

Best Practices in the Introduction and Implementation of Competition Policy and Law in East Asia Summit Countries

REPSF II Project No. 07/008

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Final Report

June 2008

The views expressed in this report are those of the authors, and not necessarily those of the ASEAN Secretariat and/or the Australian Government.

ABSTRACT

This report examines experiences in the design and implementation of competition policy and law (CPL) in ASEAN member countries, other East Asia Summit countries, the United Kingdom, the European Community and the United States. It draws on these experiences to identify “recommended best practices” at both policy and operational levels for the consideration of ASEAN member countries.

The report reviews experiences in the design and implementation of cooperative approaches to CPL. It draws on elements of 4 cooperative CPL models – namely, the OECD, the International Competition Network, the Australian New Zealand Closer Economic Relations Trade Agreement, and the European Community’s cooperative CPL regime – to propose a model for a cooperative programme of work on CPL in ASEAN or East Asia Summit countries.

The report also examines lessons learned in the design and delivery of technical assistance and capacity building programmes for competition authorities. It draws on information revealed during fieldwork interviews to provide a preliminary indication of the technical assistance and capacity building needs of ASEAN member countries to establish and implement best practice CPL arrangements. Further work is needed to develop tailored technical assistance and capacity building programmes for each ASEAN member country.

The project included extensive fieldwork interviews with competition authorities throughout ASEAN. The discussions between competition authorities and project team members are summarised in separate Country Briefs for each ASEAN member country.

The project was sponsored by the ASEAN-Australia Development Cooperation Programme: Regional Economic Support Facility Phase II (REPSF II).

EXECUTIVE SUMMARY

Concept Economics and Drew and Napier LLC (DNN) have been commissioned by the ASEAN Secretariat to undertake a study of best practices in the introduction and implementation of competition policy and law (CPL) in East Asia Summit (EAS) countries.

This Executive Summary presents our key findings in relation to:

- The objectives, coverage, rules and processes and institutional arrangements underpinning national CPL;
- A potential model for a cooperative CPL arrangement involving ASEAN or East Asia Summit countries; and
- Best practice in the design and delivery of technical assistance and capacity building programmes.

A. RECOMMENDED BEST PRACTICES FOR NATIONAL CPL IN EAS COUNTRIES

Some – for example, Rodriguez and Coate (1997) – have argued that because of the complexity of CPL analysis and weak institutional capacity in most developing countries, the establishment of CPL and competition regulatory bodies (CRB) in developing countries could do more harm than good since the risk of ill-informed and inappropriate decisions is particularly high.¹

Others – for example, ADB (2005) and Clarke and Evenett (2003) – consider that while the complexity of the task and institutional capacities cannot be ignored, they do not warrant withholding the establishment of competition policy regimes, and the net public benefits such policies can confer. Instead, they call for institutional and technical strengthening and capacity building of CRB in developing countries. They also suggest that the balance between advocacy and enforcement might be different as between developing and developed economies.

The approach recommended in this study is very consistent with the latter philosophy. It provides for the establishment of CPL in developing countries, but in a way that is sensitive to developing country conditions. More specifically, in some areas we suggest that best practice coverage, rules, processes and institutional arrangements for developing countries should be identical to the recommended best practices for developed countries. In such cases it is envisaged that technical assistance programmes can be tailored to support developing countries to implement recommended practices effectively. In other areas, we recommend that developing countries adopt a reduced form of the recommended best practices for a developed country context in order to accommodate the significant resource constraints that developing country CRB tend to experience for some time following the establishment of national CPL, even with the support of technical assistance programmes.

1. Objectives of national CPL

The most common stated objective of CPL is the maintenance of the competitive process, free competition, or effective competition.² However, the pursuit of competition is intended as a means to an end, not an end in itself. In other words, CPL is not about the pursuit of competition for its own sake. Rather, it recognises that in many situations competition is a powerful stimulus for firms to reduce costs and offer consumers a greater choice of products and services at lower prices – outcomes that often have a beneficial

¹ Rodriguez, A. E. and M. B. Coate 1997, 'Competition Policy in Transition Economies: The Role of Competition Advocacy', *Brooklyn Journal of International Law*, Vol. 23(2), pp. 367-401.

² World Bank and OECD 1999, 'A framework for the design and implementation of competition law and policy', Chapter 1.

impact on economic efficiency, economic growth, economic development and consumer welfare. In this study we refer to these as the “first order” objectives of national CPL.

Importantly, governments should not use CPL to pursue competition at any cost. There are certain situations where the promotion of competition may be detrimental to one or more first-order objectives and hence national welfare in the absence of supplementary government action (e.g. in cases where the market in question is a natural monopoly, subject to persistent information asymmetry or where some of the benefits or costs of an economic activity are unpriced).

It is sometimes not well understood that CPL can accommodate other policy objectives (both economic and social) such as promotion or protection of SMEs, facilitation of FDI, promotion of technological advancement, promotion of product and process innovation, promotion of industrial diversification, job creation, gender equity or the promotion of welfare of particular consumer groups. In this study we refer to these as “second-order” objectives of national CPL.

It is a matter for government to decide the first and second order policy objectives it wishes its CRB to pursue via the instrument of national CPL. Generally, though, the more objectives a government requires its CRB to pursue via national CPL, the more complex the task of establishing and implementing CPL and the more discretion and resources CRB require to manage potential conflicts between objectives. This tends to undermine the accountability of the CRB, as it is difficult to evaluate the performance of entities that are pursuing multiple, at times inconsistent, objectives. In deciding whether to require CRB to pursue multiple objectives, governments must bear this in mind. They also need to consider that some policy objectives (particularly social policy objectives) may be more effectively pursued via alternative policy instruments, some of which may not yet be in place. Very often it is possible to achieve these policy objectives without restricting competition and sacrificing efficiency, economic growth and development.

The simplest model is for a government to require its CRB to pursue a single objective – the promotion of economic efficiency – and use other policy instruments to pursue other economic and social objectives. It is also important to bear in mind that even where governments do not explicitly require CRB to pursue other first order and second order objectives, the implementation of national CPL can still make a positive contribution to the realisation of these other objectives. For example, even without an explicit objective to protect consumers or SMEs, CPL works to protect both from a variety of anti-competitive conduct.

If a government prefers to reserve the flexibility to give priority to other policy objectives over economic efficiency from time to time (e.g. in response to matters of national security, disaster relief or promotion of welfare of disadvantaged community groups), it may wish to consider making provision in CPL for the government of the day to issue a notice of policy to CRB. This provision could be modelled on section 26 of the *New Zealand Commerce Act 1986*, which allows the New Zealand Government to require the New Zealand Commerce Commission to have regard to any policy statement it chooses to transmit to the CRB from time to time on any matter. This provision allows for government policy to be established, and taken into account, in a transparent way.

Even if a government opts to require its CRB to pursue a single objective of promoting economic efficiency, CPL must manage the potential for conflict between the promotion of competition and economic efficiency. In most CPL regimes this is managed by the application of a net benefit test – that is, restriction of competition may be permitted if it confers net efficiency benefits to society and the restriction of competition is necessary to realise such benefits.

2. Scope or coverage of national CPL

In the main report we examine the following key areas of coverage of national CPL and consider how coverage might vary as between developed and developing countries.

a. Horizontal agreements

In relation to horizontal agreements, we recommend per se prohibition of agreements involving the fixing of pricing or output, market sharing and bid rigging. We recommend that the standard of proof for collusion in the case of per se prohibited agreements should be high – for example, it is not sufficient to infer from market data that collusive behaviour has occurred.

For all other forms of anticompetitive agreement between rival firms, we recommend a general prohibition on agreements that have a substantially anticompetitive purpose or effect. CRB would need to apply a rule of reason test to determine whether a particular agreement has such a purpose or effect. We recommend that the rule of reason test should at least take the form of a dominance test (i.e. creation or strengthening of a position of dominance). Well-resourced CRB in some developed countries may prefer a substantial lessening of competition test, which would require them to consider the impact on competition of agreements involving (say) the third, fourth or fifth largest firms in a particular market. Such assessments are typically more informationally and analytically demanding than dominance assessments and for this reason are not recommended for developing countries.

b. Vertical agreements

In relation to vertical agreements, we recognise that there is a wide and compelling economic literature that suggests that regulation of vertical agreements, whether by per se ban or general prohibition subject to rule of reason test, is at best unnecessary and at worst welfare reducing as it creates scope for regulatory error through false positives (i.e. CRB prohibits an agreement that does not substantially lessen competition and would otherwise have contributed to the achievement of first order objectives). On this basis we recommend for both developed and developing countries that there be no per se or general prohibition on vertical agreements. This is not to say CRB should never have cause to investigate vertical restraints. Vertical relations may be highly relevant to an investigation of unilateral abuse of market power and the assessment of the competitive effects of horizontal agreements and horizontal mergers.

c. Unilateral abuse of market power

In relation to unilateral abuse of market power, we recommend for both developed and developing countries at least a prohibition on abuse of dominance for an anticompetitive purpose. Developed countries may prefer a standard of abuse of substantial market power rather than abuse of dominance. However, this will entail more complex assessment of competitive effects.

d. Mergers and acquisitions

In relation to mergers and acquisitions, we recommend that both developed and developing countries introduce merger review provisions. The rationale behind the regulation of mergers and acquisitions is to prevent the creation of undertakings that will have the incentive and ability, or an increased incentive or ability, to exercise a material degree of market power. Mergers may also be prohibited when there is a risk that the resulting increased concentration in the market could facilitate concerted practices by the remaining operators in the market to restrict output or fixed prices. In this respect, merger regulation can play a pre-emptive role as a means of reducing the future need to police a market for anticompetitive practices.

We recommend that the approach to the regulation of mergers and acquisitions should differ as between developed and developing countries. Specifically, for developed countries we recommend case by case assessment of whether or not a notified merger leads to at

least the creation or strengthening of a position of dominance (or a substantial lessening of competition, if preferred). For developing economies, we recommend at least scrutiny of “mergers to monopoly”, with such mergers only being allowed where they are assessed to confer substantial net public benefits that cannot be realised absent the restriction of competition. Note that this is different to an approach that places a per se prohibition on mergers leading to undertakings with market shares exceeding a particular threshold.

CRB may wish to publish indicative safe harbour thresholds to help inform businesses of cases that are more likely to raise competition concern and therefore attract CRB scrutiny. CRB may also wish to identify specific market conditions under which they may investigate mergers that otherwise would comply with safe harbour provisions. The conditions set out by the European Commission provide a useful guide in this respect. The Commission has transparently stated that irrespective of whether a merger would otherwise enjoy safe harbour from CRB scrutiny, it will investigate mergers in situations where:

- a merger involves a potential entrant or a recent entrant with a small market share;
- one or more merging parties are important innovators in ways not reflected in market shares;
- there are significant cross-shareholdings among the market participants;
- one of the merging firms is a maverick firm with a high likelihood of disrupting coordinated conduct;
- indications of past or ongoing coordination, or facilitating practices, are present; and
- one of the merging parties has a pre-merger market share of 50% or more.

We recommend that merger notification in the case of merger to monopoly should be mandatory in developing countries, as it may otherwise be difficult for CRB to monitor merger activity. In developed countries this is a less of an issue and CRB may prefer a system of voluntary notification on the understanding that parties who decide not to notify bear the risk of their self-assessment.

e. Legislated restrictions on competition

One of the largest sources of restriction of competition is not private firms, but government regulation. In the pursuit of economic and social policy objectives, governments often rely on instruments that bring about a substantial lessening of competition. At an extreme, they may even prohibit competition altogether.

From a public policy perspective, regulation that has the effect of substantially lessening competition is not problematic if it is based on careful consideration of the costs and benefits of restricting competition and the costs and benefits of alternative means of achieving the relevant policy objective without requiring the restriction of competition. However, most regulatory processes do not require a thorough cost benefit analysis. Consequently, there are many regulations that unnecessarily restrict competition, or restrict competition to a much greater degree than is warranted to achieve the policy objective.

We highly recommend that governments in each EAS country should consider making mandatory the review of legislation that imposes nationally significant restrictions on competition as an integral part of national CPL. Through such provision governments can demonstrate a genuine commitment to the pursuit of the objectives of national CPL. They can also go a long way towards addressing a root cause of much anticompetitive activity in particular sectors of the economy, insofar as legislative restrictions create artificial barriers to entry that confer on incumbents substantial market power that they otherwise would not be able to achieve.

f. Government-owned businesses

In relation to government owned businesses, we recommend that governments legislate to remove any competitive advantages or disadvantages that government business enterprises (or on rare occasions, private businesses) may experience simply as a result of their close relationship with government. To achieve competitive neutrality, governments should ensure that businesses that have a close relationship with government do not receive favourable or disadvantageous treatment over rivals in the form of:

- tax exemptions;
- exemption from a requirement to earn a commercial rate of return;
- ability to borrow funds at interest rates lower than commercial rates;
- de facto or de jure exemption from competition law;
- exemption from industry regulation;
- under-funding or over-funding to perform community service obligations;
- favourable treatment in government procurement processes;
- powers to collect or access government data which rival businesses do not have; and
- permission to share facilities or jointly market products and services with other government businesses while their private sector rivals are not able to contest such favourable treatment.

We also recommend that, where they have not already done so, governments review the merits of structural reform of government monopoly businesses. Reviews should be performed on a case by case basis and explore:

- the appropriate commercial objectives of the government monopoly;
- the merits of separating potentially competitive elements of the government monopoly from the natural monopoly elements and into independent competing businesses, relative to the costs of doing so (which may be high);
- the best way of separating regulatory functions from the monopoly's commercial functions;
- the merits of any community service obligations provided by the government monopoly, and the best means of funding and delivering any mandated community service obligations;
- price and service regulations to be applied to the relevant industry; and
- the appropriate financial relationship between the owner of the government monopoly and the monopoly business.

By making the obligation on government to undertake such a review an integral part of national CPL, governments demonstrate that they are equally concerned about government and private sources of restrictions on competition, since both result in the sacrifice of national CPL objectives.

g. Third party access to essential facilities

In certain markets, effective competition requires that firms have access to the services of 'essential facilities' with technology that exhibit natural monopoly characteristics and hence are uneconomic to duplicate. Around the world, 2 broad approaches have been used to regulate access to infrastructure services by essential facilities. These are:

- court-based rights of access relying on the provisions of national CPL; and

- legislated access rights, usually of an industry-specific nature, though in the case of Australia also relying on a generic national access regime.

The establishment and operation of a third party access regime is very demanding. It requires very careful balancing of the interests of both the access seeker and the access provider. Some would argue that this balancing act is more difficult when done through an ongoing legislatively enacted access regime administered by the CRB rather than on a case by case basis through the courts. Others would argue the opposite.

In either case, administration of a third party access regime places great demands on the judicial system and the CRB. The risk that such regimes might in fact make outcomes less rather than more efficient or welfare-enhancing is often high. While doing nothing to address restriction of access to essential facilities with natural monopoly characteristics can lead to costs in terms of lower output and higher prices for downstream markets reliant on the services they produce, the imposition of excessive obligations on access providers or setting access prices too low can also lead to significant costs in terms of stifling of investment and innovation, with the latter situation less likely to be self-correcting in the long run than the former.

Based on these considerations, the project team is of the view that enacting a third party access regime should only be attempted by very mature economies that are not highly dependent on new infrastructure investment and have an extremely well resourced CRB and a strong, well-resourced judicial appeal system (to place a discipline on over-zealous regulation).

h. Fair trading and consumer protection measures

In relation to fair trading and consumer protection measures, we note that some governments (e.g. Australia, Korea, and the United States) have opted to use national competition laws and CRB to spearhead the implementation of consumer protection measures and/or fair trading provisions. This is a somewhat controversial practice. While there may be economies in administrative coordination between consumer protection and competition policy, depending on the institutions involved and approach to regulation of fair trading and consumer protection, full integration is difficult. On this basis we conclude there is no unambiguous, clear-cut case for full integration of fair trading and consumer protection legislation with national CPL legislation, nor for full integration of the administration of competition, fair trading and consumer protection measures under a single CRB.

i. Transition arrangements

Success in establishing or refining national CPL is to be measured in terms of the impact on the incidence of anticompetitive practices, not the number of judgements made in favour of CRB, or the quantum of fine revenue earned by CRB.

The objective of any transition arrangement is to give parties time to renegotiate agreements or restructure their business to comply with new laws insofar as they represent a departure from the laws that preceded them. This is particularly important where conduct that was once permitted or tolerated is to become criminalised.

It is apparent from the experiences of EAS countries that the duration of transitional arrangements needs to vary depending on absorptive capacity. Most transition arrangements this century appear to allow moratoriums of between 1 and 5 or 6 years. The longest moratoriums seem to apply to complex agreements that may take considerable time to unwind. It also seems to be a common and highly desirable feature that CRB are permitted a degree of flexibility to grant extensions, on request or on their own initiative, on a case by case basis where there is judged to be merit from doing so.

During these moratorium periods, there is a strong emphasis on competition advocacy (rather than enforcement) to educate businesses and consumers about the benefits and scope of national CPL as well as their rights and obligations under national CPL.

3. Rules and processes underpinning national CPL

There are a number of rules and processes needed to implement national CPL. We recommend the following rules and processes for EAS countries:

- Application of the hypothetical monopolist test to define the relevant market and development of Market Definition Guidelines containing a detailed explanation of how CRB will interpret and apply the hypothetical monopolist test;
- Provision for exemption/authorisation of conduct that otherwise might contravene competition law, except in relation to the provision on unilateral abuse of dominance or substantial market power. Exception/authorisation should only be granted for collusive agreements or mergers if the parties can demonstrate that the agreement or transaction confers net public benefits (i.e. net efficiency benefits if the CRB's sole or prime objective is to promote economic efficiency) and that such benefits cannot be realised but for a restriction of competition.
- The process for obtaining exemptions should be timely and transparent. Applicants should have the right to appeal CRB decisions.
- Developing and developed countries alike should give consideration to allowing block exemptions for particular kinds of agreements that are likely to pass such a public benefit test. Block exemptions help to provide certainty to business and also help to reduce CRB caseload.
- Developed and developing countries alike should give consideration to the adoption of a purpose standard in relation to misuse of market power cases on the grounds that in practice it is less difficult to establish purpose and an effects test increases the likelihood that scarce CRB resources will be diverted to assessment of pro-competitive behaviour, which would reduce CRB efficiency and effectiveness.
- Developed and developing countries alike should give consideration to the adoption of an effects standard in relation to merger assessment and anticompetitive agreements, except in relation to 'hard core' cartel agreements (i.e. involving fixing of prices or output, market sharing or bid rigging) where the conduct itself should be per se prohibited and not subject to either a purpose or effect test.
- Developed and developing country CRB should have autonomy to develop comprehensive guidelines outlining the structure, range and standard of information to be provided by parties to CRB to support an application for exemption from CPL.
- Developed and developing countries alike should give consideration to the review of current price control arrangements (if any) to determine whether competition concerns can be addressed by potentially less restrictive means (e.g. price monitoring).
- When formulating penalty systems, developed and developing countries should be mindful that the effectiveness of such systems in deterring abuse is a function of the level of the relevant fine/sentence as well as the probability of successful detection and prosecution of breaches. Best practice penalty systems also incorporate a leniency programme for informants of collusion. There is compelling evidence that leniency programmes can materially improve the probability of successful detection and prosecution of CPL breaches.
- Competition advocacy is a highly effective complement to national CPL enforcement in both developed and developing country contexts and is a highly effective substitute for enforcement in the context of a transition arrangement that provides for a moratorium on enforcement. On this basis, we recommend that CRB prepare advocacy plans that set out advocacy goals, priorities, strategies and activities over a 3 to 5 year planning horizon. Plans should be tailored to suit country-specific conditions.

- Periodic empirical evaluation of the net economic benefits conferred by a national CPL over an extended timeframe – say a decade - can provide a valuable advocacy resource for CRB by highlighting and clarifying the identify of beneficiaries and the overall economic contribution of national CPL to national welfare.

4. Institutional arrangements to support national CPL

Effective implementation of national CPL depends crucially on the performance of CRB and the judiciary. We recommend the following institutional arrangements for effective CPL regimes in EAS countries.

- Establishment of CRB as a statutory authority with independence from ministerial functions where staff availability permits. In developing countries, staff and skill shortages and the competing needs of other policy priorities may mean that for at least a transitional period, CRB must be established within a government ministry. Where this occurs the relevant CRB and ministry must invest in other means by which a CRB can establish a reputation for independence from political interference.
- It is vital that CRB achieve a reputation for being committed to the enforcement of CPL without fear or favour from the government of the day or regulated undertakings. The means by which a government can endow a CRB with such a reputation include:
 - mandating in legislation that CRB Commissioner appointments require the consultation and approval of Parliament and are not a unilateral decision of the government of the day (or a Minister of the government of the day). The more checks and balances there are on such appointments, the more likely that decision will be based on merit rather than favour and the more independent the CRB will be from future government interference;
 - ensuring that the CRB board enjoys a fixed term appointment of reasonable duration without possibility of being dismissed, except in extraordinary cases or serious breach. The longer the term of appointment, particularly if the term of appointment is greater than the term of government, the less vulnerable Commissioners are to political pressure from government. Five years is standard among jurisdictions that appear to give CRB a very high degree of independence;
 - ensuring the CRB enjoys administrative autonomy (i.e. ring fenced or structurally separated) and earmarked revenues; and
 - ensuring the CRB has the power to define (ex ante) the rules and processes that it will use on a daily basis to implement CPL without adhoc interference from government or a requirement to constantly refer back to government for permissions to implement national CPL. Where CRB has this autonomy, government need not play any role in day to day operations.
- Ideally the appointment of Commissioners/members should be staggered to enable experienced Commissioners/members to support new Commissioners/members and preserve a pro-competitive corporate culture.
- The establishment of at least one appeals body that is independent of CRB and executive government. Ideally this body should be both a court and an expert body, comprised of persons highly qualified in competition law and competition economics. Where this cannot be achieved it is imperative that the court, tribunal or committee that hears CPL appeals has access to recognised experts to inform their deliberations.
- CRB should be allocated responsibility for the implementation and enforcement of CPL, interpretation and elaboration of CPL, competition advocacy and outreach, and reporting to government in the form of annual reports to ensure ultimate accountability to the public through Parliament.

- CRB should have sufficient powers to perform their duties, including:
 - powers to enter business and non-business premises with a search warrant. Where the time taken by the courts to process an application for a search warrant is problematic, we recommend that governments introduce procedures to fast-track such processes in preference to the granting of permission to CRB to enter premises without the need to obtain a warrant.
 - powers to seize or require production of documents for evidence.
 - powers to compel witnesses to give evidence to CRB and courts, subject to protections where criminal penalties are involved.
 - interim powers to stop suspected anticompetitive conduct but only subject to a court order.
- Some jurisdictions have cease and desist powers. These powers allow the CRB to put a stop to conduct it regards as anticompetitive without applying for a court order. While such orders increase the flexibility of CRB to respond to potentially anticompetitive practices, it is not clear that such powers are desirable.
- Where there are already pre-existing sectoral regulators with competition-related responsibilities, national CRB and sectoral regulators need to work together to establish a platform for ongoing coordination. This could take the form of a regular inter-agency forum. It should help reduce the incidence of conflict between regulators as well as the costs of 'forum shopping' by regulated parties.
- In 'green-field' jurisdictions – i.e. jurisdictions with no national or sector-specific CPL regime – we recommend an approach in which the national CRB administers all CPL provisions and consults with sectoral technical and economic regulators to bridge a knowledge gap. The national CRB always has jurisdiction on competition matters, but works with industry regulators to take advantage of their deep industry knowledge and to enable them to assess and take any necessary supplementary action to manage the effects of national CRB decisions (and court decisions) on their respective industry/sector.
- In relation to the resourcing of CRB, we recommend that CRB invest in the accumulation and retention of specialist legal and economic expertise; communications and media relations capabilities and various corporate services (including IT, human resources, administration, financial accounting, CRB library and knowledge management services).
- CRB can manage CPL enforcement costs through:
 - reliance on complaints hotlines and leniency programmes;
 - targeting of litigation effort to the pursuit of conduct which is likely to carry the most detrimental effect on competition and first order CPL objectives. In a developing country context, litigation might initially be restricted to hard core cartel agreements and then move on to other priority areas (e.g. abuse of dominance and merger to monopoly) as resources become available; and
 - using education and outreach to create a culture of compliance among private and government businesses and to engender support from relevant stakeholders, including other government agencies, SMEs and consumers.
- In both developed and developing country contexts it is important that the judiciary are supported by, and have recourse, to a specialist panel and receives education in CPL concepts for adjudicating competition cases, particularly misuse of substantial market power cases.

B. A POTENTIAL MODEL FOR A COOPERATIVE CPL ARRANGEMENT INVOLVING ASEAN OR EAS COUNTRIES

There are a number of challenges to the establishment of a cooperative CPL arrangement in ASEAN or EAS countries. For example:

- Many AMCs (i.e. 6 out of 10) have no base of national CPL or CRB from which to build a cooperative CPL and CRB arrangement.
- Many CRB have very limited financial resources and specialist technical expertise and are already stretched to establish and implement a national CPL regime. They do not have additional resources to make a material contribution to a cooperative CPL arrangement.
- There are differences among the governments of ASEAN and EAS countries in terms of their commitment to a cooperative CPL arrangement. In some quarters there is concern that member countries have a competitive rather than complementary relationship in many regional and global product markets and so a cooperative approach to CPL might confer a competitive advantage to ASEAN or EAS rivals.
- Many small, medium and large businesses (private and government-owned) have a fear of competition. This fear manifests in the form of businesses lobbying against the establishment of CPL. In some cases this fear appears to be the result of a misunderstanding of the purpose and benefits of CPL – many businesses are in fact beneficiaries of CPL. In other cases it appears to reflect vested interest in preserving the status quo, as it provides greater flexibility to pursue profitable anticompetitive practices.
- Some of the key beneficiaries of national and cooperative CPL (i.e. consumers and small business) lack bargaining power to persuade governments to implement national and cooperative CPL.

We do not believe these challenges are insurmountable. However, they do influence the short to medium term objectives of a cooperative CPL arrangement as well as the type of cooperation that is pursued under a cooperative CPL arrangement involving ASEAN or EAS countries.

There appears to be strong endorsement among ASEAN CRB and country experts consulted in the course of this study that the overarching or long term objectives of a cooperative CPL arrangement involving at least AMCs should be:

- To promote market integration in the lead up to the establishment of a common market in 2015.
- To promote economic efficiency and growth at a regional level.

In the short to medium term (i.e. over the next 5 years) there appears to be widespread (though not universal) support for a more targeted set of goals that contribute to (but do not fully achieve) the aforementioned 2 overarching objectives, namely:

- To promote a culture of competition in the ASEAN region.
- To share information with AMCs that have not yet decided to establish national CPL about (i) the potential benefits conferred by national CPL and CRB, and (ii) how to address perceived problems, so that they can make an informed decision on whether and how to establish an effective national CPL regime.
- To improve the efficiency and effectiveness of national CRB through the sharing and exchange of information, knowledge and resources.
- To develop and agree on the basic elements of a common framework for national CPL within the ASEAN region.

- To develop a cooperative arrangement involving established national CRB to improve the efficiency and effectiveness of CPL enforcement.

In this study we consider the relative merits of 3 broad types of cooperation — i.e. collaboration, harmonisation and centralisation — by drawing on experiences with cooperative CPL in the OECD, the International Competition Network, the Australian New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) and in the European Community.

Of these 3 types of cooperation, there appears to be very strong support among consulted parties for collaboration, reasonably strong support for a particular form of harmonisation and little support for centralisation within the next 5 years. On this basis, we have recommended a mixed collaboration-harmonisation approach to cooperative CPL in ASEAN or EAS countries at least for the first 5 years.

In our opinion, the organisational arrangements underpinning the ICN and OECD arrangements (i.e. Steering Committee supported by Working Groups) serve as a good guide or model for the organisation of a cooperative CPL arrangement involving ASEAN or EAS countries. We also believe that the patient, iterative approach towards harmonisation of CPL that is a feature of the OECD, ICN and ANZCERTA approaches also serves as a good guide or model for a cooperative CPL arrangement involving ASEAN or EAS countries.

We are proposing an ambitious 5-year work programme for the Steering Committee and Working Groups that drive the proposed cooperative CPL arrangement. Activities have been matched to short to medium term objectives. These are detailed in sections 1 to 5 below.

1. Activities to support the promotion of a culture of competition in the ASEAN region

Under direction from the Steering Committee, a Working Group could be assigned the task of developing a suite of resources that are tailored to support competition advocacy and outreach activities by national CRB in AMCs, drawing from the large pool of resource material already disseminated by organisations such as the OECD, ICN and the APEC Competition Policy and Deregulation Group. This suite of resources could include:

- a Competition Assessment Toolkit for policymakers, which sets out a method for identifying unnecessary restraints on competition and developing alternative, less restrictive measures that still achieve government policy objectives;
- Guidance on best practices in the design and implementation of outreach programmes and how such programmes can be tailored to suit local conditions and requirements;
- Preparation of briefing notes containing factual information on (a) the role of competition policy in promoting efficiency and economic growth, (b) the kinds of business practices that may be harmful to competition, efficiency and economic growth, and (c) who stands to benefit from an arrangement that disallows these practices;
- Copies of published reports, particularly those relating to EAS countries, that evaluate the overall contribution of national CPL regimes to national economies and/or the net benefits conferred by competition reforms in key industries; and
- A Strategy Plan that a government could adopt to achieve government business compliance with CPL provisions, including by making Community Service Obligations (CSOs) transparent and appropriately funded.

The Steering Committee could also issue regular updates (e.g. press releases) and an annual report to keep the potential beneficiaries of a more competitive environment informed about the progress that is being made in establishing or refining national CPL across the

region, key competition decisions that have multi-member country dimensions or applicability, and key resolutions (consensus recommendations) by the Steering Committee.

2. Activities to support sharing of information with AMCs that have not yet decided to establish national CPL so that they can make an informed decision on whether and how to establish an effective national CPL regime

Under direction from the Steering Committee, a Working Group(s) could be assigned the task of:

- developing an information pack for countries that are yet to establish national CPL and CRB. This information pack could include information about the potential national benefits from the establishment of a national CPL regime prior to the establishment of the common market in 2015, the options and strategies for managing government's concerns about introducing national CPL, common misunderstandings about national CPL (e.g. that it diminishes a government's flexibility to pursue social and environmental objectives), and the potential additional benefits that may be conferred by participation in a cooperative CPL arrangement that is focussed on supporting AMCs to establish an effective CPL and CRB;
- developing a 'model' CPL regime for a developing country and guidance on how to establish a CPL regime so as to avoid some of the problems that have been encountered by others in the past. AMCs would then have the option of adopting the 'model' regime in whole or in part according to their preference;
- developing a guide to the setting up of an effective national CRB. This work product could take the form of a series of questions and answers. AMCs could be invited to submit "frequently asked questions" on this topic; and
- investigating and possibly even arranging international study trips for AMC officials to obtain information and first-hand insights on CPL regimes elsewhere in the world.

3. Activities to support improvement of the efficiency and effectiveness of national CRB through the sharing and exchange of information, knowledge and resources

Under direction from the Steering Committee, a Working Group(s) could be assigned the task of:

- negotiating information sharing arrangements with international organisations (such as the OECD and the ICN) and academic institutions to enable AMC member countries and their CRB to tap into their global experience and expertise;
- organising an annual forum on CPL, to be hosted by each AMC in turn if possible, for the purpose of bringing together high-level competition officials from member and non-member countries, as well as relevant experts, for the purpose of policy dialogue;
- organising and maintaining a website to disseminate Steering Committee press releases, conference proceedings, information briefs, Working Group reports, AEGC recommendations, competition advocacy and outreach materials, AEGC and national CRB annual reports, etc;
- organising a virtual platform (intranet) for the secure exchange of information, knowledge and resources between national CRB of member countries. This site could make provision for a virtual library to assist national CRB to access relevant legal and economic journals and reference material relevant to competition assessments. This would include provision for question and answer exchange on hot topics;
- organising an interactive capacity building workshop that brings together AMC government representatives, AMC CRB officials, foreign CRB officials with first hand

experience in the design or delivery of technical assistance, donor agencies and other potential providers of technical assistance in order to exchange information on AMC recipient needs, local conditions, and how to prepare a detailed blueprint for addressing capacity building and technical assistance needs in each AMC;

- formulating best practice guidelines for identification of CRB capacity building needs and the processes of designing and delivering a technical assistance programme for AMCs (building on outcomes of interactive capacity building workshop and possibly also material presented in Chapter VIII of this report). Each national CRB would then be responsible for identifying its own capacity building needs, documenting local conditions that a provider of technical assistance would need to take into account and preparing a tailored technical assistance and capacity building programme;
- considering which technical assistance programmes might be more efficiently or more effectively managed or delivered at a regional or multi-country level. The Steering Committee could then develop, manage and lead technical assistance activities (e.g. interactive workshops) in these areas; and
- organising a regional platform (e.g. via intranet) for matching requests for assistance from national CRB with potential providers of assistance, including other national CRB, international organisations and academic institutions.

Regular roundtable discussions between Steering Group members and national CRB representatives to exchange information and ideas on specific competition law cases and competition issues, with a view to fostering mutual understandings of the ways in which CRB have handled or propose to handle certain types of case in their country, problems they encountered in implementing this approach (e.g. handling political and vested interest pressures), strategies they devised to deal with such problems and ideas for making national CPL more effective in each AMC.

The Steering Committee could also prepare topic-specific Information Briefs setting out majority or consensus findings or recommendations from roundtable discussions.

4. Activities to support development and agreement on the basic elements of a common framework for national CPL within the ASEAN region.

Under direction from the Steering Committee, a Working Group(s) could be assigned the task of:

- developing and coordinating an agreement on the broad principles of national CPL in AMCs; and
- developing the basic elements of a common framework for CPL to be recommended to AMCs (and implemented on a voluntary basis).

Steering Committee could also explore the merits of establishing a sub-committee or a separate ASEAN body to act as mediator, arbiter or appellate body for international disputes between AMCs regarding CRB decisions.

5. Activities to support development a cooperative arrangement involving established national CRB to improve the efficiency and effectiveness of CPL enforcement

Under direction from the Steering Committee, a Working Group(s) could be assigned the task of developing a regional platform or agreement to facilitate coordination between national CRB to manage cross-border competition issues. This could include:

- development of a proposal for a formal negative comity agreement that members who have established national CPL and CRB would be willing to agree to adopt. As more AMCs establish national CPL and CRB they could be invited to sign-up to participate in this cooperative arrangement; and/or

- development of protocols for the formal exchange of information between national CRB in hard core cartel investigations.

6. The future role(s) of the AEGC

We suggest that the ASEAN Experts Group on Competition (AEGC) could assume the role of the Steering Committee and oversee the implementation of this work programme. It is envisaged that AEGC could adopt the short to medium and long term objectives described above.

The activities of the AEGC over the next 5 years could then include:

- Forging links with international organisations such as the OECD and ICN, and academics in EAS countries for the sharing of information and resources, including through participation on ASEAN cooperative CPL Working Groups;
- Deciding on the composition of Working Groups and allocating tasks to Working Groups in the form of a terms of reference and a prescribed reporting period;
- Considering the outputs produced by Working Groups and issuing consensus or majority recommendations where appropriate;
- Overseeing the development of a suite of resources tailored to support competition advocacy and outreach activities by national CRB;
- Overseeing the development of information packs for AMCs considering whether and how to establish national CPL and CRB to enable them to reach an informed decision;
- Overseeing the development of a ‘model’ CPL regime for a developing country and guidance material on how to establish a CPL regime to enable AMCs who are yet to establish national CPL and CRB to benefit from lessons learned in other jurisdictions;
- Overseeing the development of a “question and answer” style guide to the setting up of an effective national CRB, based on questions submitted by AMCs;
- Overseeing the investigation and arrangement of international study trips for AMC officials to obtain information and first-hand insights on CPL regimes elsewhere in the world;
- Overseeing the formulation of best practice guidelines for identification of CRB capacity building needs and the design and delivery of technical assistance in AMCs;
- Overseeing the development and management of technical assistance activities (e.g. interactive workshops) in situations where such assistance might be more efficiently or more effectively managed or delivered at a regional, or multi-country level;
- Organising a regional platform for matching requests for assistance from national CRB with potential providers of assistance, including other national CRB, international organisations and academic institutions;
- Organising an annual regional forum on CPL for the purpose of bringing together high-level competition officials from member and non-member countries for the purpose of policy dialogue. Responsibility for hosting this event would ideally be rotated around AEGC member countries;
- Organising regular (for example, quarterly) round table discussions with national CRB representatives for the purpose of exchanging information and ideas on specific competition law cases and competition issues. Where a majority or consensus view emerges from roundtable discussions, the AEGC could prepare non-binding best practice recommendations to AMCs and national CRB;

- Overseeing the preparation of non-binding best practice recommendations on topics of interest to national CRB;
- Overseeing the development of a common framework for CPL to be recommended to AMCs (and implemented on a voluntary basis), initially focusing on the basic elements only;
- Exploring the merits of establishing a sub-committee or a separate ASEAN body to act as mediator, arbiter or appellate body for international disputes between AMCs regarding CRB decisions;
- Overseeing the establishment and maintenance of a virtual forum (intranet) for the secure exchange of information, knowledge and resources between national CRB of member countries;
- Overseeing the development of a regional platform or agreement for managing cross-border competition issues;
- Coordinating with member countries, international organisations and other donors to raise funds and resources to implement this work programme;
- Issuing regular updates (e.g. press releases) to communicate the progress that is being made in establishing or refining national CPL across the region, key competition decisions that have multi-member country dimensions or applicability, and key findings and recommendations contained in Steering Committee Information Briefs; and
- Preparing an Annual Report on the objectives, goals, work programme (activities), outputs and outcomes of the AEGC and Working Groups under the AEGC's direction. Ideally, the AEGC would also comment on progress in individual member countries in establishing or refining an effective national CPL regime.

To be effective in implementing this ambitious work programme, we believe the AEGC would require the services of a dedicated Secretariat, comprising a team of some 10-15 individuals with experience and expertise at the policy and operational levels of CPL and CRB. It is envisaged that this small Secretariat could assist the AEGC to carry out its various activities and also provide administrative support to Working Groups. Working Groups Chairs and members could be appointed by the AEGC. Working Groups could comprise national CRB staff, government officials, academics, representatives from International organisations such as the OECD or ICN, and other experts as required.

C. RECOMMENDED BEST PRACTICES IN THE DESIGN AND DELIVERY OF TECHNICAL ASSISTANCE AND CAPACITY BUILDING PROGRAMMES

Six key lessons emerge from the recent literature on best practices in the design and delivery of technical assistance and capacity building programmes:

- Technical assistance programmes are more effective when they are demand rather than supply driven. The design of effective technical assistance and capacity building programmes should begin with a detailed local needs analysis and there should be a presumption that the recipient CRB is best placed to identify its most pressing needs;
- Early coordination between donor or provider and recipient can greatly enhance the effectiveness of technical assistance programmes. Larger programmes are more effective when implementation of technical assistance is preceded by a process to ensure mutual understanding and definition of project objectives;
- Programmes tend to be most effective when they are customised to the particular circumstances of the recipient CRB. In particular, programmes should be tailored to suit the current capabilities and absorptive capacity of the recipient CRB;

- Mid term and ex post reviews of technical assistance programmes can greatly improve outcomes;
- Any educational course content that forms part of a technical assistance programme should use an interactive case study approach to impart skills in investigative techniques, competition advocacy and technical economic analysis; and
- The involvement of regional entities and fora – such as ASEAN or the OECD – in the coordination of technical assistance and capability building programmes can help improve the quality or effectiveness of technical assistance even where these entities and fora are not directly involved in administration or enforcement of CPL. This is likely because they are often well placed to facilitate the identification of common areas of need and coordinate the design and delivery of technical assistance to multiple CRB within the region.

1. Technical assistance and capacity building needs of ASEAN countries

The project team did not conduct a detailed needs analysis for each ASEAN country, which is what best practice design of technical assistance and capacity building programmes requires. However, during fieldwork interviews a number of CRB identified current and future challenges. We have drawn on this information to provide a preliminary list of AMC technical assistance and capacity building needs.

Further consultation and research is needed to comprehensively define needs, determine which needs are best met via technical assistance and ascertain the form of technical assistance that best meets recipient needs. However, on the basis of the preliminary information provided by CRB, there appears to be much commonality in areas of need across sub-groups of AMCs. This suggests there may be scope for collaboration and coordination between AMCs in the design and delivery of technical assistance programmes.

For example, among the countries that have already established national CPL and CRB, common areas of technical assistance and capacity building needs include:

- training of CRB staff in the more complex and technically demanding areas of CPL including merger assessments;
- the development of guidelines and internal procedures;
- clarification of CPL objectives;
- clarifying the authority of national CRB over government business enterprises
- building CRB's reputation for independence;
- investment in outreach activities to business and consumers;
- building the capacity of the judiciary to handle competition cases;
- improving capacity of national CRB to advocate competition policy objectives across all areas of government policymaking; and
- improving coordination between national CRB and sectoral regulators;

Among the countries that appear to be in the process of establishing national CPL and CRB (i.e. Cambodia, Lao PDR and Malaysia), common areas of technical assistance and capacity building needs include:

- preparation of a detailed blueprint for the establishment of an effective national CPL and CRB;
- technical assistance to impart skills in legislative drafting;
- technical assistance to identify CRB priorities;

- technical assistance for TCC staff to prepare necessary documents to support implementation of legislation (e.g. guidelines), establish and implement CRB procedures and processes, administer and enforce CPL;
- technical assistance to enable the new CRB to advocate the benefits and communicate the scope and obligations associated with national CPL to private firms, government businesses, consumers and within government;
- building the capacity of the judiciary to handle competition cases; and
- development of a platform for coordination between national CRB and sectoral regulators.

Among the countries that have yet to decide to establish national CPL and CRB (Brunei, Myanmar and the Philippines), common areas of technical assistance and capacity building to help governments reach an informed decision include:

- detailed assessment of the net benefits likely to be conferred by a national CPL regime relative to other policy instruments that seek to promote competition and efficiency (including sectoral regulation);
- detailed assessment of the additional benefits likely to be conferred by participation in a cooperative CPL and CRB arrangement;
- advice on how national CPL can complement other economic and social policy objectives;
- advice on a 'model' CPL regime for the country concerned; and
- advice on strategies for public outreach to promote better understanding of CPL and educate public sector staff in the benefits and scope of CPL.

Notwithstanding the apparent commonality in areas of need, the literature on best practice in the design and delivery of technical assistance and capacity building programmes suggests that the considerable differences across AMCs in terms of (a) CRB absorptive capacity, (b) degree of commitment on the part of government to establishing an effective national CPL regime, (c) socioeconomic development and, (d) progress in establishing a market economy may mean that the same area of need is best addressed by different forms of technical assistance and capacity building activity.

For example, a more mature and well-resourced CRB may be able to address needs in the area of staff training through indigenous processes such as direct recruitment, procurement or on-the-job learning, whereas the same need in a developing country may be best met through technical assistance. Similarly, the form of technical assistance programme (e.g. short term advisor, long term in-country mission, residential advisor, interactive workshop, internships, study trip, financial assistance, conference or in-kind assistance) that best suits recipient country and recipient CRB absorptive capacities may vary across AMCs.

For this reason we recommend that technical assistance and capacity building programmes be tailored to address the specific characteristics of recipient countries and CRB. A one size fits all solution may not be effective.