Competition Law in Asia, Indonesia, and the Emerging Digital Markets

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ASEAN Map

Source:
https://en.wikipedia.org/wiki/Member_states_of_the_Association_of_Southeast_Asian_Nations
Japan New Amendment of the Antimonopoly Act (2019)

The Revisions

Leniency Program: reduce the amount of surcharges when enterprises submit information and documents for fact finding of the case + reduction according to the order of application

Calculation Methods: incl. Addition of the basis of calculation of surcharges

Penal Provisions: raising the limit of the amount of criminal fine for juridical person charged with the offense of obstructing investigation (3 mio → 200 mio JPY)

Introducing procedures for gathering electronic records in the investigation of criminal cases
# Leniency Program

<table>
<thead>
<tr>
<th>Date of Appl</th>
<th>Order of Appl</th>
<th>Reduction Rate Based on DoA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before Start of Investigation</td>
<td>1&lt;sup&gt;st&lt;/sup&gt;</td>
<td>100%</td>
</tr>
<tr>
<td></td>
<td>2&lt;sup&gt;nd&lt;/sup&gt;</td>
<td>50%</td>
</tr>
<tr>
<td></td>
<td>3&lt;sup&gt;rd&lt;/sup&gt; – 5&lt;sup&gt;th&lt;/sup&gt;</td>
<td>30%</td>
</tr>
<tr>
<td></td>
<td>6&lt;sup&gt;th&lt;/sup&gt; &amp; after</td>
<td>-</td>
</tr>
<tr>
<td>After Start of Investigation</td>
<td>Up to 3</td>
<td>30%</td>
</tr>
<tr>
<td></td>
<td>Other than above</td>
<td>-</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Date of Appl</th>
<th>Order of Appl</th>
<th>Reduction Rate Based on DoA</th>
<th>Reduction Rate Based on OoA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before Start of Investigation</td>
<td>1&lt;sup&gt;st&lt;/sup&gt;</td>
<td>100%</td>
<td>-</td>
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<tr>
<td></td>
<td>2&lt;sup&gt;nd&lt;/sup&gt;</td>
<td>20%</td>
<td>+ up to 40%</td>
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<tr>
<td></td>
<td>3&lt;sup&gt;rd&lt;/sup&gt; – 5&lt;sup&gt;th&lt;/sup&gt;</td>
<td>10%</td>
<td></td>
</tr>
<tr>
<td></td>
<td>6&lt;sup&gt;th&lt;/sup&gt; &amp; after</td>
<td>5%</td>
<td></td>
</tr>
<tr>
<td>After Start of Investigation</td>
<td>Up to 3</td>
<td>10%</td>
<td>+ up to 20%</td>
</tr>
<tr>
<td></td>
<td>Other than above</td>
<td>5%</td>
<td></td>
</tr>
</tbody>
</table>
## List of ASEAN Member States by GDP

<table>
<thead>
<tr>
<th>Rank</th>
<th>Country</th>
<th>Population in million</th>
<th>GDP Nominal millions of USD</th>
<th>GDP Nominal per capita USD</th>
<th>GDP (PPP) millions of USD</th>
<th>GDP (PPP) per capita USD</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Indonesia</td>
<td>261.989</td>
<td>1,010,937</td>
<td>3,858</td>
<td>3,242,966</td>
<td>12,378</td>
</tr>
<tr>
<td>2</td>
<td>Thailand</td>
<td>69.095</td>
<td>437,807</td>
<td>6,336</td>
<td>1,228,941</td>
<td>17,786</td>
</tr>
<tr>
<td>3</td>
<td>Philippines</td>
<td>106.268</td>
<td>321,189</td>
<td>3,022</td>
<td>874,518</td>
<td>8,229</td>
</tr>
<tr>
<td>4</td>
<td>Malaysia</td>
<td>32.077</td>
<td>309,858</td>
<td>9,659</td>
<td>926,081</td>
<td>28,870</td>
</tr>
<tr>
<td>5</td>
<td>Singapore</td>
<td>5.675</td>
<td>305,757</td>
<td>53,880</td>
<td>513,744</td>
<td>90,531</td>
</tr>
<tr>
<td>6</td>
<td>Vietnam</td>
<td>93.643</td>
<td>215,963</td>
<td>2,306</td>
<td>643,902</td>
<td>6,876</td>
</tr>
<tr>
<td>7</td>
<td>Myanmar</td>
<td>52.645</td>
<td>66,966</td>
<td>1,272</td>
<td>330,883</td>
<td>6,285</td>
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<tr>
<td>8</td>
<td>Cambodia</td>
<td>16.013</td>
<td>22,252</td>
<td>1,389</td>
<td>64,214</td>
<td>4,010</td>
</tr>
<tr>
<td>9</td>
<td>Laos</td>
<td>6.680</td>
<td>17,152</td>
<td>2,567</td>
<td>49,214</td>
<td>7,367</td>
</tr>
<tr>
<td>10</td>
<td>Brunei</td>
<td>0.429</td>
<td>11,963</td>
<td>27,893</td>
<td>32,913</td>
<td>76,743</td>
</tr>
</tbody>
</table>

Source: https://en.wikipedia.org/wiki/List_of_ASEAN_countries_by_GDP
ASEAN Community

ASEAN Political-Security Community

ASEAN Economic Community

ASEAN Socio-Culture Community
The ASEAN Way
Competition Law in the Context of ASEAN Economic Community Framework

• ASEAN Experts Group on Competition (AEGC)
• ASEAN Regional Guidelines on Competition Policy (Regional Guidelines)
• ASEAN’s Guidelines on Developing Core Competencies in Competition Policy and Law (Regional Core Competence, RCC Guidelines)
• Competition law in national levels
## Key Features of Competition Law in ASEAN Member States (2016)

<table>
<thead>
<tr>
<th>Country</th>
<th>Legislation status</th>
<th>Merger control</th>
<th>Mandatory notification</th>
<th>Type of threshold</th>
<th>Maximum financial penalties</th>
<th>Leniency policy for cartels</th>
<th>Criminal penalties for cartels</th>
<th>Are private actions permitted?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brunei Darussalam</td>
<td>Legislation passed in January 2015. Effective date expected to be no earlier than late-2016, with provisions introduced in four phases.</td>
<td>Forthcoming</td>
<td>No</td>
<td>-</td>
<td>10% of annual turnover in Brunei, up to 3 years</td>
<td>Required by legislation, but not yet in place</td>
<td>No</td>
<td>Follow-on only</td>
</tr>
<tr>
<td>Cambodia</td>
<td>No existing competition legislation. Comments in this table marked [] are based on March 2016 draft.</td>
<td>[Yes]</td>
<td>[Yes]</td>
<td>[TBA]</td>
<td>[10% of turnover in Cambodia during period of breach]</td>
<td>[Allowed for in legislation]</td>
<td>[No]</td>
<td>[Authority can order compensation]</td>
</tr>
<tr>
<td>Indonesia</td>
<td>Yes. Revisions to legislation currently being considered by Parliament; no timetable as yet for passage.</td>
<td>Yes</td>
<td>Yes: currently post-completion, although proposed to be pre-completion</td>
<td>Domestic assets and turnover</td>
<td>Approx. US$7.8m (proposal for increase in legislative revisions)</td>
<td>Under consideration as part of legislative revisions</td>
<td>Yes (though no instances of enforcement to date)</td>
<td>Yes (via authority)</td>
</tr>
<tr>
<td>Lao PDR</td>
<td>Legislation passed in July 2015, and came into effect in December 2016. Regulations yet to be published.</td>
<td>Forthcoming</td>
<td>Yes</td>
<td>Domestic assets, turnover and employees</td>
<td>To be prescribed in future regulations</td>
<td>Allowed for in legislation</td>
<td>Forthcoming</td>
<td>Yes, for compensation</td>
</tr>
<tr>
<td>Malaysia</td>
<td>Yes</td>
<td>No</td>
<td>-</td>
<td>-</td>
<td>10% of worldwide turnover for period of breach</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Myanmar</td>
<td>Legislation passed in February 2015. Effective date 24 February 2017.</td>
<td>Forthcoming</td>
<td>Yes</td>
<td>Market shares</td>
<td>Approx. US$12,200</td>
<td>Allowed for in legislation</td>
<td>Forthcoming</td>
<td>Follow-on only</td>
</tr>
<tr>
<td>Philippines</td>
<td>Legislation passed July 2015, and took effect 8 August 2015. Two-year transitional period, except for mergers.</td>
<td>Yes (temporary procedure)</td>
<td>Yes</td>
<td>Domestic turnover and assets</td>
<td>Approx. US$5.35m (on criminal prosecution)</td>
<td>Required by legislation, but not yet in place</td>
<td>Forthcoming</td>
<td>Yes, but Commission must investigate first</td>
</tr>
<tr>
<td>Singapore</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>-</td>
<td>10% of annual turnover in Singapore, up to 3 years</td>
<td>Yes</td>
<td>No</td>
<td>Follow-on only</td>
</tr>
<tr>
<td>Thailand</td>
<td>Act has existed since 1999; no instances of enforcement to date. Revisions to Act are expected to be announced by end-2016.</td>
<td>Yes, but currently unenforced</td>
<td>Yes (although no thresholds in place)</td>
<td>-</td>
<td>Currently US$170,000; new penalties under consideration as part of proposed revisions</td>
<td>Under consideration as part of proposed revisions to Act</td>
<td>No (under proposed revisions to Act)</td>
<td>Yes, for compensation</td>
</tr>
<tr>
<td>Vietnam</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Market shares</td>
<td>10% of annual turnover</td>
<td>Under consideration</td>
<td>Yes (from July 2016)</td>
<td>Authority can order compensation</td>
</tr>
</tbody>
</table>
Update in 2019

- Cambodia
  - Merger control: (business combination) Yes
  - Mandatory notification: determined by Sub-Decree
  - Type of threshold: determined by Sub-Decree
  - Max financial penalties: up to 10% of total revenue + penalties for procedural violations: 1 month to 1 year imprisonment + fine 298,78 to 5,975,70 USD (natural person) or 17,927,100 to 35,854,200 USD (legal person)
  - Leniency policy for cartels: Yes
  - Criminal penalties for cartels: No
  - Private actions: Yes
Market integration

Economic efficiency
Economy’s well-being
Consumer welfare
Privatization & liberalization of market

Info asymmetry + imbalance of bargaining power = inefficient non price terms
Weak bargaining power against producers
High transaction costs

Competition Policy: Market Integration v. Domestic Interests

Wahyuningtyas – ACS 2016
Competing Interests

Regional objectives

- ... 
- Common goal 
- Market integration

Domestic objectives

- ... 
- Econ. Dev. 
- Consumer welfare 
- Efficiency
The three pillars

2 primary objectives = ensure competition + removing entry barriers

Cartel prohibition

Prohibition of unilateral restraints

Merger control
Competition Law in Indonesia
Competition Policy in Indonesia

- Protecting competition
- Public welfare
- Efficiency
- Protecting SMEs
- Consumer welfare
- Inovation (?)

Multi-purpose of comp. pol.
Structures of Prohibition

Competition law

- Cartels
- Certain activities
- Abuse of dominance (incl. provision on merger control)
Competition Law and Competition Agency

- Law No. 5/1999 on the Prohibition of Monopoly Practices and Unfair Business
- KPPU (Commission for the Supervision of Business Competition)
KPPU: scope of authority

- Receiving reports - investigation and/or inquiry
- Drawing conclusion
- Asking for assistance from investigators
- Requesting information from the government agencies
- Obtaining, making evaluation and/or assessment
- Making decision / resolution
- Notice to undertakings
- Impose penalties
Administrative enforcement

- Based on report or KPPU initiatives
- Confidentiality except when informant seeks for compensation
- Administrative procedure (but similar to criminal)
- Types of evidence: (1) witness statement, (2) expert witness statement, (3) letters/documents, (4) indications, (5) undertaking statement
  - Difficulties to obtain evidences esp. in cartels: e.g. no authority for dawn raid and wiretapping
- Objection: district court (private procedure), cassation: supreme court (special private procedure)
- Penalties: (1) cease and desist order (and in merger case, cancellation of merger or takeover); and or (2) (private?) compensation (VLCC 2004, Temasek 2007, Astro 2008); and or (3) fine: IDR 1,000,000,000 (± USD 83,299) to IDR 25,000,000,000 (± USD 2,082,466) → too low: fine v. operational costs?
Criminal Enforcement

• Not yet used due to unclear rules
• 2 entry points:
  – criminal sanctions (Art. 48 & 49) → under criminal (i.e. district) courts, not under KPPU authority
  – filing a criminal case during or after administrative process (KPPU) upon (1) failure to comply with the obligations to provide evidence, (2) obstruction of justice, or (3) failure to carry out KPPU decision (that has become effective)
Private enforcement

- Not mentioned in Law No. 5/1999
- No prohibition for filing a civil suit according to (Art. 1365) Indonesian Civil Code
- Still under debates
- In practice: reluctance to apply
- Cases of class action (*Temasek* and *Astro*)
- Other issue: misplace of ‘compensation order’ under list of administrative penalties → should be removed and left it to civil (i.e. district) courts?
Challenges in Combating Cartels

Two issues:

Challenges in dealing with cartel cases

Way forward: responses to challenges
Overview

• Challenges in dealing with cartel cases
  – Challenges in the provisions of Law No. 5/1999
    • Unclear provision v. common business practices: trade association (?)
  – Scope of authority of the competition agency (KPPU) in the enforcement procedures
    • Administrative enforcement
    • Criminal and private enforcement
• Way forward: responses to challenges
  – Guidelines or amendment of Law No. 5/1999 (?)
  – Addressing problems concerning evidence:
    • use of indirect evidence
    • possibilities to implement leniency program
Competition Law and the Digital Market
Key Q

Competition policy?

Regulatory barriers?

Challenges: innovation + AEC?

Asymmetrical regulation

Trans border law enforcement

Innovation?

Competition policy?

Assessment of regulatory impact?

Competition law analysis

Concept of digital market
Data and Competition Law

Data

Asset?

Access

Applicability of essential facility doctrine?
Disruptive innovation Disrupts Current Law Analysis?

<table>
<thead>
<tr>
<th>New market dynamics</th>
<th>New challenges for comp law analysis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disruptive innovation</td>
<td>• Definition of relevant market</td>
</tr>
<tr>
<td>Big Data</td>
<td>• Dynamic efficiency • innovation v price</td>
</tr>
<tr>
<td>Sharing economy</td>
<td>• Accounted for market power, dominant position? • Competition law v. data protection</td>
</tr>
<tr>
<td>Multi-sided platform</td>
<td>• Innovation v regulation asymmetries</td>
</tr>
<tr>
<td>Emerging digital economy</td>
<td>• Pricing issues: predatory v price fixing</td>
</tr>
<tr>
<td></td>
<td>• E.g. Uber, GrabCar/Taxi/Bike, GoJek</td>
</tr>
<tr>
<td></td>
<td>• Market definition • Merger analysis</td>
</tr>
<tr>
<td></td>
<td>• Roles of data v privacy</td>
</tr>
<tr>
<td></td>
<td>• Net neutrality • Ex-post v ex-ante regulation • Regulation asymmetries</td>
</tr>
</tbody>
</table>
Big Data and Algorithms in Competition Law Analysis
Key Issues

(1) How does competition law take personal data into account in its analysis?

(2) How would big data establish a basis for the construction of market dominance?

(3) Which competition policy approach having been taken in Indonesia to tackle problems resulted from the use of algorithms in e-commerce?
(1) How does competition law take personal data into account in its analysis?
Personal Data
(Article 4 lit. 1, Regulation (EU) 2016/679 GDPR, OJ L 119/1)
Personal Data
(Art. 1 No. 27 Gov. Regulation No. 82/2012 on the Implementation of Electronic System and Transactions - IEST Regulation)

Certain data of an individual stored maintained the truthfulness is maintained and secrecy is kept
Personal Data & Competition Law

No automatic intervention
- Abuse of dominance

Case(s)
- e.g. abuse in non-negotiable policy?

PD as asset
- Different traits compared to other types of asset
(2) How would big data establish a basis for the construction of market dominance?
Market Dominance (Law No. 5/1999)

• Qualitative parameter: Article 1 No. 4
  – 1st scenario: no significant competitor (quasi-monopoly or monopsony) in the relevant market in relation to the market share controlled
  – 2nd scenario: having highest position among its competitors in the relevant market in relation to certain factors
    • financial capacity
    • access capacity to supply or sale
    • the ability to influence supply or demand of certain products

• Quantitative benchmarks: Article 25 par. (2)
  – ≥ 50% market share for a single undertaking or a group of undertakings
  – ≥ 75% market share for two or three undertakings or groups of undertakings
Big Data & Market Dominance

Control over big data

NOT directly contribute to market share

BUT leads to having strong bargaining power

Power asymmetry

Poor privacy policy

The work of network effects in MSPs

Leadership of power
Abuse of Dominance

Exclusionary behaviours

Non-negotiable privacy policy

Exploitative abuse
(3) Algorithms?
Some Ongoing Cases

Ongoing Cases in Commercial Air Transportation in Indonesia

- Price regulation (floor & ceiling price)
- Price cartel?
- AirAsia disappeared from OTA

Online Transportation Networks

- Indonesia: predatory pricing (abuse of dominance)
- Singapore: Grab-Uber merger (2018)
Competition Policy?

Current State

- Currently, no particular competition policy in Indonesia to tackle the problem resulted from the use of algorithms; BUT ...

Proposal for Indonesian Competition Policy?

1. A comprehensive study on e-commerce and the challenges to competition law and policy in Indonesian market (example: Singapore)

2. Competition policy to provide guidelines on which important factors should be considered in the assessment of cases involving algorithms & the role of data

3. Learning from the EU: ...
Thank You!

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