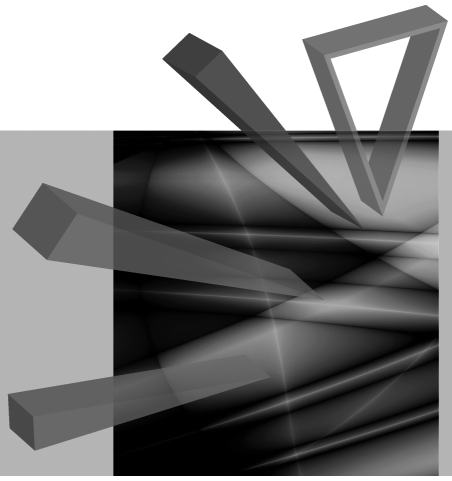
Faces of Competitiveness in Asia Pacific



edited by
Bogusława Skulska
Anna H. Jankowiak

Publishing House of Wrocław University of Economics
Wrocław 2011

Copy-editing

Marcin Orszulak

Layout

Barbara Łopusiewicz

Proof-reading

Agnieszka Flasińska

Typesetting

Małgorzata Czupryńska

Cover design

Beata Dębska

ISBN 978-83-7695-126-3
ISSN 1899-3192

Printing: Printing House TOTEM

Contents

Streszczenia

RESEARCH PAPERS OF WROCŁAW UNIVERSITY OF ECONOMICS No. 191
Faces of Competitiveness in Asia Pacific 2011

Bartosz Michalski
University of Wrocław

LINKING FREE TRADE WITH FAIR COMPETITION. CASE STUDY OF ASEAN'S EXPERIENCES

Summary: The co-ordination of the competition policy in a regional dimension is a developing domain of an inter-state co-operation as well as scientific research. This issue is also closely linked with the problem of liberalisation of international trade, which was confirmed by adopting so-called Singapore issues in 1996. The harmonization of competition law does not characterise highly developed regional groupings only, but it also takes place more and more often in developing regions. The paper addresses the specificity of such a co-operation and experiences gained by the Association of Southeast Asian Nations (ASEAN). The author analyses theoretical and practical premises of co-ordinating competition policy in ASEAN as well as barriers and perspectives of possible success.

Keywords: ASEAN, competition policy, trade policy.

1. Introduction

The first decade of the twenty first century in the world economy was a period full of extremely optimistic and pessimistic happenings. On the one hand, one has to keep in mind the extraordinary dynamics of international trade and foreign investments, while on the other, it is also necessary to take into account the financial crisis which evidently proved that the contemporary system is not as resistant against external shock as it might be expected and requires a complex transformation. The critique has been aimed especially at so-called "neo-liberal approach" stressing a limited role of state, particular significance of liberalisation of economic relations, deregulation of competences and privatisation as factors accelerating globalisation. However, there are growing concerns at the same time expressed by Western countries on the issue of the rate of economic growth in the Southeast Asia region. Different circumstances (in particular political system and social values) make this part of the world economy attractive for transnational corporations' investments and due to this mechanism generate a necessity for stronger co-operation and integration of domestic production systems with the global economy. This takes a form of more and more often negotiated cross-regional free trade agreements; therefore, it means that Southeast Asian countries are under the pressure exerted by international community

to implement and enforce a legal and regulatory framework which would be based on provisions characteristic for the Western order.

Efforts undertaken at international fora (mainly under the auspices of the World Trade Organisation, WTO) are focused on the way to identify and eliminate non-tariff trade barriers which appear to strengthen neo-protectionism tendencies. In order to avoid potential unnecessary obstacles induced by regional or – in the long run – global agreement, the process of negotiation requires to highlight so-called trade-related issues. One of them is competition law and policy (CLP).

The following paper aims at presenting activities launched by the Association of Southeast Asian Nations (ASEAN) in this matter. The analysis addresses the circumstances, motives, barriers and results of the co-operation in the region. Needless to say, these problems are discussed intensely on the ASEAN forum, which proves the reason why they need to be taken into consideration from the European perspective, for which the issues of CLP are everyday practice.

Not the least important aspect is also domestic activities to strengthen the international competitiveness of economies, thus this paper is supposed to express some of the author's views on this matter. It is essential to remember that competitive potential of an economy should not be dependent on hasty actions which seem to be usually launched by governmental bodies (e.g. within the industrial policy), but they would rather be directed towards a complex institutional and regulatory framework, where competition law and policy would play the principal role. It does not mean, as it is often wrongly claimed by critics, that the state will be restrained (or will restrain itself) from effective tools of intervention. What deserves to be stressed is that competition law and policy accept the important role of states and good governance institutions in regulating firms' behaviour.[1] Such a situation is obviously difficult to come to terms with by most policy-makers, who are sceptical whether the competition law needs to be enforced because – as it is often believed – even without it the basic goals of competition policy can be achieved.

2. The necessity to co-ordinate trade and competition policy issues

The urgency of linking up the international trade with other matters was raised by the WTO in the form of so-called Singapore-issues in the 1996. The phenomenon of fast growing volume of trade accelerated by its liberalisation imposed a new challenge to establish not only a trade-specific system, but also broader provisions constituting a certain economic/competition order. In an idealistic scenario, every member of international community is supposed to undertake only such activities which would not be contradictory to the superior objective – the maximisation of socio-economic welfare in the world. It was recognised that market mechanisms are the best tool

[1] L. Thanadsillapakul, *The Harmonisation of ASEAN Competition Laws and Policy from an Economic Integration Perspective*, http://www.thailawforum.com/articles/theharmonisation.html.

to achieve this goal, but there is also a need to negotiate a widely acceptable set of provisions.

Having said that, all activities aiming at strengthening and enhancing the international competitiveness of economies (this has become – referring to Krugman[2] – "a dangerous obsession" of the end of the 1990s) should not theoretically relate to instruments of economic policy which could be named as "a beggar-thy-neighbour policy". As a result, the industrial policy, which is usually directed to support selected sectors and companies, has been contrasted to the domestically neutral competition policy. In the circumstances of developing co-operation in this area, the liberalisation of economic relations has created a single economic platform (a sort of common-market-to-be), where international corporations operate and compete on and for the market. An additional reason to promote the development and enforcement of CLP in the national regulatory frameworks was a deal of potential benefits through which it would be relatively easy to achieve the higher level of international competitiveness. Among them one can specify:

- contesting dominant position and its potential abuses together with dispersion of market power,
- lowering barriers to entry,
- stronger pressure to improve efficiency of companies,
- innovations being an answer of competitors to strategies of their market rivals,
- consumer protection as an economically weaker actor in the market contracts,
- establishing a sound business environment,
- development of small and medium-sized enterprises.

To sum up, realisation of all possible objectives of competition law leads to a continuous economic and social welfare through increasing the output of goods and services that are supplied. A proper competition policy prevents resources to be allocated ineffectively.

However, one also has to remember about doubts which have emerged in this subject. A very important aspect is that the existence and effective enforcement of law are possible only when the level of economic development is more or less the same. Economic systems of co-operating countries may in many cases have rather competitive than complementary structure, so even if there is a political will or pressure to establish an international regulatory framework on competition law, it would be contradictory to economic interest of countries involved, because the competitive advantage that they have cannot be changed in the short term perspective. It also has to be added that key-success factors are usually issues of competences, ability to persist, a will to exchange a certain scope of information in international investigations as well as sharing experiences gained so far. The latter is of a particular importance, because the main problem encountered by most transition countries is

[2] P. Krugman, Competitiveness – a dangerous obsession, *Foreign Affairs* 1994, Vol. 73, No. 2.

that there is a significant mismatch between national implementation capabilities and the demands of new competition laws, which usually refer to Western countries.[3]

The stage of economic development and integration of the ASEAN member countries (AMCs) make one more regionally-specific element be taken into consideration. This is China and the regional rivalry for attracting foreign investments as well as preservation of existing streams and directions of international trade linking the world industrial centre, which is today Southeast Asian region, with highly developed countries. One cannot also forget numerous activities undertaken by ASEAN in order to build more stable interregional trade and production networks (through Asian Free Trade Agreement) and attempts to establish new cross-regional (interregional) trade agreements. An example for the latter ones are negotiations with the European Union launched in May 2007 (they were, however, temporarily suspended in March 2009, when both sides agreed to take a pause in the negotiations in order to reflect on the appropriate format of future negotiations[4]). The necessity of eliminating barriers to trade and investment sparks a need to provide, at a regional level, effective protection against unfair competition to govern the economic activities and transactions of transnational corporations (TNCs) located in the ASEAN region.[5]

3. The evolution of co-operation and provisions applied by the ASEAN

According to Bali Declaration of 2003[6] and the ASEAN Economic Community Blueprint[7] (20.11.2007) ASEAN is supposed to transform into a single market/ economic community (by 2015) and production base, a highly competitive economic region, a region of equitable economic development, and a region fully integrated into the global economy. In order to achieve these ambitious objectives, it seems necessary to accept an approach according to which a full liberalisation is possible only through a set of activities launched within competition policy (systemic ones; this means a general prohibition of anti-competitive behaviours and relatively rare exemptions if certain conditions are to be met), but not these relating to industrial or trade policy, which usually have an extemporary character. A temptation to intervene in the economy to correct market failures brings frequently an undesired effect in the form of discrimination against foreign competition in the domestic economy.

---

[3] http://www.thejakartapost.com/news/2010/06/10/kppu-ensure-fair-competition-single-asean-market.html .

[4] http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/index_en.htm.

[5] L. Thanadsillapakul, *op. cit.*

[6] Declaration of ASEAN Concord II (Bali Concord) Adopted by the Heads of State/Government at the 9th ASEAN Summit in Bali, Indonesia on 7 October 2003, http://www.aseansec.org/15159.htm (date of access: 8.02.2011).

[7] http://www.aseansec.org/21081.htm (date of access: 6.02.2011).

The will to deepen the economic integration requires in the mid and long term a gradual institutionalisation of common relations, establishing supranational legal rules and mechanisms which are supposed to facilitate their enforcement. Thus, strategic challenges, which on the one hand are a certain level of integration dynamics, while on the other support to improve the international competitiveness of an economy, account for key decision to be made which areas of co-operation should be co-ordinated in a more complex way, harmonised or even centralised.

However, shaping the competition order always has to be faced with overcoming numerous obstacles. In the case of the ASEAN countries, these may be of political nature, especially relating to a strong commitment to the tradition of industrial policy (Japanese model), lack of will to co-ordinate actions as well as insufficient economic education of societies, which at the same time hampers the development of competition culture as an issue whose significance is being stressed in this context. The latter in the given regulatory framework depends heavily on a certain degree of individualism and consumer sovereignty. Having said that, it is worth presenting how the AMCs are usually assessed in the three rankings, which aim at determining the ease of doing business (the World Bank), the economic freedom (the Heritage Foundation) and the general level of competitive potential (the World Economic Forum). A short comparison limited to the positions in these rankings is presented in Table 1.[8]

Data presented in Table 1 indicate precisely how differentiated ASEAN is as an integration grouping, especially when one considers the institutional aspects of the state. There is, however, one important exception – Singapore – which may be given as a model example. Other AMCs face a deal of administrative, bureaucratic or structural burdens, which have an impact on the low assessment of their competitiveness as well as stability of business environment.

If one wanted to focus on the CLP issues, at present, only Indonesia, Singapore, Thailand, and Vietnam[9] have economy-wide CLP and competition authorities,

---

[8] The author had to give up the ranking of the Institute of Management Development, which does not cover most AMC. However, it is important to stress the fact that among of 300 factors there is one relating to the issue of competition regulations within the group of criteria evaluating government efficiency and business legislation. They refer to quantitative and qualitative indicators, which are as follows: (1) government subsidies to private and public companies as a percentage of GDP; (2) competition legislation: competition legislation in your country prevents unfair competition; (3) product and service legislation: product and service legislation does not deter business activity; (4) price controls: price controls do not affect pricing of products in most industries; (5) parallel economy: parallel (black-market, unrecorded) economy does not impair economic development in your country; (6) foreign companies: foreign companies are not discriminated against by domestic legislation; (7) new businesses: new businesses are easily created in your country.

[9] A detailed analysis of legal provisions within domestic competition laws see: G. Sivalingam, Competition policy and law in ASEAN, *The Singapore Economic Review* 2006, Vol. 51, No. 2, pp. 248--263; J. Branson, Competition policy in ASEAN: Case studies, *Asia Pacific Economic Papers* 2008, No. 374; L. Thanadsillapakul, *op. cit.*

Table 1. The comparison of ASEAN member states' positions in selected international rankings (the World Bank, the Heritage Foundation, the World Economic Forum)

Country	The Ease of Doing Business 2011 (the World Bank) (2010 in brackets)	The Index of Economic Freedom 2011 (the Heritage Foundation) (2010 in brackets)	The Global Competitiveness Index 2010 (World Economic Forum) (2009 in brackets)
Brunei Darussalam	112 (117)	.	28 (32)
Cambodia	147 (145)	102 (107)	109 (110)
Indonesia	121 (115)	116 (114)	44 (54)
Lao PDR	171 (169)	141 (138)	.
Malaysia	21 (23)	53 (59)	26 (24)
Myanmar/Burma	.	174 (175)	.
Philippines	148 (146)	115 (109)	85 (87)
Singapore	1 (1)	2 (2)	3 (3)
Thailand	19 (16)	62 (66)	38 (26)
Vietnam	78 (88)	139 (144)	59 (75)

Source: The World Bank, *Ease of Doing Business 2011. Making a difference for Entrepreneurs*, Washington, D.C., 2010; The Heritage Foundation, *2011 Index of Economic Freedom,* Washington, D.C., and New York 2011; World Economic Forum, *The Global Competitiveness Report 2010--2011*, Geneva 2010.

while Malaysia has just adopted a nation-wide competition law which is expected to be in force in 2012.[10] Their main objectives are as usual: fostering competition, efficient markets, increasing productivity, innovation and consumer welfare. Such a set of provisions proves that competition law in Asian countries is based indirectly on the American legal solutions. It is essential to remember that they determined Japanese competition law (the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade) as they were introduced in 1947 in the occupation period as a tool whose main goal was to dissolve Zaibatsu structures. One cannot also forget previous and contemporary significance of technical assistance that is being offered to beneficiaries within the bilateral co-operation programmes (Germany, Australia) and by international organisations (the World Bank or UNCTAD).

Formal co-operation at the ASEAN regional level was launched in August 2007, when the ASEAN Economic Ministers endorsed the establishment of the ASEAN

[10] ASEAN, *ASEAN Regional Guidelines on Competition Policy and Handbook on Competition Policy and Law in ASEAN for Business,* 2010/AEC/06/2, 24.08.2010. In the case of Malaysia competition law is in force, but the Competition Commission will have become fully operational by January 2012. Moreover, a draft law is under consideration in Cambodia, Myanmar is preparing CLP by 2015.

Experts Group on Competition (AEGC) as a regional forum to discuss and co-operate in competition law and policy,[11] despite the fact that one of the conclusions of the 2nd ASEAN Conference on Competition Policy and Law in Bali on 14-16 June 2006 was that at that time, there was no single uniform model of competition to be applied.[12] It was decided, however, that the AEGC's activity in the first years should be focused on the development of competition law, capacity building programmes, exchange of experiences, best practice studies, expert support, and occasional peer reviews of CLP. When considering such a short time of unusual intensification of co-operation, it has to be said that it has brought two relevant successes – two documents were approved in August 2010:

- the ASEAN Regional Guidelines on Competition Policy,[13]
- Handbook on Competition Policies and Laws in ASEAN for Businesses.[14]

The contents of the first one, issued thanks to the co-operation with German organisation InWEnt – Capacity Building International, indicate that its principal objectives are:

- to set out different policy and institutional options that serve as a reference guide for the ASEAN Member States (AMSs) in their efforts to create a fair competition environment,
- to help to increase the AMSs' awareness of the importance of competition policy, with a view to stimulating the development of best practices and enhancing the co-operation between the AMSs.

Regional Guidelines are a kind of a document which systematically presents all crucial issues relating to competition policy. Therefore, one can find the main goals, potential benefits, general framework of competition law (anticompetitive agreements, abuse of dominant position, mergers and acquisitions control), how the competences are to be shared, implemented and enforced, technical assistance and other contents of dynamically growing international cooperation.

The latter one – Handbook on Competition Policies and Laws in ASEAN for Businesses – provides basic notions and explanation of the principles of CLP and covers, in relation to each AMS, the key areas of CLP that are of relevance for businesses, such as provisions concerning: substantive issues (mentioned in the previous paragraph), procedural issues (notifications systems, enforcement

---

[11] There have been six workshops so far, which were focused on the capacity building, advocacy, costs and benefits of competition policy, methodologies and techniques of competition law (Singapore, Japan, Malaysia, Vietnam).

[12] The 2nd ASEAN Conference on Competition Policy & Law: Accelerate Growth and Competitiveness through Competition Policy and Law, Bali, 14-16 June, 2006, p. 14.

[13] ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy*, Jakarta, August 2010.

[14] ASEAN Secretariat, *Handbook on Competition Policies and Laws in ASEAN for Businesses*, Jakarta, August 2010.

procedures, decisions) and the organisation of competition authorities.[15] Its most important part is a review of legal provisions existing in the AMCs (not always is it a specific anti-monopolistic act), which influence domestic competition policy. Reading this document helps to identify activities allowed (or not banned) in the national laws in every of the countries being the subject of analysis, thus, business people have an opportunity to know them better, e.g.:

- the Authority for Info-communications Technology Industry of Brunei Darussalam Order 2001 and the Telecommunications Order 2001 in Brunei;
- Law No. 5 of 1999 concerning the prohibition of monopolistic practices and unfair business competition in Indonesia;
- Decree 15/PMO (4/2/2004) on Trade Competition in Laos;
- Competition Act 2010 in Malaysia;
- the 1987 Constitution (Article XII), the Revised Penal Code (Article 186) the New Civil Code (Article 28) and the Act to Prohibit Monopolies and Combinations in restraint of Trade in the Philippines;
- the Competition Act in Singapore;
- the Trade Competition Act B.E 2542 (1999) in Thailand;
- the Competition Law No. 27/2004/QH11 in Vietnam.

To sum up, it is worth mentioning that the main goal of the Handbook was to deliver a complex set of information on the competition regime for potential investors. From their perspective, it should contribute to the minimisation of transaction costs which have to be covered in the stage of examining transactions and considering possible scenarios. If the ASEAN wants to maintain its investment attractiveness and through the inflow of foreign capital to improve the competitiveness of both economies as well as the whole system, this step seems to be fully rational. One of the criteria which transnational corporations screen is the assessment of legal system. However, there might be such which would be rather interested in the lack of certain rules in order to make as much use of their advantages as it is possible when locating their business in a particular place.

If one had to speed up the process of co-ordination of CLP, a necessary condition is that all member countries should have, understand and enforce competition regulations effectively. The essence of such activities is inseparably connected with every-day practices, involvement of parties and experiences gained in this way. If, as today, only five countries have competition law, it is extremely difficult to expect further extraordinary achievements. It has to be taken into account that economic co-operation within ASEAN is based on a very pragmatic approach and will to agree common interests through a long negotiation process, thus less developed countries, when aiming at the stimulation of structural adjustments of their own economic systems, might not need a law which would restrict government bodies and policy-makers in their plans and actions.

---

[15] ASEAN, *ASEAN Regional Guidelines...*, *op. cit.*

4. Concluding remarks

Efforts aimed at co-ordinating CLP may be seen as a part of activities relating to so-called "open regionalism". Competition policy as such is in this context regarded as a tool of accelerating the dynamics of economic integration processes. Developing regions to a large extent apply make use of European experiences, which takes its form in the set of legal provisions in their regulatory frameworks. It is thus not to expect that competition law defined and implemented one day in ASEAN will have specifically Asian character.

This would mean that in the long run, on the provision that there will be a political willingness to continue, countries will face the challenge of growing pressure to harmonise competition laws. If one took a premise that the priority lies in maximising social and economic welfare through optimal allocation of resources, such activities would be coherent with interests of:

- international companies, because they would lower the institutional uncertainty of their functioning, and therefore also minimise transaction costs;
- organisations involved into the process of trade liberalisation (e.g. the WTO), because they would eliminate a risk of applying protectionist policy;
- highly competitive economies having advantages not easy to be imitated when generating substantial benefits from international trade;
- and last but not least – consumers who thanks to more intense competition would have wider access to better market offer.

Initiatives started by ASEAN, which are supposed to be an element of a broader strategic plan aimed at establishing the economic union, have to be seen, on the one hand, as very ambitious, while on the other, extremely difficult not only in the mid-term (year 2015), but also long-term perspective.

References

ASEAN, *ASEAN Regional Guidelines on Competition Policy and Handbook on Competition Policy and Law in ASEAN for Business*, 2010/AEC/06/2, 24 August 2010.

ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy*, Jakarta, August 2010.

ASEAN Secretariat, *Handbook on Competition Policies and Laws in ASEAN for Businesses*, Jakarta, August 2010.

Branson J., Competition policy in ASEAN: Case studies, *Asia Pacific Economic Papers* 2008, No. 374.

Declaration of ASEAN Concord II (Bali Concord) Adopted by the Heads of State/Government at the 9th ASEAN Summit in Bali, Indonesia on 7 October 2003, http://www.aseansec.org/15159.htm (date of access: 8.02.2011).

Krugman P., Competitiveness – a dangerous obsession, *Foreign Affairs* 1994, Vol. 73, No. 2.

Liu Y., Ng B.K., Facing the challenge of the rising Chinese economy: ASEAN's responses, *Review of Development Economics* 2010, Vol. 14, No. 3.

Sivalingam G., Competition policy and law in ASEAN, *The Singapore Economic Review* 2006, Vol. 51, No. 2.
Sudsawasd S., An empirical assessment of the relationship between competition policy and investment, *Journal of Asian Economics* 2010, Vol. 21.
Thanadsillapakul L., *The Harmonisation of ASEAN Competition Laws and Policy from an Economic Integration Perspective*, http://www.thailawforum.com/articles/ theharmonisation.html.
The Heritage Foundation, *2011 Index of Economic Freedom*, Washington and New York 2011.
The 2nd ASEAN Conference on Competition Policy & Law: Accelerate Growth and Competitiveness through Competition Policy and Law, Bali, 14-16 June 2006.
The World Bank, *Ease of Doing Business 2011. Making a difference for Entrepreneurs*, Washington, D.C., 2010.
World Economic Forum, *The Global Competitiveness Report 2010-2011*, Geneva 2010.

Websites

http://www.aseansec.org/21081.htm (website of the Association of Southeast Asian Nations).
http://ec.europa.eu (website of the European Commission).
http://www.thejakartapost.com (website of the Jakarta Post).

MIĘDZY WOLNYM HANDLEM A UCZCIWĄ KONKURENCJĄ. STUDIUM PRZYPADKU ASEAN

Streszczenie: Koordynacja polityki konkurencji w wymiarze regionalnym jest coraz dynamiczniej rozwijanym obszarem zarówno współpracy, jak i badań naukowych. Kwestia ta jest ściśle powiązana z problematyką liberalizacji handlu międzynarodowego, co znalazło swoje potwierdzenie w stworzeniu tzw. zagadnień singapurskich w roku 1996. Harmonizacja prawa konkurencji nie jest cechą charakterystyczną jedynie ugrupowań o wysokim poziomie rozwoju, lecz także ma miejsce w regionach rozwijających się. Artykuł odnosi się do specyfiki takiej współpracy i doświadczeń, jakie w tej materii zebrało Stowarzyszenie Narodów Azji Południowo-Wschodniej (ASEAN). Autor analizuje w nim teoretyczne i praktyczne przesłanki koordynacji polityki konkurencji w ramach ASEAN, bariery oraz perspektywy potencjalnego sukcesu.