An international perspective on the development of competition law and policy

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UNCTAD approach to competition policy as a tool for economic development and international commerce

- The UN set (1) ensure that restrictive business practices do not impede the realisation of benefits that should arise from liberalisation.....A.(2) ..attain greater efficiency in international trade and development...in accordance with national aims of economic and social development and existing economic structures...
- A question is why competition authorities’ goal should be to protect consumer surplus; the second is a discussion on why competition authorities should or should not have other goals besides the protection of consumer welfare and the third one is a discussion about how competition authorities should or should not have public interest goals.
- These 3 questions are crucial for agreeing on the goals of the CAs and the concomitant institutional design.
The Goals of competition law and institutional design

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United Nations Set of Principles on Competition Policy: Scope

**Art 6** The principles and rules for enterprises are addressed to all enterprises.

Art 7. The provisions of the Set of Principles and Rules shall be universally applicable to all countries and enterprises regardless of the parties involved in the transactions, acts or behavior.

Art 8. Any reference to “States” or “Governments” shall be construed as including any regional groupings of States, to the extent that they have competence in the area of restrictive business practices.

E.3. States, in their control of restrictive business practices, should ensure treatment of enterprises which is fair, equitable, on the same basis to all enterprises, and in accordance with established procedures of law..
Choice of institutional design

✓ "one size fits all" does not apply in this field, due to the differences across sectors and to the various institutional structures and administrative cultures of the different countries. Hence the value of learning from different approaches and models, which can be based, inter-alia, on ICN, OECD, UNCTAD and regional institutions products and capacity building activities.

✓ There also implications for the judiciary, and of designing efficient systems of Appeals. The efficiency and the cost of judicial procedures, especially in appeal, is a major issue, especially for SMEs.

✓ Finally, the enforcement role of CAs needs to be scrutinised in terms of the regulatory burden that can be generated. Lack of coordination across agencies, lack of coherence between competition law enforcement and public policies to ensure regular supplies, affordable prices and access can lead to over and under-regulation, undermining the quality and the efficiency of the competition agencies.

UNCTAD Capacity building:
Competition policy and market opening

- Privatization of selective Public assets
  - Selective economic reforms
- Privatization and deregulation
  - Deeper market opening
- Non-discrimination between Public and private sector enterprises
  - Competition neutrality
Appropriate design of competition law and institutional framework

- Pre-reform assessment of existing conditions
- Scope of economic reforms

- Approach to assessing harm to competition
  - Type of prohibitions and exemptions
  - Type of remedies and sanctions
  - Enforcement powers

- Autonomous agency or part of government
  - Judicial review
  - Accountability

Appropriate design of competition regime

The differing environments imply that the design of the competition regime should differ too.

However, there are some features that characterize efficient public regulatory bodies. Among these are:

1. independence; transparency; accountability; assuring due process; being well funded in proportion to the mandate; being staffed by well-educated, well trained and non-corrupt persons; and having an appellate process that itself is well structured and non-corrupt.

2. More recent discussion about competition agencies indicates that evaluation is necessary too.

3. Among the internal processes, defining objectives and priorities, appropriately allocating resources, and taking effective decisions are necessary to an Effective competition agency
Life cycle of young competition agencies

UNCTAD Cycle of policy advise and capacity building

A new Cycle

Step One: Advocacy for economic reforms
Step two: Preparation of national competition law and policy
Step three: Capacity Building and agency effectiveness
Step four: Peer review
ASEAN’s Approach to competition law and policy

The AEC Blueprint provided for the launch of the ASEAN Economic Community, the establishment of a competition policy, a network of competition authorities or agencies, and a regional guidelines on competition policy.

The ASEAN Experts Group on Competition (AEGC) facilitates information exchange and cooperation on competition policy.

In 2010, the AEGC issued the ASEAN Regional Guidelines on Competition Policy, which describe how Member States may address anticompetitive agreements among enterprises (including price-fixing and bid-rigging), abuse of dominant position, and anticompetitive mergers.

The guidelines set a threshold for competition policy, but say little about such practical issues as price controls and the influence of SOEs on competition.
ASEAN Regional Guidelines on Competition Policy (2010)

The guidelines cover the following aspects of competition policy and law:

Definition and objectives of competition policy
Scope of competition policy and law, including prohibitions against anticompetitive agreements, abuse of dominant position, and anticompetitive mergers Exemptions or exclusions from competition policy and law
Role and responsibility of regulatory authority Transitional issues Enforcement, including different approaches to and elements of enforcement
Due process
Advocacy and outreach
International cooperation and relationship between competition and free trade agreements

ASEAN’s Approach to competition law and policy

AEGC issued ASEAN Regional Guidelines on Competition Policy, which was supplemented by the Handbook on Competition Policy and Law in ASEAN for Business.

States are free to create their own, wholly discrete and individualistic laws and policies. Although abiding by regional guidance is advised, that guidance is not binding, and no regional body addresses competition in any capacity beyond facilitating dialogue and providing advice (AEGC

Finally, the guidelines touch only lightly on “competition advocacy” as part of a government’s mission to promote competition in domestic markets.

The AECG is mindful of this role, but has stated that competition advocacy in ASEAN is undermined or constrained by special interest lobbying, weakness in market-supporting institutions, and underfunded and understaffed competition authorities.
<table>
<thead>
<tr>
<th>Member State</th>
<th>Name of the law</th>
<th>Year enacted</th>
<th>Implementing authority</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indonesia</td>
<td>Law Number 5 Concerning Prohibition of Monopolistic Practices and Unfair Business Competition</td>
<td>1999</td>
<td>Commission for the Supervision of Business Competition (KPPU)</td>
</tr>
<tr>
<td>Thailand</td>
<td>Trade Competition Act B.E. 2560 (2017)</td>
<td>2017</td>
<td>Competition Commission</td>
</tr>
<tr>
<td>Vietnam</td>
<td>Competition Law 2018</td>
<td>2018</td>
<td>National Competition Commission, Ministry of Industry and Trade</td>
</tr>
<tr>
<td>Singapore</td>
<td>Competition Act (Cap. 50B), Consumer Protection (Fair Trading) Act (Cap. 52A)</td>
<td>2005</td>
<td>Competition and Consumer Commission of Singapore (“CCCS”)</td>
</tr>
<tr>
<td>Malaysia</td>
<td>Competition Act, Competition Commission Act, Price Control and Anti-profiteering Act</td>
<td>2010</td>
<td>Malaysia Competition Commission (MPCC)</td>
</tr>
<tr>
<td>Brunei</td>
<td>Competition Order, 2015</td>
<td>2015</td>
<td>Brunei Competition Commission (“BC”)</td>
</tr>
</tbody>
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| Philippines  | Philippine Competition Act | 2015 | Philippine Competition Commission (“PCC”)
| Myanmar      | Union Parliament Law No. 9/2015 | 2015 | Myanmar Competition Commission (“MCC”) |

**Competition law regimes in ASEAN (as of November 2018)**
Importance of policy coherence?

- Governments pursue many objectives that may not always be compatible.
- Policy coherence has an impact across all development-supporting sectors.
- To avoid duplication, tensions or unnecessary conflicts between policies.
- Policy coherence has a positive impact at national, regional and international level.

Steps for achieving coherence?

- The need for policy makers to be aware of the possible impacts of the policies they are designing.
- Coordination between Ministries/other government organs.
- Importance to maintain a good balance between competition policy and other policies.
- Importance of separation of powers between different actors.
- Developing coordination mechanisms between competition authorities and sector regulators.
Challenges facing competition agencies in Asia

(a) Legislation is inadequate in terms of not properly addressing the anticompetitive conduct actually engaged in in the domestic economy, and in terms of not allowing effective enforcement by the agency;
(b) Cooperation and coordination with particular government ministries and other regulatory bodies is not sufficient;
(c) Budget is not large enough for the agency to operate effectively;
(d) There are too few skilled professionals; they are either not present in the country or are not attracted to the agency given the civil service salary structures;
(e) Judiciary is unfamiliar with competition law and its economics;
(f) A “competition culture” among the business community, government, media and general public is not developed.

International dimension :
interface with international commerce

TPP / CPTPP
The key objective of the Competition Policy chapter is to promote “economic efficiency and consumer welfare” (Article 16.1). The “Parties recognize the importance of cooperation and coordination between their respective national competition authorities to foster effective competition law enforcement in the free trade area” (Article 16.4).

The TPP appears to have avoided the problem of explicit reference to competing objectives, but Article 16.1.1 cites the Asia-Pacific Economic Cooperation (APEC) principles, which TPP parties “should take into account.” The APEC principles contain language that recognizes that policy and regulation “may have objectives other than promoting competition,” that the members will have “flexibility” to “take into account their diverse circumstances,” that “exemptions and exceptions from a competition driven regulatory framework may be necessary and that these will be implemented in a way that minimizes economic distortion.”
International dimension: interface with international commerce

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Efforts to lower barriers to trade and investment have frequently been undermined by business practices in participating countries that typically go unaddressed by the trade accords themselves. Trade agreements have sought to overcome this problem by including provisions regulating “competition policy” in signatory countries.

Two important chapters in the Trans-Pacific Partnership (TPP) address key priorities in this arena: Chapter 16 (Competition Policy) and Chapter 17 (State-Owned Enterprises and Designated Monopolies). They are essential to the TPP’s success in achieving economic integration and regulatory coherence and cooperation.
International dimension: interface with international commerce

Chapter 17 adopts a new strategy to discipline SOEs through trade law commitments as distinct from antitrust principles.

Traditionally, trade has addressed barriers to market access (tariffs, quotas, nontariff barriers), while competition policy was largely a domestic regulatory matter concerned with market structures and the anticompetitive behavior of market participants.

Cooperation and Consultations

The provisions on cooperation are general. They focus on the exchange of information and enforcement at the level of the parties and acknowledge that competition authorities may enter into cooperation arrangements on mutually agreed terms. They follow a familiar pattern in US free trade agreements, which emphasize the importance of collaboration among competition authorities covering technical cooperation, comity, investigations, and information sharing.
Thank you

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