

'Innocent' Cartels, Industry Associations and the Digital Economy

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Overview

- ▶ Application of competition law in ASEAN to MSMEs
- ▶ Application of competition law to ASEAN trade associations
- ▶ 'Innocent' cartel prosecution in ASEAN
- ▶ Specific risk areas for industry associations in the context of the digital economy
- ▶ Enforcement challenges for regulators



Application of ASEAN competition law to MSMEs

MSMEs in ASEAN Member States

- ▶ MSMEs have fallen foul of competition laws in some AMS
- ▶ Mostly because of ignorance or a lack of understanding
- ▶ Often when meeting as part of a trade or industry association

ASEAN competition laws

	Application to MSMEs	Exemption for MSMEs	Per se cartel breaches	Enforcement
Brunei	Yes	No exemption	Yes (object)	-
Cambodia	Yes	No exemption	Yes?	-
Indonesia	No	Exemption for small scale business (Art 50(h))	Yes	N/A
Lao PDR	Yes	Exemption if strengthens the competitiveness of SMEs (Art 45)	Yes?	-
Malaysia	Yes	Safe harbours provided in Guidelines	Yes	Yes
Myanmar	Yes	Commission can exempt small and medium scale businesses for the interests of the country (Art 8(b))	Yes?	-
Philippines	Yes	No exemption	Yes (partial)	-
Singapore	Yes	Safe harbours provided in Guidelines	Yes (object)	Yes
Thailand	Yes	No exemption	Yes	-
Vietnam	Yes	Exemption available if promotes the competitiveness of SMEs	Yes (partial)	Yes



Application of ASEAN competition law to Trade Associations

Trade associations and competition law

- ▶ Trade associations offer a range of benefits for their members
- ▶ Competitors meet to discuss legitimate matters e.g. industry standards, new legislation, best practices, lobbying to government
- ▶ Competition regulators are often suspicious of trade associations because of the potential for anti-competitive behaviour
- ▶ Potential to discuss anti-competitive matters e.g. pricing, oversupply, market divisions, bid prices
- ▶ Trade associations and their members have fallen foul of competition laws in many competition law jurisdictions

ASEAN competition laws

	Application to trade associations	Specific provision	Per se cartel breaches	Enforcement
Brunei	Yes	No	Yes (object)	-
Cambodia	Yes	No	Yes	-
Indonesia	Yes	No	Yes	Action against TA?
Lao PDR	Yes	Yes - Arts 3, 9, 17	Yes?	-
Malaysia	Yes?	No	Yes	Yes but TA not party
Myanmar	Yes	No	?	-
Philippines	Yes	Yes - section 48	Yes (partial)	-
Singapore	Yes	No	Yes (object)	Yes
Thailand	?	No	Yes	-
Vietnam	Yes	Yes - Art 6	Yes (partial)	Yes

Case example: Indonesia

- ▶ Tyre manufacturers (2015)
- ▶ 6 tyre manufacturers agreed not to compete on price and limit production and control distribution to put upward pressure on prices
- ▶ Fines - RP150billion
 - ▶ Rp25billion imposed on each of 6 tyre manufacturers - highest fine that could be imposed by Indonesian competition law
 - ▶ No fine on association?
- ▶ Evidence?
 - ▶ Minutes of meetings held by the Association of Indonesian Tire Producer (APBI) between 2009 and 2012. For example:
 - ▶ “continue to control distribution and maintain a conducive market condition according to their demand”
 - ▶ “market monitoring by APBI will be reactivated from May 2010, and all members must control their tire distribution to sustain this condition”.



'Innocent' Cartel Prosecution in ASEAN

Malaysia

- ▶ Cameron Highlands Floriculturist Association (CHFA) case (2012)
- ▶ Agreement reached at CHFA meeting:
 - ▶ 10% increase in price of flowers announced in the press
 - ▶ 150 members of CHFA reported to have 'agreed'
- ▶ No fine imposed (first case)
- ▶ What is interesting?
 - ▶ Announcement made in the press
 - ▶ Good reasons for price increase - increases in cost of workers, fertilisers, plastics, wood
- ▶ Evidence?
 - ▶ Minutes of meeting during which 10% price increase was agreed
 - ▶ List of names of CHFA members

Vietnam

- ▶ **Motor vehicle insurance case (2009)**
- ▶ Price fixing agreement reached through Vietnamese Insurance Association (VIA) - 19 out of 25 members reached agreement (foreign companies refused to sign because contrary to their 'home' competition laws)
- ▶ **What is interesting?**
 - ▶ Firms didn't realise they were doing anything wrong. Thought it was okay to use a common formula to calculate insurance fees. Even posted the 'agreement' on their websites.
 - ▶ Companies had been experiencing a price war in the form of insurance fee discounts and commission increases
- ▶ **Evidence?**
 - ▶ Agreement was posted on website, publicly enforced compliance



Risk areas for industry associations in the digital economy

Collusive conduct - from brick and mortar to algorithms

- ▶ “Collusion is more likely if the competitors know each other through social connections, trade associations, legitimate business contacts, or shifting employment from one company to another.” (US DOJ)
- ▶ Algorithms appear to remove these connections
- ▶ However, algorithms may (a) be utilized to facilitate collusive conduct or (b) create the collusion
 - ▶ Uber and the single pricing algorithm
- ▶ Stucke and Ezechri point to “algorithm-enhanced conscious parallelism,” as well as the ability of advanced data analytics to amplify tacit collusion:
 - ▶ By providing wider and detailed view of the market
 - ▶ Allowing faster strategic responses
 - ▶ Reaching other markets (even those less susceptible to tacit collusion) and other factors apart from price

Platforms and commercially sensitive information

- ▶ Digital markets or online presence, through associations, may facilitate information exchange or data sharing
 - ▶ Exchanging sensitive commercial data between online marketplaces and third-party sellers or manufacturers with their own shops and retailers
 - ▶ Ability to collect and process customer data
 - ▶ Ability to share customer data and company information
 - ▶ Similar issues arise with respect to the use of platform-parity policies by online booking companies that facilitate transactions between hotels and travelers wishing to purchase travel services

Retail price maintenance

- ▶ Many risk areas relate to vertical agreements (Note: Singapore and Brunei which do not apply competition laws to vertical agreements)
- ▶ Recent UK case examples:
 - ▶ Commercial catering manufacturer fined for maintaining a minimum advertising pricing policy for online sales
 - ▶ Bathroom fittings supplier fined for imposing a recommended pricing policy for online sales that it enforced through threats of delisting for non-complying retailers
 - ▶ Light fitting supplier fined for imposing RPM requirements on retailers for online sales
- ▶ Online retailers (MSMEs) themselves were not fined
- ▶ CMA issued an open letter to suppliers and resellers, outlining 'dos and don'ts' of vertical pricing restraints in online sector:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/620454/resale-price-maintenance-open-letter.pdf

Recent Philippine Competition Commission Decisions

The following decisions were taken in relation to the PCC's mergers (and acquisitions) review. However, they offer guidance in relation to the analysis of competition issues or concerns affecting e-commerce, multi-sided platforms, and data from a developing country perspective.

- ▶ Acquisition by Ayala Group of shares in BF Jade E-Services, Inc. (Zalora Philippines), July 2017
- ▶ Acquisition by Alipay Singapore Holding Pte. Ltd of shares in Globe Fintech Innovations, Inc., 23 August 2017 - transaction cleared following completion of Phase I and II review; among reasons is the absence of ability or incentive for the parties to engage in anti-competitive coordinated behavior
- ▶ Acquisition by SM Retail, Inc. of Goldilocks Bakeshop Inc., 29 December 2017 (<https://phcc.gov.ph/commission-decision-no-42-m-0172017-acquisition-sm-retail-inc-goldilocks-bakeshop-inc/>) - decision based on voluntary commitments submitted following release of Statement of Concerns
- ▶ Acquisition by Grab Holdings, Inc. and MyTaxi.ph Inc. of Assets of Uber B.V. and Uber Systems, Inc., 10 August 2018 (<https://phcc.gov.ph/wp-content/uploads/2018/08/M-2018-001-PCC-Decision-Grab-Uber-20180810.pdf>) - decision based on voluntary commitments submitted following release of Statement of Concerns pursuant to motu proprio review by the Commission



Enforcement challenges

Enforcement challenges

- ▶ Developments may constrain the competition authority's evaluative framework, to also consider that enforcement may stifle innovation
- ▶ Modern telecommunications technology and platform development, with increasing use of data analytics, has led to prevalence of multi-sided markets and network effects
 - ▶ Market definition
 - ▶ Analysis of effects
- ▶ Apparent evidentiary deficit

Thank you

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