11 February 2021

The Role of Competition Policy in Strengthening the Business Environment for MSMEs in the ASEAN Region

Acknowledgements

Dr. Michael Schaper (Deputy Chairman ACCC 2008-2018) and Ms. Rachel Burgess (competition law academic and consultant), who have authored this report, would like to acknowledge the support of a number of key individuals and institutions who have assisted in the preparation of this report. In particular, thanks are extended to staff at the UN Economic and Social Commission for Asia and the Pacific, including Mr Benjamin McCarthy, Mr Marc Proksch. In addition, the authors would like to thank staff of competition agencies in the Asia-Pacific region: Fiji (Joel Abraham, Jamie Smith), Hong Kong, China (Rasul Butt, Timothy Ker), India (Dr. Sanjay Pandey), Myanmar (Han Lin Zaw) and Singapore (Eugene Chan).

Contents

Tables

Abbreviations

ACAP:	ASEAN Competition Action Plan.
ACCC:	Australian Competition and Consumer Commission.
ACCP:	ASEAN Committee on Consumer Protection.
AEC:	ASEAN Economic Community.
AEM:	ASEAN Economic Ministers.
AMS:	ASEAN Member States.
ASEAN:	Association of Southeast Asian Nations.
BCC:	Business Competition Commission (Lao).
CCBD:	Competition Commission of Brunei Darussalam.
CCC:	Cambodia Competition Commission.
CCCS:	Competition and Consumer Commission of Singapore.
CCI:	Competition Commission of India.
CCPID:	Competition, Consumer Protection and IPR Division, ASEAN Secretariat.
ECA:	United Nations Economic Commission for Africa.
ECE:	United Nations Economic Commission for Europe.
ECLAC:	United Nations Economic Commission for Latin America and the Caribbean.
ESCAP:	United Nations Economic and Social Commission for Asia and the Pacific.
ESCWA:	United Nations Economic and Social Commission for Western Asia.
FCCC:	Fijian Competition and Consumer Commission.
FMM:	Federation of Malaysian Manufacturers.
FTA:	Free trade agreement.
GVC:	Global value chain/global supply chain.
HKCC:	Hong Kong Competition Commission.
ICC:	Indonesia Competition Commission (also known as KPPU).
ICN:	International Competition Network.
IMF:	International Monetary Fund.
MmCC:	Myanmar Competition Commission.
MNC:	Multinational corporation.
MSME:	Micro-, small and medium-sized enterprise.
MyCC:	Malaysia Competition Commission.
NCC:	National Competition Commission (Vietnam).
OECD:	Organization for Economic Co-operation and Development.
OTCC:	Office of Trade Competition Commission.
PCC:	Philippine Competition Commission.
RCEP:	Regional Comprehensive Economic Partnership.
SDG:	United Nations Sustainable Development Goals.

SME:	Small- and medium-sized enterprise. Usually taken to also include micro-sized firms.
UNCTAD:	United Nations Conference on Trade and Development.
VAT:	Value-added tax.
WTO:	World Trade Organization.

Chapter 1: Executive Summary

This report provides an overview of the interaction of competition policy and law on the micro, small and medium-sized enterprise (MSME) sector in Southeast Asia. It aims to provide policymakers with an understanding of what competition policy is, explains how competition laws are framed and operate in the region, and how all of these can impact upon MSMEs in Southeast Asia. It also includes a brief analysis of COVID-19 on the competitive environment in the region, and how competition agencies have dealt with the challenges so far. The report concludes with recommendations as to how these two different areas of public policy – those relating to competition, and those relating to MSME development – can work together in future.

This paper has been prepared in light of the growing recognition that the fields of both competition policymaking and MSME policy are important to the Southeast Asian community.

Before the advent of COVID-19, there were more than 70 million MSMEs in Southeast Asia, representing 99% of all businesses in the region, and employing more than 140 million people. Collectively, MSMEs accounted for most economic activity in the region, and were a major source of innovation, entrepreneurship and trade, both within the region and with the broader global community.

The development of formal competition policies and laws are relatively new to Southeast Asia. Whilst some countries have long-established, well-recognised competition authorities, in other nations such institutional structures, policies and operating procedures are still nascent.

Competition policy and law is important to MSMEs. If entrepreneurial, dynamic economies are to flourish in Southeast Asia, then new and small business ventures need to operate in an environment that allows them to start and compete on their own merits, and which does not allow existing entrenched, larger competitors to forestall the innovations, new products and services that MSMEs often bring to the market. When genuine open market competition flourishes, both businesses and consumers benefit.

To do this, competition policymakers and agencies need to develop a solid knowledge base about small firms, how and why they operate, how competition law and policy affects them, how they interact with competition agencies, and, in turn, how agencies can best engage with the sector. This report outlines these key issues, and concludes with a number of recommendations for future action.

Chapter 2: Introduction To Competition Policy and Law

2.1 Scope and Methodology

The report is an original background paper, with a focus on ASEAN, that examines competition policy issues that can help strengthen the ability of small firms to compete domestically and globally, and help them to recover from the COVID-19 pandemic. The report is intended to serve as the basis for discussion at meetings of ASEAN government policymakers charged with improving the business environment for MSMEs.

Predominantly, desk research has been undertaken for this report, supplemented by brief interviews with selected competition agencies in the Asia-Pacific region (namely Fiji and Hong Kong – China). It was compiled during October-November 2020, and reflects the current state of knowledge at that time.

The research provides a broad survey of the ways that the COVID-19 pandemic has changed the business environment, with a particular focus on matters of competition. It outlines the competition policies and laws that are already in place in ASEAN, and the ways in which these policies affect MSMEs specifically. The paper reviews the relatively limited academic literature in this area, supplemented with actual good and best practices in the region, utilising country case studies where possible.

2.2 Competition Policy and Competition Law

Whilst the two terms may appear to be synonymous to a layperson, competition policy is in fact different to competition law. The former is the set of policies and laws adopted by a government to ensure that competition in a market is not restricted (Corones, 2014, para 1.10), whilst the latter is the specific law that prohibits certain anti-competitive behaviours and agreements. Competition policy normally encompasses a specific competition law but also includes other measures.

The ASEAN Regional Guidelines on Competition Policy 2010 (Regional Guidelines) broadly defines competition policy as:

> "a government policy that promotes or maintains the level of competition in markets, and includes governmental measures that directly affect the behaviour of enterprises and the structure of industry and markets." (ASEAN Secretariat, 2010, para 2.1.1).

The Regional Guidelines also recognise that there are two aspects to competition policy. Firstly, there is a broad set of government policies that promote competition in local and national markets. These include enhanced trade policies, elimination of restrictive trade practices, facilitating market entry and exit, reducing unnecessary government interventions and putting greater reliance on market forces. The second element is the competition law which includes legislation, regulation, and judicial decisions. Competition law commonly prohibits anti-competitive agreements, abuse of dominance, anti-competitive mergers and acquisitions and, sometimes, laws on unfair trade practices (ASEAN Secretariat, 2010). Unfair trade practices may include prohibitions on misleading or deceptive conduct, false or misleading advertising and disclosing business secrets.

Competition policy reform: Australia

During the early 1990s, Australia recognised a need for an overhaul of its competition policy. A National Competition Review identified six key areas that should be addressed for an effective Australian competition policy: anti-competitive conduct of firms; reforming regulations which unjustifiably restrict competition; reforming the structure of monopolies to facilitate competition; providing third party access to certain facilities that are essential for competition; restraining monopoly pricing behaviour and fostering 'competitive neutrality' between government and private businesses when they compete (Commonwealth of Australia 1993, p 7). Amendments to the competition law itself formed only one aspect of the recommended reforms.

Competition agencies, with the responsibility for implementation and enforcement of competition law, often have a significant input into the competition policy of a country. However, it is the government, and not the competition agency, that determines the overriding national competition policy.

Creating a competition policy: Philippines

Republic Act No. 10667 (the Philippine Competition Act) requires the establishment of a National Competition Policy (Section 2). Chapter 16 of the Philippine Development Plan 2017-2022 is dedicated to a National Competition Policy (NCP) and recognises that competition law is only one aspect of a competition policy:

> "Competition law and the corresponding mechanism to enforce it is an essential component of a national competition policy. In formulating the NCP, the other equally essential components, such as policies relating to competitive neutrality, consumer protection, government regulations that do not impede competition, and removal of structural barriers are established, and that an effective institutional mechanism to coordinate and oversee the implementation [of] these inter-related components is put in place." (Philippine Government 2017a, p 246)

Competition law itself normally comprises three prohibitions: a prohibition against anti-competitive agreements; a prohibition against abuse of dominant market position and a prohibition of anti-competitive mergers and acquisitions. The specific law is generally enforced by one or more competition agencies although there may be sectoral regulators also responsible for competition law.

To ensure that a 'level playing field' can be achieved, it is preferable for all entities conducting business in the country to be bound by competition law. For example, state owned enterprises and the government itself can potentially distort market competition and should be subject to the same rules as other businesses when operating in the marketplace.

Fijian Competition and Consumer Protection Policy Statement[1]

The Fijian Competition and Consumer Protection Policy Statement was jointly drafted by the FCCC and the (then) Ministry for Industry, Trade and Tourism and came into effect in 2020. The role of government, business, consumers and international markets all feature in the policy framework. In relation to the role of government, the Policy Statement sets out clear criteria for ensuring that government activities do not distort competition, including:

- State-owned enterprises undergoing reform should not take advantage of any change in their status or supervision to engage in conduct that is anti-competitive;
- Unless there are compelling reasons to the contrary, enterprises that are connected with the public sector may not enjoy special advantages relative to private sector enterprises;
- A level playing field should exist between government business activities and private sector enterprises;
- Government business activities that compete with private business should comply with competitive neutrality principles;
- Government business activities should not enjoy a net competitive advantage in a market simply as a result of government ownership.
- Price regulators of state-owned enterprises should be independent of those enterprises, and make decisions based on transparent criteria.

2.3 Competition Law and Policy Within ASEAN: Background

The introduction of competition laws and policies has escalated around the world in the last 20 years. In the ASEAN region, the first competition laws were introduced in 1999 in Indonesia and Thailand, with Singapore and Vietnam following in 2004. Further impetus for the introduction of competition law and policy was provided in the ASEAN Economic Community (AEC) Blueprint 2008-2015 (ASEAN 2008). The overall vision included creating a 'competitive economic region' and this included a commitment by the AMS to endeavour to introduce competition laws before the establishment of the AEC in 2015 (paragraph 41, ASEAN 2008). This was achieved by all AMS with the exception of Cambodia, whose law is expected to pass in 2021. The AEC Blueprint 2016-2025 recognised that for ASEAN to be regarded as a competitive region, its competition laws and policies have to be operational and effective (para 26, ASEAN 2016). Five strategic measures are set out providing the direction for the further development of competition law and policy in the region (para 27).

In 2007, the ASEAN Economic Ministers (AEM) endorsed the establishment of the ASEAN Experts Group on Competition (AEGC). The AEGC is a regional forum, comprising representatives of each of the AMS competition agencies or relevant ministries, that allows discussion and cooperation on competition policy and law. The work of the AEGC is supported by the Competition, Consumer Protection and IPR Division (CCPID) of the ASEAN Secretariat. The ASEAN Competition Action Plan 2015-2025 (ACAP) was adopted in 2015 to guide the work of the AEGC. Following its scheduled mid-term review, a revised ACAP and implementation plan is currently being finalised.

[1] Available at https://www.mcttt.gov.fj/wp-content/uploads/2020/05/Annex-2-FCCP-Fijian-Competition-and-Consumer-Protection-Policy-Statement-Approved-ver-2.pdf (accessed 27 January 2021)

The table below sets out the competition laws currently passed in the ASEAN region. A number of the ASEAN competition laws have undergone substantial amendments, including a restructure of the competition agency itself (Thailand and Vietnam). Other AMS are currently proposing amendments to their existing laws (e.g. Indonesia, Malaysia).

Table 1: Competition Laws in ASEAN

Jurisdiction	**Law**	**Passed/Gazetted**	**In force**
Brunei Darussalam	Competition Order 2015	January 2015	January 2020 (phased)
Cambodia	*Draft Law on Competition*	*Not applicable*	*Not applicable*
Indonesia	Law No. 5 of 1999 Concerning the Ban on Monopolistic Practices and Unfair Business Competition	March 1999	March 2000
Lao PDR	Law on Competition No.60/NA	July 2015	January 2016
Malaysia	Competition Act 2010	April 2010	January 2012
Myanmar	The Pyidaungsu Hluttaw Law No.9, 2015	February 2015	February 2017
Philippines	Republic Act No. 10667	August 2015	August 2017
Singapore	Competition Act (Chapter 50B)	2004	January 2006 (phased)
Thailand	Trade Competition Act B.E. 2560 Replacing Trade Competition Act B.E. 2542	July 2017	October 2017
Vietnam	Law on Competition (Law No.: 23/2018/QH 14) Replacing the Law. No. 27/2004/QH11	June 2018	July 2019

2.4 Competition Agencies

All ASEAN jurisdictions now have operative competition agencies, including Cambodia which does not yet have an enacted competition law. The status of the agencies varies, with some operating as statutory bodies (e.g. Malaysia, Singapore), some as independent judicial bodies (e.g. Philippines), while others are part of government (e.g. Lao PDR, Myanmar).

Table 2: Competition Agencies in ASEAN

Jurisdiction	**Competition Agency**	**Status**	**Established**
Brunei Darussalam	Competition Commission Brunei Darussalam (supported by Department of Competition and Consumer Affairs (administrative and investigative arm))	Independent	August 2017
Cambodia	Consumer Protection, Competition and Fraud Repression	Government Department (under Ministry of Commerce)	n/a
Indonesia	Indonesia Competition Commission	Independent	June 2000
Lao PDR	Business Competition Commission	Government Department (under Ministry of Industry and Commerce)	October 2018
Malaysia	Malaysia Competition Commission	Statutory Body	April 2011
Myanmar	Myanmar Competition Commission	Government Department (under Ministry of Commerce)	October 2018
Philippines	Philippine Competition Commission	Independent	February 2016
Singapore	Competition and Consumer Commission Singapore	Statutory Body	January 2005

Thailand	Office of Trade Competition Commission	Independent	October 2017
Vietnam	National Competition Commission	[Independent] (Ministry of Industry and Trade)	*Commissioners not yet appointed to new Commission*

Some of the agencies are well-resourced with financial and human capacity, especially having regard to their GDP and population, while others face significant resource constraints.

Table 3: 2019 Budget and Staff of ASEAN Competition Authorities

Jurisdiction	Budget of Competition Authority (EUR Million)	GDP in USD Million	No. of Staff Members Working on Competition	National Population (Million)
Brunei Darussalam	NA	13,469	NA	0.4
Cambodia	Commission not yet established	27089	33 (Competition department staff)	16
Indonesia	8.8*	1,119,190	355*	270
Lao PDR	NA	18,173	NA	7.2
Malaysia	2.6*	364,651	58*	31.9
Myanmar	n/a	76,085	23	54
The Philippines	7.8	376,795	192	108
Singapore	11	372,062	43	5.7
Thailand	6.2 (2020)	543,548	139 (including Commissioners)	69.6
Viet Nam	0.6*	261,921	27*	96.4

Source: Maximiano, Burgess and Meester (2018), updated January 2021 (World Bank 2019)
* 2017 data - 2019 data not available

The competition agencies in most of the ASEAN jurisdictions have a clear mandate to provide policy advice to government[2], although the position is less clearly outlined in the laws in Myanmar and Vietnam. This mandate is important in the context of understanding how competition agencies can assist in guiding future policy direction for recovery from the Covid-19 pandemic.

2.5 Policy Objectives

It is common for competition laws to include stated policy objectives and this is also the case in the ASEAN competition laws. The Regional Guidelines identify the most commonly stated objective of competition policy to be the 'promotion and the protection of the competitive process'. It recognises that "the pursuit of fair or effective competition can contribute to improvements in economic efficiency, economic growth and development and consumer welfare' (ASEAN Secretariat 2010, para 2.2.1). Many of these concepts are directly incorporated into the AMS competition laws.

[2] Section 4(1)(f) Brunei law; Article 6(1) Cambodia law; Article 35(e) Indonesia law; Articles 79(1) and 80(1) Lao law; Section 16(a) Competition Commission Act 2010; Section 12(c) Philippines law; Section 6(f) Singapore law; Section 17(11) Thai law.

The Regional Guidelines also recognise that competition policy is beneficial to developing countries. In addition to contributing to trade and investment policies, competition policy can accommodate wider economic and social objectives including the promotion and protection of small business (ASEAN Secretariat 2010, paras 2.2.2-2.2.3).

A review of the competition policy objectives of the AMS reveals consistent themes. All of the laws recognise the importance of the promotion and protection of competition, with many also referring to economic efficiency, economic growth and development and consumer welfare. Only two AMS directly reference small business. These will be discussed further in Chapter 4.

2.6 Competition Law and Economic Development

As noted, many of the competition laws of the AMS include 'economic growth and development' as a policy objective of the law, indicating that there is at least a theoretical belief that competition policy can assist in this goal. However, the position is far from clear, with a variety of different researchers taking contrasting positions. A study undertaken in 2002 concludes that the relationship between competition and economic development is "controversial both in economic theory and in relation to empirical evidence" (Singh 2002, p 7).

A more recent UNCTAD note finds that competition policy needs to be part of a wider mix of trade, economic, social and environmental policies in order to achieve sustainable and inclusive growth and development (UNCTAD, 2015). It recommends development of a sound competition policy[3] which should be achieved through inclusive engagement with stakeholders, the identification of priority sectors relevant to the economy (particularly the poor), the potential for exemptions for certain sectors such as agriculture, complementarity with other policies (e.g. environmental), and ensuring fair (as well as free) competition (e.g. unfair business practices). This latter point (unfair business practices) may be of particular importance in the context of recovery from the Covid-19 pandemic. MSMEs may be at greater risk of being exposed to unfair businesses practices (e.g. abuse of bargaining power) when trying to negotiate with strong market players that survived the various lockdowns.

2.7 Interface Between Competition and Consumer Law in ASEAN

The AEC Blueprint 2015 identifies the need for ASEAN to be a highly competitive economic region and recognises that both competition policy and consumer protection policy are required to achieve this goal. Actions to strengthen consumer protection laws and agencies across the ASEAN region are set out (paragraph 42). Building on the achievements of the 2015 AEC Blueprint, the AEC Blueprint 2025 recognises consumer protection as "an integral part of a modern, efficient, effective and fair marketplace" (paragraph 28), further linking competition and consumer policies together to achieve the desired 'highly competitive economic region'.

In 2007, the AEM established the ASEAN Committee on Consumer Protection (ACCP). Like the AEGC, the ACCP is a regional forum, comprising representatives of each of the AMS consumer protection agencies, that allows discussion and cooperation on consumer protection. The work of the ACCP is also supported by the CCPID. The ASEAN Strategic Action Plan for

[3] The Note also addresses the design of a competition law and competition law enforcement and advocacy.

Consumer Protection 2025 provides further detail on the strategic measures set out in the Blueprint. A Capacity Building Roadmap for Consumer Protection 2020-2025 has also been developed to guide the work of the ACCP.

To date, all ten AMS have consumer protection laws in operation. In many cases, the consumer protection laws and policies predate the competition laws (Nottage, Malbon, Paterson and Beaton-Wells 2019). Since the introduction of competition law, some AMS have combined the regulatory responsibility for competition and consumer law (Singapore and Vietnam), while others are considering this potential (e.g. Myanmar).

However regulation is achieved in each AMS, the interrelation between the two policy areas will require cooperation, at the very least, between the relevant agencies. In times of crisis, complaints received by consumers may well be directed to consumer agencies but may have both competition and consumer law implications (see Chapter 5).

Chapter 3: MSMEs in the ASEAN Region

3.1 Definitions and General Characteristics

What is an MSME? This is not always a simple question to answer. Small-scale businesses are often referred to by a wide number of different titles and descriptors across Southeast Asia, but despite these variations, they share a number of distinctive common characteristics that set them apart from other types of commercial and trading entities in the region.

Sometimes collectively referred to as "micro-, small- and medium-sized enterprises" (MSMEs), these businesses are also sometimes called simply "small- and medium-sized businesses" (SMEs), or "small businesses." They refer to firms that are essentially small or limited in their nature and scale of operations, and can range from the self-employed (in which case they are sometimes known as "own-account workers," "own-account businesses," or as the "self-employed") through to quite complex, sophisticated trading enterprises.

These generalised terms can tend to obscure the extensive heterogeneity within the MSME sector throughout Southeast Asia. MSMEs in the region can range in size from the purely self-employed with no staff, through to those with a substantial number of employees. Some are new start-up ventures with no prior history, whilst others may date back over decades or centuries. A wide variety of different legal structures may be used, including both incorporated and unincorporated modes. They are not confined to particular industries, and instead can be found in every sector of the economy. Some are family-based businesses, whilst many others are not.

A central defining feature of all MSMEs is that they are independent commercial activities which do not form part of a larger business; subsidiaries of larger corporations are almost always excluded from statistical counts and policy considerations, as they are effectively simply another operating arm of the parent company. Ownership is usually concentrated in a small number of persons (often only one individual), most of the risk and financing of the business venture is undertaken by the founding owners, and the enterprise is usually frequently managed on a day-to-day basis by those same founders. Their product/service range and offering is limited, they have only a few employees, and they operate in limited markets (Schaper, Volery, Weber & Gibson 2014).

How many such firms are there? This can be hard to accurately determine, since there is a wide variation in how different governments in the ASEAN community define and measure these enterprises. Nations use sometimes quite widely differing definitional criteria. Some countries employ a mix of both quantitative and qualitative features to define these enterprises, whilst others use only a small number of metrics.

Singapore (SingStat 2020b), for example, uses a simple single categorisation which regards any enterprise as an MSME if it has operating receipts less than SGD 100 million (USD 72 million) and fewer than 200 employees. There is no breakdown into subsets such as micro, small and medium-sized within this framework.

In contrast, the federal Malaysian small business agency, SME Corporation, defines a business as small if it has either sales turnover below RM50 million (USD 11.7 million) or an employee headcount of less than 200 full-time staff in the manufacturing sector. Amongst service sector firms, though, the cut-off point is an annual sales turnover of less than RM20 million (USD 4.7

million), or fewer than 75 full-time employees. Different categories apply depending on which industry segment a firm operates in, leading to a complex matrix (for a detailed descriptor of these, see Malaysia SME Corporation 2018).

Some nations, such as Myanmar and Indonesia, define smaller businesses through one or another legislative instruments. The *Small and Medium Enterprise Development Law* of Myanmar (2015) lays out a series of categories based on industry sector, employee numbers, business turnover, and capital, whereas the Indonesian *Micro, Small and Medium Enterprise Law* (No. 20 of 2008) principally uses employee headcount to define what is or is not a medium, small or micro-sized businesses. In The Philippines, the national Statistics Authority uses definitions based on employee numbers, whereas the government's own Small and Medium Enterprise Development Council (SMEDC) uses asset size as its basis for classification (Department of Trade and Industry, Republic of the Philippines 2019). In some nations, it is difficult to access a formal English-language definition from publicly-accessible sources such as official websites.

Since there is no one universal definition of an MSME used in the region, and different national agencies use different criteria to count businesses, it can be difficult to accurately determine the total number of these businesses across Southeast Asia. One of the most recent compilations of such counts is shown is shown in Table 4 below.

Table 4: National Counts of MSMEs in Southeast Asia

	Number of SMEs	Total Number of Businesses	SMEs As % of All Firms	Persons Employed By SMEs
Brunei (2017)	5,900	6,000	97.2%	66,100
Cambodia (2019)	460,000	510,000	90% +	1,200,000
Indonesia (2018)	64,194,000	64,199,600	99.9%	116,978,600
Laos (2006)	114,200	126,900	90%	Not available
Malaysia (2016)	907,100	921,000	98.5%	Not available
Myanmar (2015)	114,200	126,900	Not available	Not available
Philippines (2018)	995,745	1,000,506	99.5%	5,714,200
Singapore (2019)	271,800	273,100	99.5%	2,520,000
Thailand (2018)	3,077,800	3,084,300	99.8%	13,950,200
Vietnam (2019)	744,800	760,000	98%	Not available
Total	70,888,100	71,010,900	99.8%	140,429,100

Figures rounded to the nearest hundred. Myanmar SME count not provided, so figures are imputed as conservatively being 90% of all firms. Sources: Schaper (2020a), Brunei Darussalam Department of Statistics (2017: 6), Indonesia Ministry of Co-operatives and SMEs (2020), Lao National Chamber of Commerce & Industry (2020), Malaysia SME Corporation (2018, 2020), Myanmar Ministry of Planning and Finance (2018: 404), Philippines (2019), SingStat (2020a, 2020b), Thailand Office of Small and Medium Enterprises Promotion (2019:4-03, 4-08), Pisei (2019), Vietnam Ministry of Planning & Investment (2020).

Regardless of how these are collected, these figures show that MSMEs collectively are a major part of the economic life of every country in the region. They are a considerable generator of employment (both for their owners and staff), wealth, and products and services. They provide greater opportunities for women and minority groups to exercise economic independence. They provide a source of new ideas, innovations and dynamic competition into markets. They provide consumers with greater choices. Less obviously, but just as important, is the contribution of the MSME to broader community benefits, many of which accord with one or more of the United Nations Sustainable Development Goals (SDG). A thriving MSME sector, for example, is important in achieving three of the SDGs: SDG 1 ("End poverty in all its forms everywhere"); SDG 8 ("Promote sustained, inclusive and sustainable economic growth, full

and productive employment and decent work for all"); and SDG 10 ("Reduce inequality within and among countries").

However, one factor which Table 4 omits is the existence of a substantial cohort of informal businesses. This is an important component of the overall MSME sector in the region, as it also is in many non-OECD nations globally. These firms, which operate outside conventional legal frameworks and are typically not registered with government authorities, are usually omitted from statistical counts because they cannot be identified or found through formal channels. If these firms are included, then the total number of MSMEs is likely to be significantly higher (Schaper 2020a).

3.2 Competition-Related Issues

Some of the defining features of MSMEs referred to in section 3.1 above are also important when considering the operation of competition policy and law in the region.

At a broad level, smaller firms generally tend to operate at a comparative disadvantage relative to their larger competitors. As Table 4 indicates, they typically sell a more limited range of products or services; have historically tended to operate in geographically limited market areas; usually only account for a very small proportion of a given market; and have greater difficulty in obtaining access to established suppliers, value chains and production processes. In addition to this, the operators of these businesses (who are typically also the founding owner-managers) usually have less access to relevant legal advice, knowledge of the market, and understanding of compliance processes (Schaper & Lee 2016).

Table 5: Some Typical Competition-Related Differences Between Small and Large Firms

	SMEs	*Large Firms*
Number of business establishments	Single	Multiple
Geographical distribution	Limited	Limited or wide
Product/service range	Limited	Limited or wide
Market share	Limited	Significant
Customer base	Small	Numerous
Likelihood of business failure/exit	High	Low
Compliance cost burden	Proportionately high	Proportionately low
Knowledge of, and to access to, regulatory information	Limited; ad-hoc	Sophisticated; extensive
Knowledge of, and to access to, marketplace information	Limited; ad-hoc	Sophisticated; extensive
Ability to access established supply sources	Difficult	Easy
Level of financial resources	Small and limited	Substantial
Use of external legal and economic advisers	Limited; ad-hoc	Systematic; structured

Source: Schaper (2010)

Another notable feature is that many entities in the MSME sector do not fall easily or conveniently into a regulatory framework. Many operate as unincorporated legal entities, and so do not constitute a "corporation" as such. Numerous part-time or gig-economy operations

may be excluded from the formal definition of what constitutes a business enterprise in some competition law regimes; the same may also be the case for own-account or self-employed workers. Likewise, informal business operations have no discernible formal structure and thus are not easily identified or capable of being regulated.

Thirdly, some of the most intense competition can exist between MSMEs themselves, rather than between large corporations and MSMEs. A small number of studies in a variety of countries have identified that the most common competitor of many businesses is in fact other small or micro-businesses, rather than bigger rivals (Foer 2001; Australian Bureau of Statistics 2012). As a case in point, informal part-time business operators operating illegally from home in fields such as hairdressing and consulting can often pose a major threat to legitimate operators.

MSMEs are less likely to understand and utilise competition law than are larger enterprises. As both Ncube and Paremoer (2009) and Blackburn, Kitching & Saridakis (2015) have argued, small firm operators exist in "an ocean of law", having to comply with a myriad of many different formal regulatory issues, such as the laws of taxation, employment, corporations, contract and many other fields. Competition law is only one area and – because small firms do not typically have any inhouse legal advisers – so the owner-managers of these enterprises do not tend to have a great deal of knowledge about the subject. They are consequently less likely to utilise competition law provisions and protections that might assist them, and less likely to lodge complaints if they are the victim of anti-competitive behaviour; instead preferring to "soldier on" (Storey 2010; Australian Small Business & Family Enterprise Ombudsman 2018).

Fourth, industry associations play an important role in the regulation and behaviour of MSMEs across the region. As in many other parts of the world, there are a wide variety of business and professional groups across the region, such as local/state/national chambers of commerce, professional societies, industry-specific associations, trade groups, and industry-specific organisations. Table 6 below lists some of the peak national bodies within ASEAN nations, but this figure is only the tip of the iceberg, with many more associations operating independently of these entities. Malaysia, for example, has over a hundred known business organisations, whilst even the small economy of Brunei Darussalam has at least four different associations in existence.

In some cases, membership of a peak industry body is compulsory (this is the case with larger business in Singapore, who are required to join the Singapore Business Federation); however, in other countries (such as Malaysia and Cambodia) membership is entirely voluntary (these two different types of entities are often known as "public law" and "private law" associations). Whether associations are mandatory or not, they are generally seen as a major conduit of knowledge to individual firms; repeated studies show that businesses usually place more trust in information and advice provided to them by industry associations (along with information from their accountants and their peers) than they do in government bodies (Doner & Schneider 2000; Schaper 2020b).

Table 6: Major Peak National Industry Associations in Southeast Asia

Brunei	National Chamber of Commerce & Industry of Brunei Darussalam
Cambodia	Cambodia Chamber of Commerce (est 1995)
Indonesia	Kamar Dagang Dan Industri Indonesia (Kadin) – Indonesian Chamber of Commerce and Industry (est 1968)
Laos	Lao National Chamber of Commerce & Industry

Malaysia	National Chamber of Commerce & Industry of Malaysia (est 1962)
Myanmar	Union of Myanmar Federation of Chambers of Commerce & Industry (est 1919)
Philippines	Philippines Chamber of Commerce & Industry (est 1978)
Singapore	Singapore Business Federation (est 2002)
Thailand	Thai Chamber of Commerce and Board of Trade of Thailand (est 1955)
Vietnam	Vietnam Chamber of Commerce & Industry (est 1963)

At the public policy level, all national governments in the region today have one or more agencies or departments that exist to meet the needs of the MSME sector. These may include a dedicated small business development agency (such as Malaysia's national SME Corporation), or economic development bodies that foster both MSMEs and entrepreneurship within a broader suite of programs (such as Enterprise Singapore).

The work of most of these agencies is focused on advice, development and growth assistance, rather than regulatory compliance of specific laws. Few MSME assistance bodies enforce competition and other legal compliance. This means that most public sector knowledge and expertise of the small business sector is to be found within business advisory agencies.

Chapter 4: Competition Policy and Law in the ASEAN Region

4.1 Overview of Competition Law in ASEAN

At a macro-level, competition laws across the ASEAN region are broadly similar with prohibitions against anti-competitive agreements (including cartels), abuse of dominant position and anti-competitive mergers and acquisitions:

a) *Cartels and other anti-competitive agreements.* Cartels are considered the most serious breaches of competition laws and generally result in the most substantial penalties (fines and, in some jurisdictions, the possibility of imprisonment). Cartels are agreements where competitors in the same market agree to fix prices, share markets, rig bids or limit production or supply. Commonly other anti-competitive agreements that have the effect of distorting competition in the market (make the playing field not level) are also prohibited.

b) *Abuse of dominant position.* Businesses that hold a dominant market position must not exploit their position to the detriment of their customers or to exclude competitors from the market. All of the ASEAN competition laws contain a prohibition of this type. Proving this type of breach can be extremely difficult for competition agencies, especially less experienced ones.

c) *Anti-competitive mergers.* A merger that results in significantly less competition in the market after the merger has taken effect may be prohibited by a competition authority. The policy objective is to ensure that competition remains in the market after the merger so that choice remains for consumers.

Note that these provisions are not always universal. For example, Malaysia currently has no merger regime. In addition to the three pillars, some competition laws contain provisions that prohibit unfair trading (Lao PDR, Myanmar, Thailand, Vietnam).

On a micro level, there are inevitable differences in the ways in which the competition laws are interpreted and enforced, often due to differing legal regimes and political priorities. Some of the ASEAN member states have civil law regimes (e.g. Philippines), while others apply a common law system (e.g. Singapore, Malaysia). A civil law regime relies heavily on codified law and judgements of courts generally carry less weight. By comparison, a common law system makes decisions of the courts binding and there may be less codified law. These differences have a significant potential impact on the development of competition law in each jurisdiction and have the potential to result in divergent approaches across the region.

The Regional Guidelines, which were completed by the AEGC in 2010, set out suggested approaches for the AMS to take when drafting and implementing their own competition laws. The recommendations contained in the Guidelines have been adopted to varying degrees by the AMS, however, the overarching policy and legal objectives have broadly been adopted.

4.2 Competition and MSME Provisions in Free Trade Agreements

Trade regimes and policy also have an impact on competition, especially in geographic regions seeking to build closer common economic frameworks. In recent years, it has accordingly become more commonplace for free trade agreements (FTAs) to contain competition law provisions. Many also include chapters on small and medium enterprises.

The Regional Comprehensive Economic Partnership (RCEP) is a free trade agreement signed between the ten AMS and five free trade agreement partners – Australia, China, Japan, New Zealand and the Republic of Korea. The final agreement was signed on 15 November 2020 and contains a chapter on competition (Chapter 13), as well as a chapter on small and medium enterprises (Chapter 14).

Regional Comprehensive Economic Partnership

The objectives of the competition chapter include the promotion of competition in markets and enhancing economic efficiency and consumer welfare, through the adoption of competition laws and regional cooperation on the development and implementation of those laws. The facilitation of trade and investment is recognised as a benefit of the RCEP agreement (Article 13.1). The remaining articles include provisions on due process in enforcing competition laws, cooperation, the treatment of confidential information, technical cooperation and capacity building and consumer protection (Articles 13.3-13.7). Overarching the chapter is a recognition that each party has the sovereign right to "develop, set, administer and enforce its competition laws, regulations and policies" and the different stages of development of competition law and policy and levels of capacity (Article 13.2).

In relation to small and medium enterprises, Chapter 14 recognises the significant contribution made by MSMEs to economic growth, employment and innovation. The objective of the chapter is therefore stated to be to "seek to promote information sharing and cooperation in increasing the ability of small and medium enterprises to utilise and benefit from the opportunities created by this Agreement" (Article 14.1). Included in the information that should be publicly accessible is:

> "information on trade and investment-related laws and regulations that the Party considers relevant to small and medium enterprises" (Article 14.2(2)(b)).

The Parties agree to strengthen their cooperation and, relevant to the Covid-19 recovery, this may include:

> "…
> (b) improving small and medium enterprises' access to markets and participation in global value chains, including by promoting and facilitating partnerships among businesses;
> (c) promoting the use of electronic commerce by small and medium enterprises;
> …
> (h) sharing best practices on enhancing the capability and competitiveness of small and medium enterprises" (Article 14.3)

In addition to the RCEP agreement, ASEAN has signed FTAs or Comprehensive Partnership Agreements with Australia and New Zealand, India, Japan, the Republic of Korea, Hong Kong, China and China. In some cases, these agreements include provisions on competition and small and medium enterprises.

Competition and MSME Provisions in ASEAN Free Trade Agreements

The ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA) contains competition provisions that encourage cooperation in competition law, subject to needs and capacity constraints (Chapter 14, Articles 1-2). In addition, under Chapter 10 on electronic commerce, the parties agree to encourage cooperation in research and training that would enhance the development of electronic commerce. This could include "assisting small and medium enterprises to overcome obstacles encountered in the use of electronic commerce' (Article 9(1)).

Both the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and China and the Agreement on Comprehensive Economic Partnership among Japan and ASEAN include cooperation in relation to SMEs as a potential field for economic cooperation (Article 7 and Article 53, respectively).

4.3 Facing Competition from Foreign Firms

The free flow of goods, services, investment, capital and people within ASEAN will expose MSMEs in each of the AMS to greater competition from foreign (regional based) firms that are able to freely establish themselves in ASEAN jurisdictions of their choice. This is in addition to the potential for multinational corporations (MNCs) to enter these growing markets.

Increasing movements are highly likely, as the AEC Blueprint 2025 identifies a 'highly integrated and cohesive economy' as a key characteristics of the envisaged community. The main objective of this characteristic is:

> "… to facilitate the seamless movement of goods, services, investment, capital, and skilled labour within ASEAN in order to enhance ASEAN's trade and production networks, as well as to establish a more unified market for its firms and consumers." (paragraph 7)

New market entrants, both domestic and foreign (whether regional or international), have an important role to play in creating and sustaining a competitive environment. Not only do entrants introduce new products and services, they incentivise incumbent participants to innovate. Without the threat of new entry, existing players risk becoming gradually less efficient and/or more expensive, resulting in consumer harm. This concern has been recognised in the context of national champions who are protected to ensure that a domestic capability is retained but this protectionism may come at the expense of potentially new innovative competitors (OECD 2009).

In jurisdictions where competition policy and law is new, it is common for MSMEs to fear competition from foreign players entering the market. Traditional ways and methods of doing business may not have encouraged competition, instead relying on practices of cooperation and the co-ordinating guidance of trade associations and business associates which may now be

prohibited. The role for competition authorities in advocating the benefits of competition law and policy to MSMEs becomes critical in these circumstances[4].

Competition and competition policy can provide opportunities for MSMEs. New entry from large foreign firms may provide opportunities such as greater access to foreign markets, access to necessary inputs, and an increased range of potential business partners. Competition law can provide an avenue for redress for MSMEs that may not have otherwise existed, for example, the ability to lodge a complaint about the conduct of a large player[5]. Jurisdictions with merger control or market review regimes can also provide additional oversight of the competitive conditions in the market through merger analysis or market assessments.

Downsides also exist. As markets participants enter, there is the increased risk of MSMEs being targeted for acquisitions or mergers or simply being forced out of the market due to an inability to remain competitive. These risks may be heightened in the context of a global pandemic.

The question may become whether protectionist policies should be reinvigorated, with renewed emphasis on ensuring the survival of domestic firms. The temptation to protect domestic capability may be greater in times of crisis. Although the lockdown measures themselves may have prevented new entry from foreign firms, it may have allowed foreign firms already operational in a country to become more entrenched as smaller businesses struggle to remain open (let alone competitive) during the lockdown periods.

Despite the temptation to do so, protecting MSMEs from foreign competition may assist them in the short term but will not benefit the market in the medium to longer term. MSMEs are often in an ideal position to engage in dynamic competition as they are small (few staff members), enabling them to be agile (Schaper, *Competition Regulation, Open Markets and Small Business*, 2012). With the right government support (e.g. funding, digital skills training), MSMEs can adapt quickly to the changed market environment and offer realistic competitive alternatives. Learning how to operate in a competitive market will put MSMEs in a strong position to assist in the economic recovery. Competition authorities can assist in ensuring a competitive market exists in a number of ways, discussed in Chapter 6 below.

4.4 MSME-Specific Measures in ASEAN Competition Frameworks

The Regional Guidelines contain two provisions that deal directly with MSMEs. Recognising that competition policy contributes to trade and investment policy, paragraph 2.2.3 of the Guidelines also recognises that competition policy can accommodate other policy objectives. These are listed to include:

> "… the integration of national markets and promotion of regional integration, **the promotion or protection of small businesses**, the promotion of technological advancement, the promotion of product and process innovation, the promotion of industrial diversification, environment protection, fighting inflation, job creation, equal treatment of workers according to race and gender or the promotion of welfare of particular consumer groups." [emphasis added in bold]

[4] For a discussion on the topic of strengthening competition advocacy, see UNCTAD, *Ways and means to strengthen competition law enforcement and advocacy*, 2015 available at https://unctad.org/system/files/official-document/tdrbpconf8d5_en.pdf

[5] Raising awareness of MSMEs of this possibility is a key function of advocacy efforts of competition agencies.

In addition, the AMS may consider exempting MSMEs from competition law "in order to enhance their competitiveness in the market and to improve their market opportunities when competing against large companies/enterprises" (ASEAN Secretariat 2010, paragraph 3.5.5).

4.4.1 Policy objectives

Two of the AMS expressly recognise the promotion or protection of small business as a policy objective of their competition law. The objectives set out in Indonesia's competition law include the creation of "a conducive business climate through healthy business competition, thus securing equal business opportunity for large, middle and small-scale entrepreneurs" (Article 3(b)). Article 4 of Lao PDR's *Law on Competition* outlines the State's policy on competition. In addition to creating a free and fair market in which all parties can participate equally, the law provides:

> "The State creates conditions for and enhances the capacity of Small and Medium Enterprises (SMEs) to participate in the fair competition."

The express inclusion of MSMEs in the overarching policy objectives of the competition law should result in the competition agency and courts interpreting the law in a manner that is supportive of MSMEs (as this would be consistent with its policy objectives).

Other ASEAN jurisdictions implicitly recognise the positive impact that competition law can have on MSMEs through the policy objectives of economic growth. For example, in Malaysia, the preamble to the law states that 'the process of competition encourages efficiency, innovation and entrepreneurship" (Preamble to *Competition Act 2010*). Likewise, in Cambodia's draft law, the purposes of the law include to 'encourage new businesses' (Article 1 of the *Law on Competition*). Many of the remaining jurisdictions include the policy objective of 'economic development' (for example, Philippines, Lao PDR and Brunei Darussalam).

Even where MSMEs may not be expressly or impliedly referenced in the competition law's objectives, their position may still be taken into account where wider policy objectives are required to be considered by the competition agency. For example, when considering a merger in Vietnam, the National Competition Committee is required to assess the positive impacts of the economic concentrations, based on a number of factors including the potential for 'positive impacts on the development of small and medium-sized enterprises' (Article 32(b) *Law on Competition 2018*).

4.4.2 Exclusions

Only one AMS (Indonesia) expressly excludes MSMEs from the application of its competition law. Article 50 (h) provides an exemption for "entrepreneurs categorized as engaging in small scale business". The Indonesian Competition Commission has published a guideline (*Guideline on the exemption of small and medium enterprises (Section 50(h)*) but it is not available in English.

4.4.3 Exemptions

In some jurisdictions, different rules or thresholds are prescribed for the application of competition law to MSMEs, whether in relation to anti-competitive agreements or mergers. In

some cases, provisions are included in the laws themselves, while in others, thresholds are contained in guidelines published by the competition agency.

In Myanmar, the national Competition Commission is permitted to exempt MSMEs from competition law, if considered necessary (Section 8 *The Competition Law*)[6]. In Lao PDR, MSMEs are exempted from the requirement to submit documents to the Competition Commission in relation to a merger. Instead, the MSMEs are simply required to notify the Commission of the merger (Article 39).

Both Singapore and Malaysia have published guidelines which provide "safe harbours" (and therefore some legal certainty) for MSMEs wishing to enter into potentially anti-competitive agreements. Where the parties to the agreement are competitors, and the combined market shares of the parties is less than 20%, the Guidelines state that the agreement is unlikely to infringe competition law because it is unlikely to substantially lessen competition. Where the parties to the agreement are non-competitors, each party may have a market share of up to 25% without substantially lessening competition (CCCS 2016, paragraph 2.25; MyCC 2012, paragraph 3.4). The Singapore Guidelines then expressly state:

"In general, agreements between SMEs are unlikely to be capable of distorting competition appreciably within the section 34 prohibition. Nevertheless, CCCS will assess each case on its own facts and merits and the markets concerned."

4.5 Competition Agencies and MSMEs

Competition law agencies are responsible for the implementation and enforcement of the competition law in their jurisdiction. The priorities for each competition agency will be different, based on the particular economic circumstances in the country. Although as a percentage of the total number of businesses, the number of MSMEs in a country is always high, the focus of a competition agency, particularly newly established ones, may not be on this group. Government and public pressure may result in competition agencies focussing on larger businesses, on the assumption that the law is not really relevant to MSMEs.

Assisting competition law agencies to recognise the importance of the MSME sector in the context of competition law enforcement and implementation will be vital to the overall success of competition policy, as well as to the growth of MSMEs in a country. Some of the AMS competition agencies have taken an active role in advocating to MSME groups, enforcing the competition laws against MSMEs and working with trade associations to encourage compliance and raise awareness within this large and often disparate group.

4.5.1 Advocacy

One of the key roles of a competition agency is to advocate the benefits of competition law and policy, as well as to highlight where further change is needed. Advocacy efforts in the early years of operation of a competition agency are vital. Recognising the importance of advocacy for competition agencies in the region, the AEGC has published a Toolkit for Competition Advocacy in ASEAN (ASEAN Secretariat, 2016).

[6] To date, there are no guidelines from the MmCC which explain the circumstances in which MSMEs may be exempt

Several national competition bodies have already developed an extensive advocacy history, especially in their early days of operation. For example, the Malaysia Competition Commission (MyCC) conducted 120 advocacy sessions between April 2011 (when it was established) and November 2014 (Raj and Burgess 2016). Likewise, the Philippine Competition Commission conducted 102 advocacy events during 2016-2019 for the judiciary, legal community, government agencies and business groups (PCC 2019, PCC 2018, PCC 2017b, PCC 2016). As of April 2020, the Competition Commission of Brunei Darussalam (established in August 2017) had conducted 46 advocacy sessions for key stakeholders (CCBD, (2019-2020), p 1).

Mature agencies such as the Indonesia Competition Commission (ICC) and the Competition and Consumer Commission of Singapore (CCCS) also continue to conduct advocacy activities. In 2019, the ICC advocated to more than 2000 stakeholders, focussing on the central and regional governments and higher education (ICC, 2019, p 9). In 2018, the CCCS set up an advocacy and outreach unit to focus its advocacy efforts. Its advocacy focusses on various groups including government, business, legal practitioners, students and consumers (CCCS 2019a)

In the ASEAN region, there is a significant risk that many MSMEs are still unaware of the existence of the laws (as many have been introduced in the last 5 years) or unsure how the law applies to them, if at all.

Some competition agencies in the region have conducted surveys to assess the awareness and understanding of competition laws within their jurisdictions. The results indicate that a lot more advocacy work is required. For example, a study in Malaysia in 2014 revealed that only 27 per cent of MSMEs were aware of the competition law (Ramaiah, 2017). In Singapore, the CCCS conducts regular stakeholder perception surveys. Its most recent survey (2019) indicated that less than 30% of businesses surveyed were aware of the Competition Act. Perhaps not surprisingly, there was a sharp big firm-small firm dichotomy: whilst 50% of multinational companies were aware of the existence of the CCCS, only 13% of local enterprises were (CCCS 2019b).

Case study: Raising awareness of competition laws in ASEAN

Following early cases involving breach of competition law by MSMEs, the MyCC published articles in a mainstream newspaper (*The Star*) in 2013 and a series of articles aimed specifically at SMEs in the *Malaysia SME* magazine in 2014 (Raj and Burgess 2016). The MyCC also published a FAQ brochure for SMEs (MyCC, 2013) and, more recently, developed an online e-learning tool on competition compliance for MSMEs (MyCC undated).

In 2019, the PCC conducted a public forum for MSMEs on the PCC and the Philippine Competition Act to advocate for the cultivation of a culture of competition (PCC 2019). Additional activities have been organised by the PCC for MSMEs focussing on recovery from the Covid-19 pandemic (see Chapter 5).

4.5.2 Enforcement

The approach taken to enforcement across the ASEAN region has differed. Some jurisdictions have phased in operation of their laws (Singapore and Brunei Darussalam) which has allowed capacity building within the agencies to be focussed and gradual. Although the Philippine competition law itself was not phased in, the Philippine Competition Commission has focussed its early enforcement activities on the review of mergers - it has reviewed 204 merger transactions in the period 2016 to 2019 (PCC 2019, page 8). Malaysia, which does not have a merger regime, brought early cartel cases (many against MSMEs) while Myanmar has focussed its enforcement efforts to date on utilising its administrative powers in less serious competition cases.

Competition agencies in the ASEAN region have not shied away from enforcing their laws against MSMEs. The competition agencies in both Singapore and Malaysia brought early cases against MSMEs, many of whom had acted through their trade associations (Burgess 2016). However, the approach taken to strict enforcement against MSMEs differs.

The first case brought by the MyCC was against the Cameron Highlands Floriculturist Association. The members of the association (all MSMEs) agreed to increase the price of cut flowers by 10% and announced the price rise in the newspaper. MyCC had declared a 'soft touch' approach in its initial period of enforcement so no fine was imposed on the association or its members. However, to ensure increased awareness, the MyCC required the association and its members to change the behaviour, and publish an apology statement in a local newspaper (MyCC, 2012a). The MyCC has since enforced the competition law against other trade associations and their members (Raj and Burgess, 2016).

Although many cases against MSMEs involve anti-competitive agreements, it is worth noting that MSMEs can be dominant in their respective markets. In the first dominance case brought by the CCCS, Sistic (a MSME) was found to have abused its dominant position by entering into exclusive dealing arrangements. The CCCS imposed a penalty of S$989,000 (reduced to S$769,000 on appeal) (CCCS, 2010).

4.5.3 Trade Associations

In addition to the risk of a breach being facilitated (knowingly or innocently) by a trade association, competition agencies can utilise trade associations as an effective means of advocating the benefits of competition law to the MSME community.

The MyCC and the Federation of Malaysian Manufacturers (FMM) worked closely together to advocate the benefits of competition law to members of FMM. Activities included regular compliance training events (conducted by the MyCC for FMM members) and the publication of a joint MyCC/FMM competition law compliance checklist (Borneo Post, 2014). Other ASEAN competition agencies (Singapore, Philippines, Myanmar) also regularly engage with trade associations as a means of understanding issues faced by MSMEs and advocating the benefit of competition.

4.5.4 Overseeing Partnerships with MSMEs

The ICC has an express mandate to supervise and enforce partnerships between large enterprises and MSMEs pursuant to Law No. 20 of 2008 on Micro, Small and Medium

Enterprises. The 2019 Annual Report of the Indonesia Competition Commission refers to this regulation being in line with the priorities of Government in developing MSMEs, "especially to oversee and ensure that MSMEs have the same opportunity or bargaining position with the large business actors that become their partners" (ICC 2019, p 6).

4.6 Treatment of MSMEs in Competition Laws in Other Selected Asia-Pacific States

Four other Asia-Pacific jurisdictions with competition regimes have been selected for the purposes of comparison in this report. The following paragraphs highlight key aspects of the competition laws in these jurisdictions that impact on MSMEs. Their approach to MSMEs in the context of Covid-19 is discussed in Chapter 5.

Australia

Australia's competition law is applicable to MSMEs, without any provision for exemption or exclusion based only on the size of the business. Australia's law allows for a MSME (or a collection of MSMEs, perhaps through their trade association) to approach the ACCC for approval of agreements or conduct on the basis that there is minimal harm to competition or that any harm to competition is outweighed by the public benefit. More recently, the ACCC have approved a collective bargaining class exemption which, when available, will allow MSMEs to collectively bargain (as a group) without fear of infringing competition law.

The ACCC recognises that MSMEs comprise more than 97% of all business in Australia and treat them as a key stakeholder. The ACCC consults at least twice per year with the Small Business and Franchising Consultative Committee and publishes a *Small Business in Focus* publication (twice a year) which highlights the work of the ACCC that is relevant to MSMEs.

Fiji

Competition law in Fiji also applies to all businesses without any exemptions or exclusions based only on size. Like Australia, Fiji has a formal authorisation process which is available to MSMEs. As MSMEs do not have access to legal advice about this formal process, an informal approach to collaborations by MSMEs has been implemented by the FCCC during the Covid-19 pandemic, as a continuation of its practice in relation to MSMEs[7]. For certain provisions of the Fiji competition law, MSMEs are treated as consumers rather than as businesses, typically to protect them from predatory or harmful behaviour from larger businesses.

Although micro and small businesses have been found to have infringed competition law in Fiji, the FCCC has approached enforcement of the law from the perspective of education and awareness raising. MSMEs who have infringed competition law are required to attend a free training programme conducted by the FCCC to ensure that the business is educated on what is and is not permitted by the law. The philosophy is to ensure that micro and small businesses grow into compliant medium and larger businesses.

[7] The FCCC actually prepared draft authorisations at the beginning of the pandemic so as to be ready to respond quickly to requests from retailers, wholesalers and distributors of groceries to cooperate. In the end, these authorisations were not required as the pandemic has been relatively well contained. The FCCC continues to monitor the market and this proactive, visible approach is to be commended.

Hong Kong, China

Despite strong lobbying for MSMEs to be exempt from Hong Kong's competition law, the competition law applies to all businesses in Hong Kong, China. The Hong Kong Competition Commission (HKCC) has taken a proactive approach to engaging with its MSME community including publishing brochures targeted specifically at this group. The *Competition Ordinance and SMEs* brochure is described as explaining "the major types of anti-competitive conduct and how they are relevant to SMEs in an easy-to-understand approach with hypothetical examples and illustration" (HKCC, 2019). Likewise, the *Competition Ordinance and Trade Associations* brochure provides "practical guidance on what trade associations should and should not do to minimise the risk of contravening competition law" (HKCC, 2015a) .

In addition, the HKCC has published a *How to comply with the Competition Ordinance: Practical Compliance Tools for Small and Medium-sized Enterprises* brochure, designed to assist businesses, particularly small and medium businesses with forming a compliance strategy (HKCC, 2015b).

India

The competition law in India does not distinguish between different types of economic entities. The Act is applicable to all enterprises, and this term is defined widely (see section 2(h)). MSMEs are covered under section 2(h) of the Act. The statutory mandate of the CCI requires it to consider various socio-economic aspects mentioned in section 19(4)(k) of the Act when investigating competition breaches; generally, the CCI takes the view that MSMEs are a relevant consideration. Practically speaking, mergers between MSMEs will not be generally scrutinised under the Act as the thresholds will not be met.

The CCI has also treated MSMEs as a significant constituency when formulating its competition advocacy initiatives. As regards competition enforcement actions against MSMEs, Section 27 of the Act gives the CCI a discretionary mandate. The CCI has taken into account the ability of MSMEs to pay a fine when determining enforcement actions. This is discussed further in Chapter 5.

Chapter 5: COVID-19 and Competition Policy

5.1 How Has COVID-19 Changed The Business Environment for MSMEs?

Despite the fact that the pandemic has been operative since the early months of 2020, it is still difficult to objectively gauge the impact of COVID-19 on the MSME sector, both at an individual country level, as well as on a regional basis.

Some rough estimates have emerged as to the impact on the sector. For example, in July 2020 the Philippines' Trade and Industry Secretary, Ramon M. Lopez, stated that Department of Trade and Industry surveys showed that around a quarter of all Filipino firms had ceased trading (Manila Bulletin 2020). In November, Malaysia's Entrepreneurship Development and Co-operation Ministry (Medac) was quoted as claiming that more than 32,000 small firms had been forced to stop trading in the six month period between March and September (Adam 2020). Broader statistics, however, appear to be quite limited.

Despite this, commentators have observed some evident trends that are emerging in the business environment.

Moving online has become a principal response by most businesses. Restrictions on movement, coupled with limited capacity to engage in face-to-face transactions and traditional sales methods, have seen many businesses use digital tools. For some businesses, this is a first foray into online trading; for others, it has seen the enhancement or acceleration of previous digital operations. Firms are using apps, social media tools, websites and email (or a combination of the above) to promote themselves, stay connected with customers, and sell products.

Government support has also been made available to businesses through a number of mechanisms. Assistance has included direct cash grants in some cases, tax deferrals and rebates, the provision of employment assistance, and loans, amongst other tools.

Table 7 Financial Assistance to MSMEs in Response to Covid-19 in ASEAN Countries

Country	Capital Buffer Safeguards	Deferral of Debt Repayments	Relaxation of Lending Conditions	New Lending	Credit Guarantees	Regulatory Forbearance
Brunei Darussalam	-	Yes	-	-	-	-
Cambodia	Yes	Yes	-	Yes	-	Yes
Indonesia	Yes	Yes	Yes	Yes	-	Yes
Lao PDR	-	Yes	-	Yes	-	Yes
Malaysia	Yes	Yes	Yes	Yes	Yes	Yes
Myanmar	-	-	-	Yes	-	-
Philippines	Yes	Yes	Yes	-	-	-
Singapore	-	Yes	-	-	-	-
Thailand	Yes	Yes	Yes	Yes	-	Yes
Vietnam	Yes	Yes	Yes	Yes	-	-

Source: Extracted from *Table 3.1 Financial Assistance to Micro, Small, and Medium-Sized Enterprises in Response to Covid-19 in Select Asian Countries*, Susantono 2020

Each of these poses both opportunities and potential threats to MSMEs from a competition perspective. Online trade, for example, can give businesses access to new markets, and allow digitally-nimble smaller firms to present themselves online as counterparts to larger traders. At

the same time, the existing market power of digital platform providers, search engines and other virtual businesses has reinforced their market dominance. In some regions, businesses have limited access to reliable wifi and internet access, which impedes their ability to operate online.

Government assistance packages can be useful in many circumstances – for example, tax deferrals and other financial support measures can help businesses weather lockdowns and loss of income. At the same time, some forms of support (such as tax deferrals) tend to bring more benefits to larger firms (who are more likely to report taxable profits) than smaller ones.

Finally, industry associations have come to the fore as a primary tool in the process of government communication with, and assistance delivery to, business. Many nations have begun to consult with various business and professional organisations as they have developed policy responses to Covid-19, and in the disbursement of funding, advice and other support to individual firms.

5.2 Policy Responses: ASEAN

At a regional level, a number of policy statements were made by the AEM. An early statement on Strengthening ASEAN's Economic Resilience in Response to the Outbreak of Covid-19, confirmed a resolution at the regional level to:

> "leverage on technologies and digital trade to allow businesses, especially the micro, small and medium enterprises (MSMEs) to continue operations amidst the COVID-19 outbreak" (AEM 2020)

Subsequently, in the Declaration of the Special ASEAN Summit on Coronavirus Disease 2019 (COVID-19) (ASEAN 2020), the AMS resolved to task ministers and officials to implement this joint statement, including implementing:

> "appropriate measures to boost confidence and improve stability of the regional economy, including through policy stimulus, assist people and businesses suffering from the impact of COVID-19, especially the micro, small and medium enterprises (MSMEs) and vulnerable groups".

5.3 Competition Policy Responses

Common competition law issues have arisen around the world during the Covid-19 pandemic. The responses to those issues from competition agencies has varied – from a relaxation of rules regarding collaboration to ensure continuity of supply (Singapore) and fast-tracked applications for interim authorisation of collaborative conduct (Australia), to warnings regarding price gouging (Thailand, Fiji), price regulation (Malaysia) and price caps (Lao PDR, Malaysia, Philippines, Thailand, India (Ministry of Consumer Affairs, 2020) and relaxation of merger notification requirements (Philippines).

As noted, some competition authorities in the Asia-Pacific region have joint regulatory responsibility for competition and consumer policy, and as such have addressed several issues with a focus on consumer benefit or detriment. In those countries where this is not the case, competition agencies have nevertheless been working closing with consumer protection agencies to address Covid-19 issues.

5.3.1 Competition Policy Responses: Asia-Pacific

Regardless of the particular policy responses, the overwhelming message from the competition agencies has been that competition law and policy remains as, if not more, important in times of economic hardship and is one of the keys to post-Covid economic recovery. The AEGC, in its Joint Statement, confirmed:

> "Competition law continues to play a fundamental role in the economy. Fair competition in an economy will enhance economic efficiency, stimulate innovation and economic growth and increase consumer welfare. This will greatly contribute to the region's efforts in overcoming the pandemic's adverse impact." (AEGC, 2020).

The joint statement acknowledges the steps taken by the AMS competition agencies to work with governments to keep a level playing field and avoid market distortions; calls on businesses to continue to comply with competition law, including approaching competition agencies for guidance where required; and notes a continued commitment to cooperation between the competition agencies in the region. Specific mention is made of exploitative conduct that would amount to an abuse of dominant position (e.g. price gouging). The AEGC commits to take action, through the national competition authorities, against businesses engaging in such conduct (AEGC, 2020).

Some of the AMS have made similar express statements. Competition has been expressed by the PCC as being 'essential in attaining economic recovery' (Aquende, 2020). In cases where competition agencies have published guidance that supports collaborations, a warning is still given to businesses to not act beyond the scope of what is needed to deal with the pandemic situations. For example, the CCCS cautions businesses against:

> "taking advantage of the COVID-19 pandemic as a cover to engage in anti-competitive activities that do not generate net economic benefit. CCCS retains the discretion to commence investigations in such cases". (CCCS 2020)

Likewise, competition agencies in other parts of the Asia-Pacific region have issued statements on the application of competition law during Covid-19, either formally or through speeches.

Case study: India, Fiji and Hong Kong

As one of the BRICS countries, India is party to the *Statement of the BRICS Competition Authorities on COVID-19*. The statement expressly recognises "the integral role of competition policy and competition enforcement in protecting the interests of consumers and supporting businesses during the COVID-19 pandemic and optimally overcoming the consequences of the post COVID-19 pandemic economic crises". Of relevance to this paper, the competition agencies agree to exchange "experience on the elaboration of competition measures during and after Covid-19 aimed at resuming the economic sectors".

Fiji has published a Guide for Business entitled *Business Collaboration in the Covid-19 Pandemic* (FCCC 2020b) which sets out the approach the FCCC will take to assessing collaborations during the pandemic. In the Guide, the FCCC recognise that collaboration may be beneficial to consumers but that businesses may be reluctant to collaborate if they fear breaching competition law. The FCCC notes that the guidance may need to be updated

during the pandemic and will be withdrawn when it is no longer needed. The continued enforcement of the competition law is made clear:

> "The FCCC will continue to enforce the FCCC Act robustly and any attempt to take advantage of the current pandemic to profiteer, either by collusive conduct or the abuse of a dominant position will be met with the full force of the law. While cooperation aimed solely at ensuring adequate supplies of goods reach consumers is to be encouraged, any attempts to exploit the pandemic for private gain remain unacceptable and will not be tolerated by the FCCC."

The Hong Kong Competition Commission published a *Statement by the Competition Commission regarding the Covid-19 outbreak* which reinforces the continued application of the Hong Kong Ordinance but recognises 'that there could be a need for additional cooperation between businesses in certain industries on a temporary basis, particularly to maintain the supply of essential goods and services to consumers". The HKCC goes on to warn businesses that it will remain vigilant in protecting consumers and warns against using the outbreak to justify collusion or anti-competitive conduct.

To assist businesses, the Statement references statements made in the *Guideline on the First Conduct Rule* which may be applicable in the current climate and welcomes informal engagement with the Commission to discuss proposed temporary cooperative measures (HKCC 2020).

Some agencies have directed some of their policy responses to MSMEs (e.g Philippines and Fiji) while others remained focussed on the enforcement of key competition law provisions (cartels and abuse of dominance). In less experienced jurisdictions, this may be because of a lack of understanding as to how competition policy can assist MSMEs, or simply because of a lack of resources.

Case study: Competition policy in the Philippines amended during Covid-19

The Philippine government passed legislation during the pandemic (Bayanihan II) which withdrew the PCC's mandate to review mergers and acquisitions with a transaction value of less than P50billion for a period of 2 years. This policy change appears to be intended to facilitate speedy business responses to the economic effects of the pandemic. Such an approach may ultimately prove harmful to competition in the market post-recovery as it may result in the creation of a small number of dominant market players.

Other measures contained in the Bayanihan II include "enforcement of protection measures against hoarding, profiteering, price manipulation, cartels, monopolies or other combinations in restraint of trade" and "acceleration of online commerce, including the digitalisation of MSMEs' (PCC, 2020). In response to these other measures, the PCC has confirmed that it is "intensifying enforcement activities to scan the market for anti-competitive agreements and abusive practices that harm the Filipino people" and "will work even harder to ensure that consumer welfare and competition are safeguarded especially at a time when consumers and small businesses are more vulnerable to unscrupulous business practices" (PCC 2020).

5.3.2 Competition Policy Responses: International Competition Bodies

UNCTAD, the OECD and the ICN have all issued statements regarding the continued application of competition law and competition policy during the Covid-19 pandemic.

UNCTAD issued nine recommendations for governments aimed at protecting consumers, especially those most vulnerable. Of most relevance to this report, UNCTAD highlighted the need for coordination between government agencies (particularly health, customs, consumer protection and competition agencies), undertaking enforcement action against excessive price increases or hoarding of goods, and misleading and false claims; and cooperation with consumer protection agencies (UNCTAD, 2020).

The OECD published a policy paper *OECD Competition Policy Responses to Covid-19* which set out recommendations for both governments and competition agencies on state interventions and competition policy, and considerations for the enforcement of competition law in the short and medium terms (OECD, 2020).

The ICN Steering Group Statement: Competition during and after the COVID-19 Pandemic notes that "maintaining competition in the long term is critical to benefit consumers, the functioning of markets, and our economies". It also notes that the promotion and protection of competition will be vital to managing the crisis and creating the best environment for recovery, noting this is of particular importance to consumers, new and small businesses (ICN, 2020).

5.4 Competition Issues Arising From Covid-19

Common competition issues have arisen around the world from the Covid-19 pandemic including price gouging, the risk of collaborations and crisis cartels, the risk of an increased number of failing firm mergers, increased risk of market power becoming more concentrated and a distortion of the level playing field arising from government support measures.

5.4.1 Price Gouging

Price gouging may be treated as a competition issue where the competition law prohibits excessive pricing or gives the competition agency the mandate to monitor prices. Concerns regarding price gouging arose in the early days of the pandemic as consumers sought access to essential health and food items in the face of supply shortages.

Some of the AMS competition agencies have the mandate to enforce their competition laws in relation to excessive prices. In the Philippines, the *Competition Act* expressly prohibits excessively high and excessively low prices (section 15) (De Vera and Burgess 2018). In Malaysia, guidelines published by the MyCC confirm that excessive prices are prohibited by their competition legislation, subject to price control regulations (MyCC, 2012b).

Price monitoring powers also exist in a number of the AMS and have been used during the pandemic. For example, the Malaysian *Price Control and Anti-Profiteering Act 2011* and *Price Control Act 1961* regulate prices of certain goods during periods of high demand and this regulation has been able to operate successfully during Covid-19 (Melbourne Law School, 2020). This has largely removed the need for the MyCC to become involved in price gouging issues. In Thailand, the OTCC warned food delivery apps of the risk of prosecution for overcharging during the Covid-19 pandemic (CPI 2020). In Fiji, the FCCC has a price

monitoring function pursuant to the Fijian Competition and Consumer Act 2010 and this power has been utilised during pandemic lockdowns (FCCC, 2020). In fact, the FCCC has been particularly concerned with opportunistic price-gouging behaviours as one of the two Covid-specific sources of consumer harm (the other being misleading claims about Covid-benefits of products)[8]. The FCCC has also worked to ensure that tax and duty reductions introduced in the 2020 government budget have been passed to consumers.

5.4.2 Collaborations and the Risk of Crisis Cartels

The response to the supply shortages for critical medical and food supplies, especially during the initial weeks of the pandemic, gave rise to the risk of anti-competitive collaborations between parties that would otherwise compete. The pro-competitive benefits of these collaborations are, perhaps, obvious, with consumer needs able to be better met by cooperation which ensured continuity of supply. However, the collaborations may infringe competition law if approval from the competition agencies is not given.

Recognising the time critical nature of the responses required, the CCCS issued a *Guidance Note on Collaborations between Competitors in Response to the Covid-19 Pandemic* in which the CCCS states that it 'will generally not investigate' collaborations that meet the criteria set out in the Guidance Note. In particular, the collaborations must relate to the supply of essential goods or services in Singapore, be limited in time and scope, and not include any cartel provisions (price fixing, market sharing, limiting production and supply or bid rigging). Acceptable types of collaborations that may improve or sustain supply of essential goods or services are listed as including joint production, joint distribution & marketing, joint purchasing, and information sharing (CCCS, 2020).

No other AMS have issued guidance of this nature, instead relying on the general statement of the AEGC. Initial inquiries suggest that newer competition regimes have not been approached to approve collaborations of this nature. The PCC confirmed that it has not been approached for approval of collaborations during the pandemic even though the PCC does have a forbearance power which could be used to provide 'exemption' (University of the Philippines, 2020). Likewise, the competition agencies in Brunei Darussalam, Myanmar and Vietnam informally advised that they had not been approached.

From a competition policy perspective, the medium to longer term effects of collaborations will need to be considered. The time limit imposed under the Singapore Guidelines is presumably directed to addressing this potential issue. One of the challenges with a relaxation of competition law and policy, even for limited periods of time, is ensuring that competition can resume after the collaboration period expires. This was recognised by Rod Sims, Chairman of the ACCC in a speech given around the outbreak of the Covid-19 pandemic. Recognising the need for coordination to respond to the pandemic, he also noted:

> "It is important that these short-term measures do not give rise to long-term structural damage to competition, market concentration or long-term arrangements that make it more difficult for businesses to enter and compete into the future" (ACCC, 2020).

Advocacy efforts of the competition authorities during the pandemic can assist to reinforce this message.

[8] As advised by the FCCC

5.4.3 Increased Merger Filings Arising from Failing Firms

Some of the AMS competition laws expressly recognise a failing firm defence, for example, Singapore and the Philippines. Although there is the potential for increased merger filings arising from businesses that are not financially able to survive the pandemic, the anecdotal evidence to date suggests this is not yet the case[9]. It may be too early to tell, as in many jurisdictions government funding is still ensuring liquidity. The true measure of pandemic-driven mergers is unlikely to be known until after these subsidies come to an end.

The Indian *Competition Act* (2002) also provides for consideration of a possibility of failing firm by the competition authority under Section 20(4)(k) of the Act while assessing appreciable adverse effect on competition as a result of a combination.

5.4.4 Increased Market Power Arising from Covid-19 Consequences

An increase in businesses leaving the market is likely to lead to increased market power being held by those that remain. With increased market power, comes the increased risk of misuse of market power. The ability of competition agencies to address increased market power will be important for economic recovery. A mix of competition and consumer policy tools may be needed.

5.2.5 Distortion of the 'Level Playing Field'

There is a risk that funding provided to support businesses during the Covid-19 pandemic could distort the level playing field if not applied in a transparent, objective and non-discriminatory manner. This area will require close monitoring by competition authorities in the region, as well as close liaison with the relevant government departments.

[9] Based on discussions with Fiji and India.

Chapter 6: Recommendations

There are a number of potential areas in which Southeast Asian nations can co-operate to ensure that competition laws and policies assist, or at least provide a level playing field to, MSMEs.[10] This is especially important in light of the COVID-19 pandemic.

Some of these steps can most effectively be actioned by relevant national competition agencies (recommendations 6.1, 6.2 and 6.3), whilst others are more applicable to the work of small business development agencies and similar economic development bodies (items 6.4 and 6.5). Finally, there are also some areas in which both competition authorities and MSME ministries can work together (recommendations 6.6, 6.7 and 6.8).

6.1 Raising Awareness of Competition Policy and Law for MSMEs

The single most important recommendation is an ongoing need by competition authorities to raise awareness within the MSME sector about how competition law and regulation affects them. Small firms need to understand when laws do or do not apply to them, the benefits of competition policy for MSMEs, and how they can actively utilise these laws for their benefit. This is a challenge in all countries, as knowledge levels are often low and there is a constant stream of new business entrants into the marketplace. It may also be necessary for competition agencies to undertake some internal capacity building to educate their own staff on this issue, as many regulators have only a limited understanding of the MSME sector.

6.2 Establishing Dedicated MSME Consultative Bodies in Competition Agencies

An ongoing way in which competition agencies can familiarise themselves with the needs and concerns of the MSME sector is to create a standing small business consultative committee. As was noted earlier in the report, some national competition agencies already have created MSME-specific consultation mechanisms. Such bodies exist in several regulators already, such as Australia. These committees are drawn from the ranks of individual entrepreneurs, industry bodies/associations, and research institutions specialising in MSME issues. They can provide agencies with the external MSME perspective, suggest new ideas and issues for agencies to consider, and can also partner with agencies to promote education and empowerment campaigns within the MSME community.

6.3 Appoint Competition Commissioners with an MSME Background

Most competition agencies globally, and in Southeast Asia, are governed by a set of commissioners or a similar board. This group of individuals is ultimately responsible for the overall management of the regulator, the overall strategic direction of the agency, and major decisions regarding both education and enforcement amongst the business community. Yet in many cases these roles are drawn from large corporations, the legal community, government and academia; few MSME representatives are included in their ranks.

It may be appropriate to mandate that at least one of the commissioners in each such national agency have experience in, and knowledge of, the MSME sector. This is already the case in one neighbouring jurisdiction – the Australian Competition and Consumer Commission is

[10] During discussions with the authors of this report, a number of competition agencies in neighbouring regions also expressed an interest in participating in any such events that ASEAN member states may convene.

required under its *Competition and Consumer Act* to have at least one deputy chair with this background.

6.4 Standardised Collection of MSME Data

Current understanding of the MSME sector in the region is constrained by the widely diverse calibre of business data collected by countries. Measuring the true size of the MSME sector is made difficult because there are no standard definitions across the region, and it may now be time for governments to consider working through ASEAN and other multilateral forums to adopt a standardised set of MSME definitions and reporting frameworks.

Other regional groupings have already moved to a common definition of small firms. Perhaps the most successful has been that of the European Union (European Union 2015), which since 2005 has used the following definition: *"Micro, small and medium-sized enterprises (SMEs) are made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million."*

Whilst the same employee count and financial definition may not be appropriate for Southeast Asia, the concept is. A common definition is allowing countries in the EU to clearly enumerate the total number of enterprises within each jurisdiction, to accurately gauge changes in business demographics over time, and to foster research into the sector using commonly agreed-to definitions of the business entities under examination. Now may be the time for ASEAN to adopt a similar approach.

6.5 Annual Publications of MSME Data in Each Country

Standardised data collection can also be assisted by effective dissemination in easily-accessible formats that are frequently updated. At present, only two countries in the region consistently publish English-language compendia of key information about the MSME sector. Brunei Darussalam's *Annual Census of Enterprises* and Thailand's *White Paper on SMEs* both provide counts of firms by size, measurements of their employment contribution, and other basic business demography. This data gives readers an easy to understand overview of the MSME sector, and is invaluable in helping policymakers and regulators to better understand the sector. Other countries in the region should be encouraged to emulate this example. Wherever possible, it would be beneficial if the data presented in each country report was similar.

6.6 Joint Forums Between Competition Agencies and MSME Support Agencies

There are currently no standing or regular informal forums in which national MSME agencies meet with competition regulators to discuss developments in each of their areas of portfolio responsibility, exchange ideas, and evaluate the impact of competition frameworks on the MSME sector. Such a forum will help both parties better understand each other. It can also encourage the development of a greater in-depth knowledge of the MSME sector, and assist competition agencies in enhancing their engagement with small firms.

6.7 Regional Dialogue With Industry Associations

It may also be appropriate for competition authorities and MSME agencies across ASEAN to jointly undertake more regional dialogue with key industry associations, such as peak national business bodies. Whilst a number of competition agencies engage with business chambers and organisations within their own national jurisdictions, a wider regional focus may now be appropriate. Many businesses in the region trade actively across borders, particularly with the establishment of the AEC in 2015. To do this, national business associations must also be bought into dialogue with their regional counterparts, regional MSME regulators, and regional MSME policy agencies.

6.8 Further Research

There are still many aspects of the interaction between MSMEs and competition frameworks that are poorly understood. For example, what are the perceptions of MSME owner-managers towards competition law and policy? What are the barriers and triggers towards greater MSME compliance with competition law? How extensive is the actual level of anti-competitive behaviour within the MSME sector? These and many other questions still remain to be answered. There is little published academic and refereed research on such topics, with only a very small number of refereed articles and books published on this phenomenon to date (Schaper and Lee 2016). One way to help address this is to encourage more research into this poorly-understood sector, through the provision of greater research funding, the creation of dedicated university research chairs into this phenomenon, greater engagement with researchers, and more dissemination of such findings by competition agencies and MSME development agencies.

References

Adam, A. (2020) "Ministry: Over 30,000 SMEs Have Shutdown Since Start of MCO," *Malay Mail*, 10 November [online] https://www.malaymail.com/news/malaysia/2020/11/10/ministry-over-30000-smes-have-shutdown-since-start-of-mco/1921094 (accessed 17 November 2020).

Aquende, E.B. (2020). Balancing competition law and the preference for Filipino businesses. [online] https://www.phcc.gov.ph/column38-bm-ceba-balance-complaw-filipino-businesses/ (accessed 29 January 2021).

ASEAN (2008) *ASEAN Economic Community Blueprint 2008-2015*. Jakarta: ASEAN Secretariat.

ASEAN (2016) *ASEAN Economic Community Blueprint 2016-2025*. Jakarta: ASEAN Secretariat.

ASEAN (2020) *Declaration of the Special ASEAN Summit on Coronavirus Disease 2019 (COVID-19)* [online] https://asean.org/storage/2020/04/FINAL-Declaration-of-the-Special-ASEAN-Summit-on-COVID-19.pdf (accessed 28 November 2020)

ASEAN Economic Ministers (2020) Strengthening ASEAN's Economic Resilience in Response to the Outbreak of the Coronavirus Disease (Covid-19), [online] https://asean.org/storage/2020/03/AEMR-26-Statement-on-COVID-19-FINAL-10.03.2020.docx.pdf (accessed 28 November 2020)

ASEAN Experts Group on Competition (2020). *Joint Statement by the ASEAN Experts Group on Competition in Response to the Coronavirus Disease (Covid-19) Pandemic*, [online] https://asean-competition.org/file/Press%20Release/AEGC%20Joint%20Statement%20in%20Response%20to%20COVID-19%20-%209June20%20FINAL.PDF (accessed 1 February 2021)

ASEAN Secretariat (2010) *ASEAN Regional Guidelines on Competition Policy*. Jakarta: ASEAN Secretariat.

ASEAN Secretariat (2016) *Toolkit for Competition Advocacy in ASEAN*. Jakarta: ASEAN Secretariat.

Australian Bureau of Statistics (2012) *Selected Characteristics of Australian Business 2010-11*, cat. no. 8167.0, Canberra: ABS.

Australian Competition and Consumer Commission (2020) *Media Release - Competition will be key to driving economic recovery*. Canberra: ACCC

Australian Small Business & Family Enterprise Ombudsman (2018) *Access To Justice: Where Do Small Businesses Go?* Canberra: ASBFEO.

Blackburn, R.; Kitching, J. & Saridakis, G. (2015) *The Legal Needs of Small Businesses: An Analysis of Small Businesses' Experience of Legal Problems, Capacity and Attitudes*,

London: Small Business Research Centre, Kingston University for the UK Legal Services Board.

Borneo Post (2014) *MyCC and FMM launch competition compliance and checklist* [online] https://www.fmm.org.my/images/articles/FMM%20In%20The%20News/2014/Borneo%20Post%20-%20Nov%2027,%202014%20-%20MyCC%20and%20FMM%20launch%20competition%20law%20compliance%20and%20checklist.pdf (accessed 28 November 2020)

BRICS countries, *Statement of the BRICS Competition Authorities on COVID-19* [online] https://brics-russia2020.ru/images/53/22/532294.pdf (accessed 29 January 2021)

Brunei Darussalam Department of Statistics (2017) *Report of Summary Findings - Annual Census of Enterprises 2017*, Brunei Darussalam: Ministry of Finance and Economy http://www.deps.gov.bn/DEPD%20Documents%20Library/DOS/Annual%20Census%20Enterprise_ACE/ACE_2017.pdf

Burgess, R. (2016) "Trade Associations: Competition Law Advocates or Offenders?" in Schaper, M.T. and Lee, C. (eds) *Competition Law, Regulation and SMEs in the Asia-Pacific: Understanding the Small Business Perspective*, Singapore: ISEAS – Yusof Ishak Institute.

Commonwealth of Australia (1993) *National Competition Policy*. Canberra: Australian Government Publishing Service.

Competition Commission of Brunei Darussalam, (2019-2020) *Annual Report 1 January 2019 -30 April 2020*. Bandar Seri Begawan: Suruhanjaya Persaingan Brunei Darussalam.

Competition and Consumer Commission of Singapore (2020) *Guidance Note on Collaborations between Competitors in Response to the Covid-19 Pandemic.* Singapore: CCCS

Competition and Consumer Commission of Singapore (2019a) *Annual Report 2019*. Singapore: CCCS

Competition and Consumer Commission of Singapore (2019b) *CCCS Stakeholder Perception Survey 2019*; available at https://www.cccs.gov.sg/resources/publications/cccs-stakeholder-perception-survey/cccs-stakeholder-perception-survey-results-2019 (accessed 29 November 2020)

Competition and Consumer Commission of Singapore (2016) *Guidelines on Section 34 Prohibition*. Singapore: CCCS

Competition and Consumer Commission of Singapore (2010) *Abuse of Dominant Position by Sistic.com Pte Ltd CCS/600/008/07*. Singapore: CCCS
Competition Policy International (2020). *Thailand Warns Food Delivery Apps of Overcharging During Covid-19* [online] https://www.competitionpolicyinternational.com/thailand-warns-food-delivery-apps-of-overcharging-during-covid-19/

Corones, S. (2014) *Competition law in Australia* (7th edition). Sydney: Thomson Reuters

De Vera, G. and Burgess, R. (2018) "The Philippine Competition Act and the Small Business Sector Framework for Development", Vol.91 *Philippine Law Journal* 566.

Department of Trade and Industry, Republic of the Philippines (2019) *2019 Philippines MSME Statistics in Brief* [online] https://www.dti.gov.ph/resources/msme-statistics/ (accessed 20 November 2020).

Doner, R.F. & Schneider, B.R. (2000) "Business Associations and Economic Development: Why Some Associations Contribute More Than Others" *Business and Politics*, Vol.2 No.3, pp.261-288.

European Union (2015) *User Guide to The SME Definition*, Luxembourg: Publications Office of the European Union.

Fiji Competition and Consumer Commission (2020a). *Press Release - Traders Warned Not to Raise Prices During Coronavirus Period* [online] https://fccc.gov.fj/wp-content/uploads/2020/03/PR-Traders-Warned-Not-to-Raise-Prices-During-Coronavirus-Period-1.pdf (accessed 28 November 2020)

Fiji Competition and Consumer Commission (2020b). *Business Collaboration in the Covid-19 Pandemic*. Suva: FCCC

Foer, A.A. (2001) "Small Business and Antitrust" *Small Business Economics* Vol.16 No.1 (February), pp.3-20.

Hong Kong Competition Commission (2020) *Statement by the Competition Commission regarding the Covid-19 outbreak* [online] https://www.compcomm.hk/en/about/public_notices/files/20200327_Statement_by_CC_regarding_the_COVID19_outbreak_Eng.pdf (accessed 29 November 2020)

Hong Kong Competition Commission (2019) *The Competition Ordinance and SMEs*. Hong Kong: HKCC

Hong Kong Competition Commission (2015a) *How to comply with the Competition Ordinance: Practical Compliance Tools for Small and Medium-sized Enterprises*. Hong Kong: HKCC

Hong Kong Competition Commission (2015b) *The Competition Ordinance and Trade Associations*. Hong Kong: HKCC

Indonesia Competition Commission (2019) *Annual Report 2019*. Jakarta: ICC

Indonesia Ministry of Co-operatives and SMEs (2020) *Development of Micro, Small, Medium (UMKM) and Big Business (UB) Business Data Development 2017 – 2018* [online] http://www.depkop.go.id/uploads/laporan/1580223129_PERKEMBANGAN DATA (accessed 18 November 2020).

International Competition Network (2020) *ICN Steering Group Statement: Competition during and after the COVID-19*. [online]

https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/04/SG-Covid19Statement-April2020.pdf (accessed 28 November 2020)

Lao National Chamber of Commerce & Industry (2020) *SMEs in Laos* [online] https://lncci.la/smes/ (accessed 16 November 2020).

Manila Bulletin (2020) *Closure of 26% of PH Businesses Alarms DTI* https://mb.com.ph/2020/07/16/closure-of-26-of-ph-businesses-alarms-dti/ (accessed 28 June 2020).

Malaysia Competition Commission (2012a) *Guidelines on Chapter 1 Agreements*. Kuala Lumpur: MyCC

Malaysia Competition Commission (2012b) *Guidelines on Chapter 1 Agreements*. Kuala Lumpur: MyCC

Malaysia Competition Commission (2012c) *Cameron Highlands Floriculturist Association Case Number: MyCC/0003/2012*. Kuala Lumpur: MyCC

Malaysia Competition Commission (2013) *FAQs for SMEs.* Kuala Lumpur: Malaysia

Malaysia Competition Commission (undated), *E-learning for MSMEs* [online] https://e-learning.mycc.gov.my

Malaysia SME Corporation (2018) "SMEs Are The Backbone Of The Economy" [online] https://www.smecorp.gov.my/index.php/en/policies/2020-02-11-08-01-24/sme-statistics (accessed 26 November 2020).

Maximiano, R., R. Burgess and W. Meester (2019) "Promoting Similarities and Eliminating Contradictions in ASEAN Competition Laws and Practice" in P. Burnier da Silveira and W. Kovacic (eds) *Global Competition Enforcement: New Players, New Challenges*. The Netherlands: Kluwer Law International Inc.

Melbourne Law School (2020) *Competition Law and Covid-19 in Asia: Malaysia with Dr Wan Khatina Nawawi and Dr Wendy Ng* [online video] https://law.unimelb.edu.au/centres/clen/engagement/other-clen-engagement/competition-law-and-covid-19-in-asia/malaysia

Ministry of Consumer Affairs, Food and Public Distribution, India (2020) *Notification*. New Delhi: Gazette of India [online] https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/Notification21mar2020.pdf (accessed 28 November 2020)

Myanmar Ministry of Planning and Finance (2018) *Myanmar Statistical Yearbook 2018*, Nay Pyi Taw: Central Statistical Organization.

Ncube, P. and Paremoer, T. (2009) "Competition Policy in South Africa and Small Business: A Review of Enforcement Cases" Paper presented to the 3rd annual Competition Conference, Competition Commission of South Africa.

Nottage, L., J. Malbon, J. Paterson and C. Beaton-Wells. (2019) *ASEAN Consumer Law Harmonisation and Cooperation*. [City]: Cambridge University Press

OECD (2020). *OECD Competition Policy Responses to Covid-19*. Paris: Organisation for Economic Co-operation and Development.
OECD (2009) *Competition Policy, Industrial Policy and National Champions*. Paris: Organisation for Economic Co-operation and Development.

Philippine Competition Commission (2020). *Press Statement: PCC M&A Review Moratorium in the Bayanihan 2 Act* [online] https://www.phcc.gov.ph/press-statements/pcc-mergers-bayanihan2/ (accessed 29 January 2021)

Philippine Competition Commission (2019). *Annual Report 2019*. Manila: Philippine Competition Commission

Philippine Competition Commission (2018). Annual Report 2018. Manila: Philippine Competition Commission

Philippine Government (2017) Philippine Development Plan. Manila: National Economic Development Authority.

Philippine Competition Commission (2017). Annual Report 2017. Manila: Philippine Competition Commission

Philippine Competition Commission (2016). Annual Report 2016. Manila: Philippine Competition Commission

Pisei, Hin (2019) "Ministry: SMEs Vital to Economy, but 95% Not Registered" *Phnom Penh Post,* 25 August [online] https://www.phnompenhpost.com/business/ministry-smes-vital-economy-95-not-registered (accessed 18 November 2020).

Raj, S.D & Burgess, R. (2016) "SMEs and Malaysia's New Competition Law: Experiences to Date" in Schaper, M.T. & Lee, C. (eds), *Competition Law, Regulation & SMEs in the Asia-Pacific - Understanding the Small Business Perspective*, Singapore: ISEAS – Yusof Ishak Institute.

Ramaiah, A.K. (2017) *Competition Law and SMEs in Malaysia: To Exempt or Not?* [online] *http://dx.doi.org/10.15405/epms.2017.06.6* (accessed 01 December 2020).

Schaper, M. (2010) "Competition Law, Enforcement and the Australian Small Business Sector", *Small Enterprise Research*, Vol.17 No.1, pp.7-18.

Schaper, M. (2012) "Competition Regulation, Open Markets and Small Business" *European Competition Law Review*, No.8, pp.333-338.

Schaper, M.T.; Volery, T.; Weber, P. & Gibson, B. (2014) *Entrepreneurship and Small Business: Asia Pacific Edition* (4th edition) Brisbane: John Wiley & Sons.

Schaper, M.T. & Lee, C. (eds) (2016) *Competition Law, Regulation & SMEs in the Asia-Pacific - Understanding the Small Business Perspective*, Singapore: ISEAS – Yusof Ishak Institute.

Schaper, M.T. (2020a) "The Missing (Small) Businesses of Southeast Asia" *ISEAS Perspectives,* No.79, 22nd July, Singapore: Institute of South East Asian Studies-Yusof Ishak Institute. https://www.iseas.edu.sg/wp-content/uploads/2020/06/ISEAS_Perspective_2020_79.pdf

Schaper, M.T. (2020b) "Advocacy in a Time of Change: Business Associations and the Pakatan Harapan Government in Malaysia, 2018–20" *Trends in Southeast Asia,* Issue 9 (TRS 9/20), Singapore: Institute of South East Asian Studies-Yusof Ishak Institute. https://www.iseas.edu.sg/wp-content/uploads/2020/05/TRS9_20.pdf

Singapore Department of Statistics (SingStat) (2020a) *Topline Estimates For All Enterprises and SMEs*, March [online] www.singstat.gov.sg/find-data/search-by-theme/industry/enterprises/latest-data (accessed 22 November 2020).

Singapore Department of Statistics (SingStat) (2020b) *Singapore Economy 2019*, June [online] https://www.singstat.gov.sg/modules/infographics/economy (accessed 26 November 2020).

Singh, A. (2002) *G-24 Discussion Paper Series – Competition and Competition Policy in Emerging Markets: International and Development Dimensions*. Geneva: UNCTAD.

Storey, D.J. (2010) "The Competitive Experience of UK SMEs: Fair and Unfair" *Small Enterprise Research,* Vol.17 No.1, pp.19-29.

Susantono, B., Sawada, Y. and Park, C. (2020). *Navigating Covid-19 in Asia and the Pacific*. Manila: Asian Development Bank.

Thailand Office of Small and Medium Enterprises Promotion (2019) *White Paper on SME*, Bangkok: OSMEP.

UNCTAD (2020). *Covid-19: Firmer Action Needed To Better Protect Consumers*. [online] *https://unctad.org/news/covid-19-firmer-action-needed-better-protect-consumers* (accessed 28 November 2020).

UNCTAD Secretariat. (2015) *The Role of Competition Policy in Promoting Sustainable and Inclusive Growth* TD/RBP/CONF.8/6. Geneva: UNCTAD.

University of the Philippines – Competition Law and Policy Program (2020) *Competition Law Enforcement - A Knowledge Sharing Session on the Enforcement of the PCA and the Impact of Bayanihan 2.* Webinar [online] https://www.facebook.com/uplawofficial/videos/393336118768343 (accessed 28 November 2020).

Vietnam Ministry of Planning & Investment (2020) "Improving Access To Resources Critical for SME Development: Ministry" Media Release, 11 February [online]

http://www.mpi.gov.vn/en/Pages/tinbai.aspx?idTin=45226&idcm=92 (accessed 18 November 2020).

World Bank GDP and Population Data (2019) [online] https://data.worldbank.org/indicator/NY.GDP.MKTP.CD and https://data.worldbank.org/indicator/SP.POP.TOTL (accessed 29 January 2021).
