CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle

February 2013 (1)

Some Recent Developments in ASEAN Competition Law

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I. INTRODUCTION

All countries in Southeast Asia are hierarchical and authoritarian to some degree, which has implications for competition. All countries are marked by considerable inequalities in status, wealth, and education. With the exception of Singapore, corruption and cronyism are widespread. Big business in Southeast Asia is mainly dominated by ethnic Chinese families, originally brought in during the 18 and 19th centuries as cheap labor or with skills as traders, tax farmers, miners, and artisans—skills lacking among the indigenous population (who were mainly farmers). To protect against property expropriation, taxes, and limited ability to enforce contracts, they developed their own financial networks and relationships based on family and clan groups—perhaps best described as *closed shops* that sought to limit competition. At the same time, self-serving political elites awarded monopoly privileges.

Nevertheless, economic necessities now drive public policy in this region. While patronage is still important, competition is now increasingly seen as necessary for economic development—but competition upsets traditional monopoly privileges that form the basis of much elite wealth and is resisted politically by governments of all ideological persuasions. Using competition law to improve economic outcomes, if properly enforced, disrupts pre-existing monopoly privileges.

In addition, vague and ambiguous goals mean interest groups can be favored. But a clear emphasis on a single goal—promoting economic efficiency—provides greater predictability and certainty and limits the ability of regulators and courts to promote entrenched vested interest group welfare.

Competition law goals in Southeast Asia, however, are not all singular. They vary from the single unambiguously economic in Singapore to the broad goals expressed by the very important founding principle of *pancasila* in Indonesia which stresses responsibility to a monotheistic God (your choice), respect for humanitarian values of dignity and integrity, national unity and social justice.

II. INTEGRATION

This difference in goals is under pressure. An increasing focus on competition in improving economic outcomes in Southeast Asia is driven in part by the (competing) economic rise of China and India. So the Southeast Asian countries, through their regional grouping, the Association of Southeast Asian Nations ("ASEAN") are integrating economically. The ASEAN Economic Community ("AEC") Blueprint provides a roadmap for establishing a "single market"

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by 2015 that will create a single economic market and production base for approximately 600 million people. Integration goes beyond mere trade liberalization but does not go as far as the European Union model and does not create supranational decision-making institutions such as an ASEAN competition commissioner.

Reflecting the ASEAN consensus approach the AEC Blueprint sets non-binding goals in a number of policy areas, including competition policy. Each ASEAN member state has agreed to enact a national competition statute by 2015, and most have already done so. However, there is no intention to harmonize competition laws across the region or to have a regional enforcement body. Instead, countries will rely on regional networks through the ASEAN Experts Group on Competition to build capacity and enhance cooperation and coordination. The ASEAN Secretariat has produced Regional Guidelines on Competition that are closely modeled on the European Union, and these are followed already by Malaysia and Singapore.

II. NATIONAL PROGRESS

Indonesia, Malaysia, Singapore, Thailand, and Vietnam have already introduced general competition laws. The remaining countries are in the process of examining alternative competition law models.

A. Countries Developing Competition Laws:

- Brunei is likely to legislate a law based on that of Malaysia and Singapore (in turn based on the European Union/United Kingdom).
- Cambodia has prepared a draft competition law but it is not known what the final form will take. Several international experts have been hired to assist. For example, Ken Davidson, a long serving lawyer with the U.S. FTC, following funding from the ASIAN Development Bank, drafted a competition law. But it has not been presented nor discussed publicly.
- In Laos a competition law decree closely following Thai competition law was issued by the Prime Minister’s Office in 2004, but has not been implemented. This decree is being reviewed at the moment and other models are being examined, including the Vietnamese and Malaysian competition laws.
- In June 2011, in the Philippines, a Presidential Executive Order designated the Department of Justice as the overall Competition Authority. However, two bills have been introduced into the Parliament. The lower house (House of Representatives) bill aims to establish an independent Philippines Fair Trade Commission (the Second Reading had almost been completed in November 2012) while the upper house (Senate) introduced a Bill early in 2012 that proposes an Office of Competition within the Department of Justice.
- Myanmar has announced that it will introduce a competition law—but as the economy is dominated by the (military) government and the government has exclusive rights to carry out almost all major economic activities (including extractive and natural resource industries, fisheries, transportation, finance, post and telecommunications, defense, broadcasting, and electricity generation) it is unclear what form the new law will take, or what the industries it will affect. In

2010, on the sidelines of the 42nd ASEAN Economic Ministers Meeting in Vietnam, U Soe Tha, the Minister for National Planning and Economic Development told the *Myanmar Times* that the competition law would be based on the ASEAN Regional Guidelines. No further information is available.

B. Indonesia

Indonesia's competition law was introduced in 2000 following the ASEAN Financial Crisis. The Business Competition Supervisory Commission ("KPPU") is the most active regulator in Southeast Asia but is hampered by an act that is complicated and ambiguous. The administration of the act is also made difficult by the fact that the competition regulator (the KPPU) was the first independent regulatory body in Indonesia. Given a lack of experience the "independence" of the KPPU extended to the need to hire staff independent of the civil service—which was hired on contract.

This has led to administrative problems. The former Chairman of the KPPU, Mrs. Tadjuddin Noer has been quoted as saying "it was difficult to enforce the 1999 law while not being a part of the government." He added that the KPPU's ambiguous status was hampering its work. Because of these limited staff contracts, the KPPU has a hard time making long-term plans.[2]

C. Malaysia

The Malaysian Competition Act 2010 came into force on January 1, 2012. Based on the European Union/United Kingdom model, unique in Southeast Asia, it also explicitly introduced private rights of action. Surprisingly, an overseas Chamber of Commerce opposed its introduction on the basis that guidelines had not been issued—not unusual in new regimes—but the Government rejected their objection. The Malaysian Competition Commission ("MyCC") has issued several guidelines, including those concerning market definition, prohibited anticompetitive agreements, and abuse of dominance. However, following industry lobbying Malaysia has not initially included a prohibition on anticompetitive mergers.

Introducing a new competition law always has the potential to impact adversely some sectors—in Malaysia small and medium enterprises are currently seeking exemption from the Act—but this is unlikely to happen. The MyCC has focused initially on education but the CEO has warned it will be taking its "gloves off" in 2013 and will focus on bid-rigging and trade associations.

D. Singapore

The 2006 Singapore Competition Act was introduced to promote Singapore's long-term economic interests. The Singapore Government has long intervened directly in markets by creating bodies to supply goods and services where existing markets had failed, or by encouraging self-regulation as a more effective way of dealing with market failures rather than through direct price or quality regulation. For example, the Ministry of Health encouraged the

[2] JAKARTA GLOBE (September 24, 2012), *available at* http://www.thejakartaglobe.com/business/call-for-review-of-indonesias-anti-monopoly-law/545373.

collective setting of recommended fees by doctors to prevent overcharging rather than using direct price control—but then the Singapore Medical Association ran afoul of the new competition law.

Similarly, the genesis of a recent abuse of dominance appellate decision was government intervention to raise ticketing standards in Singapore. In the *SISTIC* case the Competition Appeals Board ("CAB") upheld a 2010 decision by the Competition Commission of Singapore ("CCS") to fine SISTIC $989,000 for abusing its dominance in Singapore's ticket services market. The abuse allegation arose because SISTIC (whose market share was over 90 percent) required venues such as the Esplanade and the Singapore Indoor Stadium to use SISTIC ticketing services exclusively. SISTIC lodged an appeal to the CAB, which was heard in September - October 2011.

The CCS decision (similar to tribunals in Australia, New Zealand, and the United Kingdom, the CAB is set up as a Tribunal comprising not only judges but also economists and businessmen), which was supported by the CAB, was particularly important in Singapore where, due to its small size, many markets have dominant players. SISTIC's insistence that venues only buy SISTIC'S ticketing services effectively stopped other companies from competing—even if they were more efficient. The CAB found that SISTIC's exclusivity restrictions contained in the Exclusive Agreements made no economic sense other than having the effect of "foreclosing competition."

What makes the SISTIC case unusual is the fact that SISTIC, a ticketing agency owned by two government bodies, imposed exclusive ticketing restrictions on two major venues owned by its own two shareholders. Why would two government bodies owning two major venues, through a solely owned company, essentially foreclose competition by other ticketing companies?

It was a legacy of previous government intervention. Perhaps the restrictions were necessary, initially, for the new investments to be profitable. But, as with infant industries, the assistance should stop once grown up. But the assistance via exclusivity continued, ensuring good profits for SISTIC and a lack of opportunity for new players to compete with better and cheaper ticketing services. If SISTIC was efficient it would not have needed exclusivity arrangements. The only rational economic explanation for such arrangements would be to increase profits above the competitive level for these two government bodies.

Companies with persistently high market share, including government-linked corporations ("GLCs"—also called "SOEs") are now on notice following the SISTIC case. There will be much angst among those encouraged to collaborate in the past or to behave in ways to promote domestic industry that are now prohibited by competition law.

In January 2013, the CCS signaled it is going to be more interventionist than formerly. Following a complaint that Coca Cola Singapore had included restrictive conditions (exclusivity and conditional rebates) in its distribution agreements, Coca Cola voluntarily agreed to amend its distribution agreements. This included an agreement to allow retailers to use up to 20 percent of the space in coolers provided by Coca Cola for non Coca Cola products—where there is no alternate cooler space. As Singapore has exempted vertical arrangements unless the firm is dominant, this means that Coca Cola has implicitly accepted, or did not want tested, that it is dominant in some relevant markets in Singapore.

E. Thailand

Very few competition law matters have been dealt with in Thailand in the last few years. Some believe this is because the Office of Trade Competition is within the Ministry of Commerce—and other policy priorities are seen as more important. However, administrative arrangements are currently being reviewed and the possibility of a leniency program being introduced is being discussed.

F. Vietnam

Vietnam's competition law came into effect on July 1, 2005. Being a communist state, Vietnam wants state-owned enterprises ("SOEs") to drive economic growth (they account for about one-third of Vietnam's GDP) but they are highly inefficient and usually corrupt. During the 1990s and the beginning of the 2000s Vietnam partially privatized ("'equitized"') thousands of small and medium SOEs. In 2005, the Government created large SOEs called State Economic Groups (in an attempt to emulate Japan's Keiretsu and South Korea's Chaebol conglomerate groups). As in Japan and South Korea the Government gave SOEs preferential access to finance, etc. and, while they have some autonomy, they still report directly to the Prime Minister. In June 2012 the Finance Ministry announced plans to restructure 889 SOEs by 2015.

There is some dissatisfaction within the Vietnam Competition Authority ("VCA") about the competition law itself—particularly presumptions based on market shares, limited time for investigation of complex cases, the two-stage process in dealing with competition law matters, and the fact that members of the decision body for competition matters—the Competition Council—are non-specialist civil servants who have other jobs and so have limited time to deal with matters within the specified time period.

From 2006 to date the VCA has investigated six cases relating to competition issues (three relating to abuse of dominance or abuse of a monopoly position) and three relating to anticompetitive agreements. Over the same period, the VCA investigated 94 unfair competition cases. Most related to unfair advertising but also included multi-level sales, misleading advertising, discrediting competitors etc.