

Competition law in Asia

A country-by-country approach has emerged

by *Suzanne Rab**

Most countries across the Asia-Pacific region already have competition law legislation and new laws are in the pipeline. The end of 2015 marks the coming into force of an economy-wide competition law in Hong Kong and the target date for the 10 member states of the Association of Southeast Asian Nations (ASEAN) to have competition law in place. Against an increasingly globalised antitrust enforcement environment, many of these newer competition laws draw inspiration from the more established regimes, notably those of the EU and the US.

The progression of competition law across Asia has created a complex regulatory environment for international businesses seeking to navigate the different systems, often with their local idiosyncrasies. There are calls for greater harmonisation and consistency in the rules and enforcement policies. Yet in a region characterised by economic, political and cultural diversity, it may be asked whether greater rationalisation is possible, or even desirable.

Common themes but no one size fits all

I have taken it as axiomatic that the Asian jurisdictions and the folk and businesses that reside there are very much like anyone else, and that any differences in nature, conduct and needs are to be ascribed to the differences in context (ie those features that make the local people and markets different). Important differentiators include culture; the relative small size of the economy; the limited number of players in some industries; the prospects for trade with other countries; and the role of the state in the economy.

To illustrate the contrasts, some of the ASEAN countries, such as Cambodia and Laos, for example, have very low standards of living compared with the more vibrant economies in Japan, Hong Kong, Singapore or South Korea.

Both India and China face a consumer revolution where addressing consumer demands requires supplying more of the right quality goods, improving services and enhancing value for money. But there are differences in size, trade policies and the pace of economic and social development. The differences go much deeper than driving on the left or the right side of the road. India is a constitutional or parliamentary democracy, with a population of 360 per square km, a literacy rate of 66% and infant mortality at 55/1,000 live births. Contrast this with China which is a communist republic, with a population of 129 per square km, a literacy rate of 93% and infant mortality at 23/1,000 live births.

However, this does not mean that competition law cannot be of benefit to economies at different stages of development. Rather, the law needs to be formulated and applied as part of a consistent policy that coheres with the relevant legal, economic and policy context.

Independent competition authority

An independent competition authority is a cornerstone of an effective competition regime. A key issue raised by policymakers relates to the allocation of functions between regulators,

government and industry. At least the following conceptual models of regulation present themselves across the region:

■ A separate competition authority and sector regulator applying competition law and sector regulation respectively. India, Indonesia, Japan, Malaysia, Singapore, South Korea, Taiwan, Thailand and Vietnam each have a single dedicated authority responsible for economy-wide competition law enforcement.

■ A consolidated regulator applying competition law and sector regulation. In Australia, the recent Harper review has been tasked with assessing the country's established competition regime, and a significant recommendation is the removal of certain regulatory functions from the Australian Competition and Consumer Commission and the National Competition Council and transferring these functions to a new regulator.

■ Separate competition and regulatory authorities applying competition law and sector regulation respectively, where the sector regulator can apply competition law in its own sector. While the new Hong Kong Competition Commission will have the power to apply the Competition Ordinance (CO) to all sectors of the economy, the Competition Commission and the Communications Authority will have concurrent jurisdiction to apply the CO to practices in the telecoms and broadcasting sector.

However, variations exist. In China, responsibility for competition law enforcement is split between agencies resulting in a regulatory smorgasbord. The Ministry of Commerce, the State Administration for Industry and Commerce and the National Development and Reform Commission are responsible for enforcing the Antimonopoly Law (AML).

A further issue relates to the nature and degree of the independence of the regulator. Functional independence from politicians and industry is only one element in ensuring that the authority can act without fear or favour. One of the issues for Cambodia's new competition law has been whether the new authority should be independent or under the control of the ministry. Laos has grappled with similar questions.

Restrictive agreements and abusing market power

The basic prohibitions of restrictive agreements and abuse of substantial market power – resembling articles 101 and 102 TFEU – form the central planks of competition law across Asia. The third plank (merger control – see further below) is not present in all regimes. While the basic legal tools are similar, there are differences in the enforcement policy and framework.

In China, for example, in addition to the stated goals of restraining monopolies and protecting fair market competition, the AML seeks to “promote the healthy development of socialist market economy”. In Indonesia, Malaysia and Thailand, the competition authority has emphasised that its role includes the protection of smaller companies from more powerful rivals.

The regimes can differ in the extent to which they afford exclusions or exemptions from the basic competition law

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prohibitions. Hong Kong's new competition law provides specific turnover-based exemptions for small and medium-sized enterprises, and envisages a procedure for individual and block exemptions. In China, there are currently no block exemptions of the type existing under EU competition law.

An area that has prompted intense debate in other competition laws relates to the relationship between competition law and intellectual property rights. In India, there is a limited exception to the prohibition of anticompetitive agreements, which allows reasonable conditions to protect any rights conferred under specific IP legislation. This is restricted to a limited set of rights granted under Indian law and does not apply to cases of abuse of dominance. China's AML contains a similar provision in article 55.

From an international perspective, many companies active in the US and in Europe have sizeable operations in Asia (for instance, Apple, BHP Billiton, BT, Disney, General Electric, Google, Intel, Microsoft and News Corporation). The Asian competition authorities have investigated competition cases in relation to companies or issues that have been or are the subject of investigation by their international competition law counterparts. Many probes are complaints-driven, which heightens the risk that cases in one jurisdiction will fuel investigations in others.

Criminalisation of cartels

Proponents of the criminalisation of competition law – and particularly the direct imposition of sanctions on individuals – argue that this is necessary to incentivise compliance and deter serious violations (for example, price-fixing, bid-rigging or market-sharing cartels). Australia, Indonesia, Japan, Malaysia, South Korea, Taiwan and Thailand have complemented their civil administrative enforcement with criminal penalties for cartels. In contrast, China, Hong Kong (when in force), India, Singapore and Vietnam deploy only civil penalties for substantive competition law violations.

On the whole, newer competition law systems have not opted for criminalisation in the early stages of implementation, focusing instead on civil fines for companies. The rationale is that it may take a more mature system that has built up a strong track record and experience in prosecuting civil cases to provide the basis for investigation and prosecution according to criminal law techniques and standards of detection and proof “beyond reasonable doubt”.

If there is confidence that the authority can stand apart from political and other influences – and there are the necessary checks and balances in the process to ensure that the rights of the defence are protected – then the ability to deploy criminal sanctions may be useful. But this will only be the case after experience in the administrative procedure has been thoroughly tested and then only after detailed consideration of the arguments and evidence on both sides.

Leniency for whistleblowers

The majority of the Asia-Pacific jurisdictions offer some form of immunity or reduced penalties in return for co-operation by the company concerned with a competition law investigation. Exceptions are Thailand and Vietnam. Indonesia has a proposal to introduce a leniency policy. Hong Kong's Competition Commission published a consultation draft of its leniency policy on 23 September.

Leniency will only be attractive to business if the net benefit to the company exceeds the real and likely penalty. The lack of decisional practice or guidance on the likely level of penalty or the potential size of the reduction for leniency can seriously undermine a country's leniency policy and with it the ability to root out and successfully prosecute cartels.

Although Indian competition law allows for leniency, there are no detailed guidelines on the circumstances in which leniency will be available. There is a lack of clarity in terms of nature and quality of evidence that is required for the applicant to qualify for leniency. There is no guidance on the extent to which the Competition Commission of India (the CCI) will permit disclosure of leniency documents to private litigants and third parties in private damages actions in India or elsewhere. Over six years into the life of the CCI's enforcement, there is no published case of a company being granted a leniency reduction.

By contrast, in a landmark decision in April 2012, Pakistan's Competition Commission granted Siemens total immunity from fines for its co-operation in a cartel investigation relating to bid-rigging in supplies to power companies. This case is reportedly the first time that the new authority has received and granted a request for leniency.

A culture against whistleblowing may also undermine the leniency regime, although guidance on leniency will reinforce the message that the authority's work is to be taken seriously and may encourage others to come forward with evidence of a cartel.

Private enforcement of competition law

The majority of Asian competition regimes permit standalone and follow-on private rights of action, whether through the general courts or (as in Indonesia) via a quasi-judicial procedure of the competition authority.

The right of private action following a breach of competition law has been curtailed under Hong Kong's forthcoming competition regime. Private actions based on infringement of the Competition Ordinance (CO) can only be brought after the Competition Tribunal has ruled that there has been a violation following an application by the Competition Commission for the imposition of a fine or an order to stop the infringing practices. By contrast, in China parties to a monopolistic agreement who have suffered loss as a result can bring damages claims in the courts. There is no requirement for there to be a prior finding of infringement by a competition agency. Unlike the position in the EU, most competition law private enforcement claims in China tend to be standalone rather than follow-on actions.

Merger control

Asian countries have adopted different models of merger control.

The mandatory premerger filing plus suspension model applies in, for example, China, India, Japan, South Korea, Taiwan and Vietnam (assuming that the jurisdictional thresholds are met).

Singapore and Hong Kong have followed the approach in Australia, New Zealand and the UK with voluntary merger control. However, there is no sector-wide merger control in Hong Kong. The CO provides for merger control limited to the telecommunications sector where transactions that have or are likely to have the effect of substantially lessening competition in Hong Kong will be prohibited. The voluntary model has its supporters and has generally worked well in the more established

jurisdictions, partly aided by the predictability afforded by a history of decisional practice and guidance.

Indonesia's system is a hybrid mandatory post-merger notification system, carrying the risk that a transaction could be unwound after completion if found to be problematic.

Malaysia is an outlier with no merger control system in force and no exception from the conduct prohibitions for concentrations. The effect of this was seen in a recent case where the Malaysia Competition Commission imposed a fine on Malaysia Airlines and AirAsia for anticompetitive activity relating to an aborted merger.

A conclusion that could be drawn from experience is that businesses want legal certainty, provided that this does not come with unnecessary costs and administrative burdens. Herein lies the challenge for new competition enforcers in Asia or, indeed, elsewhere: whether to adopt brightline mandatory merger control usually based on turnover thresholds or to leave it to firms and their lawyers to self-assess the risk.

Competition law challenges in Asia

The International Competition Network has indicated that it would like to see greater harmonisation in the substantive and procedural rules and compliance standards.

As will appear from the above discussion, there is already a surprising degree of harmonisation across the region. The basic tenets of the Asian competition laws are inspired by EU law in jurisdictions such as China, Hong Kong, India, Malaysia and Thailand. Mandatory premerger control can be seen in over 90% of the Asian jurisdictions.

That said, there are particular challenges in implementing competition law where none has gone before. Although the region is one of extreme diversity, there are some familiar themes.

The starting point is often limited awareness or acceptance of the benefits of competition law. Thus, adoption of competition law in Hong Kong faced stiff resistance largely based on arguments that there was no need to disrupt the status quo in an already strong economy. Yet a United Nations report confirmed that Hong Kong has the worst income disparity of all developed economies, suggesting that there was a role for competition law in promoting consumer welfare. In paving the way to adoption and acceptance of competition law, there will be a need for advocacy and outreach by the government and the competition authority and, potentially, amnesty, exemptions and transition periods.

Many of the smaller Asian nations are characterised by high levels of market concentration. For example, the aborted sale of the ParknShop supermarket chain by Hong Kong's Hutchison Whampoa with a market share of 30%-40% took place against an already concentrated market with the Wellcome chain occupying a similar position. With the third player Vanguard representing close to 8%, consolidation among the existing players at these levels would typically attract antitrust scrutiny were it to take place in an economy with merger control.

And the issue of market concentration is not just relevant to the question of future consolidation. Rather, a consolidated market, when coupled with other factors, tends to render more likely collusion among the few players, raising the prospect of higher prices and bad outcomes for consumers.

The implementation of new competition law often faces an accepted culture of facilitation fees, which runs counter to the goal of free and open markets. Tackling such issues requires a long-term investment in building awareness of the role of competition law and a zero tolerance of corruption in the public and private sector.

The complexities of competition law and the introduction of unfamiliar technical concepts mean that the authorities and courts need to be equipped with the necessary legal, financial and economics skills to apply the law intelligently and effectively. They must recruit and train high-calibre staff and have the financial resources to do that, putting strain on more troubled economies.

Even once there is public acceptance of the principle of competition law, building awareness and understanding is demanding of a fledgling authority. For example, in Myanmar a draft competition law was approved in July 2014 but challenges remain. A problem highlighted has been the lack of experience both in government and in the private sector, which can make competition advocacy difficult.

A further challenge is the length of time that it can take from adoption of the new law, through building up institutional capacity to final implementation. India's Competition Act 2002 did not become fully operational for almost a decade. The legal framework was challenged as unconstitutional before the country's Supreme Court. Meanwhile, the nascent CCI took its first steps with a skeleton staff and saw staged implementation of the behavioural provisions in 2009 and merger control finally in 2011.

Even when the legal basis for the law is not challenged, the process of drafting guidance and creating and cementing the authority is often measured in years rather than months. It is one of the mundane facts that whether through lack of resources, bureaucracy, inexperience or sheer inertia, it can take a lot of time to make the regime fully operational. Legal process in developed countries is not always agile, but in countries where one or more of these challenges are present, the consequent delay and lack of momentum can compromise a new competition law before it gets off the ground.

Important questions remain: how to ensure that politics does not distort the debate about free and fair competition, how to create and sustain an environment where diverse business models can thrive, and how to adapt to the realities of changing economic times where consolidation is perhaps inevitable.

Looking ahead

The end of 2015 marks an important juncture in the development of competition law across Asia. With it, the last developed economy in the region will have its competition law fully operational, and the aspiration is that the ASEAN countries will be fully compliant. Asia has shown that it is serious about enforcing competition law. Given the diversity across the region, it is understandable that a country-by-country approach has emerged. Insights from international experience can be useful in pointing out approaches that have worked well and not so well in the past, and in highlighting safer pathways that may be considered. And it should always be implemented with the particular socio-ideological, market, legal and economic context firmly in sight.