano (2019):

> "So far, only four of the AMSs (Indonesia, Philippines, Thailand and Viet Nam) have created specific notification thresholds for mergers in their legislation. The first two use solely objective criteria, as Indonesia has defined minimum asset values and/or sales values[182] and The Philippines minimum revenues and/or asset values as the value of the transaction[183]. Thailand and Vietnam use both objective and subjective criteria. In

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

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

[175] Art. 23 Brunei Darussalam law

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

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

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

[179] Section 51 Thai law.

[180] Art. 29(4) of Vietnam law.

[181] Maximiano (2019), pp 251-252

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

[183] In the Philippines, mergers need to be notified when (i) the aggregate annual gross revenues or value of the assets of at least one of the ultimate parent entities exceeds PHP 5.6 billion, or (ii) the value of the transaction exceeds PHP 2.2 billion. See Commission Resolution No. 03-2019: Adjusting the Merger Notification Thresholds Pursuant to Memorandum Circular No. 18-001

Thailand[184], it uses both market share (subjective) and sales turnover (objective), while Vietnam considers market share (subjective) combined with asset values, turnover and transaction value (all objective).[185] None of the other countries have implemented notification thresholds."[186]

6.1.3 Substantive assessment

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

As stated by Maximiano (2019):

> "Brunei and Singapore prohibit mergers that "result in a substantial lessening of competition"[187], while the Philippines prohibits mergers that "substantially prevent, restrict or lessen competition"[188] and Thailand prohibits mergers that result in a "substantial reduction of competition"[189]. The other countries use terminology less close to the SLC, although the assessment focuses on the effects of the merger. In the case of Lao PDR a merger ("combination") that restraints competition, i.e. aimed "to reduce, distort and/or prevent competition", is prohibited.[190] Indonesia assesses whether a merger "causes monopolistic practices and/or unfair business competition"[191], while Viet Nam prohibits a merger that has "a significant competition-restrictive impact".[192] Finally, the terminology in the Myanmar Competition Law emphasises the dominance as a result of a merger (it prohibits "collaboration among businesses" that "raise extremely the dominance over the market")[193], but it seems to focus on effects of the merger as well.[194]"[195]

Cambodia also uses language reflective of the SLC test, prohibiting mergers that have or may have the "effect of significantly preventing, restricting or distorting competition"[196].

[184] Section 5 of Thai law.
[185] Art. 33(2) Vietnam law. The exact values shall be stipulated by the Government "in accordance with the socio-economic conditions in each period". Currently, there are proposed thresholds, but further legislation needs to be issued: (i) either party's total assets in the Vietnam market exceeds VND 500 billion; (ii) either party's total turnover exceeds VND 1,000 billion in the preceding fiscal year; (iii) the value of the transaction exceeds VND 500 billion; or (iv) the combined market share of the combining entities in the relevant market meets a threshold to be stipulated. (Vietnam notes that, at the date of writing, the specific thresholds have not been issued. The thresholds will be stipulated in the Decree providing detailed regulations on a number of articles in the law.)
[186] Maximiano,(2019) pp 252-253
[187] Art. 23(1) Brunei Darussalam law and art. 54(1) Singapore Competition Law.
[188] Section 20 Philippines law.
[189] Section 51 Thai law.
[190] Art. 18, 19 Lao PDR law. Art. 38 dictates that a merger is aimed to restrain competition if it leads to restrained market access and technology development, and creates a negative impact on consumers, other business operators and the national socio-economic development. Hence, this seems also an SLC test.
[191] Art. 28(1) Indonesia law. Moreover, art. 3(2) of the Government Regulation No. 57 of 2010 prescribes that the merger assessment will include an analysis of market concentration, barriers to market entry, potential of anti-competitive behaviour, efficiency and/or bankruptcy).
[192] Art. 37(2) Vietnam law.
[193] See Myanmar law, Art. 30 and 31(a).
[194] It assesses whether a collaboration intends to "decrease competition". Art. 31(b).
[195] Maximiano (2019), p 254
[196] Article 12 Cambodia law

6.1.4 Joint ventures and ancillary restraints

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

Five of the AMS expressly refer to joint ventures in their AMS laws (Brunei Darussalam, Lao PDR, Myanmar, Singapore and Thailand[197]). The Philippines has prepared separate *Guidelines on Notification of Joint Ventures*[198]. Only Brunei Darussalam and Singapore deal expressly with ancillary restraints in their laws[199].

6.1.5 Defences/justifications

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

Some of the AMS expressly recognise these defences in their laws. Three of the AMS recognize the failing firm defence (Lao PDR, Myanmar, Philippines[200]) while Brunei Darussalam, the Philippines and Singapore expressly recognize the efficiencies defence in the context of mergers. Lao PDR and Myanmar include a broader defence that is focused on growth of exports and technological development[201]. Thailand allows an exemption where there is a "valid business-related necessity, benefit in supporting a business operator, not causing severe damage to the economy, and no impact on the essential benefits consumers are entitled to as a whole".[202] It is not yet clear how those defences will be applied in practice.

6.1.6 Remedies

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

Only the Philippines and Vietnam expressly refer to structural or behavioural remedies in their laws[203]. This is an area that is more commonly addressed in guidelines[204].

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

[198] Available at https://phcc.gov.ph/guidelines-on-notification-of-joint-ventures/

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

[200] It is unclear whether section 52 of the Thai law is applicable in these circumstances.

[201] Article 47 Lao PDR law, Section 33(c) Myanmar law

[202] Section 52 Thai law

[203] Section 12(h) Philippines Act; Article 42 Vietnam law

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

6.1.7 Sanctions

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

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

6.3 AMS Self-Assessment

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

6.4 Initial Conclusions on Commonalities and Differences: Merger Provisions

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

(1) The differences in terminology used across the AMS could result in different interpretations and merger assessments, potentially leading to legal uncertainty and increasing transaction costs for merging parties[205].
(2) The notification thresholds are diverse, with a mix of mandatory and voluntary, ex-ante and ex-post regimes, again leading to the risk of increased costs and uncertainty[206].

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

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

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

[205]Maximiano (2019) p 256
[206]Maximiano (2019) p 256

7. Institutional arrangements

Maximiano (2019) recognises three institutional factors that will influence the enforcement and convergence of competition laws across ASEAN: regulator independence; the role of sector regulators and the courts[207].

7.1 ASEAN Regional Guidelines: Regulator independence

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

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

The Guidelines then note:

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

AMS may determine that the competition regulatory body's budget should be free from political considerations and offers some suggestions as to how this can be achieved (paragraph 4.3.4).

7.2 ASEAN Institutional Structures

Competition regulators should be independent to enable them to make decisions without fear of consequences.

In ASEAN, the institutional design of competition regulators (as well as other agencies) is impacted by divergent strategic interests, the heavy involvement of the State, priority of policies, as well as poverty and underdevelopment. Against this background, it is difficult to achieve a totally independent institution in ASEAN. Nevertheless, important steps in this direction have been taken.

[207] Maximiano (2019) p 256

7.2.1 Responsible Ministry

A key question for the independence of the competition regulators is its relationship with the relevant government. All of the competition agencies in ASEAN sit under a Ministry to which they are accountable for decisions and initiatives. However, this does not mean that the government department has the ability or power to review decisions of the regulator.

Table 13: Responsible Ministry

Jurisdiction	Authority	Line Ministry
Brunei Darussalam	Competition Commission of Brunei Darussalam (CCBD)	Ministry of Finance and Economy
Cambodia	Competition Commission of Cambodia	Ministry of Commerce
Indonesia	Indonesia Competition Commission	President[208]
Lao PDR	Business Competition Commission	Ministry of Industry and Commerce
Malaysia	Malaysia Competition Commission	Ministry of Domestic Trade and Consumer Affairs
Myanmar	Myanmar Competition Commission	Ministry of Commerce
Philippines	Philippine Competition Commission	Office of President
Singapore	Competition and Consumer Commission Singapore	Ministry of Trade and Industry
Thailand	Trade Competition Commission	Ministry of Commerce
Vietnam	National Competition Commission	Ministry of Industry and Trade
Source: Author's analysis based on Competition Laws, responses to Self-Assessment and input from AMS		

7.2.1.1 AMS Self-Assessment

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

> "26. On which amongst the following matters does the government/a minister have overriding power over the competition agency as provided by law?
> - The decision to open/close an investigation on an alleged infringement of the competition law
> - The decision to impose/not to impose specific sanctions and/or remedies when closing an investigation on an alleged infringement of the competition law
> - The decision to clear/block a merger
> - The decision to grant/not to grant exemption for anticompetitive conducts which would otherwise have contravened the competition law
> - Neither the government nor any minister could override the decisions of the competition agency over competition matters".

Indonesia, Myanmar, the Philippines and Thailand stated that there are no circumstances where the government or a minister has power to override a decision of the competition regulator. Singapore noted the Minister's power to "grant an exemption for anti-competitive conduct which would otherwise have contravened the competition"[209]. In Malaysia, the Minister has power to order an investigation to be

[208] Article 30, para (3) Indonesia law
[209] See exclusions found in the Third and Fourth Schedule of the Singapore law and the power to grant a block exemption under section 36 of the Singapore law

commenced by the MyCC. Brunei Darussalam and Vietnam were the only jurisdictions to identify matters where the government/a minister *could* intervene in a decision of the competition regulator:

(i) Decision to clear/block a merger (Brunei Darussalam and Vietnam);
(ii) The decision to grant/not grant an exemption for anti-competitive conduct (Brunei Darussalam and Vietnam(?) (in the case of Vietnam, the answer is incomplete)
(iii) Decision to impose/not to impose specific sanctions and/or remedies when closing an investigation on an alleged infringement of the competition law (Vietnam)
(iv) Vary or revoke a block exemption (Brunei Darussalam)

Legislatively, (i) and (iv) are also provided for in Singapore's legislation[210].

Lao PDR did not answer this question.

7.2.2 Commissioners

The appointed members of the Commission play a key role in the development and progress of the law. As can be seen from Table 13, most of the institutions in ASEAN are represented by Commissioners who come from the civil service. In many ASEAN countries, it is not common to have a completely independent agency. Often, AMS prefer to retain a governmental link with a new establishment so that it can retain some control over the management and budget. This stems from the political need to have control over institutions which report to relevant ministries with Ministerial control. The part time nature of many of the ASEAN Commissioners will have a significant impact on the development of competition law across ASEAN. The introduction and implementation of competition law is an enormous task and one that is difficult for both the Commissioners and the agency staff to achieve with part-time Commissioners.

Table 14: Commissioners appointed to Competition Regulators

Jurisdiction	Authority	Commissioners (Part Time/Full Time)	Number of Commissioners	Representation of Commissioners	Appointed by	Term	Re-appointment
Brunei Darussalam	Competition Commission of Brunei Darussalam (CCBD)	Part Time	Chairman plus 6-12 Commissioners	Mainly civil servants, private and academia	His Majesty the Sultan of Brunei Darussalam	3-5 years	Yes
Cambodia	Competition Commission of Cambodia	NA	Chairman, Vice-Chairmen and others	NA	Government	5 years	NA
Indonesia	Indonesia Competition Commission (ICC)	Full time	Chairman, Vice Chairman, and not less than 7 members	Private sector/academia /Legal practitioner	President of the Republic of Indonesia upon recommendation of the Parliament	5 years	1 (one) subsequent term of office

[210] Section 40(3) and Section 57(3) Singapore law

Jurisdiction	Authority	Commissioners (Part Time/Full Time)	Number of Commissioners	Representation of Commissioners	Appointed by	Term	Re-appointment
Lao PDR	Business Competition Commission	Part time	11	Civil servants	Prime Minister upon recommendation of Minster of Industry and Commerce	NA	NA
Malaysia	Malaysia Competition Commission (MyCC)	Part time	Chairman and 9 Commissioners	Civil servants, private and academia	Prime Minister	3 years	Yes, for one additional term only
Myanmar	Myanmar Competition Commission (MmCC)	Full/Part time	11	Civil servants, private and academia	Union Government (Cabinet)	3 years	The members shall not serve for more than two consecutive tenures. However, the tenure may be extended in case of skills and other requirements. (Rule 10).
Philippines	Philippine Competition Commission (PCC)	Full time	Chairman plus 4 Commissioners	Private and academia	President	7 years [211]	No
Singapore	Competition and Consumer Commission Singapore (CCCS)	Part time	Chairman plus 6-12 Commissioners	Civil servants, private and academia	Minister of Trade and Industry[212].	3-5 years	Yes
Thailand	Trade Competition Commission	Full time	7	Private	Prime Minister after a detailed selection process	4 years	Yes, for one additional term only
Vietnam	National Competition Commission	Both Full time and Part time	Chairman, 2 Vice Chairman and 11-15 Commissioners	Civil servants and experts	Prime Minister at direction of Minister of Industry and Trade	5 years	Yes

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

7.2.3 Budget and Staff

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

[211] For first set of appointees, two of the Commissioners will hold office only for 5 years: section 7 Philippines law
[212] See First Schedule of the Singapore law

Table 15: Budget and Staff of Selected Competition Authorities for 2017 and GDP and Population Context

AMS	Budget of Competition Authority (EUR Million)	GDP in USD Million	No. of Staff Members Working on Competition	Population (Million)
Brunei Darussalam	NA	12,128	NA	0.4
Cambodia	NA	22,158	NA	16
Indonesia	8.8	932,259	355	264
Lao PDR	NA	16,853	NA	6.9
Malaysia	2.6	296,359	58	31.6
Myanmar	NA	67,069	NA	53.4
The Philippines	7.1	313,595	159	104.9
Singapore	10.6	296,966	39	5.6
Thailand	NA	455,303	60–80	69
Viet Nam	NA	202,616	30-40	95.5

Source: Maximiano, Burgess and Meester, *Promoting Convergence in ASEAN Competition Laws*, in Kovacic and de Silviera (eds) "Global Competition Enforcement", Kluwer Publishing, 2019, p 258. Updated January 2020
Note: NA means that information is either not available or not applicable.

Maximiano (2019) say:

> "As can be observed from Table[14], budget and staff count differ significantly not only in absolute but also in relative terms. Singapore and the Philippines seem to have a relatively high budget compared with others (taking into account its GDP), while Singapore has by far the largest relative staff count (taking into account the population). A lower budget indicates a relatively marginal importance of competition matters on the national public policy agenda. Without the necessary investment from the public purse, there is a decreased likelihood that a competition authority can fulfil its duties under the competition law. A shortage of staff can lead to challenges in terms of the number and quality of investigations of competition law violations the authority can execute. Moreover, given the (growing) importance of economics in competition law, a competition authority requires a sufficient number of sufficiently qualified (economic and legal) staff.[213]…
>
> In summary, low budgets and staffing can pose a challenge for the independence of – and the sound technical decisions made by – competition agencies of the AMSs. This in turn can eventually deter further convergence of decision making across ASEAN based on well-accepted and well-tested competition law and economics."[214]

[213] Given that competition law lies at the interface of law and economics, a sound competition enforcement of competition law requires a sufficient number of well-qualified staff with sophisticated skills.
[214] Maximiano (2019), pp 258-259

Table 16: Budget and staff

Jurisdiction	Authority	Budgetary source	Staff numbers[215]	Qualifications of staff
Brunei Darussalam	Competition Commission of Brunei Darussalam (CCBD)	Ministry of Finance and Economy via Department of Competition and Consumer Affairs, Department of Economic Planning and Statistics	5	3 economists 2 finance and accounting
Cambodia	-	-	-	-
Indonesia	Indonesia Competition Commission (ICC)	State Treasury and percentage of Collected Fines determined by the Minister[216]	355	72 lawyers 101 economists 46 finance and accounting 16 communications 42 strategic planning 42 others (engineers, social scientists)
Lao PDR	Business Competition Commission	Ministry of Industry and Commerce	-	-
Malaysia	Malaysia Competition Commission	Ministry of Finance through MDTCA	58	17 lawyers 5 economists 2 finance and accounting 3 IT forensics 1 statistics 3 communications
Myanmar	Myanmar Competition Commission	Ministry of Commerce	19	1 economist 5 legal practitioners
Philippines	Philippine Competition Commission	Congress	162	43 lawyers 18 economists 10 accountants 3 engineers
Singapore	Competition and Consumer Commission Singapore	Ministry of Trade and Industry	70	15 lawyers 24 economists 10 IT forensics 9 strategic planning
Thailand	Trade Competition Commission	Legislature	68	17 lawyers 13 economists 15 business 3 accounting 7 political science 3 science 4 art 2 communications 1 logistics 2 engineers
Vietnam	National Competition Commission	Ministry of Industry and Trade	60	10 lawyers 27 economists 5 finance and accounting 3 IT forensics 5 strategic planning

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

[216] Indonesia's response to the Self-Assessment, 2019

7.3 ASEAN Regional Guidelines: Sector regulators

The Regional Guidelines offer suggestions as to how the AMS should manage sector-specific regulators, both in terms of the scope, and implementation, of competition law[217]. The Regional Guidelines also suggest the establishment of:

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

7.4 Sector Regulators with Competition Law Jurisdiction

Maximiano (2019) state:

> "[t]he presence of sector regulators with competition powers may also be a further challenge for the convergence process. There may be different legal provisions in the sectoral laws, or the regulators may be implementing the same legal tests differently. They may even not be applying them at all, as they do not see it as their main responsibility and priority, among their competing tasks."[218]

Table 17: Regulatory authorities with competition enforcement powers

Jurisdiction	Sector specific Regulatory Authorities with competition enforcement powers
Brunei Darussalam	None
Cambodia	None
Indonesia	None
Lao PDR	Sector specific authorities have powers to regulate disruptive behaviours. These may include anti-competitive behaviours but so far there is no precedent
Malaysia	Yes – Malaysian Communications and Multimedia Commission (MCMC), Energy Commission (EC), Malaysian Aviation Commission (MAVCOM)
Myanmar	None
Philippines	Yes
Singapore	Yes
Thailand	Yes
Vietnam	None

Source: Handbook on Competition Policy and Law in ASEAN for Business 2017
NB: The question asked in the Handbook was "*Are there any sector-specific regulatory authorities (RAs) with competition enforcement powers?*" which differs to the question in the Self-Assessment

7.4.1 AMS Self-Assessment

> "27. In which amongst the following sectors does the competition agency have concurrent jurisdiction with the sector regulators?"

Myanmar, Vietnam and Malaysia identified that there are sector regulators with concurrent competition law jurisdiction[219]. Singapore and Brunei Darussalam said no

[217] ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy*, 2010. ASEAN Secretariat: Jakarta, section 4.4
[218] Maximiano (2019), p 259
[219] Myanmar – telecommunications; Vietnam – not identified; Malaysia – telecommunications and multimedia, energy, upstream oil and gas activities and aviation.

sector regulators had concurrent jurisdiction. The Philippines noted it has primary jurisdiction. Lao PDR did not answer this question.

7.5 Initial Conclusions on Commonalities and Differences: Institutional arrangements

Institutional arrangements will play a crucial role in regional convergence and cooperation in ASEAN. Based on the Self-Assessment responses, there are a number of jurisdictions with ministerial power to make decisions that could impact on the competition regulators' independence. In addition, six out of nine competition regulators have Commissioners appointed from the civil service which may affect the perceived autonomy of the institution. The same six out of nine jurisdictions have only part-time Commissioners which suggests that these appointments also hold other government positions which limits their ability to give the implementation and enforcement of competition law the time and attention it requires. The budget provided to the regulators will have an impact on the ability to employ qualified staff, including lawyers, economists and investigators.

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

8. Provisions to support Regional Convergence

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

8.1 Guidelines

The power to publish Guidelines will be critical to achieving regional convergence as many of the potential areas of divergence can be addressed through consistent guidelines (for example, clarity around the types of abuse). All of the AMS have this power in their laws[220], although the terminology sometimes differs. Myanmar gives powers "to issue necessary notifications, orders, directives and procedures" which would seem to include guidelines.

8.2 Cooperation with foreign competition agencies

8.2.1 Confidential information

One of the key considerations for cooperation between competition regulators will be their treatment of confidential information. All of the AMS laws (except Myanmar) contain a provision that requires the competition regulator to protect confidential information[221]. Myanmar has addressed this in its Rules which provide for confidentiality to be retained[222].

8.2.2 Express ability to cooperate

Six of the AMS laws contain an express provision that permits the competition regulator to cooperate with foreign competition bodies (Brunei Darussalam, Lao PRD, Myanmar, Singapore, Thailand, Vietnam)[223].

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

(a) In the case of the Philippines, by virtue of its power to act as the representative of the government in international competition matters[224]; and
(b) In the case of Malaysia, by virtue of its power to disclose confidential information to a foreign competition agency in connection with a request from that country's competition authority[225].

[220] Section 33 Brunei Darussalam law; Art 7 Cambodia law; Article 35(f) Indonesia law; Art 79(3) Lao PDR law; Section 66 Malaysia law; Section 56(b) Myanmar law; Section 12(k) Philippines law; Section 61 Singapore law; Section 17(3) Thai law; Art 10(5) Vietnam law.
[221] Section 70 Brunei Darussalam law; Art 27 Cambodia law; Article 39(3) Indonesia law; Art 57(1) Lao PDR law; Section 21 Malaysia law; Section 34 Philippines law; Section 89 Singapore law; Section 76 Thai law; Art 54(2) Vietnam law.
[222] Rules 64, 67 and 73, Myanmar Competition Rules 2017
[223] Section 69 Brunei Darussalam law; Art 79(6) Lao PDR law; Section 8 Myanmar law; Section 88 Singapore law; Section 29(8) Thai law; Art 108 Vietnam law.
[224] Section 12(p) Philippines law
[225] Section 21(2) Malaysia law

8.2.2 Exchanging confidential information

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

(a) In the case of Brunei Darussalam and Singapore, the exchange can only take place if an undertaking is obtained that ensures the foreign agency will comply with the confidentiality requirements[226];
(b) In the case of Cambodia and Malaysia[227], the disclosure needs to be authorised by the Commission or the Chairman.

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

8.2.4 Ability to receive and give undertakings

The OECD recommends that exchanges of confidential information can be made with foreign competition authorities with the use of 'waivers'[228]. Only Brunei Darussalam and Singapore contain provisions that contemplate the giving and receiving of undertakings to deal with confidential information[229].

8.3 AMS Self-Assessment

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

> "38. Which amongst the following types of cooperation regarding competition law enforcement does the competition agency enter into with other jurisdictions?
>
> 39. Which amongst the following types of informal cooperation arrangements does the competition agency have with its counterparts from other jurisdictions?"

Each of the competition regulators in Indonesia, Malaysia, Philippines, Singapore and Vietnam responded to question 38 that they engaged in 'consultation and information exchange". It is not clear whether this include confidential information. In addition, Indonesia responded that it engages in positive and/or negative comity principles and joint investigations.

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

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[226] Section 69(2) Brunei Darussalam law; section 88(2) Singapore law
[227] Article 28 Cambodia law; Section 21(2) Malaysia law
[228] OECD, *International Enforcement Cooperation – Secretariat Report on the OECD/ICN Survey on International Enforcement Cooperation*, 2013
[229] Section 69(2) Brunei Darussalam law; section 88(2) Singapore law

8.4 Initial Conclusions on Commonalities and Differences: Supporting Regional Cooperation

All of the AMS have power to publish guidelines (although the terminology sometimes differs) which will be an important tool for achieving convergence. Although many of the AMS have the power to cooperate with foreign competition agencies, there are significant barriers to sharing confidential information. All of the AMS laws (except Myanmar[230]) impose an obligation to retain confidentiality of information on the competition regulator. A limited number of AMS expressly contemplate a waiver of that confidentiality where it is required to assist a foreign competition regulator.

[230] Myanmar has addressed this in its Rules which provide for confidentiality to be retained (Rules 64, 67 and 73 Myanmar Competition Rules 2017).

PART IV: INSIGHTS AND OUTLOOK

1. Summary of the main findings of the Study

In summarising the main findings of the Study, it is most useful to begin at the end of the Study with the findings on the provisions to support Regional Convergence. Regional Convergence of ASEAN Competition Laws will be supported primarily by the development of soft law, and cooperation and coordination between the AMS competition regulators. It is therefore important to understand the ability for each of the AMS competition regulators to participate in these activities.

The Study found that all of the AMS have power to publish guidelines (although the terminology sometimes differs). The important role for guidelines cannot be overstated. The Strategic Recommendations below identify a number of areas where **guidelines issued by the AMS could help achieve convergence**.

Although many of the AMS have the power to cooperate with foreign competition agencies, there are significant barriers to sharing confidential information. All of the AMS laws (except Myanmar[231]) impose an obligation to retain confidentiality of information on the competition regulator. A limited number of AMS expressly contemplate a waiver of that confidentiality where it is required to assist a foreign competition regulator. Only Brunei Darussalam and Singapore expressly set out what is required in these circumstances. **This is an area that should be addressed in the near term to ensure that regional cooperation, which will help significantly with regional convergence, can be achieved. Both the benefits and the risks of cross-border sharing of information will need to be considered. As has already been seen in the Grab/Uber case, there is an immediate need for cooperation in relation to cross-border mergers and the same point is relevant to cross-border cartels.**

In relation to the three pillars of competition law, the Study found a large degree of convergence existing at a macro level as all AMS prohibit anti-competitive agreements (including cartels) and abuse of dominance, and all AMS, except Malaysia, prohibit anti-competitive mergers. (Malaysia is in the process of seeking to amend its Competition Act and Competition Commission Act, including a proposed prohibition against anti-competitive mergers and acquisitions[232]. However, it is not yet certain that this amendment will be adopted or its timing.) There is a significant exception to this as both Brunei Darussalam[233] and Singapore **exempt vertical agreements** from the prohibition against anti-competitive agreements in their competition laws. Particularly given the significant growth in online markets, this could **present a significant divergence in competition laws** across ASEAN.

[231] Myanmar has addressed this in its Rules which provide for confidentiality to be retained (Rules 64, 67 and 73 Myanmar Competition Rules 2017).
[232] Shanthi Kandiah, *Malaysia: Overview* in Asia-Pacific Antitrust Review, 19 March 2019, available at http://globalcompetitionreview.com/insight/the-asia-pacific -antitrust-review-2019/1189002/malaysia-overview (accessed 13 January 2020)
[233] See Third Schedule Paragraph 8(1), Sections 11 (Agreements etc preventing, restricting or distorting competition) and 12 (Excluded Agreements) of the Competition Order 2015 (Order made under 83(3) of the Constitution of Brunei Darussalam.

When looking in more detail at the prohibitions on cartels, potential for divergence exists between the AMS in relation to key areas: the scope of application of the laws (the wider 'economic' or narrower 'commercial' activities); the meaning of 'object' and whether it is equivalent to 'per se'; the application of the laws to 'concerted practices'; the sanctions to be applied; the leniency regimes; and investigation powers. **Further research is required in these areas.**

In relation to anti-competitive horizontal and vertical agreements (non-cartel), regional convergence will benefit from clarity and consistency around the application of 'appreciability' thresholds and 'safe harbours'; the application of 'efficiency' defences; and the approach to calculating civil or administrative penalties. **Further research is required in these areas.**

Abuse of dominance is a difficult area for competition regulators in practice. Establishing dominance is a significant hurdle. Across ASEAN, there is a risk to regional convergence arising from the application of market share thresholds to determine dominance if they operate as pre-requisites. Divergence may also arise depending upon the willingness of the competition regulators to apply the abuse of dominance provisions to SOEs.[234] Regional convergence will benefit from consistency on what types of abuse are intended to be covered by the relevant laws and which, if any, defences may be argued. Both these points could be addressed in Guidelines issued by the AMS. A less pressing issue is the application of the laws to 'collective dominance' as some of the AMS do not currently provide for this.

In relation to **mergers**, there is **potential for considerable divergence leading to business uncertainty** in this area. This is due to the different terminology used as between the laws (which could give rise to confusion) and the notification requirements (a mix of mandatory and voluntary, pre- and post-merger requirements) which will make cross-border mergers difficult for businesses to navigate. In addition, the potential for diverse remedies to be imposed in different jurisdictions (as evidenced in the Grab/Uber merger), gives rise to substantial risks to convergence.

Overarching the application of the law in all areas are the **policy objectives** sought to be achieved by the AMS. This will impact the enforcement priorities set by the AMS competition regulators, the manner in which the laws are applied and the decisions regarding remedies and sanctions. It is therefore **key to regional convergence**. Although there is currently a large degree of overlap between the AMS in relation to their stated policy objectives, the concern is that multiple policy objectives will lead to divergence as each AMS determines which of the multiple policy objectives should take priority.

Finally, the institutional structures in the AMS will play a key role in achieving regional convergence. The appointment of Commissioners from the civil service, especially on a part time basis, put the **independence** of the competition regulator at risk. Sufficient **budgetary** allocations are needed to ensure that the appropriately skilled staff can be employed to ensure a "sound technical legal and economic analysis which will help

[234]Maximiano (2019), p 249

[the regulator] deliver the desired efficiency benefits and productivity gains to the economy"[235]. Overlaps between the competition regulator and **sector regulators** with competition law jurisdiction pose an additional threat to regional convergence.

2. Strategic recommendations on areas feasible for convergence

Regional convergence will be supported primarily by converging policy objectives, the development of soft law, and cooperation and coordination between the AMS competition regulators. The rise of cross-border cartels and mergers around the world is also likely to feature across ASEAN, particularly given the forecast economic growth. For these reasons, the strategic recommendations on areas feasible for convergence focus on four key areas in the short term: policy objectives, regional cooperation, mergers and cartels.

In the medium term, priority should be given to the creation of guidelines (potentially at both a regional and national level) that interpret and apply the laws in a manner that supports convergence.

2.1 Short term priorities

Short term priorities are recommended that will allow important steps to be taken towards regional convergence in areas requiring immediate action. They also reflect the fact that there is a rare (and potentially limited) opportunity to influence thinking of the government, the judiciary, lawyers, academics, business and consumers in the early days of introduction of competition laws. Each of these areas may warrant a separate brainstorming activity.

2.1.1 Policy objectives

The review of the **Regional Guidelines** could give consideration to whether ASEAN-wide policy objectives could be included so that, at least in relation to regional matters, a common objective/s is/are being pursued. In turn, this may provide guidance for the AMS competition regulators as to which of their multiple policy objectives should be prioritised when enforcing their laws on a domestic level.

2.1.2 Regional Guidelines on Cooperation

The creation of Regional Guidelines on Cooperation would be an important step to facilitate cooperation in relation to cross-border mergers and cartels. The Guidelines could address the internal policies and procedures needed by each of the AMS to enable regional cooperation. They could also address the important question of confidentiality and include a regional pro-forma confidentiality waiver and common conditions to be imposed on any sharing of information, for example, how information should be treated by the receiving party.

[235]Maximiano (2019), p 257

In addition, the AMS could consider establishing regular meetings between representatives of the AMS competition regulators designated with achieving regional cooperation.

2.1.3 Mergers

There is significant potential for divergence in relation to the merger regimes across the AMS and this uncertainty is not good for investment in the region. This is likely to be one of the most difficult areas to address due to the potential need for legislative changes. However, much can be achieved at a policy level:

- Clarification of the terminology used in the legislation can be provided in guidelines. Ideally, the terminology should be clarified in as consistent a manner as possible across the AMS.
- A pro-forma merger notification form could be considered on a regional level which would ease the burden on businesses required to file in multiple jurisdictions.
- Consideration could be given to one jurisdiction 'leading' the investigation, where the merger is cross-border. The ability to share information will be critical if this is to be achieved. A pro-forma confidentiality waiver (see paragraph 2.1.2 above) will be essential.
- A procedure for discussing remedies in cross-border merger cases is to be encouraged.
- Consistency in timeframes for merger review.

Practically, cooperation facilitated under paragraph 2.1.2 above would also help to align the application of the AMS merger laws. In particular, if the AMS were able to share thoughts particularly in relation to proposed remedies, a great deal of regional convergence could be achieved. There may be a need for separate Regional Guidelines on Merger Cooperation to facilitate the level of cooperation likely to be required.

The further research on procedural aspects of merger review identified in 3.1 below will be needed to support much of this work.

2.1.4 Cartels

There is some potential for divergence in relation to enforcement of hardcore cartels across the AMS. Divergence will make prosecution of cross-border cartels difficult.

AMS competition regulators could amend and/or develop guidelines on cartels that could address the potential areas of inconsistency between the AMS and thus support regional convergence. The following key areas could also be included in the proposed review of the **Regional Guidelines**: the scope of application of the laws (the wider 'economic' or narrower 'commercial' activities); the meaning of 'object' and whether it is equivalent to 'per se'; and the application of the laws to 'concerted practices'; the sanctions to be applied; the leniency regimes; and investigation powers.

Separate guidelines could be prepared by the AMS competition regulators to support regional convergence dealing with:

(1) Leniency;
(2) Sanctions;
(3) Investigation Powers.

These will need to be supported by the further research outlined in 3.1 below.

Practically, cooperation facilitated under paragraph 2.1.2 above would also help to align the application of the AMS cartel laws. In particular, if the AMS were able to share thoughts particularly in relation to proposed remedies, a great deal of regional convergence could be achieved.

2.1.5 Abuse of dominance

The review of the **Regional Guidelines** could address the potentially divergent issues of requiring minimum market share thresholds as a pre-requisite to dominance and the application of the abuse provisions to SOEs.

2.2 Medium term priorities

In the medium term, the AMS competition regulators could amend and/or develop guidelines that address potential areas of inconsistency between the AMS and thus support regional convergence:

(1) Guidelines on anti-competitive agreements:
a. Relevance of an appreciability threshold;
b. A 'safe harbour' threshold/s to provide more certainty for businesses and others operating in the region;
c. The relevance of 'efficiencies' as a defence;
d. Approach to calculating penalties.

(2) Guidelines on abuse of dominance
a. Types of abuses that are recognised, against international best practice benchmarks;
b. Defences that may be considered, against international best practice benchmarks;
c. Collective dominance.

These issues could also be clarified in the review of the **Regional Guidelines**, as a preliminary step to assist the AMS.

3. Suggestions for further research and/or regional discourse

3.1 Further research

There is considerable further research that can be undertaken to develop this Study.

Study

The Study will benefit from the following additional activities:

a. Testing the findings of the Study against the working practices and understanding of the competition regulators in each of the AMS through face to face (or phone) interviews;
b. Incorporate a review of all available implementing regulations and guidelines to better understand the AMS regulator approaches;
c. Compare the approaches taken in ASEAN with international best practices;
d. Review available ASEAN caselaw to obtain a clear picture of the manner in which the AMS regulators, relevant courts and appellate bodies are interpreting and applying the existing laws and regulations, and, in doing so, consider the extent to which international best practice is being followed.

A similar study and strategy paper should be completed to deal with the procedural aspects of the AMS laws, including investigation powers, remedies and sanctions, burdens of proof, standards of proof, timeframes, appeals processes. Procedural aspects are key to the prospects of convergence of laws and practices across the region for cartels (matters such as leniency and sanctions) and mergers (notification requirements and timescales).

Cartels

In relation to cartels, the following additional research activities are recommended:

a. An in-depth review of the AMS leniency regimes (as there will be a need to avoid conflicting requirements);
b. A study on remedies and sanctions for cartels;
c. An analysis of the procedural matters relating to proving the cartels, including the investigation powers of the AMS regulators, burden and standard of proof, timeframes for investigation, appeals processes.

Mergers

In relation to mergers, the following additional research activities are recommended:

a. Review of merger procedural provisions for consistency in timings of reviews and processes;
b. An in-depth review of merger remedies;
c. An in-depth review of merger assessment criteria.

Other matters

a. Exemptions and exclusions from competition law e.g. SOEs, SMEs.
b. Treatment of intellectual property rights

3.2 Further discourse

A separate conference dedicated to discussing the potential divergences raised, particularly where representatives from each jurisdiction (regulators, academics, lawyers) can input, would be highly beneficial to any further research.

3.3 Advocacy

The AMS may wish to consider preparing a simple publication that highlights the similarities and differences between the AMS competition laws. This would be a positive initial step to provide some reassurance to businesses operating in the region both that there are many similarities and that the competition regulators are aware of any potential differences.

Annex A: Objectives of Competition Laws in AMS

	Policy Objectives
Brunei Darussalam	Section 1(3): to **promote and protect competition** in markets in Brunei Darussalam, to promote **economic efficiency**, **economic development** and **consumer welfare**; and to provide for the functions and powers of the Competition Commission of Brunei Darussalam and to provide for matters connected therewith.
Cambodia	Article 1: Purposes of the law are to: - Encourage **fair** and honest business relations, - Promote **economic efficiency** and the establishment of new businesses; - **Protect** the national economy from **harmful anti-competitive behaviour**; and - Assist **consumers** to obtain goods and services of higher quality at lower prices and with greater variety and greater choice.
Indonesia	Article 3: The purposes of enacting this law shall be as follows: 1. safeguard the public interest and enhance the **efficiency** of the national economy as one of the endeavours aimed at improving the **people's welfare**; 2. create a conducive business climate by regulating fair business competition in order to ensure certainty in **equal business opportunities** for large-, middle- as well as small-scale business actors; 3. **prevent monopolistic practices and/or unfair business competition** caused by business actors; and 4. creating effectiveness and **efficiency** in business activities.
Lao PDR	Article 1 Objectives: This Law determines principles, regulations and measures for managing and monitoring the competition in business activities in order to make such **competition lawful, fair, transparent, flexible and equal**, and aims to **prevent and counter the unfair competition and the restriction of the business competition** as well as to **protect rights and interests of the State, business operators and consumers**, which contributes to regional and international integration, and the expansion and sustainability of the **national socio-economic development**. Note also Article 4 State Policy on Competition (which includes the State creating conditions for and enhancing the capacity of SMEs to participate in fair competition) and Article 5 Principles of Competition
Malaysia	Preamble: An Act to promote **economic development** by **promoting and protecting the process of competition**, thereby protecting the **interests of consumers** and to provide for matters connected therewith.
Myanmar	Section 2(f) defines competition policy as "policies laid down by the State to cause direct effect on production, services, trade, investment and businesses in order to emerge **fair competition in the market** and **protect the interests of the consumers** from monopolization". Section 3: The objectives of the Competition Law are: (a) to prevent acts that injure **public interests** through monopolisation or manipulation of prices by any individual or group with intent to endanger **fair competition in economic activities**, for the purpose of **development of the national economy**; (b) to control unfair market competition on the internal or external trade and

	economic development; (c) to prevent the abuse of dominant market power; and (d) to control the restrictive agreements and arrangements among businesses.
Philippines	Section 2 Declaration of Policy: (a) Enhance **economic efficiency** and promote **free and fair competition** in trade, industry and all commercial economic activities, as well as establish a National Competition Policy to be implemented by the Government of the Republic of the Philippines and all of its political agencies as a whole. (b) Prevent economic concentration which will control the production, distribution, trade, or industry that will unduly stifle competition, lessen, manipulate or constrict the discipline of free markets; and (c) Penalize all forms of anti-competitive agreements, abuse of dominant position and anti-competitive mergers and acquisitions, with the objective of **protecting consumer welfare** and advancing domestic and international trade and **economic development**.
Singapore	None stated in the law
Thailand	None stated in the law
Vietnam	Article 6 State policies on competition: 1. To create and maintain competitive environment in a healthy, **fair**, equal and transparent manner. 2. To **promote competition**, ensure the enterprises' right to freely compete in business as stipulated by law. 3. To strengthen the ability to access to market, increase the **economic efficiency**, **social welfare** and **protect consumers interests**. 4. To create conditions for the society and users to participate in the process of supervising the implementation of the competition law.

Source: Author's analysis