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SEA View

The rise of competition law in Asia

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In our October (and seventh) issue of #SEAView, Adrian Emch looks at competition law in Southeast Asia (SEA). Adrian describes a competition framework which is new and full of nuance. His message is pervasive: international norms are arriving or settling into the area, but have local peculiarities which corporates must be attentive to.

The 21st century has been branded the "Asian century." That's also, or mainly, because Asian nations have embraced the market as the primary way to allocate resources.

As part of the growth of Asian market-based economies, there has also been a push to adopt a remedy against a certain type of market failure: anti-competitive practices. Indeed, over the past years, competition law has blossomed in Asia. Except for a few early birds, like Japan (which enacted the Anti-Monopoly Act in 1947) and South Korea (which adopted the Monopoly Regulation and Fair Trade Act in 1980), the competition laws of many Asian jurisdictions are far more recent.

The ASEAN Project

Let's take the Association of Southeast Asian Nations (ASEAN) as an example. Indonesia was the first ASEAN member state to adopt a competition law in 1999, closely followed by Thailand in the same year. Singapore and Vietnam adopted their competition statutes in 2004 and Malaysia in 2010. Somewhat of a gap followed until there was a concerted regional push: an ASEAN project whereby member states committed to adopting competition laws by 2015 to facilitate deeper integration of the ASEAN market. In 2015 - Brunei, Myanmar, Laos, and the Philippines passed their competition laws, complying with this informal commitment. Only Cambodia did not adopt a formal competition law by the 2015 deadline; it is still finalizing its draft law today. In short, the ASEAN project was largely successful. Nine out of 10 ASEAN member states have now enacted competition laws.

During the course of this ASEAN competition law push, some of the ASEAN member states with existing laws not only updated those laws, but also restructured their enforcement authorities.

For example, Thailand amended its law in 2017 and established the Trade Competition Commission in the same year. Similarly, in Vietnam, the new competition law, which took effect in July 2019, created the National Competition Commission.

If we look at the substance of the competition laws across the region, the scene is one of similarities rather than differences. Many Asian competition laws are broadly in line with international competition law (if there is even such a unity). But, of course, there are many local peculiarities, some shared among several Asian jurisdictions. For example, while most Asian jurisdictions subscribe to the rules of the market economy, these markets are punctuated by state-owned enterprises (SOEs).

Many competition laws in Asia don't have special rules for SOEs, but some do. In China, for example, there's a special clause in the Anti-Monopoly Law which contains some language, albeit ambiguous, on how to treat SOEs under the law. 'Ambiguous' as the clause appears to exempt conduct where the SOEs act under state regulation (such as regulated pricing), but at the same time keeping the scope of the exemption very narrow. In practice, against many observers' expectations, the clause hasn't worked like a blanket exemption for SOEs. On the contrary, in over 11 years of enforcement of the Anti-Monopoly Law, quite a number of SOEs have been fined for anti-competitive practices. However, in some areas, the scope of the Anti-Monopoly Law, in particular merger control, hasn't been a particularly effective tool against SOEs yet.

In Vietnam, both the old and the new competition laws have very similar clauses on SOEs. Those clauses exempt SOE conduct where the government directly determines the prices, quantities, or other parameters of the products, but at the same time applies the law's full force against SOE conduct outside this limited scope.

In some jurisdictions, there is even a conscious effort to create a level playing field between private market players and SOEs. For example, the Philippine Competition Act explicitly applies to government-owned and controlled corporations, as SOEs are called there, and the local

competition authority has been keen to conduct a review of these corporations in order to ensure "competitive neutrality."

SOEs apart, there are allegations, mainly from Western sources, that companies subject to government investigations against anti-competitive practices enjoy fewer due process rights in Asia as compared to the United States or Europe. Whatever the merits of these allegations, it is clear that close communication with the investigating authorities, and creativity to seek mutually satisfactory solutions, are often key in competition law investigations in Asia.

To conclude, so far and to date, the Asian competition landscape is fresh; jurisdictions are more alike than not. Yet a one-size-fits-all approach to a region of differences will not work to navigate this terrain. The laws and many of the enforcement practices may follow international competition law practices, but with each nation's local peculiarities. Time will tell whether the "Asian century" will also see the emergence of a new, coherent, or Asian-brand of competition law.

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SEA View

Since April 2019, our monthly periodical has featured investigation, compliance, and regulatory developments in Southeast Asia (SEA). For a 12-month period, one monthly article will showcase our insights on particular developments in the region, liaising with our extensive global network. We draw on the firm's market-leading practices, including our assembled Global Regulatory team, to lead clients' businesses through challenges encountered in and out of SEA. SEA View is horizon spotting in practice.

This month's analysis looks at competition law in SEA, all of our previous articles which leap from crisis management, sanctions, and across the region from Vietnam to Indonesia, hop from Hong Kong to Australia and began with solutions to sanctions for financial institutions are available here.