COOPERATION AMONG ASEAN MEMBER STATES TO INVESTIGATE CROSS BORDER CARTEL IN ACCORDANCE WITH ASEAN ECONOMIC COMMUNITY AGENDA

A BACHELOR DEGREE THESIS

By:

ALIFIA FHADILA

Student ID Number : 13410034

INTERNATIONAL PROGRAM

FACULTY OF LAW

UNIVERSITAS ISLAM INDONESIA

YOGYAKARTA

2017

COOPERATION AMONG ASEAN MEMBER STATES TO INVESTIGATE CROSS BORDER CARTEL IN ACCORDANCE WITH ASEAN ECONOMIC COMMUNITY AGENDA

A BACHELOR DEGREE THESIS

By:

ALIFIA FHADILA

Student ID Number : 13410034

INTERNATIONAL PROGRAM

FACULTY OF LAW

UNIVERSITAS ISLAM INDONESIA

YOGYAKARTA

2017

COOPERATION AMONG ASEAN MEMBER STATES TO INVESTIGATE CROSS BORDER CARTEL IN ACCORDANCE WITH ASEAN ECONOMIC COMMUNITY AGENDA

A BACHELOR DEGREE THESIS

Presented as the Partial Fulfillment of the Requirements
To Obtain the Bachelor Degree at the Faculty of Law
Universitas Islam Indonesia
Yogyakarta

By:

ALIFIA FHADILA

Student ID Number : 13410034

INTERNATIONAL PROGRAM

FACULTY OF LAW

UNIVERSITAS ISLAM INDONESIA

YOGYAKARTA

2017

PAGE OF APPROVAL

بِسْمِ اللَّهِ الرَّحْمَٰنِ الرَّحِيمِ

A BACHELOR DEGREE THESIS

COOPERATION AMONG ASEAN MEMBER STATES TO INVESTIGATE CROSS BORDER CARTEL IN ACCORDANCE WITH ASEAN ECONOMIC COMMUNITY AGENDA

Has been proven and declared acceptable by the Thesis Content Advisor to be examined by the Board of Examiners at the Thesis Examination on

November 1st, 2017

Yogyakarta, November 1st, 2017

Thesis Content Advisor,

Dr. Siti Anisah S.H., M.Hum

NIP. 014100111

iii

PAGE OF APPROVAL

بِسْمِ اللَّهِ الرَّحْمَٰنِ الرَّحِيمِ

A BACHELOR DEGREE THESIS

COOPERATION AMONG ASEAN MEMBER STATES TO INVESTIGATE CROSS BORDER CARTEL IN ACCORDANCE WITH ASEAN ECONOMIC COMMUNITY AGENDA

Has been proven and declared acceptable by the Thesis Content Advisor to be examined by the Board of Examiners at the Thesis Examination on

November 7,2017

Yogyakarta, 7 November 2017

Language Advisor,

Arini Fuspita S.S., M.Hum.

iv

PAGE OF APPROVAL

بِسْمِ اللَّهِ الرَّحْمَٰنِ الرَّحِيمِ

COOPERATION AMONG ASEAN MEMBER STATES TO INVESTIGATE CROSS BORDER CARTEL IN ACCORDANCE WITH ASEAN ECONOMIC COMMUNITY

AGENDA

Defended before the Board of Examiners

On December, 19th, 2017 and Declared **ACCEPTABLE**

Yogyakarta, December 19th, 2017

Board of Examiners			**Signature**
Chief Examiner	:	Dr. Siti Anisah, S.H., M.Hum	
Examiner 1	:	Ratna Hartanto, S.H., LLM	
Examiner II	:	Aburrahman Al Faqih S.H., MA., LLM	

International Program

Faculty of Law

Universitas Islam Indonesia

Dean,

Dr. Aunur Rohim Faqih, SH., M.Hum

NIK: 844100101

v

SURAT PERNYATAAN
ORISINALITAS KARYA ILMIAH BERUPA TUGAS AKHIR
MAHASISWAFAKULTAS HUKUM UNIVERSITAS ISLAM INDONESIA

Bismillahir rahmaanir rahiim

Yang bertandatangan di bawah ini, saya:

Nama : **ALIFIA FHADILA**
No. Mahasiswa : **13410034**

Adalah benar-benar mahasiswa Program Internasional Fakultas Hukum Universitas Islam Indonesia Yogyakarta yang telah melakukan penulisan karya tulis ilmiah (tugas akhir) berupa skripsi atau legal memorandum atau studi kasus hukum dengan judul:

COOPERATION AMONG ASEAN MEMBER STATES TO INVESTIGATE CROSS BORDER CARTEL IN ACCORDANCE WITH ASEAN ECONOMIC COMMUNITY AGENDA Karya ilmiah ini akan saya ajukan kepada tim penguji dalam ujian pendadaran yang diselenggarakan oleh Fakultas Hukum Universitas Islam Indonesia.

Sehubungan dengan hal tersebut, dengan ini saya menyatakan :

1. Bahwa karya tulis ilmiah ini adalah benar-benar hasil karya saya sendiri yang dalam penyusunan tunduk dan patuh terhadap kaidah, etika dan norma-norma penulisan sebuah karya tulis ilmiah sesuai dengan ketentuan yang berlaku
2. Bahwa saya menjamin hasil karya ilmiah ini adalah benar-benar asli (orisinal) bebas dari unsur-unsur yang dapat dikategorikan sebagai melakukan penjiplakan karya ilmiah (plagiat)
3. Bahwa meskipun secara prinsip hak milik atas karya ilmiah ini pada saya, namun demi untuk kepentingan yang bersifat akademik dan pengembangannya, saya memberikan kewenangannya kepada perpustakaan Fakultas Hukum Universitas Islam Indonesia dan Perpustakaan di lingkungan Universitas Islam Indonesia dan mempergunakan karya ilmiah saya tersebut.

Selanjutnya, berkaitan dengan hal di atas terutama pernyataan pada butir no. 1 dan 2, saya sanggup menerima sanksi baik sanksi administrasi, akademik, bahkan sanksi pidana jika saya terbukti secara kuat dan menyakinkan telah melakukan perbuatan yang menyimpang dari pernyataan tersebut. Saya juga akan bersifat kooperatif untuk hadir menjawab, membuktikan, melakukan pembelaan terhadap hak-hak saya. Tim Fakultas Hukum Universitas Islam Indonesia yang ditunjuk oleh pimpinan Fakultas apabila ada tanda-tanda plagiat yang disinyalir terjadi pada karya tulis ilmiah saya ini oleh pihak Fakultas Hukum Universitas Islam Indonesia.

Demikian, Surat Pernyataan ini saya buat dengan sebenar-benarnya dalam kondisi sehat jasmani dan rohani, dengan sadar serta tidak ada tekanan dalam bentuk apapun oleh siapapun.

Dibuat di : Yogyakarta
Pada Tanggal : 22 Desember 2017
Yang Menyatakan

ALIFIA FHADILA

vi

CURRICULUM VITAE

Name : Alifia Fhadila
Place of Birth : Jakarta
Date of Birth : 23 Januari 1995
Gender : Female
Phone number : +6285878912395
Email : Alifiafhadila@yahoo.com
Address : Jalan Benda II No. 4 Kebayoran Baru, Jakarta Selatan

Parents Identity :

a. Father : Taufik Arsyad
   Pekerjaan : Private Employee
b. Mother : Lenny Anggraini
   Pekerjaan : Private Employee

I. EDUCATION

1. SD Dharma Karya UT 2001 - 2007
2. SMP Putra Pertiwi 2007 – 2010
3. SMAN 8 Tangerang Selatan 2010 – 2013
4. International Program of Law School, Universitas Islam Indonesia 2013 – 2017

II. ORGANISATION EXPERIENCE

1. Setia Hati Pencak Silat 2002 – 2003
2. OSIS SMP Putra Pertiwi Period 2007 – 2008
3. MPK (Majelis Perwakilan Kelas) 2010 – 2011
4. Cinematography Club 2010 – 2011
5. Public Relation in SAIL (Student Association of International Law) of UII 2013 – 2015
6. Social Department in JCI (Juridical Council of International Program) of IP UII 2015 – 2016
7. Study and Discussion Department in SAIL (Student Association of International Law) of UII 2015 - 2016

III. LANGUAGES

1. Indonesian: native language
2. English : speak, write, listen

MOTTO

Whoever does righteous deeds, and is a believer, his effort will not be denied. We are writing it down for him. ***(QS. Al-Anbiya: 94)***

Science gives man knowledge, which is power; religion gives man wisdom, which is control. ***(Martin Luther King, Jr.)***

As it turns out, if the heart is not envious of one with knowledge, then it can be illuminated by the rays of enlightenment. Like stupidity, intelligence is contagious. ***(Andrea Hirata)***

Without leaps of imagination, or dreaming, we lose the excitement of possibilities. Dreaming, after all, is a form of planning. ***(Gloria Steinem)***

Never forget what you are, for surely the world will not. Make it your strength, then it can never be your weakness. ***(George R.R. Martin)***

This thesis is wholeheartedly dedicated to:

My beloved parents, Lenny Anggraini and Taufik Arsyad.

My imperfectly perfect little sister, Azalia Fitriyani.

Myself and all my fellow procrastinators.

ACKNOWLEDGEMENTS

بِسْمِ اللهِ الرَّحْمٰنِ الرَّحِيْمِ

Assalamualaikum Wr.Wb

First of all, *Alhamdulillahirabbil'alamin*, in the name of Allah SWT, The Lord of the Universe. An enormous gratitude for His blessings that has been given in all my life, especially during the creation of my thesis titled, **Cooperation among ASEAN Member States to Investigate Cross Border Cartel in Accordance with ASEAN Economic Community Agenda** until it is finally completed. Also, *Shalawat* and *Salam* to the messenger, Muhammad SAW., for bringing all the humankind to a brighter era.

During the process of making this thesis, the writer realized that it would never be finished without any contribution, assistance, guidance, and support from various parties. So, the writer would like to extend gratitude to:

1. **Allah SWT**, The First and Foremost, The One and Only Lord, because of His *rahmat, hidayah and innayah* the writer can finish this thesis properly.
2. **Mr. Nandang Sutrisno, S.H., LL.M., M.Hum., Ph.D.**, as a Rector of Universitas Islam Indonesia, may Allah guide you to lead the students to become *rahmatan lil 'alaamiin.*
3. **Dr. Aunur Rahim Faqih**, as a Dean of Faculty of Law Universitas Islam Indonesia.
4. **Dra. Sri Wartini, S.H., M.Hum., Ph.D.,** as the Chief of International Program Faculty of Law Universitas Islam Indonesia, for the permission to write this thesis.
5. **Dr. Siti Anisah, S.H., M.Hum.,** as my lecturer and advisor who tirelessly guiding assisting, and motivating me through and through. Your lecture about competition law is impressive, which is the reason why I chose this subject in the first place.

6. My Parents, **Lenny Anggraini** and **Taufik Arsyad**, thank you for always been so proud of me since the very beginning. Your infinite love and prayers make me succeed to finally finish my thesis.
7. My little sister, **Azalia Fitriyani**, my biggest fan on earth who supports me the way nobody ever could.
8. **Arini Fuspita, S.S M.Hum.,** thank you very much for being a patient language advisor. Your constructive critics and advices are truly valuable to this thesis.
9. **Mr. Muhammad Setiawan** and **Ms. Novera Widyarani,** for being very kind, helpful, and patient throughout my years as a student.
10. **Yaries Mahardika Putro, S.H.**, for being my advisor slash a good friend. You never stop daring me to cross off my bucket list. I truly appreciate your advices for this thesis and for my life as well. *Multumesc, ries.*
11. My lady best friends, **Elliana Sinta, Ayu Rachmawati,** and **Aida Zulfa Larasati**, thank you for being supportive, awesome, and wonderfully weird. This thesis would not be done without you guys irritating me all the time. Winter is coming, and we have got each other.
12. My **Kos Friends**, Rifkha, Ucik, Dian, and Hanung, thank you for always look out for me and remind me to actually finish my thesis. Look! High fives.
13. My classmates (**IP 2013)** Alan, Ali, Intan, Andan, Oky, April, Aulia, Brenda, Dian, Halin, Dwita, Aryo, Firman, Gegi, Ekal, Hanif, Ibe, Uci, Julian, Laras, Bang Ali, Teguh, Marga, Mishbah, Aul, Era, Nizar, Rafi, Tedy, Wening. Thank you for being so amazing and encouraging for the past 4 years. I heart us, indeed.
14. **Johan Caesarean Musa, S.H.,** for being the best of a friend. Thank you for your undying motivations and endearing encouragement that inspire me to eagerly write my thesis. You are the light that never goes out.
15. **Narpati Broto Kusumo, S.H.,** for being my lobster all the way through.

Finally, the writer recognizes that this thesis is still far from being perfect, so the writer expects the readers to give some criticism and suggestions. However, the thesis will hopefully be useful for anyone who reads this.

TABLE OF CONTENTS

Cover i

Cover ii

Page of Approval iii

Page of Approval iv

Page of Final Thesis Approval v

Originality Statement vi

Curriculum Vitae vii

Motto viii

Dedication ix

Acknowledgements x

Table of Contents xii

List of Tables xiii

Abstract xiv

CHAPTER I: INTRODUCTION 1

A. Context of Study 1
B. Problem Formulation 8
C. Research Objectives 8
D. Definition of Terms 8
E. Theoretical Review 11
F. Research Method 15
G. Structure of Writing 16

CHAPTER II: OVERVIEW OF COMPETITION LAW, CARTEL, LENIENCY PROGRAM, AND INTERNATIONAL COOPERATION 17

A. Competition Law 17
B. Cartel 31
C. Leniency Program 40
D. International Cooperation 48

CHAPTER III: ANALYSIS ON COOPERATION AMONG ASEAN MEMBER STATES TO INVESTIGATE CROSS BORDER CARTEL IN ACCORDANCE WITH ASEAN ECONOMIC COMMUNITY AGENDA.....61

A. Preparation on ASEAN Cooperation to Investigate Cross Border Cartel.....61
B. Obstacles in International Cooperation to Investigate Cartel in ASEAN 87

CHAPTER IV: CONCLUSION AND RECOMMENDATION 91

A. Conclusion 91
B. Recommendation.....92

BIBLIOGRAPHY 94

LIST OF TABLES

Table 2.1 Status of Implementation of Competition Law in ASEAN 29

Table 3.1 Strategic Goal 1.....66

Table 3.2 Strategic Goal 2.....67

Table 3.3 Strategic Goal 3.....68

Table 3.4 Strategic Goal 4.....69

Table 3.5 Strategic Goal 5.....70

ABSTRACT

Cartel considers as one of the most dangerous anti-competitve acts in business practices. Its impacts will not only inflict fellow business actors but also the consumers by conspiring to affect products and sales to gain monopolistic profit. Alongside with the trend of globalization, this activity also expends its scope from national frontiers to a worldwide concerns. Infamously known with its secrecy, evidence to prove this act is extremely hard to obtain, especially when it spreads all over the globe. Therefore, competition authorities from all the jurisdictions are required to cooperate for an enhanced cross border cartel investigations. As one of the youngest regions to implement competition law, ASEAN countries began its work by launching ASEAN Economic Community in 2015 as representation of a major milestone to put in place the regional arrangements in competition field. Even so, ASEAN Member states still face significant obstacles in the context of investigating cross border cartel regarding with the different stage of development in each member state. Hence, there must be strategic measures to be taken in order to cooperate without negatively affect another jurisdictions. This research is using a normative legal research, by reviewing regulation that deals with the legal issues that being researched. The sources for this research are divided into three categories. AEC Blueprint 2015, AEC Blueprint 2025, and ASEAN Competition Action Plan 2025 as the primary sources. Literatures and journals as the secondary. Then, dictionary as the tarsier research source. As developing countries, ASEAN Member States are still lacking in competition sector due to resource constraints, hostile political-legal environment, and underdeveloped market. This gap prevents ASEAN to have a supranational institution to investigate cross border cartel. Therefore, cooperation is the best alternative to solve case like this. In order to avoid ineffective investigations, ASEAN Member States agreed to follow a progressive agenda in ASEAN Competition Action Plan 2025 with the final outcome as to have a harmonization of standard enforcement procedure in regional level. Conclusively, to have an effective cooperation in investigating cross border cartel, ASEAN Member States must establish competition law in each domestic legal framework and implement leniency program. In order to assist the establishment, elaborate workshops and forums must be held by ASEAN Expert Group of Competition, thus the representative from each member state may meet and exchange their views and practices for more coordinated approach.

Keywords: ***Cross-border cartel, ASEAN, Cooperation***

CHAPTER I
INTRODUCTION

A. Context of the Study

Global economic today has been dynamically shifted. As the result of globalization, the economic activities remain gradual since the slowdown of China economy and lower commodity price. However, According to IMF[1] the recent development of growth in emerging market and developing economies has been steadily increasing from 4 percent in 2015 to 4.3 percent in 2016 and projected up until 4.7 percent in 2017.[2] These numbers not only display the initiation of worldwide economic integrity, but also indicate extensive opportunities for business actors to expand their businesses to a broader market. As the volume of business activities are enlarging, the investment is enhanced. This situation may lead to domestic development and numerous job vacancies.

Economists considered human as a rational creature,[3] which means every decision making process is based on making choices that result in the most optimal level of benefit or utility for the individual. As such, in spite the evident advantages, business actors are actually challenged to compete with each other. The fact that the consumers and market range are limited, competition[4] is inevitable. Regardless,

---

[1] International Monetary Fund is an organization of 189 countries that has been working to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty around the world, http://www.imf.org/external/about/htm Accessed on 21st October 2016, 23:03 P.M.

[2] IMF. World Economic Outlook Update, January 2016, http://www.imf.org/external/pubs/ft/weo/2016/update/01/ Accessed On 21st October 2016, 23:03 P.M.

[3] Andi Fahmi Lubis dkk., *Hukum Persaingan Usaha Antara Teks dan Konteks*, Deutsche Gesellschaft Technische Zusammenarbeit (GTZ) GmbH, Indonesia, 2009, Page 23

[4] Generally, competition can be defined as a process where the market power operates freely to ensure the scarce resources are allocated efficiently to maximized total economic

the existence of competition is incredibly significant to avoid the concentration of market power to one or several companies which can restrict the customers to choose alternative products. Consequently, the business actors should progressively invent, pack, and promote their products in order to become the leading business in the particular industries and maintain the preferences of the consumers.

The implications of positive business competition are efficiency and prosperity. It could create certain mechanism that aims to conducive atmosphere for every business actors in each level. As the result of consistent and well preserved competition, the consumers' expediency will be guaranteed by various prices and high quality products. On the contrary, if the implications of business competition turn negative, the market will be distorted and can be awfully inconvenient for the consumers. Hence, it is very vital for every country that has a modern economic system to implement the regulation for business competition.

In the 90s era, Francis Fukuyama[5] already predicted that most countries in the world would tend to adopt the free market mechanism.[6] Though the fluctuation of the market is determined by the power of the market itself[7], Fukuyama still thought that there must be indicators and guidelines, thus all the business actors would fall in line.[8] As for nowadays, competition law generally develops to achieve certain

prosperity. Look: Philip E. Area and Herbert Hofenkampt, "Antitrust Law: An Analysis of Antitrust Principles and Their Application", Vol. 1 No. 4 Ed.2, 2000.

[5] Francis Fukuyama, *The end of History Essay*, The National Interest, Summer 1989.

[6] Free Market describes a theoretical, idealized, or actual market where the price of an item is arranged by the mutual non-coerced consent of sellers and buyers, with the supply and demand of that item not being regulated by a government, http://www.uscentrist.org/platform/docs/history-of-economics Accessed on 22nd October 2016, 11:00 A.M.

[7] There several essential elements that can influence the market power such as scarcity, choices, opportunity cost, and supply and demand, Andi Fahmi Lubis dkk, op. cit. Page 22.

[8] *Ibid*., Page 2.

essential objectives. First and foremost, according to the responses of questionnaire from 35 jurisdictions that conducted by OECD[9], the core objectives of competition law are promoting and protecting the competitive process also attaining greater economic efficiency as well. Conclusively, the regulation not only uphold a proper economic competition, but also as an instrument to prevent competition distortion that can potentially destruct the free market mechanism and indicate to an unfair competition.

Essentially, anti-competition acts could be categorized into two models, namely individual act (unilateral) and conspiracy. Individual act occurs when the dominant position is in place and violates its position which may initiate price discrimination, predatory pricing, and so forth. On the other hand, there is conspiracy. It occurs when there are two or more business actors making restrictive agreement such as price fixing, market allocation, and bid rigging.[10] The main motive of anti-competition act is to increase prices so the firms can benefit from higher sales revenue. In the practice, conspiracy with restrictive selling agreement commonly known as cartel.

In literature, cartel is generally defined as an agreement between independent business actors with the same market range to affect products and sales to gain monopolistic profit.[11] Therefore, the majority of legal scholars are consistent with

[9] The Organization for Economic Cooperation and Development is an organization that focused on helping government around the world to promote policies that will improve the economic and social well-being of people around the world, http://www.oecd.org/about/ Accessed on 22nd October 2016, 11:21 A.M.

[10]HMBC Rurik Rizkiyana and Vovo Iswanto, "Catatan Kecil tentang Praktek Penyalahgunaan Posisi Dominan (Studi Kasus di Indonesia"), dalam *Litigasi Persaingan Usaha (Competition Litigation),* Centre for Finance, Investment and Securities Law (Jakarta: PT. Telaga Ilmu Indonesia, 2010), page. 64-65.

[11] Ahmad Kaylani, *Ada Kartel di Tanjung Priok*, dalam *Kompetisi*, edisi 11 2008, page 11.

the fact that cartel is excessively dangerous because of its implications. Starting from the viewpoint of the consumers alone, cartel may cause the customers to loose price options, competitive qualities of goods, and qualified selling service. In larger sphere as macro-economic, cartel may create a deadweight loss[12] as a result of inefficient allocation of national resources. Considering its serious consequences, in some jurisdictions cartel even classified as felony which may be sentenced to prison.

Naturally, a hardcore cartel may be conducted by influencing price, goods, and market area. In spite of its negative impacts, cartelist frequently basing their act in order to stabilize prices in the market. As it perceived, the instability of the prices are triggered by the price wars that conduct by the companies that compete against each other. All business actors are encouraged to participate in the market by supplying low cost goods with the best quality. In point of fact, this concept is the core of competition which clearly avoided by the cartelist. According to survey that held by OECD Competition Committee between 1996 - 2000 on cartel cases, at least 16 large cartel cases reported in the survey exceeded USD 55 billion world-wide. The survey showed that cartel mark-up can vary significantly across cases, but in some it can reach up until 50%. Thus, it is clear that the magnitude of harm from cartels is many billions of dollars annually.[13]

---

[12] A deadweight loss is a cost by an inefficient allocation of resources, http://www.investopedia.com/terms/d/deadweightloss.asp Accessed on 17th November 2016, 13:09 P.M.

[13] Directorate for Financial, Fiscal, and Enterprise Affairs Competition Committee, *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels under National Competition Laws*, 9th April 2002, page 2.

Regarding with the globalization, business is no longer restricted to time and space. It means that cartel activity also rises its stake to the global scope. Its impact is not only affecting national but international market as well. During the period 2000 – 2016, 75 new cartels were uncovered each year and more than 100.000 companies (7200 named) were found liable for international price fixing whereby gross cartels overcharges exceed USD 1.5 trillion, 60% by international cartels.[14] Despite the staggering number of discoveries, it is believed that a great number of cross border cartels remain undetached. Those cartels that are documented have brought about tremendous damage to economies, particularly to emerging markets. Hence, in order to investigate international cartels, cooperation between business competition authorities in various jurisdictions is required.

In dealing with international cartels, cooperation is the ingredient to effective enforcement of competition law. It allows agencies to augment resources, reduce costs of regional studies, enhance training, and promote mutual understanding of competition regime, thereby contributing to build trust.[15] The significance of cooperation is related with the major barrier to reveal cartel. It occurs because the cartelist today are well aware with the sanction for collusive behavior, thus they use the secretive way. Therefore, the adoption of leniency program may become a valuable asset in the portfolio tools available for cooperation amongst jurisdictions. Its method is fit to penetrate the secrecy cloak of cartel.

---

[14] John M. Connor, *The Private International Cartels (PIC)*, Data Set: Guide and Summary Statistics, 1990 – July 2016 (Revised 2nd Edition), USA, 2016.

[15] UNCTAD, *Informal Cooperation among Competition Agencies in Specific Cases*, Consultations and Discussions Regarding Peer Reviews on Competition Law and Policy, Review of the Model Law on Competition and Studies Related to the Provisions of the Set Principles and Rules, Fourteenth Session, Geneva, 2014, Page 2.

Leniency program has been adopted for more than 50 jurisdictions. It's largely used in European Union and United States to eradicate cartel cases. Leniency program considers as an effective tool because it encourages cartel participants to confess their cartel conduct and implicate their co-conspirators, providing first-hand, direct insider information or evidence of conduct. Additionally, Leniency program helps to uncover conspiracies that would otherwise go undetected and can destabilize the existing cartels. They also act as a deterrent to those contemplating entering into cartel arrangements.[16] A continuing trend of implementing leniency program worldwide is highly necessary not only for a national interest, but also internationally. It is linked with the global demands which shows that business is no longer domiciled under one government but it is already across national frontiers. As result, the existing competition laws in different jurisdictions will be addressed as potential co-operative partner based on shared commitment to fight cartels.

After being one of the last regions of the world to embrace competition law, the nations of South-East Asia have now begun to develop their competition regimes at a very swift rate. It began from the ASEAN vision 2020 that foresee on a shared vision of ASEAN as a concrete Nations, outward looking, living in peace, stability, and prosperity, bonded together in partnership in dynamic development and in a community of caring society.[17] Therefore, at the 27th ASEAN Summit, Member States launched ASEAN Community 2015 as a representation of a major milestone in ASEAN's regional integration agenda. This document chart the direction for

[16] International Competition Work, *Anti-Cartel Enforcement Manual*, Chapter 2, April 2014, Page 4.

[17] ASEAN Vision 2020.

ASEAN over the next 10 years, focusing on strengthening ASEAN unity and consolidating and deepening regional integration, towards a politically cohesive, economically integrated, socially responsible, and truly rules-based, people-oriented and people-centered ASEAN Community. Under the AEC blueprint 2025, ASEAN remains committed to intensify its economic cooperation. In this context, the competition section under the AEC Blueprint 2025 highlights the need for effective competition regimes, with strengthened capacities, a more competition awareness region and putting in place regional arrangements on competition.[18]

Using the ASEAN Way with its flexibility and consensus, the member states progressively move the region to harmonization. While the AEC is a milestone in ASEAN's journey towards closer integration and centrality in Asia's architecture for cooperation, it alone is insufficient to retain relevance in an increasingly multipolar global landscape. In order to strengthen their competitiveness and role as a hub of Asia's dynamism, ASEAN countries must also introduce deep structural reforms nationally. A proper combination of domestic reforms and initiatives for closer integration that complement and reinforce one another are needed to promote the region's equitable and inclusive development, strengthen its macroeconomic stability, and protect the environment. ASEAN countries must build their unique brand of integration and cooperation to close development gaps and maintain identity, particularly in investigating cases like cross border cartels.[19] This study will discuss about the preparation for ASEAN Member States to implement an

[18] http://www.asean.org/asean-economic-community/sectoral-bodies-under-the-purview-of-aem/competition-policy Accessed on October 6th 2017, 20:26 A.M.

[19] Asian Development Bank Institute, *ASEAN 2030 Towards a Borderless Economic Community*, Asian Development Bank Institute, 2014, Japan, Page xxi.

effective cross border cartel investigations in accordance with ASEAN Economic Community agenda.

B. Problem Formulation

From the explenation above, this research seeks answers for:

1. What should be prepared by ASEAN Member States to cooperate in cross border cartel investigations?
2. What are the obstacles to implement cooperation between ASEAN Member States in investigating cross border cartel?

C. Research Objectives

Problem formulations above aim to achieve such purposes as:

1. To analyze the elements to prepare in order to establish cooperation among ASEAN Member States for investigating cross border cartel
2. To understand the obstacles to implement cooperation between ASEAN Member States and find its solutions.

D. Definition of Terms

Antitrust Law is a well-known term in America for competition law. It regulates business activities in order to protect consumers by promoting competition in the market place. Nowadays, one of the America's oldest antitrust law namely The Sherman Act, has been becoming the ground to illegalize unfair methods of competition.[20]

[20] https://www.consumer.ftc.gov/files/pdf Accessed on November 24th 2016, 16:23 P.M.

AEGC or ASEAN Expert Group on Competition is a regional forum consists of ASEAN Member States to discuss and cooperate on competition law and policy.[21]

AMS or ASEAN Member States are 10 country members that include in Association of Southeast Asian Nations.

ASEAN Vision 2020 is a prospects in the decades leading to the year 2020 that envisioned ASEAN as concrete of Southeast Asian Nations, outward looking, living in peace, stability and prosperity, bonded together in partnership in dynamic development and in a community of caring societies.[22]

Cartel is a form of monopolistic act where several of the competing business actors agree to control production, pricing, and marketing areas of goods or services, therefore the competition among them will be no longer exist.[23] The definition of cartel also stated in article 11 Law No. 5/1999 on Prohibition of Monopolistic Practices and Unfair Business Competition and classified as prohibited agreement. It is commonly conducted by trade association along with its members, which practically often occurred in oligopoly market structure.[24] It is using various approaches to coordinate their activity such as production maintenance, horizontal price fixing, tender collusion, market sharing, and non-

[21] https://www.asean-competition.org/aegc Accessed on October 9th 2017, 14:33 P.M.

[22] ASEAN Vision 2020.

[23] Rachmandi Usman, *Hukum Persaingan Usaha di Indonesia*, Sinar Grafika, Jakarta, 2013, Page 283.

[24] The main features of oligopoly market can be identified by several distinctive characteristics such as: the market is dominated by few firms, interdependency between firms, barriers to entry, differentiated products, http://www.economicshelp.org/microessays/markets/oligopoly/ Accessed on 22nd November 2016, 10:40 A.M.

territorial consumer division.[25] Cartel may bring destructive impacts because of its nature to restrict competition. Consequently the consumers are forced to pay maximally for decent quality products because their choices are limited.

Game theory is a formal theory of interactive decision making, used to model any decision involving two or more decision makers, called players, each with two or more ways of acting, called strategies, and well-defined preferences among the possible outcomes, represented by numerical payoffs. In the theory, a player can represent an individual decision maker or a corporate decision making body, such a committee or a board.[26]

Leniency Program defines a set of rules for granting reductions in penalties to firms or individuals involved in cartels, in exchange for discontinuing participation into the practice and for providing an active cooperation in the investigation of the enforcement authorities. Leniency program can be viewed as a success story in this perspective, as they have allowed to reach an unprecedented effectiveness in discovering and interrupting illegal agreements among firms. The regulation of leniency program that adopted in the different countries have some heterogeneity in the specific rules of the policies, however they may share certain basic features.[27]

Prisoner's dilemma theory is probably the most widely used game in economics. The model of prisoner's dilemma game can be described as two individuals who are arrested under suspicion of a serious crime, though it is not possible to convict either of the party for the crime unless one or both of them

[25] Rachmandi Usman, *op. cit*. Page 285.
[26] Andrew M. Colman, *Game Theory*, John Wiley & Sons, Ltd, Volume 2, 2005, Page 1.
[27] Michele Polo and Massimo Mota, *Leniency Programs*, 31st May 2005, Page 1.

confesses. The prisoners are separated, each is told to testify against others guilt and as doing so, they will be rewarded a reduced sentence for the crime that they are known to be guilty of. This method is well known to be effective to investigate cartel in antitrust law because its nature of interdependency between parties.[28]

E. Theoretical Review

1. Evidentiary theory has a significant role in competition case. It becomes an indicator to determine the position of business actors. Rules and procedures for assessment of evidence has been regulated by the law, therefore the parties involved in verification process must follow accordingly. As evidence happens to be reference to seek for the truth, its validation is limited by the law. Thus, evidence transpires the instrument to establish legal facts on the case so the judge may decide based on the sense of justice. Focusing on the sphere of business competition, the concept of justice differ into two perceptions namely legal certainty and expediency.[29] Regarding with these model concepts, competition law is using these two approaches such as:

    a. Per se illegal, based to Webster's New World Dictionary, per se defined as: By through itself; standing alone; on its own merits; without need for reference to outside facts; the opposite of per quod.[30] The characteristics of this approach is quite simple since it tends to create a legal certainty. Therefore, if there is a suspicion of

[28] http://economicsonline.co.uk/Business_economics/Prisoner's_dilemma.html Accessed on 29th November 2016, 12:10 P.M.

[29] I Made Sarjana, *Prinsip Pembuktian dalam Hukum Acara Persaingan Usaha,* Zifatama Publisher, Surabaya, 2014, Page 130.

[30] Susan Ellis Wild, *Webster's New World Law Dictionary,* Wiley Publishing Inc., Canada, 2006, Page 199.

the business actor violates the law, the sentence can be applied directly without any complex process.

b. Rule of reason, is an opposing approach of per se illegal. The rule of reason method is highlighted on expediency. Consequently, by using this approach the business competition authority needs to carefully evaluate the suspected business activity whether its impact will obstruct or support the competition.[31] Rule of reason is used to accommodate the activities in the grey area between legal and illegal. There are several aspects that become consideration in order to determine any violation such as economic, justice, efficiency, protection for low financial group, and fairness.[32]

Figuring collusion is difficult. The term itself implies an awareness among individual members that the purpose behind joining together is not completely innocent.[33] Even with the "smoking gun" agreement, the law hesitates to deem the intentions ascribed to one member of a group to all the members of the group. It occurs because competition law enforcement officials always strive to obtain direct evidence of agreement in prosecuting cartel cases. It gets harder because cartelist often conceal their activities and usually they do not cooperate with an

[31] I made Sarjana, *op. cit.* Page 176.

[32] Hermansyah, *Pokok-Pokok Hukum Persaingan di Indonesia,* Kencana Prenada Media Group, Jakarta, 2008, Page 79.

[33] Martin J. Shanahan and David K. Round, *Serious Cartel Conduct, Criminalization an Evidentiary Standards: Lessons from the Coal Vend Case of 1911 in Australia*, Centre for Regulation and Market Analysis, School of Commerce of South Australia, Page 7.

investigation of their conduct, unless they perceive that it is to their advantage.

Although cartel is an extremely serious misconduct, each jurisdiction treats it differently. Comparing to United States, Indonesia has a very contrast regulation in proving the existence of cartel. The United States regulates cartel in Sherman Act, the Section 1 states, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal".[34] Furthermore, Section 3 Clayton Act mentions the prohibition of cartel as well, "It shall be unlawful for any person engaged in commerce, to lease or make a sale or contract for sale of goods … or fix a price charged … where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be substantially lessen competition or tend to create a monopoly in any line of commerce".[35] Although Congress does not use the term "per se" literally in the U.S legislation, the U.S. Supreme Court clearly indicates that hardcore cartel, naked price fixing, resale price maintenance, tying, boycotts, and such of market sharing are per se illegal.[36]

2. Game Theory is a formal study about decision making based on the principles of cost and benefit. In everyday sense, it is a competitive activity in which players contend with each other according to set of rules. The scope of Game

[34] Section 1 Sherman Act.
[35] Section 3 Clayton Act.
[36] Jacqueline Bos, *Antitrust Treatment of Cartels: A Comparative Survey of Competition Law Exemptions in the United States, the European Union, Australia, and Japan,* Washington University Global Studies Law Review, Volume 1, January 2002, Page 426.

Theory is vastly wide, because it can be an instrument to illuminate economic, political, and biological phenomena.[37] One of the Game Theory that frequently used is strategic games. It is a model of interacting decision makers. This model captures interaction between the players by allowing each player to be affected by the actions of all players. In United States, using the strategic games is fairly common to prove the agreement between business actors in order to reveal the existence of cartel. One of the most well-known strategic games is Prisoner's Dilemma.

The term of Prisoner's Dilemma comes from a story involving suspects in crime. The model of this theory is by putting suspects in a crime into separate cells. Each of them is suspected in a major crime, but there is not enough evidence to convict them more than a minor offense unless one of them acts as an informant against the other. During the examination, if all of the suspects stay quit, they will be sentenced for their minor offense. If one and only one of them turns into an informant, that person will be freed from the sentences and will be used as witness to testify against the rest of the suspects who will be punished for their major crime. However, if some of them confess and turns into the informants, all of the suspects will be sentenced justly.

This type of strategy is relatively efficient and often used to determine the punishment for cartelist. It also becomes the basic concept of leniency program to eradicate cartel in the United States. The system of leniency program may credibly turn to be an effective enforcement tool to give incentives to cartel

[37] Martin J. Osborne, *An Introduction to Game Theory*, Oxford Press University, England, 1995, Page 1.

members to come in, confess, and aid the competition law enforcers. It aims to drive wedge through the trust and mutual benefit at the heart of cartel. By giving reward with huge reduction penalties, the method is attracting whistleblowers to disrupt cartel.[38]

F. Research Method

1. Type of Research

   This research is qualified as qualitative legal research. It means that this research is using non numerical technique to identify the source of law applicable to understand the legal problem, and then find the solutions to the problem that has been acknowledged.

2. Research Sources

   The sources for this research are divided into three categories, such as primary, secondary, and tersier research sources. The primary research sources are ASEAN Economic Community Blueprint 2015, ASEAN Economic Community Blueprint 2025 and ASEAN Competition Action Plan (2016 – 2025). The secondary research sources are literatures, reports, journals, and books. Then, the tersier research source is dictionary.

3. Research Sources Approach

   The sources approach of this research is using statute approach by reviewing legislation or regulation that deals with the legal issues that being researched. This approach is used for researching and reviewing some of the legislation in the context of competition law.

---

[38] United Nations Conference on Trade and Development, *The Use of Leniency Programmes as a Tool for the Enforcement of Competition Law Against Hardcore Cartels in Developing Countries*, Geneva, November 2010, Page 4.

4. Research Sources Collecting

   The method of obtaining legal material is using research and searching data through the internet. The data were collected from books, news, journals, and articles which discussed the issue of regional cooperation in combating cross border cartels in ASEAN.

5. Research Sources Analysis

   In analyzing the legal materials, the descriptive qualitative method was employed. The obtained data was descriptively presented and analyzed in accordance with relevant regulations that govern on the topic of regional cooperation in investigating cartel in ASEAN.

G. Structure of Writing

Chapter I contains an introduction which encompases these following parts: Context of Study, Problem Formulation, Research Objectives, Definition of Terms, Theoretical Review, Research Method, and Structure of Writing.

Chapter II contains Theoretical Review which discussing the study of Competition Law, Cartel, Leniency Program, and International Cooperation.

Chapter III contains of two discussions as follow: Preparation on ASEAN Cooperation to Investigate Cross Border Cartel and Obstecles to Implement Cooperation between ASEAN Member States in Investigating Cross Border Cartel.

Chapter IV contains of the Conclusion and Recommendation which are obtained by the previous analysis that has been done.

CHAPTER II

OVERVIEW OF COMPETITION LAW, CARTEL, LENIENCY PROGRAM, AND INTERNATIONAL COOPERATION

A. Competition Law

1. Competition Law in Islam

Competition law takes an important role in today's business practices. It promotes fairness within market competition by ensuring that each and every player may compete on common and equal grounds.[39] In regards to achieve this core objective, competition law regulates and controls behavioral and structural conduct of market players through enforcement of anti-monopoly prohibitions, concerted conduct law and merger control. Therefore, any deviation in business dealings that may create unfair situation in the market is prohibited because it initiates unfair competition. In light with this matter, Islam also has a similar idea.

Islam is neither simply a religion nor a mere ideological vision. It is a practical system of life that provides guidance for all walks of life individually, economically, morally, and politically. As a comprehensive religion that covers every aspect in its entirety, it includes *shariah*, *akhlak*, and *aqidah*. This integrated system is solely to protect five main values to the human being namely religion, *aqal*, *nasab*, property, and life.[40] In light of competition field, unfair treatment is strongly prohibited in Islam because it does not in line with the standards of justice amongst the mankind. During the time of the Prophet, *Ahlaf* and *Fudul* were established by group of wealthy merchants in which the aims to protect the business

[39] Safinaz Mohd Hussein, dkk, *Is Fair Market Competition Regulated under Syariah Law?*, Mediterranean Journal of Social Sciences, Vol.5, No. 23, November 2014, Page 152.

[40] Zulkifli Hasan, *Islamic Perspective on the Competition Law and Policy*, Page 1.

monopoly and to maintain virtues, protect poor and destitute.[41] Islam is way ahead laying down principle on total rejection on monopoly in its economic system.

General principles of Islam are preserved in *al-Quran* and *al-Sunnah.* There are Islamic fundamentals that will direct and organize the economic activities of individuals. In concerns with the process of solving the variable problems of the society. In the sphere of market competition, Islam establishes three teachings. Firstly, it is encouraging and motivating sellers to compete; secondly, it is rejecting the state to intervene price and market; thirdly, it is banning all of the unfair transactions.[42] Allah ta'ala says in *Al Baqarah* 148: *"Then Strives towards all that is good".* Broad meaning of this verse is Allah ta'ala encourages to pursue all good things. In business particularly, competition is a good activities in two terms. First one it creates a healthy rivalry between sellers which leads to continuous innovations. The second one it gives the buyer opportunities to select the best products with a reasonable prices.

Moreover, in Surah *Hud* verse 6 Allah says: "*Islam concerns on man's living and his livelihood*". This verse highlights a prohibition to accumulate wealth in the hands of the few. Whatever the deal is, justice should be observed and established in the society to uphold the equality of all men before the law. Islam banned unfair competition thoroughly. The Prophet ever inspected the market and outlawed an unfair seller who tried to cheat his consumers. *The* Prophet said: *"One who cheats is not of us".* The inspection also done in Mecca. He appointed Said bin Said bin

[41] Razali Nawawi, *Islamic Law of Transactions*, Kuala Lumpur: CT Publications Sdn.Bhd., 1999, Page 2.

[42] Agung Riyadi and Ahmad Mardalis, *Promoting a Market Competition: An Islamic Perspective,* Proceeding Seminar Nasional dan Call for Paper Sancall, 2013, Page 237.

Ash to bea Mecca market inspector. The Islamic leader after The Prophet continued the market inspection by founded wilayatul muhtasib or wilayatul hisbah. Wilayatul muhtasib or wilayatul hisbah is a part of the legal institution in the Islamic state. Legal institution consists of Wilayatul Mazhalim, Wilayatul Qadha from any unfair transactions. The blocking from unfair transactions is an accurate and quick blocking. An accurate blocking comes from the comprehensiveness of the banning and a quick blocking comes from the role of market inspector under wilayatul muhtasib or wilayatul hisbah, who always ready and continuously inspects market and bans unfair sellers. As a consequent, market becomes a fair market. Nobody of the market participants disadvantaged.[43]

Therefore, Islam is seriously condemned unfair business practices. This condemnation is not only to ensure the effectiveness of economic administration but also as basis to form a just and fair society in the light of Islamic teaching.[44] There are couples of doctrines that can be applied in promoting fair trading. The first one is *maslahah.* Literally, *maslahah* means benefit or interest. Technically, it refers to the need of balancing between private interests and public interests in harmonious objectives of *shariah,.*[45] which are to provide benefits to mankind, provide mercy, and attain justice.[46] As referring to the current situation in competition law, it may imply in Article 85 (1) of the Treaty of Rome. This provision prohibits trading agreement which is incompatible with the common

[43] According to Solikhin 2005 as citated by Agung Riyadi and Ahmad Mardalis, *Promoting a Market Competition: An Islamic Perspective,* Proceeding Seminar Nasional dan Call for Paper Sancall, 2013, Page 240.

[44] Zulkifli Hasan, *Islamic Perspective on the Competition Law and Policy,* Page 5.

[45] Muhammad Hasim Kamali, *Principles of Islamic Jurisprudence*, 2nd Ed. Kuala Lumpur: Ilmiah Publishers Sdn. Bhd., 1998, Page 267.

[46] http://www.skrine.com/ Accessed on December 21st 2017, 23:42 P.M.

market because it may affect trade between member states, including price fixing, limiting production, market or technical developments, market sharing, and applying dissimilar conditions equivalent transactions. These agreements is contrary with the principle of *maslahah.* Thus, it is not encouraged and allowed by Islam.

The second principle is *sadd al-dharai'. Sadd al-dharai'* conceptually means blocking an evil deed. Islam law approves certain conducts and prohibits certain things on the competition based on their benefit and harm to the society. There are several legal maxim on the matter.

a. Any harm which occurs need to be redressed;
b. What is perceived as greater harm should be avoided even if resulting in inconsequential minor harm;
c. General or unspecified harm should be given priority to specific harm;
d. The avoidance of harm takes precedence over the promotion of interest, and;
e. During emergency normal rules of legality are waived and resort to unlawful acts are allowed.[47]

The basis for the assessment of blocking is examining the consequences of the action wholly. The principle of *saad-dharai'* can be seen from the prohibition of *ihtikar* by the Prophet.[48] *Ihtikar* means a single person or a company is being the only producer of a commodity either goods or service of which there is no close substitute available in the market. This prohibition is referring to one *hadith* where Prophet has reminded us that Allah will curse a person who monopolize others. In

[47] Zulkifli Hasan, *Islamic Perspective on the Competition Law and Policy*, Page 7.
[48] *Ibid.*, Page 8.

another *hadith* reported by al-Tirmidhi, Prophet declared that: "*He who monopolizes is not but a wrongdoer".*

The principle of *saad-dharai'* also in line with the Treaty of Rome Article 86. This provision regulates individual behavior by companies and individuals who have a dominant position. These acts involving impose unfair prices, limit production or technical development, and apply dissimilar conditions to equivalent transactions. *Saad-dharai'* principle is one of the justifications for the recognition of the law of competition in Islam. It is basically prevent true harm to the society.

2. Basis of Competition Law in ASEAN

In 1776, Adam Smith ensured that the free market economies which operated with its own devices would be more beneficial than the one that had been intervened.[49] This statement has been confirmed based of the fact that for the last 200 years one of the main driving force of ideal market is the process of rivalry between business actors. This vigorous competition becomes the basis to establish a strong and effective market in order to help consumers to get a good deal. In the spirit of competition, business actors are encouraged to be the finest. They shall maintain their position as consumers' preference by lowering the cost of productivity, providing quality goods or services, and discovering new inventions. Regarding with its significance, competition is placed in the central of economic growth.[50]

[49] There are two major conceptions of competition, the classical and the neoclassical. In the classical conception, competition is viewed as a dynamic rivalries process of firms struggling with each other over the expansion of their market shares at the expanse of their competitors. This dynamic view of competition characterizes mainly with the work of Smith, Ricardo, J.S Mill, and Marx; a similar view can be also found the writings of Austrian economists and the business literature. Look: Mark Furse, *Competition Law of the EC and UK*, Oxford University Press, England, 2004, Page 1.

[50] : Mark Furse, *Competition Law of the EC and UK*, Oxford University Press, England, 2004, Page 1.

Generally competition can be defined as a process when each company attempts to gain consumers for their products through:[51]

a. Price competition;
b. Non price competition, such as, products differentiation, promotion, and qualified services;
c. Low cost production.

In economic perspective, most economists endorse the competition. Classical economists, in particular, they explicitly viewed competition as a mechanism that coordinates the conflicting self-interests of independently acting individuals and directs them to the attainment of equilibrium in a dynamic sense of term.[52] This simply means that competition initiates positive implications such as, efficient resources allocation; expansion of market share; and effective usage of productivity cost. Moreover, according to the classical economic theory, the maximum structure of market will be achieved if the economic actors are free to conduct their activities and make their own choices.

In general perspective, competition frequently linked to the western culture. It occurs because of the similarity of characteristics with the system of capitalism, such as:[53]

a. The acknowledgement of individual ownership. It means, someone is allowed to buy or own production tools and gain the profit. This system is different from

[51] Gunawan Widjaja, *Merger dalam Persepktif Monopoli*, PT. Raja Grafindo Perkasa, Jakarta, 1999, Page 1.
[52] Lefteris Tsoulfidis, *Classical vs. Neoclassical Conceptions of Competition*, University of Macedonia, 2011, Page 2.
[53] Edwin Mansfield, *Principles of Microeconomics*, WW Norton & Company, New York, 1980, Page 51.

communism and socialism, where the government is the one who determines the capital and profit sharing.

b. The liberty for the consumers to select the offers.

c. The liberty for the workers and investors to choose their own businesses without any barrier to entry the market and use their own resources to achieve their goals.

d. The context of perfect competition is where the producers mainly produce the similar products, hence they have to compete in production level.

e. Significantly influenced by the free market.

Regardless, competition still considered as one of the important instruments in economic development. It could be seen from the downfall of strategic economic systems in the East Europe years ago. The system broke down because of the failure of bureaucracy and refusal of economic principles, which part of a proper economic activities.[54] As result, East Bloc Countries along with the Third World Countries rearranged their economic policies. Ever since fair competition has been number one priority above all.

The establishment of competition laws is relatively green due to its popularity only after World War II.[55] Efforts to initiate a global competition regime solely started as early as 1947, with the draft provisions of the International Trade Organization (ITO)[56] which included measures on restrictive business practices.

---

[54] Andi Fahmi Lubis dkk., *op.cit.*, Page 1.

[55] Umut Aydin, *Promoting Competition: European Union and the Global Competition Order*, Presented at the Biennial Conference of the EUSA, Los Angeles, April, Page 5.

[56] The International Trade Organization (ITO) is an intellectual precursor of the World Trade Organization (WTO). During and after World War II, extensive efforts were made to bring it into being, but United States drop its efforts to win congressional backing for the ITO by the end of 1950. However, ITO was accountable to brought the General Agreement on Tariffs and Trade into bring and it marked an important staging post the shift between two contrasting types of trade liberalism: moral internationalism and institutional internationalism,

These rules were included in the draft ITO against the backdrop of 1930s, when international cartels had been widespread and were perceived to have been damaging the world economy.[57] Although the attempts never enter into force, in the late 1980s, Central and Eastern European, and former soviet countries began their market reforms. Until recently, the adoption of competition law continues spreading all around the world. Nowadays, around 80 countries have already implemented the competition laws fundamentally in order to maintain the fair competitive atmosphere. The main projected outcome of this regulation is to decentralize the decision of "what", "how much", and "how" the productions are. Therefore, the needs of the consumers can be fulfilled in the utmost diverse prices.

However, there remain many important differences among competition law and policies. These are including in the priority attached to competition policy vis-à-vis other policies; objectives other than consumer welfare or efficiency under many competition laws; legal approaches to the control of anti-competitive practices; analytical techniques utilized; substantive rules in particular to competition law violations; scope of intellectual property rights; enforcement capabilities; legal doctrines; ability to implement the regulation; and regulatory restrictions upon market entry.[58] Although, despite these differences, competition law in every jurisdiction shares similar objectives and content for constructing the appropriate regulations to maintain specific circumstance in each countries. Therefore, to be effective, competition system design requires careful assessment of existing

---

http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199586103.001.0001/oxfordhb-9780199586103-e-5/ Accessed on 22nd April 2017, 17:00 P.M.

[57] Umut Aydin, op. cit. Page 6.

[58] United Nations Conference on Trade and Development, *The Role of Competition Policy in Promoting Economic Development: The Appropriate Design and Effectiveness of Competition Law and Policy*, August 10th 2010, Page 3.

conditions in the country and attention to how the country will implement the competition policy.

ASEAN is one of the newcomers that requires a comprehensive pre-assessment in enacting competition law. Its significance is regarding with the existing literature that identifies many obstacles to the effective implementation in developing countries. Such obstacles commonly concerning about resource constraints, hostile political-legal environment, lack of competition culture, institutionally undeveloped markets, and geographically underdeveloped markets.[59] Subsequently, the implementation of competition law in ASEAN is depending on development of various sectors. Therefore, it cannot be separated from the series of action plans towards the realization of the ASEAN Vision 2020.

ASEAN Vision 2020 is a projected future of ASEAN. Its goals are set forth in ASEAN Concord II (Bali Concord II) which comprising three pillars, namely political-security community, economic community and socio-cultural community, all of which are closely intertwined and mutually reinforcing for the purpose of ensuring durable peace, stability, and shared prosperity in the region.[60] Despite the importance of each pillar, the ASEAN Economic Community (AEC) has a major influence in establishing competition policy. Therefore, a single coherent blueprint of AEC that consists of clear targets and timelines for implementation of numerous measures was agreed upon in 2006. Sequentially, at the 12th Summit in January 2007, the Leaders affirmed their strong commitment to accelerate the establishment

[59] Umut Aydin and Tim Buthe, *Competition Law and Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits,* Paper presented at the 6th UNCTAD Research Partnership Platform on Competition and Consumer Protection, Geneva, July 2015, Page 15.

[60] Cha-am Hua Hin Declaration on the Roadmap for the ASEAN Community (2009-2015)

of AEC which include free movements of goods, services, investment, skilled labor, and free flow of capital.[61]

There are at least four characteristics and elements that should be highlighted in AEC, such as:[62]

a. The AEC is the realization of the end goal of economic integration as espoused in the vision 2020, which is based on a convergence of interests of ASEAN Member Countries to deepen and broaden economic integration through existing and new initiatives with clear timelines. In establishing the AEC, ASEAN shall act in accordance to the principle of openness, outward-looking, inclusive, and market-driven economy consistent with multilateral rules as well as adherence to rules-based systems for effective compliance and implementation of economic commitments.
b. The AEC will establish ASEAN as single market and production base making ASEAN more dynamic and competitive with new mechanisms and measures to strengthen the implementation of its existing economic initiatives; accelerating regional integration in the priority sectors; facilitating movements of business persons, skilled labor and talents, and strengthening the institutional mechanism of ASEAN.
c. AEC will address the development divide and accelerate integration of Cambodia, LAO PDR, Myanmar, and Vietnam through the initiative for ASEAN integration and other regional initiatives. Other areas of cooperation are also to be incorporated such as human resources development and capacity

[61] Association of Southeast Asian Nations, *Roadmap for an ASEAN Community*, ASEAN Secretariat, Jakarta, 2012, Page 21.
[62] *Ibid,* Page 22.

building; recognition of professional qualifications; closer consultation on macroeconomic and financial policies; trade financing measures; enhanced infrastructure and communication connectivity; development of electronic transactions through e-ASEAN; integrating industries across the region to promote regional sourcing; and enhancing private sectors involvement for the building of the AEC.

d. AEC envisages the following key characteristics:
    1) A single market and production base;
    2) A highly competitive economic region;
    3) A region of equitable economic development; and
    4) A region fully integrated into the global economy.

These past years, there have several progresses in areas under the purview of the ASEAN Economic Ministers (AEM). The AEM is certainly intensifying its performance to ensure the work under its portfolio remains on track. The ASEAN Experts Group on Competition (AEGC) implemented several initiatives in fostering competition policy in ASEAN.[63] AEGC emphasized on capacity building, intra and extra regional networking. Five capacity building workshops have been conducted since June 2011 focusing on:[64]

a. The establishment and organizational reforms of competition authorities;
b. Coordination on cross-border issues on competition;
c. Australia's and New Zealand's sharing experiences in implementing competition policy and law;

---

[63] Association of Southeast Asian Nations, *Evolving Towards ASEAN 2015: ASEAN Annual Reports 2011-2012,* ASEAN Secretariat, Jakarta, 2012, Page 39

[64] [64] Association of Southeast Asian Nations, *Evolving Towards ASEAN 2015: ASEAN Annual Reports 2011-2012,* ASEAN Secretariat, Jakarta, 2012, Page 40.

d. Relationships between competition policy and law and competitiveness of a nation; and

e. Aligning and coordinating competition policy and enforcement between various government entities.

3. Implementation of Competition Law in ASEAN Member States

The AEC Blueprint identifies the realization of single market and production base. Therefore, ASEAN should have a high economic competitiveness, either individually or regionally among member of countries. In order to create a region which has high competitiveness, the development gap among member of countries should be minimized. Hence, common competition law and policy framework in ASEAN are the main prerequisite towards the attaining of those objectives. As most basic, it should consist of the rules that are intended to protect the process of competition in order to maximize consumer welfare.[65]

Currently, the implementation of competition law amongst the AMS are seven out of ten. It was applied in three different waves. The first ones were Indonesia and Thailand implemented its own national competition laws immediately after Asian Financial Crisis in 1997-1998. The second ones were Singapore and Vietnam because of the influence of trade-related factors in 2005. Then lastly was Malaysia and Philippines because of the reinforcement from the AEC blueprint.[66] These are the detailed status of implementation of competition laws in ASEAN:

[65] Deborah Healy, *Application of Competition Laws to Government in Asia: The Singapore Story*, Asian Law Institute Working Paper, Series No. 25, 2011, Page 1

[66] Cassey Lee and Yoshifumi Fukunaga, *ASEAN Regional Cooperation on Competition Policy*, Eria Discussion Paper Series, 2013, Page 7.

Table 2.1 Status of Implementation of Competition Laws in ASEAN

No	Country	Status	Year	Details
1	Brunei Darussalam	FORTHCOMING	2015	-Sector Provisions – Telecommunications Order 2001. - Legislation was passed in January but not effective yet.
2	Cambodia	FORTHCOMING	-	Draft under consideration.
3	Indonesia	YES	1999	Law No. 5 Year 1999 Agency: Business Competition Supervisory Commission (KPPU)
4	LAO PDR	FORTHCOMING	2015	Legislation was passed in July 2015
5	Malaysia	YES	2010	Competition Act 2010 Agency: Malaysia Competition Commission (MyCC)
6	Myanmar	YES	2015	-Article 36(b) of Constitution contains general intention for competition policy - Legislation was passed in February 2015
7	Philippines	YES	2015	-Competition-related provisions in the 1987 Competition, revised Penal Code, and New Civil Code. Agency: Office for Competition (DOJ) -Specific Competition law draft was passed in July 2015
8	Singapore	YES	2005	Competition Act Agency: Competition Commission of Singapore (CCS)
9	Thailand	YES	1999	Trade Competition Act B.E.2542 (1999) Agency: Trade Competition Commission
10	Vietnam	YES	2005	Competition Law No.27/2004/QH11 Agencies: Vietnam Competition Authority (investigation) and Vietnam Competition Council (Adjudication)

According to the table above, it can be perceived that due to the enactment of AEC in the end of 2015, there are still several countries that have not implemented competition law just yet. Myanmar still a work in progress. Presently, Competition Policy Division of Ministry of Commerce is drafting the Rules of Competition Law and discussing it with other relevant ministries and private sector such as Union of Myanmar Federation of Chambers of Commerce and Industry and preparing to form the Myanmar Competition Commission.[67] Brunei Darussalam also committed to introduce competition law as in line with its 2035 vision. It orders to provide competition tribunal for anti-competition agreements, abuse of dominant power, and anti-competitive mergers. The recruitment and formation of the Commission is currently in progress.

As for Cambodia, the draft law has been reviewed and finalized among the working group on Drafting Competition Law and international experts from Australia Competition and Consumer Commission ACCC. As scheduled, this draft law is expected to submit to the council of Minister of Cambodia at the end of 2016 and to the National Assembly by the beginning of 2017.[68] Lastly, in Lao PDR the legislation still in process. The holdup of the implementation is essentially because of the lack understanding of competition concepts and culture.[69]

---

[67] www.asean-competition.org/selectcountry=Myanmar Accessed on May 7th 2017, 17:28 P.M.

[68] www.asean-competition.org/selectcountry=Cambodia Accessed on May 7th 2017, 17:39 P.M.

[69] www.asean-competition.org/selectcountry=LaoPDR Accessed on May 7th 2017, 17:47 P.M

B. Cartel

1. Definition of Cartel

Naturally, cartel is a form of monopoly. The operation is involving the competitive producers conspired while conspired while continuing to promote themselves as competitors.[70] The main goal of this operation is to limit the competition and increase profits. The domination of the market by single entity is not only disadvantageous for the producers, but to the consumers as well. It distorts prices and innovations because it eliminates fearful rivals. To oversimplify, the operation of cartel is influencing supply and demand within the market. It sets prices above and/or reduce output below what it would have been without collusion.[71]

Definition of cartels also familiar in international laws. Under the glossary of terms used in the EU Competition Policy, a cartel is defined as "an arrangement between competing firm designed to limit or eliminate competition between them, with the objective of increasing prices and profits of the participating companies and without producing any objective countervailing benefits".[72] Article 101 (1) of Treaty of Lisbon also mentions about the prohibition of all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States, and which have has the object or effect of such agreements the prevention, restriction, or distortion of competition within the common market. Particularly five categories of cartels considered as anticompetitive such as:[73]

---

[70] John M. Connor, Albert A. Foer, and Simcha Udwin, *Criminalizing Cartels: An American Perspective*, New Journal of European Criminal Law, Vol. 2, 2010, Page 200.

[71] John M. Connor, Albert A. Foer, and Simcha Udwin, *Criminalizing Cartels: An American Perspective*, New Journal of European Criminal Law, Vol. 2, 2010, Page 201.

[72] http://www.europa.eu.int/comm/competition/publications/glossary_en.pdf.

[73] UK. 1998 Competition Act, Section 2 (2).

a. Price fixing;
b. Output limitation;
c. Market division;
d. Discriminatory treatment to equivalent transactions; and
e. Making the conclusion of contracts subject to acceptance by the other parties of irrelevant supplementary obligation.

Moreover, in Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (UN Set) cartel is identified as restrictive business practices. It states that enterprises, except with dealing with each other in the context of an economic entity wherein they are under common control, should refrain from the such practices as limit access to markets or otherwise unduly restrain competition through formal, informal, written or unwritten agreements or arrangements with possible adverse effects on international trade and economic development particularly in developing countries.

Not only acknowledge internationally, cartel also recognized nationally in several countries. Indonesia in particular, mandated the prohibition of cartel in Article 11 Law No. 5 of 1999. In addition, KPPU also issued Regulation No. 4 of 2010 on Guidance of Article 11. It comprehensively explains each element of cartel definition in Article 11 as such:[74]

a. Business Actor

   According to Article 1 (5) Law No. 5 of 1999, business actor is defined as individual person or a company, in the form of legal or non-legal entity established and domiciled or engaged in activities within the legal territory of

[74] Chapter III KPPU regulation No.4 of 2010 on Guidance of Article 11 Law No. 5 of 1999.

Republic of Indonesia, conducting various kinds of business activities in economic sector through contracts, individually and/or collectively. In cartel cases, it takes more than one business actors to be engaged in an agreement in certain market range.

b. Agreement

According to Article 1 (7) Law No. 5 of 1999, an agreement is defined as an action by one or more business actors to bind themselves with one or more business actors, either in writing or not.

c. Competitor

Competitor is another business actor within the concerned market.[75]

d. Intentionally to Affect Prices

The main purpose of cartel is to affect prices, therefore to achieve it, the cartelist agree to control productions and/or marketing of certain products and/or services.

e. Production and/or Marketing Control

Production control means determining the amount of products. In cartel the supplies of the products generally less than the capacity of the demands to ensure the scarcity within the market. While marketing control means determining the areas where the producer should sell its products.

f. Goods

[75] According to Chapter IV KPPU Regulation No. 3 of 2009, concerned market is a concept to define the market range of the product. The importance of market range is to identify the domination of certain product within the certain market by several business actors.

According to Article 1 (16) Law No. 5 of 1999 goods are defined as any object, both tangible or intangible, movable or immovable, that can be traded, used, utilized, or taken advantages by the consumers or business actors.

g. Services

According to Article 1 (17) Law No. 5 of 1999 services are defined as form of work or performances traded in the society to be used by the consumers or business actor.

h. Potentially Caused Monopoly

According to Article 1 (2) Law No. 5 of 1999 monopoly practices are defined as centralization of economic power by one or more business actors causing the control of production and/or marketing of certain goods and/or services, resulting an unfair business competition and can cause damage to the public interest. Regarding with the end game of cartel is to gain massive profit merely for the cartel members, it may cause inconveniency for the public interest.

i. Potentially Caused Unfair Competition

According to Article 1 (6) No. 5 of 1999 unfair competition is defined as competition among business actors in conducting their product activities and/or in marketing goods and/or services, conducted in matter which is unfair or contradictory to the law or hampering business competition. Cartel is supposedly fulfill the element of causing unfair business competition because of its nature. Cartel is a collusion of business actors, therefore the perks of cartel collected solely by its members. Furthermore, since the interests of cartel members are priority, it may cause disadvantages for other business actors.

2. Types of Cartel

Regardless with the dependency of each cartel member and its nature of secrecy, cartel still considers as contractual act. Mainly it is because the cartelist are linked in cooperating in the same stage production or services and mutual aim in profitability.[76] Therefore, the key elements of hardcore cartel are remarkably consistent across the jurisdictions, such as:

a. Price Fixing

Price fixing is an agreement among competitors to raise, fix, or otherwise maintain the price at which their goods or service are sold.[77] The aim and result of every price fixing agreement is the elimination of one form or another of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to set arbitrary and unreasonable price.[78] A price fixing conspiracy works best in certain structural environments with barriers to entry and homogeneity of product.

b. Market Division

Market division or allocation schemes are agreements in which competitors divide markets among themselves. In such schemes, competing firms allocate specific customers or types of customers, products, or territories among themselves as well.[79]

c. Bid Rigging

---

[76] http://www.economics.accounting-coach.com/business-economics/microeconomics/cartel Accessed on June 9th 2017, 13:58 P.M.

[77] http://www.justice.gov/atr/guidelines Accessed on July 14th 2017, 15:51 P.M.

[78] Leo polopolus and James S. Wershow, *The Incidence, Nature, and Implications of Price-Fixing Litigation in U.S. Food Industries,* Southern Journal of Agricultural Economics, July 1978, Page 1.

[79] https://www.justice.gov/atr/price-fixing-bid-rigging-and-market-allocation-schemes Accessed on June 14th 2017, 16:29 P.M.

Bid rigging occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through bidding process. Bid rigging can be particularly harmful if diminish public confidence in the competitive process, and undermine the benefits of a competitive marketplace.[80]

d. Output Restrictions

Output restrictions or might as well be called as supply restrictions occur when competitors agree to prevent, restrict, or limit the volume or type of particular goods or services available.[81] Although naturally any business may reduce their output on its own in accordance with the market demand, it is prohibited to make agreement with fellow competitors to coordinate restricting an output aiming to initiate scarcity that causes increasing price.

3. Cartel Regulations

The issue of competition has already been on the table during the discussion to establish an international Trade Organization (ITO) in the late 1940s. It was reflecting concerns informed by the behavior of German Cartels and Japanese zaibatsu in the pre-war period, that international cartels and restrictive business practices could block market access.[82] Ever since, for the past decades, striking efforts to prevent anti competition acts, especially anti cartel enforcement has become the top agendas around the globe. According to the review from DLA Piper

---

[80] OECD, *Guidelines for Fighting Bid Rigging in Public Procurement Helping Governments to Obtain Best Value for Money*, Page 1.

[81] https://www.accc.gov.au/business/anti-competitive-behaviour/cartels/output-restrictions Accessed on July 28th 2017, 10:21 A.M.

[82] Bernard Hoekman, *Economic Development, Competition Policy, and The WTO*, April 8th 2003, Page 1.

in June 2017 regarding with the cartel enforcement, competition authorities around the world will continue to prioritize investigating and prosecuting cartel conduct. In fact, in many jurisdictions this focus has fuelled a steady increase in financial penalties levied against companies operating in targeted industries or sectors.[83] While other jurisdictions prefer to enhance its competition law by changing their investigations powers, amending the law, and implementing leniency program.

Currently, nations in six continents are either implementing or considering legislation to criminalize cartel. This global trend is accompanied by the growth of corporate leniency programs, which have resulted in multinational companies paying record fines globally. United States is one of the countries that applied criminal sanctions for cartel activity.[84] Since May 1999, more than 30 foreign defendants have served or are currently serving prison sentences in the United States for their participation in international cartels. In June 2004, the Sherman Antitrust Act, 15 U.S.C. § 1, was amended to increase (1) the maximum corporate fine to $100 million from $10 million; (2) the maximum individual fine to $1 million from $350,000; and (3) the maximum prison term to 10 years from 3 years. (With respect to the amount of the fine, higher maximums are still available under the alternative fine statute, 18 U.S.C. § 3571, which provides for a maximum of twice the gross gain from the offense or twice the gross loss to victims of the offense).[85]

---

[83] DLA Piper, *Cartel Enforcement Global Review*, June 2017, Page 2.

[84] Cartel Regulation Getting the Fine Down in 42 Jurisdictions Worldwide Global Competition Review, Published by Getting the Deal Through in Association with Paul Hestings, 2010, Page 3.

[85] International Competition Network, *Trends and Developments in Cartel Enforcement*, (Presented at the 9th Annual ICN Conference in Istanbul, Turkey, April 2010), Page 23.

In Europe, the EU member states prosecuted 11 cartel cases criminally. The specific substantive provisions in cartel prohibition is stated in Article 101 (1) Treaty on the Functioning of the European Union, "*all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market*". Article 101(1) provides a non-exhaustive list of practices caught by the above provision that includes:[86]

a. Price fixing;
b. Agreeing output restrictions; and
c. Market sharing.

In Asia Pacific region, the enhancement of cartel enforcement can be perceived from the amendment of the legislations from several countries. On June 2009, the Australian Parliament passed the Trade Practices Amendment (Cartel Conduct and Other Measures) This new legislation, which took effect in July 2009, follows the US approach of criminally prosecuting individuals and corporations for competition law violations. Individuals face a maximum prison term of 10 years and fines up to $220,000. Corporations may be fined up to 10 per cent of their annual profits in the preceding year. Under the Trade Practices Amendment, a person must not make, or give effect to, a contract, arrangement or understanding that contains a 'cartel provision'. Civil fines for cartel violations were also increased: corporations may

[86] https://iclg.com/practice-areas/cartels-and-leniency/cartels-and-leniency-2017/european-union Accessed on July 31st 2017, 10:21 A.M.

be fined up to $10 million per violation and individuals may be fined up to $500,000.[87]

Japan also amended its Antimonopoly Law by increasing criminal sanctions for collusive market conduct. Moreover, the prison sentences of cartel activity and bid rigging are extended maximum from three to six years. The new legislation also allows up to five corporations to apply for leniency under Japan's amnesty program. The latter three applicants, however, will only receive a 30 per cent reduction in any fines imposed. The JTFC has also just announced that in April 2010 it will launch a 10-member international cartel investigation team to exclusively probe cross-border cartels.[88]

As for Middle East and Africa, it also follows the wave of amending its cartels enforcement. South Africa amended on August 28th 2009. The Competition Amendment Act has a dual impact on the country's anti cartel enforcement program such as:[89]

a. It introduces criminal liability for individuals who, while being a director of a firm or while engaging or purporting to engaged in a cartel conduct. The criminal sanctions consist of a fine not exceeding than R500.000 or imprisonment of up to 10 years or both. Such prosecution can only be executed by National Prosecuting Authority in South Africa.

---

[87] Cartel Regulation Getting the Fine Down in 42 Jurisdictions Worldwide Global Competition Review, *op.cit*, Page 4

[88] Cartel Regulation Getting the Fine Down in 42 Jurisdictions Worldwide Global Competition Review, *op.cit*, Page 4.

[89] International Competition Network, *Trends and Developments in Cartel Enforcement, op.cit.*, Page 22.

b. The Competition Amendment Act expressly empowers the Competition Commission to certify a firm or a person as deserving for leniency.

C. Leniency Program

1. Definition of Leniency Program

Until today, hardcore cartels[90] are still considered as the most dangerous offence against competition laws in many jurisdictions. Therefore, many countries aim to defect cartel and promote its dissolution. However, the implementation will not be as easy regarding with its secrecy nature that designs the evidences to be hidden away. Consequently in the present day, in order to detect cartels most of the competition authorities are only using tips or market research. Considering its limit to effectively investigate and prosecute cartels, recently, some countries begin to develop a more effectual tool called leniency program. These programs basically give incentives to members of cartel to self-report to the competition law enforcement agency which is incredibly efficient to break the code of silence among cartel conspirators.[91]

Leniency programs can be defined as reduced legal sanctions for wrongdoers who spontaneously self-report to the law enforcers, or, in more detail, as granting

---

[90] "hard core" cartel conduct has been defined by the Organization for Economic Cooperation and Development (OECD) as, "an anti-competitive concerted practice, or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets my allocating customers, suppliers, territories, or lines of commerce." (OECD 1998). Also see footnote in United Nations Conference on Trade and Development, *The Use of Leniency Programmes as a Tool for the Enforcement of Competition Law against Hardcore Cartels in Developing Countries,* Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for The Control of Restrictive Business Practices, Geneva, 2010, Page 3.

[91] United United Nations Conference on Trade and Development, *The Use of Leniency Programmes as a Tool for the Enforcement of Competition Law against Hardcore Cartels in Developing Countries,* Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for The Control of Restrictive Business Practices, Geneva, 2010, Page 3.

full immunity from possible sanctions (or at least their considerable reduction) to the cartel member who first provides the competition authority with the information about cartel agreement, its participants, and at the same time actively cooperates during the following investigation with the competition authority.[92] The aim of this method is simply to drive a wedge at a cartel through its trust and mutual benefit. The rewards will be a huge for the first informant. The offer of penalty reductions will also stand for the next informants with more evidences as well, although it will not nearly as attractive. Consequently, for those who involved in cartels, they are placed in the perplexing situations. Comparing the cost and benefit, commonly cartelist focuses on three potential actions which are continuing the cartel arrangement, quietly dissolve the cartel arrangement, or seeking the leniency.

A leniency program is a system. The procedure involves the cartelist must self-report and fulfill certain other requirements. Commonly, they must confess, cease the cartel activity, and fully cooperate in providing significant evidence to aid in the proceedings against the other cartel members. Necessary conditions for an effective leniency program include:[93]

a. Anti-cartel enforcement is sufficiently active for cartel members to believe that there is a significant risk of being detected and punished if they do not apply for leniency;

[92] Martina Steinbockova, *Leniency Program in Antitrust Law*, Masaryk University in Brno Faculty of Law, 2008, Page 7.

[93] United United Nations Conference on Trade and Development, *The Use of Leniency Programmes as a Tool for the Enforcement of Competition Law against Hardcore Cartels in Developing Countries*, Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for The Control of Restrictive Business Practices, Geneva, 2010, Page 3.

b. Penalties imposed on cartelists who do not apply for leniency are significant, and predictable to a degree. The penalty imposed on the first applicant is much less than the imposed on later applicants;
c. The leniency program is sufficiently transparent and predictable to enable potential applicants to predict how they would be treated;
d. To attract international cartelists, the leniency program protects information sufficiently for the applicant to be no more exposed than non-applicants to proceedings elsewhere.

2. General Principles of Leniency Program

Simply adopting leniency program will not ensure that it is going to be effective. The obstacles appear when cartelists consider the benefit of coming forward is not as promising as the benefit of cartel itself. The fear tend to be gone when the penalties of cartel activities barely severe and outweigh the future profit. As result, cartel members will not attract to seek for leniency and likely to ignore the anti-cartel laws. Therefore, in order to apply an effective leniency program there are several principles that essential to be followed.

The first one is certainty. Leniency program works best when they provide a clear and reliable promise of amnesty.[94] Moreover, the seriousness of the possible penalties and the risks of personal liability may induce the significance of the relief leniency can offer.[95] Agencies need to build up the trust of the applicants and their legal representatives by applying a consistent application of the program. An applicant needs to be able to predict with a high degree of certainty how it will be

[94] OECD Policy Brief, *Using Leniency to Fight Hard Core Cartels*, 2001, Page 4.
[95] OECD Policy Brief, *Using Leniency to Fight Hard Core Cartels*, 2001, Page 4.

treated if it reports the conduct and what the consequences will be if it does not come forward. This is why agencies ensure that their leniency policies are clear, comprehensive, regularly updated, and well publicized.[96]

The second one is confidentiality. Leniency works on information that brought forward. Thus, agencies must promise strong protections against unauthorized disclosure. Co-operating with other enforcement agencies about cartel enforcement will require finding ways to communicate about the existence of the situations calling for enforcement attention, without divulging the details of these confidential sources. Therefore, confidentiality is important to leniency applicants, because informants can run serious risk of retaliation, as well as liability in other jurisdictions. Too great a risk that information would be conveyed to other jurisdiction might decrease firms' incentives to come forward.[97]

The third one is respect on general principles of human rights. Even though the competition authorities have been granted far reaching competences for the detection and punishment of antitrust infringements, the power of those should always be limited by general principles of human rights.[98] The authorities must refer their procedural and formal conducts to constitutional traditions common to the states and international human rights treaties. One of the principles that supposed to put in concern is non-discrimination. This principle is closely related to proportionality. Competition laws and regulation provisions applicable to cartels should not make any difference between cartelists unless it is expressly stated, like

---

[96] International Competition Network, *Anti-Cartel Enforcement Manual,* 2009, Page 3.

[97] OECD Reports, *Fighting Hardcore Cartels: Harm, Effective Sanctions, and Leniency Programmes,* 2002, Page 10.

[98] Tine Carmeliet, *How Lenient is the European Leniency System? An Overview of Current (dis)incentives to Blow the Whistle*, Jura Falconis, jg 48 Nummer 3, 2012, Page 485.

cases of gradual reductions in fines. Discrimination on any other but legally permissible basis such as nationality, market location, market branch, individuality of some executives, etc. is strictly prohibited.[99]

USA is one of the states that implement a quite successful leniency program. The Department of Justice (DoJ) is the primary body that responsible for carrying out the investigations of cartel activities basing on Sherman Antitrust Act (1890). It defines cartel as both a criminal and a civil offence under section 1 and section 4 respectively. As per the civil code, the guilty has to serve ten years of imprisonment and/or pay a minimum fine amount of $20,000. The punishment meted to companies involves 20 per cent of volume of affected commerce as a base fine. The Act sets maximum fine to be $ 100million. However, in present times, the fines have gone up to $1,000,000 for individuals and $ 100,000,000 for corporations or an imprisonment for ten years or both as per the discretion of the court. As per the provisions of the Corporate Leniency Policy, leniency is restricted to only one entity. There are two types of leniency laid out by the department.[100]

The type A leniency policy is applicable when DoJ has not procured the relevant information from the outside source before the commencement of investigation, or when the company terminates its participation before the investigation. The type B leniency policy is applicable when investigation has begun and DoJ already possess relevant information.[101] Leniency under both types is granted to only the first qualifying corporation or individual. Individuals also qualify for immunity

[99] Jiri Sorf, *The Leniency Policy*, Charles University in Prague, 2002, Page 40.
[100] CUTS International Discussion Paper, *Designing Effective Leniency Program for India: Need of the Hour*, 2016, Page 14.
[101] *Ibid.*, Page 15.

protection under the Individual Leniency Program, quite similar to other jurisdictions. It also exhibits a leniency plus provision referred as "Amnesty Plus" which serves as an incentive to companies and individuals that do not qualify for complete forgiveness. In such a case, the respective company gets reduced sentence for reporting involvement of other companies' dealing in different products or markets. Also, the provision of markers system is highly sought after to hold an applicant's place in line for leniency as it gathers all possible information. The duration for which the marker is provided is generally for thirty days but is subjected to change depending on factors such as location and number of employees counsel needs to interview, the documents to be reviewed. The identity of applicants and the information provided by them is treated as confidential and the DoJ does not publicly disclose the information it possesses until asked by the court to do so. However, in the case of an international cartel, the department is free to share information with foreign governments as per the provisions of bilateral antitrust cooperation agreements.[102]

3. Game Theory in Leniency Program

While investigating a crime like cartel when the evidence is insufficient, implementing game theory is the best method to enforce a conviction. The method simply aims to assist understanding the situations in which decision-makers interact. In everyday sense, a game defines as a competitive activity in which players contend with each other according to a set of rules.[103] In this context, game theoretic modeling provides an idea related to some aspects of strategic interactions

[102] CUTS International Discussion Paper, *Designing Effective Leniency Program for India: Need of the Hour*, 2016, Page 15.

[103] Martin J. Osborne, *An Introduction to Game Theory*, Oxford University Press, London, 2000, Page 1.

among rational individuals.[104] Therefore, various strategies might be taken considering the advantages and disadvantages of certain positions.

Some game theoretic ideas can be traced back to the 18th century. Although some of the major development only began in 1920 with the work of the mathematician Emile Borel (1871-1956) and the polymath John von Neumann (1903-1957).[105] A decisive event in the development of the theory was the publication in 1944 of the book *Theory of Games and Economic Behavior* by von Neumann and Oskar Morgenstern. In the 1950s game theoretic models began to be used in economic theory and political science, and psychologists began studying how human subjects behave in experimental games. Subsequently, game theoretic methods gave come to dominate microeconomic theory and are used also in many other fields of economics and a wide range of other social and behavioral sciences.[106]

A prisoner's dilemma is one of the models of strategic game that is often used in prosecuting cartels. The mechanism works by creating distrust in a manner that makes confession by expanding the eligibility for amnesty. A prisoner's dilemma occurs when there are at least two parties pursue their own individual interests and act in a rationally selfish manner, which resulting both parties ending up in a worse position than if they had cooperated and pursued the group's interests instead of their own.[107] In cartel cases, the cartelist is faced with binary choice: confess or do

[104] Leven Kockesen and Efe A. Ok, *An Introduction to Game Theory,* 2007, Page 8.
[105] Martin J. Osborne, *Op.Cit.*, Page 3.
[106] Martin J. Osborne, *Op.Cit.*, Page 3.
[107] Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, Journal of Corporation Law, Vol 3, Winter 2006, Page 455.

not confess. The players make their decisions simultaneously in a defined iteration, and one player cannot know the other player's move before making their own.[108]

Although, unlike any other crime, in cartel it is preferred to confess because it will be rewarded with amnesty. The amnesty program reduces the wisdom of wait-and-see strategy for cartel members. Therefore, a firm must confess before other firms do in order to maximize the gains from confession. There are essentially three possible actions: confess first, confess second, and do not confess. While confess second will not guarantee any penalty reduction and an outcome of mutual non-confession is not going to happen, thus it is better to confess first.[109]

Distrust is the key to dissolve cartels. Unfortunately, in many cartels it may still be difficult to create distrust among firms. While competitors may initially find it harder to trust each other, after they overcome their reluctance and have entered into a price-fixing conspiracy, the firms may create a wealth of trust. Nothing creates trust like a history of mutual cooperation. Therefore, leniency program is backed with high sanctions and incentives to confess.[110]

Through prisoner's dilemma method, the cartelists are likely to trust each other when the benefits of confessing is relatively high. A cartelist would probably not turn state's evidence against his partner in exchange for a sentence reduction instead he would confess in exchange for no prison time. Knowing a player is provided by an attractive deal would cause concern for the others. The trust between partners become less and less, then it turns into some vicious cycle until somebody

---

[108] *Ibid.*, Page 466.
[109] *Ibid.*, Page 467.
[110] Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, Journal of Corporation Law, Vol 3, Winter 2006, Page 455.

confesses. In sum, confessing first can eliminate criminal fines and reduce private liability from treble damages to single damage.[111]

D. Elements of International Cooperation

1. Comity

In the ninetieth century, A German jurist, Rudolf Von Ihering stated: "while the states were fighting one another, and established between them a relation of exchange of goods and ideas".[112] Apparently, the validation of this statement considerably applicable in the recent century. The relevancy is acknowledged from the expanding transnational activities and the development of business that naturally cut the national boundaries. Private enterprises export, invest, transfer of technology, and engage in all sorts of business activities in pursuit of profit. This trend is continued to expect acceleration through the growth of e commerce and computer networks.

The development of business activities is certainly followed by evolving competition law and policy. Internationally, the evolution of competition regulation has been driven by the intersection of two forces. First, the internationalization of business and commerce. This means that domestic economies are highly interdependent and private business in one country will generate great impacts to other countries. Second, the significantly escalating number of countries that

[111] *Ibid.*, Page 475.

[112] Mitsuo Matsushita, *International Cooperation in the Enforcement of Competition Policy*, Washington University Global Studies Law Review, Vol. 1, 2002, Page 463.

adopting competition law. The various system of competition law may highlight similar points, but also draw divergence.[113]

In this interconnected world, the intersection of the two forces may create a problem. Any country that substantially and directly affected by private, economic conduct, wherever it may occur, has a legitimate interest in regulating that conduct because it must protect the economic wellbeing of its citizens. It becomes complex because the diversity of competition law in each state will create regulatory overlap. Ultimately, when anti-competitive conduct occurs in national market and cause disadvantages to other trading nations, it will be difficult to unravel because the regulatory solutions that suitable for the problem will be quite different from one another. Particularly for pursuit of international hardcore cartels because the lack of enforcement in the legislation and the limitation of the state's authorities to prosecute the case.

Accordingly, it is a necessity to introduce an international cooperative framework in competition matter. The concept of international cooperation has especially been used in the literature on international relations. A standard definition is that cooperation occurs when "actors adjust their behavior to the actual or anticipated preferences of others". Therefore, international cooperation describes as interactions to achieve common objectives when actors' preferences are neither identical (harmony) nor irreconcilable (conflict).[114] In the subject of competition, cooperation among competition authorities and courts is not a new phenomenon. In

[113] Brendan Sweeney, *International Competition Law and Policy: A work in Progress*, Melbourne Journal of International Law, Vol. 10, 2009, Page 1.

[114] Sebastian Paulo, *International Cooperation and Development a Conceptual Overview*, Deutsches Institut fur Entwicklungspolitik, Netherlands, 2014, Page 3.

fact, there had been earlier attempts between states to ensure common line of action against international cartels and improved coordination regarding mergers across the border.[115]

Regarding with the international cooperative relationships between domestic competition authorities, there are some principles that must be highlighted. One of the key principles that must be implemented is comity. Comity basically is the legal principle whereby the country should take other countries' important interests into account while conducting its law enforcement activities, in return for their doing the same.[116] The importance of applying comity principle within the countries is significantly vital considering the increasing number of cartel cases in international dimensions. Many transnational cases as such put courts in the awkward situation of adjudicating the interstices of law, narrow fields created when legal acts or omissions occurs across borders and implicate various sovereign interests. When courts are placed in this gap, comity bridges the chasm by encouraging them to take account of the sovereign interests that the exercise of judicial power would implicate. In this way, state sovereignty is respected, and a conflict between sovereigns is either avoided or ameliorated, thereby respecting and encouraging international relations. In that comity helps maintain amicable working relationships between nations, it facilitates the transnational exchange of peoples, services, and goods, and supports private and international interests.[117]

---

[115] Terhechte J.P, *International Competition Enforcement Law between Cooperation and Convergence,* Springer, USA, 2011, Page 10.

[116] OECD, *Improving International Co-operation in Cartel Investigation,* Page 20.

[117] Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws,* University of California, Vol. 44, 2010, Page 14.

International cooperation in the competition field recognize two types of comity such as negative comity and positive comity. Firstly, negative comity or traditional comity is a country's consideration of how to prevent its law and law enforcement actions from harming another country's important interests. As it stated in 1995 OECD, "notify other countries when its enforcement proceedings may affect their important interests, and give full sympathetic consideration to ways of fulfilling its enforcement needs without harming those interests".[118] Secondly, positive comity is a request by one country that another country undertake enforcement activities in order to remedy allegedly anti-competitive conduct that is substantially and adversely affecting the interests of the referring country.[119] Positive comity is already incorporated within many bilateral agreements. This is a practical way to control anti-competitive activities that adversely affect a party without resorting to an extraterritorial application of its competition law that may result in a conflict of jurisdiction. The provision of positive comity has also set forth in the OECD Recommendations 1995 that stated, "give full and sympathetic consideration to another country's request that it open or expand a law enforcement proceeding to remedy conduct in its territory that is substantially and adversely affecting another country's interests, and take whatever remedial action it deems appropriate on a voluntary basis in considering its legitimate interests".[120]

In such situation, the approach of positive comity may play a vital role especially in cartel or boycott cases that cut across the nation boundaries. The nation

[118] OECD, *International Regulatory Co-operation Draft Case Study on Competition Law Enforcement,* Page 4.

[119] OECD, *International Regulatory Co-operation Draft Case Study on Competition Law Enforcement,* Page 5.

[120] OECD, *International Regulatory Co-operation Draft Case Study on Competition Law Enforcement,* Page 5.

affected may request the nation or boycott originates to take action vis-à-vis in its territory. If the host country takes action, the conduct in question can be controlled effectively. In United States v. Nippon Paper Industries[121], U.S and Canada authorities cooperated closely in their investigation of a Japanese cartel in which several paper mills fixed the price of fax paper to be sold in the United States and Canada. Their close cooperation resulted in the successful criminal enforcement of U.S. and Canadian competition laws against cartel.[122]

The OECD recommendation does not refer to categories of positive comity, but it is useful to identify several categories such as:[123]

a. A case-specific positive comity arrangement is an understanding between requesting and a requested country concerning a matter that requested country agrees to investigate.

---

[121] In 1995, a federal grand jury handed up an indictment naming as a defendant Nippon Paper Industries Co., Ltd. (NPI), a Japanese manufacturer of facsimile paper.[1] The indictment alleges that in 1990 NPI and certain unnamed coconspirators held a number of meetings in Japan which culminated in an agreement to fix the price of thermal fax paper throughout North America. NPI and other manufacturers who were privy to the scheme purportedly accomplished their objective by selling the paper in Japan to unaffiliated trading houses on condition that the latter charge specified (inflated) prices for the paper when they resold it in North America. The trading houses then shipped and sold the paper to their subsidiaries in the United States who in turn sold it to American consumers at swollen prices. The indictment further relates that, in 1990 alone, NPI sold thermal fax paper worth approximately $6,100,000 for eventual import into the United States; and that in order to ensure the success of the venture, NPI monitored the paper trail and confirmed that the prices charged to end users were those that it had arranged. These activities, the indictment posits, had a substantial adverse effect on commerce in the United States and unreasonably restrained trade in violation of Section One of the Sherman Act, 15 U.S.C. § 1 (1994). See: UNITED STATES of America, Appellant, v. NIPPON PAPER INDUSTRIES CO., LTD., et al., Defendants, Appellees No. 96-2001. http://caselaw.findlaw.com/us-1st-circuit/1316485.html Accessed on 7th August 2017, 10:05 A.M.

[122] Mitsuo Matsushita, *International Cooperation in the Enforcement of Competition Policy*, Washington University Global Studies Law Review, Vol. 1, 2002, Page 470.

[123] OECD, *Improving International Co-operation in Cartel Investigation*, Page 21.

b. Allocative positive comity is a case-specific positive comity arrangement under which the requesting country undertakes to defer or suspend action during the course of the requested country's proceeding.
c. Co-operative positive comity in any case specific positive comity arrangement that does not constitute allocative positive comity.

The potential benefits of positive comity will largely depend on the extent to which competition authorities are willing and able to create a co-operative culture in which authorities can justify bringing cases primarily for the benefit of others on the basis of the benefits that they expect to receive from cases brought by others. The benefits include: [124]

a. *Improved effectiveness.* By invoking a requested country's laws, positive comity can provide a remedy for illegal conduct that the requesting country cannot remedy itself due to jurisdictional problems.
b. *Improved efficiency.* Since positive comity results in an investigation by the country in the best position to gather the necessary facts, it can improve efficiency by reducing investigation costs and the risk of inconsistencies.
c. *Reducing the need for sharing confidential information.* Since the proceeding is handled by the competition authority with the best access to the evidence, there is likely to be less need for sharing confidential information.

The OECD's Positive Comity Report in 1999 considered the potential of positive comity in hardcore cartel cases. As such, where a requesting country acknowledges that it does not have or may lack jurisdiction. Co- operative positive comity could be beneficial as part of a coordinated challenge in which, for example,

[124] *Ibid.,* Page 22.

a requested country takes the lead initially with the understanding that roles may shift and there may be multiple investigations. The report recognized that allocative positive comity has limited potential in hard core cartel cases because injured countries are likely to want to impose their own remedies. Positive comity is also unlikely to be available in most export cartel cases because such cartels are seldom illegal in their home countries.

2. Best Practices

Businesses today is more likely come into contact with other competition authorities outside the home jurisdictions. Consequently, business practice that once were in the local scope, expanded and affected the citizens and business communities worldwide. In light of the laws in b many countries preventing competition authorities from exchanging confidential information in cartel investigations, or severely restrict their ability to do so. Therefore, OECD's Competition Committee developed Best Practices for the formal exchange of information in cartel investigations in 2005. The Best Practices aim to identify safeguards that countries can consider applying when they authorize competition authorities to exchange confidential information in cartel investigations.[125] The adoption of such best practices would not only ensure procedural fairness for those involved, but would also importantly strengthen vigorous, efficient enforcement of competition laws in a number of respects.

For example, frequent and open engagement with firms under investigation enhances the ability of agencies to gather relevant information, increases efficiency by focusing the parties on the issues in which agencies are actually interested, and

[125] OECD, *Improving International Co-operation in Cartel Investigation*, Page 27.

strengthens the internal deliberations of agencies by enabling them to better understand the firms' arguments, and the facts that support those arguments, before, rather than after, the agencies decide whether to recommend formal charges. Providing due process protections to firms under investigation enable competition authorities to ensure that their decisions are respected by all parties.[126] High standards of transparency and openness increase support for the decision-making processes of competition authorities by instilling in regulated parties and the public a sense of confidence that decisions are made fairly and consistently. Transparency also facilitates voluntary compliance with competition laws because businesses and their counselors can better predict the likely reaction of authorities to a contemplated course of conduct or transaction if they understand the basis for prior decisions and have confidence that the law will be applied consistently and objectively. Further, protecting the confidential information submitted by the respondents and relevant third parties can ensure that agencies have access to information that will strengthen enforcement decisions and public trust in the ultimate conclusion.[127] Thus, increased procedural fairness can strengthen agency decision-making and increase public confidence in agency decisions, benefitting businesses, competition authorities and the consumers they serve.

The best practices are based on this following principles:[128]

a. International treaties or domestic laws authorizing a competition authority to exchange confidential information in certain circumstances should provide for

[126] UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS, *Recommended Framework for Best Practices in International Competition Law Enforcement Proceedings,* Page 2.

[127] UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS, *Recommended Framework for Best Practices in International Competition Law Enforcement Proceedings,* Page 2.

[128] OECD, *Improving International Co-operation in Cartel Investigation,* Page 22.

safeguards to protect the confidentiality of exchanged information. On the other hand, such safeguards should not apply where competition authorities exchange information that is not subject to domestic law confidentiality restrictions.

b. Member countries should generally support information exchanges in cartel investigations. It should, however, always be at the discretion of the requested jurisdiction to provide the requested information in a specific case, or to provide it only subject to conditions, and there should be no obligation to act upon such a request. A country may decline a request for information, for example, because honoring the request would violate domestic law or would be contrary to public policy in the requested jurisdiction. In addition, information exchanges should not inadvertently undermine hardcore cartel investigations, including the effectiveness of amnesty/leniency programs.

c. When initiating an exchange of information, jurisdictions should act with the necessary flexibility in light of the circumstances of each case. They should consider engaging in initial consultations, for example to assess the ability of the jurisdiction receiving the request for information to maintain the confidentiality of information in the request as we as the confidentiality of information exchanged.

d. Appropriate safeguards should apply in the requesting jurisdiction when it is using the exchanged information. In the this context, the best practices address in particular the use of exchanged information for other public law enforcement purposes, disclosure to third parties, and efforts to avoid unauthorized disclosure.

e. Information exchanges should provide safeguards for the rights of parties under the laws of member countries. The best practices specifically mention the legal professional privilege and the privilege against self-incrimination. Regarding legal professional privilege, whichever of the levels of protection is higher, that of the requesting or the requested jurisdiction, should be applied. The requesting jurisdiction should ensure that its privilege against self-incrimination is respected when using the exchanged information in criminal proceedings against individuals.

f. In light of concerns that prior notice to the source of information can severely disrupt and delay investigations of cartels, the best practices advise against giving prior notice to the source of information unless required by domestic law or international agreement. Competition authorities may, on the other hand, consider ex-post notice if such notice would not violate a court order, domestic law, or an international agreement, or jeopardize the integrity of an investigation.

3. Capacity Building and Technical Assistance

In today's economy, it is vital that competition enforcement transcends national boundaries to protect the benefits of competition and fair market. Generally, an effective agency requires certain essential condition such as independence, adequate financial resources, skilled staff, leadership, the ability to advocate compliance with competition law among business and government agencies to take competition objectives into account, and effective cooperation with sector regulation.[129] Moreover, regarding with the borderless workplace for competition

[129] United Nations Conference on Trade and Development, *Effectiveness of Capacity Building and Technical Assistance Extended to Young Competition Agencies*, Page 1.

enforcers nowadays, it also entitles competition agencies to seek out reliable, constructive, and innovative means of cooperation and information sharing with other competition agencies.[130] Therefore, it will establish a solid teamwork of competition agencies which might be convenient in order to investigate international cartels and collect the information that has to be obtained abroad. However, according to UNCTAD peer reviews, most competition agencies in developing countries has been struggling to build strong foundations as the result of lack of good governance and competition culture. Thus, capacity building and technical assistance are necessary to overcome the challenges.

Capacity building and technical assistance are two terms that often use in the same string. However, those two clearly have a rather distinctive concepts. Capacity building is a process of putting into place at the national or regional level, sustainable competition policy frameworks and processes. Its process centers on the enforcing and advocating competition authority itself, but in wider sense encompasses all actors involved in the creation and implementation of a competition regime. While, technical assistance is more of a transfer of skills and know-how from one agency or jurisdiction to another.[131] Regardless with the distinctive concepts, capacity building and technical assistance is closely interrelated. The successful introduction of a credible competition regime requires a range of sophisticated skills and expertise. Some of this know-how may be initially difficult to obtain on the national scene for the perspective competition

[130] International Competition Network, *Anti-Cartel Enforcement Manual*, Page 3.

[131] International Competition Network, *Capacity Building and Technical Assistance Building Credible Competition Authorities in Developing and Transition Economies*, Presented in ICN 2nd Annual Conference, Mexico, 2003, Page 46.

agency. External support can give access to this know-how through technical assistance.[132]

For decades, several international organizations such as UNCTAD, OECD, ICN, and more advanced competition agencies have been attempting to improve the capacity of underdeveloped competition agencies around the world. Among other things, there are certain requirements in terms of concrete capacity building, such as:[133]

a. Guidelines and descriptions of the roles, functions, powers, and responsibilities of relevant national competition authorities from those countries that have such legislation and competition authorities;
b. Provision of legal assistance and policy advice, supported by domestic experts who are well-versed of their own national legal system and political administrative structure, with respect to:
    1) Identification of the statutory structure and substantive elements that should be included in the legislation;
    2) Legal concepts relating to competition, such as: anti-competitive practices, mergers, hardcore cartels, abuse of dominance, consumer protection, state monopolies, regulatory objectives, etc.;
    3) Autonomy and administrative structure of the competition authority, including clarification of the concept of administrative independence from the executive branch of the government, budgetary sourcing, and

[132] International Competition Network, *Ibid*, Page 47.
[133] United Nations Conference on Trade and Development, *Effectiveness of Capacity Building and Technical Assistance Extended to Young Competition Agencies*, Page 4.

application of civil service regulations to the staff of the competition authority, etc.;

4) Administrative, criminal, and civil actions and penalties, including the allocation and extent of criminal and civil responsibility and liability for violations of the national competition legislation, the applicable rules of procedure and the appellate process, etc., and;
5) Procedures for information exchange and cooperation with competition authorities of other countries.

Many agencies, especially the newer ones, tend to see cooperation broadly, as a way to build enforcement capacity, exchange experiences, and share methodologies and not just in case-specific, enforcement context. According to the OECD/ICN survey on International Enforcement Co-operation Status Quo and Areas for Improvement that addressed for 120 competition agencies, the objective of international cooperation identified in the most responses was capacity building for 29 respondents. These are including exchange and development of best practices, exchange of experience and expertise, and sharing of methodologies (non-case specific). Key enforcement related objectives indicated frequently in responses included: facilitating investigations and avoiding conflicting outcomes, identified by 28 respondents and 27 respondents respectively.[134]

[134] OECD, *International Enforcement Co-operation*, Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation, 2013, Page 37.

CHAPTER III

ANALYSIS ON COOPERATION AMONG ASEAN MEMBER STATES TO INVESTIGATE CROSS BORDER CARTEL IN ACCORDANCE WITH ASEAN ECONOMIC COMMUNITY AGENDA

A. Preparation on ASEAN Cooperation to Investigate Cross Border Cartel

1. Elements to Prepare to Establish Cooperation in Cross Border Cartel Investigations

The establishment of ASEAN Economic Community (AEC) in 2015 is a major milestone in the regional economic integration agenda. The key component of the goals is formed in AEC blueprint, which included initiating a comprehensive competition policy as one of the cornerstones to achieve ASEAN Vision 2020. Therefore, competition policy is clearly an important aspect to ASEAN's Vision of economic integration. The formation of a single market and production base is premised upon the notion competition across markets in the ASEAN countries. Also, the economic competitiveness of the ASEAN region and its integration into the global economy are integral to all four aspects of the AEC. Therefore, to assist this process, ASEAN plans and composes its programs through Guidelines and forums.[135]

Aside with its highlighted objectives, the significance of competition evidently is beyond that. It is indicated in the definition of competition policy in the Guidelines:[136] "Competition policy can be broadly defined as a governmental policy that promotes on maintains the level of competition in the markets, and includes governmental measures

[135] Cassey Lee and Yoshifumi Fukunaga, *ASEAN Regional Cooperation on Competition Policy*, Eria Discussion Paper Series, 2013, Page 2.

[136] ASEAN Regional Guidelines on Competition Policy.

that directly affects the behavior of enterprises and the structure of industry and markets. Competition policy basically covers two elements:

a. It involves putting in a place to set of policies that promote competition in local and national markets, such as introducing an enhanced trade policy, eliminating restrictive trade practices, favoring market entry and exit, reducing unnecessary governmental interventions, and putting greater reliance on market forces.
b. It is known as competition law, comprises legislation, judicial decisions, and regulations specifically aimed at preventing anti-competitive business practices, abuse of market power and anti-competitive mergers."

Therefore, due to the dynamic regional economic integration and its ongoing process, ASEAN keeps pushing its agenda. While the overall vision articulated in the AEC 2015 remains relevant, the AEC Blueprint 2025 will continue building on the AEC Blueprint 2015. It consists of five interrelated and mutually reinforcing characteristics, namely: [137]

a. A highly integrated and cohesive economy;
b. Competitive, innovative, and dynamic ASEAN;
c. Enhanced connectivity and sectorial cooperation;
d. A resilient, inclusive, people-oriented, and people-centered ASEAN; and
e. A global ASEAN.

In this context, competition plays a fundamental role through the second characteristic by protecting fair and efficient competition, as per allowing market-oriented reforms to produce their expected benefits. Aligning with the commitment

[137] ASEAN Economic Community Blueprint 2025.

in ASEAN Economic Community, all market players are ensured to reach a level-playing field by guaranteeing its contribution to economic development and consumer welfare.

For ASEAN to be a competitive region with well-functioning markets, rules on competition will need to be operational and effective. The fundamental goal of competition policy and law is to provide a level playing field for all firms, regardless of ownership. Enforceable competition rules the proscribe anti-competitive activities are an important way to facilitate liberalization and a unified market and production base, as well as to support the formation of a more competitive and innovative region. Strategic measure include the following:[138]

a. Establish effective competition regimes by putting in a place competition laws for all remaining ASEAN Member States that do not have them, and effectively implement national competition laws in all ASEAN Member States based on international best practices and agreed-upon ASEAN guidelines;
b. Strengthen capacities of competition-related agencies in ASEAN Member States by establishing institutional mechanisms necessary for effective enforcement of national competition laws, including comprehensive technical assistance and capacity building;
c. Foster a "competition-aware" region that supports fair competition, by establishing platforms for regular exchange and engagement, encouraging competition compliance and enhanced access to information for businesses, reaching out to relevant stakeholders through an enhanced regional web portal

[138] ASEAN Economic Community Blueprint 2025.

for competition policy and law, outreach and advocacy to businesses and government bodies, and sector-studies on industry structures and practices that affect competition;

d. Establish Regional Cooperation Arrangement on competition policy and law by establishing competition enforcement cooperation agreements to effectively deal with cross-border commercial transactions;
e. Achieve greater harmonization of competition policy and law in ASEAN by developing a regional strategy on convergence;
f. Ensure alignment of competition policy chapters that are negotiated by ASEAN under the various FTAs with Dialogue Partners and other trading nations with competition policy and law in ASEAN to maintain consistency on the approach to competition policy and law in the region; and
g. Continue to enhance competition policy and law in ASEAN taking into consideration international best practices

Extremely diverse, yet bound by a common desire for peace and prosperity for its people, ASEAN gradually broke through barriers that previously blocked cooperation in fighting common problems. Today, ASEAN is a unique model for socio-economic integration that widely recognized globally. It has matured as a regional grouping and has begun the process of moving from cooperation by consensus to integration by choice.[139] Although, the diversity of economic structure within AMS still has impacts, specifically on competition regime. Given with these various economic weight and level of industrialization among AMS, the Guidelines

[139] ASEAN Development Bank Institute, *ASEAN 2030 Towards a Borderless Economic Community*, Japan, 2014, Page 4.

tends to use the soft law approach. It is solely a roadmap providing general framework to promote and share best practices in order to create a competition culture.[140] Consequently, ASEAN harmonization on competition law aims only at narrowing distinctions between national laws while leaving the details to national legislators. Therefore, in order to have an enhanced economic integration among the AMS, each state must have an evenly developed national law.[141]

Hence, upon the strategic measures under the AEC Blueprint 2025 that builds on the initiatives of AEC Blueprint 2015, ASEAN Competition Action Plan (ACAP) 2025 is established. It details the strategic goals and outcomes on competition policy and law in ASEAN over the next 10 years. Those strategic goals consist of:[142]

a. Effective competition regime are established in all ASEAN Members States;
b. The capacities of competition-related agencies in AMS are strengthened to effectively implement competition law and policy;
c. Regional cooperation arrangements on competition law and policy are in place;
d. Fostering a competition-aware ASEAN region; and
e. Moving towards greater harmonization of competition law and policy in ASEAN.

These goals are designated to allow ASEAN to work towards the overarching vision of a competitive, innovative, and dynamic ASEAN with effective and enforceable

[140] Barbora Valockova, *EU Competition Law: A Roadmap for ASEAN,* Working Paper No. 25, 2015, Page 8.
[141] *Ibid.*, Page 9.
[142] ASEAN Competition Action Plan 2025.

competition policies and law.[143] In preparing cooperation among AMS to investigate cross border cartel, particularly, there are several strategic goals that requires to be achieved.

The first strategic goal is an effective competition regime in all AMS. This strategic goal builds on the commitment of ASEAN to ”endeavor to introduce competition policy in all Member States by 2015”. Some AMS already have competition laws in place by 2015. Several member states are also currently in the process of reviewing their existing competition regimes, in light of their enforcement experiences, changing market dynamics and in accordance with international best practices.[144] This goal is highlighted as follows:[145]

Table 3.1 Strategic Goal 1.

Initiatives	**Outcomes**
1. Complete legal framework on competition law and policy in all AMSs.	1. Competition law enactment in all AMS.
2. Strengthen the legislative framework of AMS to meet in accordance with international best practices.	1. A developed ASEAN glossary on competition terms; 2 A carried out self-assessment (with improvements clearly mapped and monitored) every two years based on the assessment toolkit on competition enforcement and advocacy.

Once a competition law has been adopted, the more complex challenge of implementation begins. The second strategic goal is to strengthen the capacities of

[143] ASEAN Competition Action Plan 2025.
[144] *Ibid.*
[145] *Ibid.*

competition-related agencies in AMS in order to effectively implement competition law and policy. The initiatives under this strategic goal are oriented towards addressing capacity building gaps in view of a set of skills or competencies that competition agencies and related actors (including, among others, judges, lawyers, economists) should possess in order to be able to effectively enforce the law. The ASEAN Regional Core Competencies (RCC) Guidelines already provide guidance to Member States on their required competencies in competition law and policy and recommendations on how to develop these. Capacity building measures would have to be delivered in a holistic approach and customized to various (groups of) Member States, according to the degree of development of their respective competition regimes, specifically as follows:[146]

Table 3.2 Strategic Goal 2.

Initiatives	Outcomes
1. Conduct assessment The of national and regional capacity needs related to competition law and policy.	1. Comprehensive capacity needs assessment undertaken, with a reference to the Regional Cooperation on Competition Guidelines.
2. Enhance capacity in institutional development, enforcement, advocacy, economic analysis / sector studies and related policy area.	2. Updated regional capacity building roadmap 2016 – 2020 by 2017 with a vision until 2025.
3. Establish ASEAN competition centers to conduct regional research and training activities related to competition law and policy.	3. Feasibility study for the ASEAN Competition Center(s) conducted by 2017.

[146] ASEAN Competition Action Plan 2025.

4. Develop enforcement strategies tailored to ASEAN economies to facilitate the effective implementation of competition law and policy in the region.	4. National enforcement strategies formulated in all AMSs by 2020.
5. Engagement with the judiciary is developed at the national and regional level.	5. The judiciary was engaged in at least two ASEAN regional competition events per year.

The next stage is to advance the regional cooperation agenda on competition law and policy and essentially build on the initiatives carried out under the strategic goals related to the strengthening of national competition regimes in ASEAN. Efforts need to be directed towards addressing competition issues or cases that are cross border or regional in nature. It is anticipated that in a post 2015 landscape, cross border issue that involving multinational companies will occur, exceeding the mandate of a single national jurisdictions. This will prompt the ASEAN Member States to establish and enhance cooperation arrangements on Competition, with a view towards working out common understanding as well as joint actions. The initiatives as follow:[147]

Table 3.3 Strategic Goal 3.

Initiatives	Outcomes
1. Establish a regional cooperation agreement on Competition law.	1. The regional cooperation agreement endorsed by all AMSs by 2020.

[147] ASEAN Competition Action Plan 2025.

2. Develop enforcement mechanism to handle cross-border cases in ASEAN.	2. An ASEAN Competition Enforcers' Network being established and launched in 2019.
3. Strengthen the AEGC	3. AEGC widen its agenda to look at broader competition policy issues at the regional level by 2025.

The fourth strategy is cross cutting and focusing on developing both competition culture and a wider competition community to promote fair competition in the region. With the ASEAN Competition Conference (ACC) as its flagship event, the AEGC has already established a regular forum for the interaction with different stakeholder groups. In the future, there could be additional specific initiatives for regional advocacy campaigns, particularly vis-à-vis the private sector. It means that the understanding of competition regime will not only limited to legal framework but also by the general public. The strategic goals as follow[148]:

Table 3.4 Strategic Goal 4.

Initiatives	Outcomes
1. Assess the impact of competition law and policy on the market of AMS.	1. Regional study in undertaken on the impact of exceptions and exemptions from competition law on the markets of AMSs by 2019, with recommendations.
2. Asses the impacts on competition in the markets of AMSs relating to state-owned enterprises and/or government-linked monopolies.	2. Regional study is undertaken by 2021 with recommendations.

[148] ASEAN Competition Action Plan 2025.

3. Strengthen interface between competition policy issue and other economic areas.	3. Opinions on regional policies that have possible impacts on intra-regional trade and competition released by the AEGC by 2025.
4. Establish a platform for regular exchange and engagement by competition agencies with relevant stakeholder groups.	4. Regular platforms such as the ASEAN Competition Conferences (ACC) are maintained.
5 .Encourage competition compliance among businesses.	5. Toolkit or checklist on competition compliance for businesses by 2017.
6. Build the capacity of the media to cover competition issues.	6. Major media in AMS have improving competition issues.

The final strategic goal is to harmonize regional competition policy, after the ASEAN successfully introduced national legislations in respective Member States and effectively enforced these rules. Greater harmonization of competition policy in ASEAN is expected to create seamless policy environment for goods, services, and capitals to move around freely and without barriers, while companies could operate and allocate their resources in the most efficient ways possible. It would also contribute to enhance the transparency and predictability of the investment climate. The plans consist of:[149]

Table 3.5 Strategic Goal 5.

Initiatives	Outcomes
1. identify commonalities and differences across national competition law in ASEAN	1. Recommendations on substantive as well as procedural standards in competition law enforcement for ASEAN by 2018.

[149] ASEAN Competition Action Plan 2025.

2. Develop a strategy for regional convergence on competition matters.	2. Strategy paper on areas feasible for regional convergence developed by 2018.
3. Improve the Regional Guidelines on Competition Policy.	3. An improved regional guidelines on competition policy by 2020.
4. Formulate an ASEAN Set of Agreed Principles as the model law framework.	4. An ASEAN set of Agreed principle drafted by 2022 and a declaration on the ASEAN Set of Agreed Principles by 2025.

2. Types of Cooperation to Investigate Cross Border Cartel among ASEAN Member States

The globalization of business means cartel activities rise up to a whole new scope that cross the boundaries of jurisdictions. Therefore, the cooperation between competition authorities in different jurisdictions imperative to the success of domestic enforcement. The proliferation of competition enforcement around the globe, with ever growing number of jurisdictions introducing anti-cartel rules, emphasizes the shared interest in fighting international cartels. However, to ensure that certain steps to investigate cartel are well taken and will not negatively affect other jurisdictions, it is necessary to have strategy. Join planning and involving coordination of simultaneous searches, raids or inspections, exchange information, discussion of general orientations regarding investigations, gathering information, interviewing witnesses on behalf of another agency, are highly important to safeguard its effectiveness an prevent the destruction of concealment of information by cartelist.[150]

[150] OECD, *Improving International Co-operation in Cartel Investigation*, Policy Roundtables, 2012, Page 11.

The OECD makes an effective competition law enforcement its high priority to eradicate hardcore cartel. This has been recognized in recent acts by the OECD Council, which also encouraged member countries to cooperate in their law enforcement activities:[151]

a. The Council's Recommendation concerning Co-operation between Member Countries on Anti-Competitive Practices Affecting International Trade recommended that, when permitted by their laws and consistent with their interest, Member Countries should coordinate competition investigations of mutual concern and should comply with each other's requests to share information.
b. Further the Council's Recommendation concerning Effective Action Against Hard Core Cartels recognized that member countries' mutual interest in preventing hardcore cartels warrants cooperation that might include sharing documents and information in their possession with foreign competition authorities and gathering documents and information on behalf of foreign competition authorities on a voluntary basis and when necessary through use of compulsory process, to the extent consistent with their own laws, regulations, and important interests, and subject to effective safeguards to protect commercially sensitive and other confidential information.
c. The latter Recommendation also encouraged member countries to review all obstacles to their effective co-operation in the enforcement of law against hardcore cartels and to consider actions, including national legislation and/or

[151] OECD Competition Committee, *Best Practices for the Formal Exchange of Information between Competition Authorities in Hardcore Cartel Investigations*, 2015, Page 1.

bilateral or multilateral agreements or other instruments, by which they could eliminate or reduce those obstacles in a manner consistent with their important interests.

Cross border cartels are prohibited for the obvious reasons. It has adverse effect not only on the competitors, but customers will also suffer disproportionality from the effects of collusion in commerce and public procurement. High prices, particularly, in essential goods and services, force the consumers to consume less or none of these goods.[152] For several decades, competition authorities around the world have been fighting against cross border cartels. While it has been a major success for most of the developed countries, a handful of developing ones still left behind. It still encounters with several challenges in prosecuting international cartels, even for those competition authorities that have been greatly prosecuted domestic cases.[153]

Recognizing that cooperation among agencies is necessary, the first and foremost question that needed to be answered is why. Seeking answers for this question logically comes from understanding the cartel itself. Settling the definition of cartel in international law context would be very important. Apparently, it is not easy to reach the international agreement of cartel in light of complicated interests from diverse economic situations, legal systems, and cultural backgrounds. The diverse aspects of cartel activities make the reaching of the agreement more difficult. Rather than adopting the definition covering a broad aspect of cartels,

[152] UNCTAD, *The Impact of Cartels on the Poor*, Thirteenth Session, Geneva, 2103, Page 1.

[153] UNCTAD, *The Impact of Cartels on the Poor*, Thirteenth Session, Geneva, 2103, Page 8.

defining it needs to consider its purpose. Pursuing the agenda of international cartel regulation, it will start with a narrowed category such as hardcore cartel. Highlighting the distinction of the cartel with the syndicate and the trust, the following elements of the cartel definition are proposed under the narrow focus:[154]

a. As a subject, more than two independent entrepreneurs or undertaking competing in the same level of business,
b. As to conduct, agree to restrain or do restrain reciprocal business activities, such as fix prices, allocate market, or limit production, and rig a bid,
c. As a regard to purpose, to prevent competition thereby to secure extra profit.

The first element is subject, particularly private companies that reciprocally competing. The combination-operating or forming agreement needs to be screened by cartels regulation whether it includes competition restraining activities, particularly hardcore cartel activities. The issue is whether the 'independent entrepreneurs' as member of a cartel include either a country or state-managing company. A country with public interests acts differently from the private company pursuing a profit-interest. A state which receives financial resources from public revenue functions as a market-moderator by taking loss or reducing profit, dissimilar from private companies operating on a maximization principle of profits or market share. In addition, such exemption from domestic law, the activities of a state in the international level are protected under the sovereignty immunity which does not allow other countries to intervene in its domestic affairs.[155]

---

[154] Lee J.S., *Strategies to Achieve a Binding International Agreement on Regulating Cartels*, Springer, Singapore, 2016, Page 21.

[155] Lee J.S., *Strategies to Achieve a Binding International Agreement on Regulating Cartels*, Springer, Singapore, 2016, Page 22.

The second element is conduct and purpose. In term of conduct, a cartel shall have agreement for restricting or do restrict reciprocal competitive activities in the market among participating companies which are supposed to compete for the purpose of enjoying extra profit.[156] The purpose of restricting competition may be presumed by the contents of the agreement and the impact of cartelistic activities on market subsequent to the agreement. However, the diverse types of business activities may fall under the category of an illegal cartel when their anticompetitive effect outweighs pro-competitive effect. For example, concerted refusals to supply or deal with a competitor fall on the illegal cartel when the cooperative parties enjoy market power or exclusive access which is essential to effective competition.[157]

Conclusively, in investigating cross border cartel information for better understanding is very critical. For developing regions like ASEAN, information regarding cartel usually obtains through the enforcement reports of other competition authorities or the media.[158] The kinds of information which may be exchanged fall largely into four categories:[159]

a. *Public information.* In this case, one agency simply helps another agency to gain time by providing information which is already in the public domain (perhaps a hard-to-find market report, or information about the market arising from studies carried out by the agency)

---

[156] *Ibid.*, Page 22.

[157] Lee J.S., *Strategies to Achieve a Binding International Agreement on Regulating Cartels*, Springer, Singapore, 2016, Page 22.

[158] UNCTAD, *Enhancing International Cooperation in the Investigation of Cross-Border Competition Cases: Tools and Procedure*, Intergovernmental Group of Experts on Competition Law and Policy, Sixteenth Session, Geneva, 2017, Page 3.

[159] International Competition Network, *Co-operation between Competition Agencies in Cartel Investigations*, International Competition Network Cartels Working Group Subgroup 1 General Framework, 2016, Page 7.

b. *Agency information.* This is information which is not necessarily in the public domain, but which is generated within the agency itself, rather than provided by parties to the investigation. Such information may concern the stage which the investigation has reached, the planned timing for further steps, and so forth.
c. *Information from the parties already in possession of one agency.* This kind of material can be evidence of an infringement or background information on the market or the activities of the parties. The information may have been provided voluntarily through leniency applicant or under compulsion.
d. *Information obtained from the parties at the request of another agency.* Where two agencies have a highly developed co-operative relationship, it may be possible for one of them to request to other to obtain information from parties in its jurisdiction, which is not already in its possession. This could involve carrying out surprise searches, raids or inspections, issuing subpoenas, interviewing witnesses, and forth.

In cross border anti-competitive cases, cooperation can be categorized into formal and informal. Both can take place at different phase on an investigation, such as:[160]

a. At the *pre-investigatory phase,* that is the phase before evidence-gathering takes place, agencies can cooperate regarding markets to be investigated, companies to be targeted, the location of evidence, and avoidance of destruction of evidence;

[160] International Competition Network, *Co-operation between Competition Agencies in Cartel Investigations*, International Competition Network Cartels Working Group Subgroup 1 General Framework, 2016, Page 7.

b. At the *investigatory phase*, the phase during which evidence is gathered and analyzed, and the case built up, they may coordinate investigatory measures. This could include the organization of simultaneous searches, raids or inspections, issuing subpoenas or other requests for information, or interviewing of witnesses;
c. At the *post-investigatory phase,* which concerns prosecution, adjudication, and sanctioning, agencies may exchange evidence and other information which they have obtained, and they may cooperate via general case discussions between the investigators.

Given the different levels of socio-economic advancement, needs, and resources availability and newborn of some competition agencies within the region, ASEAN Member States is more suitable for informal cooperation. Based 1995 OECD Recommendation on co-operation` informal cooperation is principally open to most jurisdictions because it has no particular legal basis. Even so, it may become an important tool for information sharing that utilized by the competition agencies as enforcement strategy. As a general rule, informal exchanges do not involve highly sensitive information, unless there are exemptions, such as waivers, given by the parties. This type of information sharing can be done at the working level on the management level, and can be involve discussion between competition agencies relating to cases that are common between two or more competition agencies, or the sharing of best practices. This type of information sharing can be done in a

bilateral format between two competition agencies, or in a multilateral forum involving multiple agencies.[161]

The primary means in which information is shared informally between competition agencies involves bilateral contact at the working level. This contact can take a variety of forms, including in-person meetings, email exchanges, and telephone calls between individuals or case teams. Bilateral contact can occur at all stages of an investigation, and involves the sharing of many different types of information. For example, bilateral contact could include a discussion of background information about the industry and relevant actors, the sharing of case theories or the disclosure of investigative or analytical findings.[162] In addition to informal information sharing at the working level, many competition agencies also engage in extensive cooperation with foreign counterparts through bilateral meetings at the management level. These meetings can take place in-person or over the phone, and often occur on a regular basis. Bilateral meetings in management level generally involve high-level discussions of common cases, including the status of the investigation and other case-related information. In addition, bilateral meetings are also good forum to discuss policy issues, or to seek guidance from another competition agency on a specific issue or concern.[163]

In addition to informal information sharing at the working level, many competition agencies engage in case-specific multilateral contact with two or more

---

[161] International Competition Network, *Anti Cartel Enforcement Manual Chapter on International Cooperation and Information Sharing,* Cartel Working Group, Subgroup 2: Enforcement Techniques, Page 9.

[162] International Competition Network, *Anti Cartel Enforcement Manual Chapter on International Cooperation and Information Sharing,* Cartel Working Group, Subgroup 2: Enforcement Techniques, Page 9.

[163] *Ibid.*

competition agencies. This form of contact normally occurs when multiple competition agencies are investigating the same or similar conduct in their respective jurisdictions. The contact can occur through in-person meetings, by e-mail or by phone. However, in-person meetings are rare due to logistical difficulties with arranging these meetings between several competition agencies. Multilateral contacts typically include discussion of investigative and analytical findings, the sharing of case theories and the coordination of formal powers.[164]

Specific examples of this type of cooperation at each phase of investigation are as follow:[165]

a. Pre-investigatory phase: sharing of leads and background information about the industry an relevant actors; notification of initial investigative actions which can facilitate later specific investigative requests for assistance; coordination of searches, raids, or inspections and of interviews; travel by officials to foreign jurisdictions to conduct interviews.
b. Investigative phase: state of play of the procedure; general assessment of the case; travel officials to foreign jurisdictions to conduct interviews of foreign parties relevant to the agencies investigation; order requiring a company to produce certain documents in the possession of its foreign affiliates.
c. Post-investigative phase: providing copies of public court filings; providing access to non-public information that is not statutorily protected or otherwise

[164] International Competition Network, *Anti Cartel Enforcement Manual Chapter on International Cooperation and Information Sharing*, Cartel Working Group, Subgroup 2: Enforcement Techniques, Page 9.

[165] International Competition Network, *Co-operation between Competition Agencies in Cartel Investigations*, International Competition Network Cartels Working Group Subgroup 1 General Framework, 2016, Page 10.

entitled to confidential treatment; co-ordination with other agencies on the filing of charges; notifications to foreign agencies of guilty pleas and convictions of foreign corporations; adoptions of decisions in cases which are also under investigation in other jurisdictions

For exchanging more sensitive information or wish to use information formally in their proceedings, formal cooperation must be established. There are several formal tools available to competition agencies to assist in the sharing information. These formal tools including agreements, Memoranda of Understanding (MoU), and domestic provisions. However, this technique requires the domestic laws to adopt leniency program as facilitator to seek for evidence and key element to decision-making.[166] The adoption of leniency program may facilitate cooperation with other countries that have leniency program as well. Without one, applicants have no reason to consent to information sharing with jurisdictions where leniency is not available as it explicitly recognized in ASEAN Regional Guidelines on Competition Policy.[167]

Furthermore, the development of regional platform is encouraged in the Guidelines to facilitate cooperation between competition regulatory bodies. The more enhanced each national competition policy and competition regulatory body within the AMS, the more contribution it may be given in cooperative arrangements. Within this regional platform, competition regulatory bodies will be able to discuss competition issues and promote a common approach. The regional

[166] UNCTAD, *Enhancing International Cooperation in the Investigating Cross-border Competition Cases: Tools and Procedure*, Intergovernmental Group of Experts on Competition Law and Policy, Sixteenth Session, Geneva, 2017, Page 3.

[167] OECD, *Improving International Co-operation in Cartel Investigations, Policy Roundtables*, 2012, Page 38.

platform will allow competition regulatory bodies to exchange their experiences, identify best practices and endeavor to implement cooperative competition policy and competition regulatory body arrangements that provide for harmonization.[168] Also, it may aid working groups to discuss general issues that related to certain sectors. In the framework of this platform, working groups may be created between AMS' and AMS' competition regulatory bodies in order to discuss general or specific issues related to the establishment and enforcement of competition policy. The working groups may work together by any agreed mode of communications. Annual conferences and workshops may also provide opportunities to discuss projects and their implications for competition policy enforcement.[169]

As such, the implementation of leniency program in AMS may ease the international cartel investigations in ASEAN since it will most likely serve as an effective tool. Combined with waivers obtained from leniency applicants in instances of simultaneous applications in multiple jurisdictions, leniency promotes an exchanges of information between competition authorities, including confidential evidence where allowed by law. Leniency also allows authority to closely coordinate their investigations during early stages, including the conduct of simultaneous dawn raids, which in turn helps each jurisdiction's proceedings. There is a growing tendency towards international cooperation being confined among authorities that receive leniency applications. Given the advantages of leniency

[168] ASEAN Regional Guidelines on Competition Policy, 2010, Page 43.
[169] *Ibid.*, Page 43.

applications, the establishment of an effective leniency program should be considered a leady policy priority.[170]

Moreover, implementing leniency program in AMS may also promote culture of competition in ASEAN which considerably new. It may facilitate cooperation or at least a high degree of consistency in the implementation of competition policy in the ASEAN region, by allowing AMS' to share information on the benefits of introducing national competition policy and establishing a competition regulatory body and to promote best practices. This will assist those AMS' which are yet to introduce or implement competition policy, in making informed choices on how to establish an effective national competition policy regime.[171] Also, it will provide AMS' competition regulatory bodies with an avenue for maintaining regular contacts and addressing practical competition concerns. This allows for a dynamic dialogue that serves to build consensus and convergence towards sound competition policy principles across the ASEAN region.[172]

3. Comparison between EU and ASEAN Competition Model

The structural approach of EU competition model is very much related with its historical background, which is a peace project. In 1952, the European Coal and Steel Community began to unite European Countries economically and politically in order to end frequent wars between neighbors secure lasting peace. Then, in 1957 the Treaty of Rome created the European Economic Community (EEC) with the

[170] UNCTAD, *Enhancing International Cooperation in the Investigation of Cross-Border Competition Cases: Tools and Procedure*, Intergovernmental Group of Experts on Competition Law and Policy, Sixteenth Session, Geneva, 2017, Page 7.

[171] ASEAN Regional Guidelines on Competition Policy, 2010, Page 42.

[172] *Ibid.*, Page 42.

goals of achieving customs union and common market.[173] After the achievement of single market in 1993, EU became a monetary union that emphasizing in regional integration. Therefore, the member states accepted to transfer decision-making power to the European Commission to allow for effective enforcement of competition law, crucial for the well-functioning of the single market.

In contrast, ASEAN is a classic type of intergovernmental organization with the idea of autonomy and regional cooperation, instead of integration.[174] There are no supranational institution within the ASEAN, but occasionally the AMS do pool their sovereignties when national and regional interests converged in order to speak with one common voice to confront a common threat. Regionalism in ASEAN was conceived to support national development instead of taming sovereignty. Considering a great diversity amongst the member states, the goal is more likely pursuing to focus on national building. Therefore, in Southeast Asia, regional economic integration has been shaped more by market forces than by the governments.[175]

Within the EU, both national and EU competition laws apply to cartels. As far as competition law is concerned, the relevant provision is Article 101 of the Treaty on the Functioning of the European (TFEU). Any secret agreement or understanding between competitors that seeks to fix prices, limit output, share markets, customers or sources of supply (for involves cartel behavior such as bid rigging) will almost inevitably be regarded as an agreement restricting competition.

---

[173] Barbora Valockova, *EU Competition Law: A Roadmap for ASEAN,* Working Paper No. 25, 2015, Page 5.

[174] Barbora Valockova, *EU Competition Law: A Roadmap for ASEAN,* Working Paper No. 25, 2015, Page 5.

[175] *Ibid.,* Page 6.

These types of restrictions are generally viewed as hardcore infringement of the competition rules, presumed to have negative market effects. Arrangement involving hardcore price fixing or market sharing will attract intense regulatory scrutiny if they come to the attention of the competition authorities.[176]

Article 101 can apply to agreements between undertakings located outside the EU if they could have effects on competition within the EU. According to the "effect doctrine", the application of competition rules on cartels is justified under public international law whenever it is foreseeable that the relevant anti-competitive agreement or conduct would have an immediate and appreciable effect in the EU. The European Courts have recognized that it is not necessary that companies implicated in the alleged cartel activity be based inside the EU; nor it is necessary for the restrictive agreement to be entered into inside the EU or the alleged acts to be committed or business conducted within the EU.[177] EU opted for supranational competition rules because of its institutional set-up emphasizing integration. They are enshrined in the Treaty on the Functioning of the European Union (TFEU) with a major aim of speeding up market integration. The TFEU is complemented by a number of regulations and directives intended to be followed by all MS. The EU has exclusive competence in the establishment "of the competition rules necessary for the functioning of the internal market" (Art. 3 TFEU). Nevertheless, at the same time member states have separate and distinct national competition laws and

[176] Slaughter and May, *The EU Competition Rules on Cartels A guide to the Enforcement of the Rules Applicable to Cartels in Europe*, June 2016, Page 2.

[177] *Ibid.*

national competition authorities which may converge on some points and diverge on others.[178]

Unlike EU's choice on hard law, ASEAN prefer a soft law approach to competition. The latter has been promoted by ASEAN Experts Group on Competition (AEGC) which is a regional forum established in 2007 to discuss and co-operate on competition law and policy. It has developed the ASEAN Regional Guidelines on Competition Policy (2010) and compiled a Handbook on Competition Policy and Law in ASEAN Member states for Business (launched in 2010 and updated in 2013). It has also drafted Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN (2012), based on the experiences of AMSs and internationally recommended practices. By providing a general framework, these guidelines promote cooperation, the sharing of best practices among the AMS, and the creation of a competition law culture. Consequently, ASEAN harmonized approach to competition law aims only at narrowing the distinctions between national laws while leaving variations of detail to national legislators. Thus, it is less than the uniform EU competition law and relies on the network model based on mutual assistance and cooperation, given the diversity of AMS, this model seems suitable for ASEAN for the time being.[179]

In the EU, the enforcement of international competition rules has been assigned to several supranational institutions, with the main one being the Commission, in particular the Directorate-General (DG) for Competition. The Commission is the competition regulator for the single market possessing extensive investigative

[178] Barbora Valockova, *EU Competition Law: A Roadmap for ASEAN,* Working Paper No. 25, 2015, Page 7.

[179] *Ibid.,* Page 9.

powers including requesting information from relevant parties, calling parties to oral interviews and conducting unannounced investigations at corporate as well as private premises. It makes decisions in the areas of antitrust (cartels and abuse of dominance), mergers and state aid. The organization of DG Competition is sector-specific, and covered all three areas of antitrust, mergers and state aid. Two other EU institutions dealing with competition law are the General Court (EGC) and the European Court of Justice (ECJ). Following a decision taken by the DG Competition, parties may appeal the decision to the General Court of First Instance which may annul the decision, order a new investigation, or uphold the Commission's decision.[180]

The parties or the Commission may appeal further to the ECJ of final instance, which may reverse the decision of the General Court. The ECJ is also competent to give preliminary rulings which are decisions on the interpretation of EU law, made at the request of a court or tribunal of an EU member states. Regulation 1/2003 also established a network of competition authorities called the European Competition Network (ECN). The latter is a mechanism for an optimal allocation of cases among the Commission and national competition authorities and sets rules for the exchange of information as there is a decentralized arrangement for decision making and enforcement in the area of competition law and policy within the EU. This means that national competition authorities and courts have been empowered to apply European law, even in cases which have an effect outside the national border.[181]

[180] Barbora Valockova, *EU Competition Law: A Roadmap for ASEAN,* Working Paper No. 25, 2015, Page 10.

[181] Barbora Valockova, *EU Competition Law: A Roadmap for ASEAN,* Working Paper No. 25, 2015, Page 11.

While the EU consists of a hybrid system of supra-nationalism and inter-govern mentalism, ASEAN still operates primarily by the 'ASEAN way'. The latter is based on decision-making by consensus and non-interference in each other's domestic affairs which often results in informal and non-binding agreements. Therefore, the EU built cooperation top-down, whereas ASEAN approaches issues horizontally and has just recently started to adopt a 'consensus-based but not necessarily unanimity' in certain areas of decision-making. Thus, ASEAN does not have any regional mechanisms such as DG Competition or the Court to implement or enforce competitions law. The ASEAN experts group on competition (AEGC), with the support of ASEAN Secretariat (which however does not have any powers to make decisions), primarily focus on advocacy work and strengthening competition-related policy capabilities and best practices among AMS. It has organized various region-wide socialization workshops in several AMS for government officials and the private sectors, intended to help foster a level playing field and raise awareness concerning fair business competition. Other activities promoted by AEGC include: capacity building and intra- and extra-regional networking. A multi-year program is currently being implemented in order to improve and enhance competition-related institutional building, legal framework and, advocacy and awareness for regional- and national-level in AMS.[182]

B. Obstacles in International Cooperation to Investigate Cartel in ASEAN

Even though competition law has already been promoted and implemented in most of the ASEAN countries, there are still lots of challenges concerning

[182] Barbora Valockova, *EU Competition Law: A Roadmap for ASEAN*, Working Paper No. 25, 2015, Page 12.

international cooperation. The most noticeable one are the lack of sufficient enforcement experience to venture into international cooperation and only few competition authorities can effectively cooperate with each other due to inadequate capacity of national enforcement to deal with cross border competition cases.[183] According to UNCTAD research, developing countries like the majority of AMS, shows a constraint capacity and resource. The limited resource base is linked to the fiscal crunch, while prioritizing competition demands on government budgets. Therefore, there might be an absence of sufficient political backing for competition law and policy. This affects the ability the developing country competition authorities to cooperate with their counterparts from other countries and complicates their ability to deal with cross border anti-competitive practices. [184]

Generally, in detecting international cartel the developing countries often go through several routes. The first scenario is that the cartel comes to their attention through leniency applications. The second one is from public announcement made by developed countries after dawn raids were conducted or the case went to trial. Another possibility is that developing countries detect international cartel by its own.[185] Of the first two scenarios, it is clear that the leniency applications is the most effective one. For AMS, however, only handful countries have active leniency programs, while the vast majority are still lacking. In addition, it is well known that cartelist certainly will make a strategic choices in selecting jurisdiction to apply for

[183] UNCTAD, *Enhancing International Cooperation in the Investigation of Cross-Border Competition Cases: Tools and Procedure*, Intergovernmental Group of Experts on Competition Law and Policy, Sixteenth Session, Geneva, 2017, Page 3.

[184] UNCTAD, *Enhancing International Cooperation in the Investigation of Cross-Border Competition Cases: Tools and Procedure*, Intergovernmental Group of Experts on Competition Law and Policy, Sixteenth Session, Geneva, 2017, Page 7.

[185] UNCTAD, *Cross-border Anticompetitive Practices: The Challenges for Developing Countries and Economics in Transition,* Twelfth Session, Geneva, 2012, Page 5.

leniency program and that they have little incentive to apply for a small jurisdiction where they face low exposure or time-consuming proceedings.[186]

As it perceived, competition law and enforcement in ASEAN is relatively young. Consequently, the international cartelist seldom to apply leniency program in these countries considering the deficiency of incentive. Therefore in many cases of international cartels there is no physical evidence that presented. In regards with no branch or subsidiary in their jurisdictions, developing countries face huge difficulties in collecting evidence enough to prove the conduct. Since the cartelists are out of their jurisdiction, they cannot employ conventional investigation instruments, such as dawn raids, interrogation or requests for written statements. Hence, their investigations have no choice but to greatly rely on voluntary cooperation from cartelists, while cartelists have no incentive to cooperate with them.[187]

The existence of legislation in various stages of development also present its own challenge for cooperation in investigating international cartel among AMS. There is indeed a worldwide consensus on the concept of hardcore cartels politically, economically, and socially. However, wherein the cartel activity takes place affect and shape certain context of such definition.[188] Legal standing concerning cartel differs from jurisdiction to jurisdiction. These differences involving offences has been regarded as a major impediment to cooperation in all stages of multijurisdictional cartel investigations because of the different nature of

[186] *Ibid.*, Page 6.

[187] UNCTAD, *Cross-border Anticompetitive Practices: The Challenges for Developing Countries and Economics in Transition,* Twelfth Session, Geneva, 2012, Page 6.

[188] Pierre M. Horna, *Problems in Multi-Jurisdictional Cartel Investigations and Some Ways to Tackle Them*, United Nations Sabbatical Leave Programme 2017, Page 16.

the proceedings that imply having a criminal versus administrative standing to investigate and sanction cartel. As result, the distinguished characteristics of criminal law (burden of proof, legal presumptions) would be different from the classic approach of administrative proceedings which has been normally adopted by young competition regimes to enforce cartel laws. In addition, beyond economic harmfulness, there is an international and ongoing debate on why cartels should be criminalized to encompass moral and social acceptance.[189]

[189] Pierre M. Horna, *Problems in Multi-Jurisdictional Cartel Investigations and Some Ways to Tackle Them*, United Nations Sabbatical Leave Programme 2017, Page 12.

CHAPTER IV

CONCLUSION AND RECOMMENDATION

A. Conclusion

Filtered from the comprehensive explanation in the previous chapters, there are two points that could be drawn:

1. Cartel is one of the most dangerous anti-competitive practices in the market. It is disadvantageous because it prevents the rivalry dynamic between producers which may distort the market and rising the price way too high for the consumers. Although competition law in both developed and developing countries are on the same page on the attempt of prohibiting and eradicating cartels, the practice still difficult to investigate and prosecute concerning its secretive way that leaves no trace for evidences. In today's business, when countries are bound and interdependence with each other, the practice of cartels also expanding and affecting the worldwide economic. Hence, every jurisdiction must prepare and cooperate to put and end to it, including ASEAN Member States. Although the establishment of competition law in the region is considereably new, the spirit lives in the progressive agenda of ASEAN Economic Community. Each state is following the steps in the Economic Plan in order to be a sufficient partner for cooperating in competition field. There are two types of cooperations in ivestigaring cartel. The first one is informal cooperation it includes sharing more of a general information, and the second one is formal cooperation which thorugh more of a binding agreement to share confidential information that gather from leniency applications.

2. Although competition law is moving forward within the ASEAN Member States, there are still a lots of obstacles concerning international cooperation. The basic ones are the lack of sufficient enforcement experience to venture into cooperation and not enough competition authorites can effectively cooperate with each other due to lack of experience in international cases.

Recommendation

1. AMS must be adopted a sufficient competition law within its domestic jurisdiction and followed the AEC blueprint 2015 accordingly before jump into AEC blueprint 2025. AMS do not necessarily need to rely upon soft multilateral enforcement but could hybridize different approaches (hard and soft approach or bilateral and multilateral approach) which could be effective. With the hybrid approach, an AMS could conclude a bilateral agreement with other members on certain private sectors that both have similar level of maturity, while also opt for the soft law approach at a regional level based on guidelines rather than formal rules and regulations.
2. AEGC, with the support of ASEAN Secretariat, will continue to play a crucial role in regional harmonization of competition law, not only by providing a framework through its publications but especially by organizing networking events. These allow representatives of different AMS to meet and exchange their views and practices and to adopt a more coordinated approach and push those who launched their competition regimes more recently. Such networking and cooperation efforts started with the establishment of the AEGC through conferences and annual meetings of the heads of the national competition authorities, but it seems important to intensify these meetings. Many speakers

at the ‘ASEAN Antitrust: Issues and Challenges’ conference in April 2015 advocated enhanced cooperation between the national competition authorities in order to avoid unnecessary burden and uncertainty.

BIBLIOGRAPHY

BOOKS:

Andi Fahmi Lubis, et.al. *Hukum Persaingan Usaha Antara Teks dan Konteks,* Deutsche Gesellschaft Technische Zusammenarbeit (GTZ) GmbH, Indonesia, 2009.

ASEAN Development Bank Institute, *ASEAN 2030 Towards a Borderless Economic Community,* Japan, 2014.

Association of Southeast Asian Nations, *Evolving Towards ASEAN 2015: ASEAN Annual Reports 2011-2012,* ASEAN Secretariat, Jakarta, 2012.

Association of Southeast Asian Nations, *Roadmap for an ASEAN Community,* ASEAN Secretariat, Jakarta, 2012.

Edwin Mansfield, *Principles of Microeconomics,* WW Norton & Company, New York, 1980.

Gunawan Widjaja, *Merger dalam Persepktif Monopoli,* PT. Raja Grafindo Perkasa, Jakarta, 1999.

Hermansyah, *Pokok-Pokok Hukum Persaingan di Indonesia,* Kencana Prenada Media Group, Jakarta, 2008.

I Made Sarjana, *Prinsip Pembuktian dalam Hukum Acara Persaingan Usaha,* Zifatama Publisher, Surabaya, 2014.

Mark Furse, *Competition Law of the EC and UK*, Oxford University Press, England, 2004.

Martin J. Osborne, *An Introduction to Game Theory,* Oxford Press University, England, 1995.

Mustafa Kamal Rokan, *Hukum Persaingan Usaha Teori dan Praktiknya di Indonesia,* PT. RajaGrafindo Persada, Jakarta, 2012.

Rachmandi Usman, *Hukum Persaingan Usaha di Indonesia*, Sinar Grafika, Jakarta, 2013.

Razali Nawawi, *Islamic Law of Transactions*, Publications Sdn.Bhd., Kuala Lumpur, 1999.

Rizkiyana, Rurik dan Vovo Iswanto, *Litigasi Persaingan Usaha (Competition Litigation),* PT. Telaga Ilmu Indoenesia, Jakarta, 2010.

Susan Ellis Wild, *Webster's New World Law Dictionary,* Wiley Publishing Inc., Canada, 2006.

Journals:

Asian Development Bank Institute, *ASEAN 2030 Towards a Borderless Economic Community,* Asian Development Bank Institute, Japan, 2014.

Order, Presented at the Biennial Conference of the EUSA, Los Angeles, April.

Bos, Jaqueline *Antitrust Treatment of Cartels: A Comparative Survey of Competition Law Exemptions in the United States, the European Union, Australia, and Japan*, Washington University Global Studies Law Review, Volume 1, January 2002.

Carmeliet, Tim, Tine Carmeliet, *How Lenient is the European Leniency System? An Overview of Current (dis)incentives to Blow the Whistle*, Jura Falconis, jg 48 Nummer 3, 2012.

Colman, M. Andrew, *Game Theory*, John Wiley & Sons, Ltd, Volume 2, 2005.

Connor, M. John, *The Private International Cartels (PIC)*, Data Set: Guide and Summary Statistics, 1990 – July 2016 (Revised 2nd Edition), USA, 2016.

CUTS International Discussion Paper, *Designing Effective Leniency Program for India: Need of the Hour*, 2016

DLA Piper, *Cartel Enforcement Global Review*, June 2017

Directorate for Financial, Fiscal, and Enterprise Affairs Competition Committee, *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels under National Competition Laws*, 9th April 2002.

Fukuyama, Francis, *The End of History*, The National Interest, 1989.

Healy, Deborah, Deborah Healy, *Application of Competition Laws to Government in Asia: The Singapore Story*, Asian Law Institute Working Paper, Series No. 25, 2011.

Hoekman, Bernard, *Economic Development, Competition Policy, and The WTO*, April, 2003.

International Competition Work, *Anti-Cartel Enforcement Manual*, Chapter 2, 2014.
International Competition Network, *Trends and Developments in Cartel Enforcement*, 2010.

Kamali, Muhammad Hasim, *Principles of Islamic Jurisprudence*, 2nd Ed., Ilmiah Publishers Sdn. Bhd., Kuala Lumpur, 1998.

Kaylani, Ahmad, *Ada Kartel di Tanjung Priok*, Kompetisi, Edisi 11 Novermber 2008.

Lee, Casey and Yoshifumi Fukunaga, , *ASEAN Regional Cooperation on Competition Policy*, Eria Discussion Paper Series, 2013.

Leslie, R. Christopher, , *Antitrust Amnesty, Game Theory, and Cartel Stability*, Journal of Corporation Law, Vol 3, Winter 2006.

Lubis, Andi Fahmi, *Jurnal Hukum Bisnis Akreditasi Jurnal Ilmiah SK No.52/DIKTI/Kep./2002*, Yayasan Pengembangan Hukum Bisnis, Volume 32, 2013.

Matshushita, Mitsuo, *International Cooperation in the Enforcement of Competition Policy*, Washington University Global Studies Law Review, Vol. 1, 2002.

OECD, *Guidelines for Fighting Bid Rigging in Public Procurement Helping Governments to Obtain Best Value for Money.*

OECD, *Improving International Co-operation in Cartel Investigation*, Policy Roundtables, 2012.

OECD, *International Enforcement Co-operation,* Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation, 2013.

OECD Competition Committee, *Best Practices for the Formal Exchange of Information between Competition Authorities in Hardcore Cartel Investigations,* 2015,

OECD Reviews of Regulatory Reform, *Competition Law and Policy,* September 2012.

OECD, *International Regulatory Co-operation Draft Case Study on Competition Law Enforcement.*

OECD Reports, *Fighting Hardcore Cartels: Harm, Effective Sanctions, and Leniency Programmes,* 2002.

OECD Policy Brief, *Using Leniency to Fight Hard Core Cartels,* 2001.

Polo, Michael and Massimo Mota, *Leniency Programs,* 31st May 2005.

Polopulus, Leo James S. Wershow, *The Incidence, Nature, and Implications of Price-Fixing Litigation in U.S. Food Industries,* Southern Journal of Agricultural Economics, July 1978.

Riyadi, Agung and Ahmad Mardalis, *Promoting a Market Competition: An Islamic Perspective,* Proceeding Seminar Nasional dan Call for Paper Sancall, 2013.

Shanahan, J. Martin and David K. Round, *Serious Cartel Conduct, Criminalization an Evidentiary Standards: Lessons from the Coal Vend Case of 1911 in Australia*, Centre for Regulation and Market Analysis, School of Commerce of South Australia.

Steinbockova, Martina, *Leniency Program in Antitrust Law*, Masaryk University in Brno Faculty of Law, 2008.

Sweeney, Brendan, *International Competition Law and Policy: A work in Progress,* Melbourne Journal of International Law, Vol. 10, 2009.

Tsoulfidis, Lefteris, *Classical vs. Neoclassical Conceptions of Competition,* University of Macedonia, 2011.

United Nations Conference on Trade and Development, *Effectiveness of Capacity Building and Technical Assistance Extended to Young Competition Agencies.*

United Nations Conference on Trade and Development, *Informal Cooperation among Competition Agencies in Specific Cases,* Consultations and Discussions Regarding

Peer Reviews on Competition Law and Policy, Review of the Model Law on Competition and Studies Related to the Provisions of the Set Principles and Rules, Fourteenth Session, Geneva, 2014.

United Nations Conference on Trade and Development, *The Role of Competition Policy in Promoting Economic Development: The Appropriate Design and Effectiveness of Competition Law and Policy*, August 10th 2010.

United Nations Conference on Trade and Development, *The Use of Leniency Programmes as a Tool for the Enforcement of Competition Law Against Hardcore Cartels in Developing Countries*, Geneva, November 2010.

UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS, *Recommended Framework for Best Practices in International Competition Law Enforcement Proceedings.*

Valackova, Barbora, *EU Competition Law: A Roadmap for ASEAN*, Working Paper No. 25, 2015.

LEGISLATIONS:

ASEAN Vision 2020.

ASEAN Competition Action Plan 2025.

ASEAN Economic Community Blueprint 2015.

ASEAN Economic Community Blueprint 2025.

Clayton Act.

Commission Regulation No. 4/2010 on the implementation of Article 11 on cartel in Law No. 5/1999.

Declaration on the Roadmap for the ASEAN Community (2009-2015).

Law No. 5/1999 on Prohibition of Monopolistic Practices and Unfair Business Competition.
Sherman Act.

UK Competition ACT 1998.

INTERNET:

https://www.asean-competition.org/aegc

www.asean-competition.org/selectcountry=Cambodia

www.asean-competition.org/selectcountry=LaoPDR

www.asean-competition.org/selectcountry=Myanmar

http://www.asean.org/asean-economic-community/sectoral-bodies-under-the-purview-of-aem/competition-policy

https://www.consumer.ftc.gov/files/pdf

http://www.economics.accounting-coach.com/business-economics/microeconomics/cartel

http://economicsonline.co.uk/Business_economics/Prisoner'sdilemma.html

http://www.economicshelp.org/microessays/markets/oligopoly/

http://www.europa.eu.int/comm/competition/publications/glossary_en.pdf.

https://www.ftc.gov/about-ftc

https://iclg.com/practice-areas/cartels-and-leniency/cartels-and-leniency-2017/european-union

http://www.imf.org/external/about/htm

http://www.investopedia.com/terms/d/deadweightloss.asp

https://www.justice.gov/atr/price-fixing-bid-rigging-and-market-allocation-schemes

http://www.justice.gov/atr/guidelines

http://www.kppu.go.id

https://www.mahkamahagung.go.id

http://www.oecd.org/about/

http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199586103.001.0001/oxfordhb-9780199586103-e-5/

www.skrine.com/

http://www.uscentrist.org/platform/docs/history-of-economics