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Cross-Border Merger and Acquisition In Asean: A Comparative Study To The Merger Control Regulations of The European Union

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Abstract. This research aims to analyze (1) the weaknesses of ASEAN Regional Guidelines on Competition Policy on Merger Control Regulation compared to similar regulations in the European Union; and 2) the improvement of the ASEAN regional guidelines that needs to be undertaken related to Merger Control Regulation based on the lessons learned through the studies of regulations in the European Union. This is a normative legal study that was conducted through library research by tracing secondary data in the form of primary, secondary, and tertiary legal materials. The data were analyzed using qualitative analysis. This study found that the weaknesses of ASEAN Regional Guidelines as follow: first, the nature of ASEAN Regional Guidelines that uses soft-law approach leads to the diversity of regulations among ASEAN member states; second, no institution in the ASEAN level has the authority to enforce the said competition law, particularly in regards to cross-border M&A. The substantive test under ASEAN Regional Guidelines uses the Significant Impediment to Effective Competition (SIEC) model. It does not contain any detailed provisions and has lack of indicators. Notification under the ASEAN Regional Guidelines recognizes both mandatory and voluntary notification, yet it does not specify which notification that should be implemented. Furthermore, lessons learned from the study of the regulations in the European are the use of both soft-law and hard-law approaches; the establishment of an institution in the ASEAN level; the clarity of indicator or parameter regarding the substantive test or assessment; and the notification shall be implemented as well as its mechanism.

Keywords: Merger Control, ASEAN Regional Guideline, European Union

Abstrak. *Penelitian ini bertujuan untuk menganalisis (1) kelemahan ASEAN Regional Guidelines on Competition Policy dibandingkan dengan peraturan serupa di Uni Eropa; dan (2) bagaimana seharusnya ASEAN Regional Guidelines on Competition Policy pada masa yang akan datang berdasarkan lesson learned yang diperoleh melalui kajian pengaturan di Uni Eropa. Penelitian ini merupakan penelitian hukum normatif yang dilakukan melalui studi pustaka dengan menelusuri data sekunder berupa bahan hukum primer, sekunder, dan tersier. Data dianalisis dengan menggunakan analisis kualitatif. Penelitian ini menemukan bahwa kelemahan ASEAN Regional Guidelines adalah; pertama, sifat dari ASEAN Regional Guidelines yang menggunakan pendekatan soft-law menyebabkan adanya keragaman peraturan di antara negara-negara anggota ASEAN; kedua, tidak ada lembaga di tingkat ASEAN yang memiliki kewenangan untuk menegakkan hukum persaingan usaha tersebut, khususnya terkait M&A lintas negara (cross border). Uji substantif di bawah ASEAN Regional Guidelines menggunakan model Significant Impediment to Effective Competition (SIEC). Model ini tidak memuat ketentuan-ketentuan yang rinci dan memiliki indikator yang kurang. Notifikasi di bawah ASEAN Regional Guidelines mengakui adanya notifikasi wajib dan sukarela, namun tidak menentukan notifikasi mana yang harus dilaksanakan. Selain itu, lesson learned yang dapat diambil dari studi pengaturan di Uni Eropa adalah penggunaan pendekatan soft-law dan hard-law; pembentukan lembaga di tingkat ASEAN; kejelasan indikator atau parameter terkait uji substantif atau penilaian; dan notifikasi yang harus dilakukan serta mekanismenya.*

Kata Kunci: *Kontrol Merger, ASEAN Regional Guideline, Uni Eropa*

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INTRODUCTION

Merger and acquisition (M&A) have transformed into a popular trend and is considered a strategic corporate action to carry out company reconstruction or business consolidation.[1] Not only that, M&A plays an important part of a competitive economy to improve financial performance and growth. Additionally, M&A includes activities that are carried out in a cross-border nature.

Cross-Border M&A is claimed to be a fairly efficient transaction when a foreign company intends to make a foreign direct investment (FDI) in the recipient country rather than having to establish a whole new company or through a greenfield investment mechanism.[2] This is driven by the fact that business actors tend to experience many "obstacles" when making a direct or a greenfield investments in the recipient country (host country).[3] Over the last decade, cross-border M&A transactions in ASEAN have been mostly carried out by countries such as Indonesia, Malaysia, the Philippines, Singapore and Thailand.[4]

From the competition law perspective, a merger can result in the creation of a concentration of control from several previously independent business actors into one single business actor; or a group of business actors or the transfer of control from one business actor to another business actor who were previously independent. Thus, creating a concentration of control or a market concentration.[5] From the M&A transactions, it is likewise highly possible to produce business actors who hold dominant positions in certain markets. If the dominant position of a business actor is abused, it means that there has been an unhealthy business competition practice.

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[1] Mohammed Sawkat Hossain, "Merger & Acquisitions (M&As) as an Important Strategic Vehicle in Business: Thematic Areas, Research Avenues & Possible Suggestions", Journal of Economic and Business, Vol. 116, 2021, https://doi.org/10.1016/j.jeconbus.2021.106004. p. 1.

[2] Hwy-Chang Moon, et.al, *Cross-Border Mergers & Acquisition: Case Studies of Korea; China; and Hong Kong, China,* Asia Pacific Economic Cooperation, September, 2003, p. 1.

[3] Ronald B. Davies, Rodolphe Desbordes, dan Anna Ray, "Greenfield Versus Merger and Acquisition FDI: Same Wine, Different Bottles?", *Canadian Journal of Economics,* Vol. 51, No. 4, 2018, https://doi.org/10.1111/caje.12353.

[4] Avin Tiwari, Gaurav Shukla, dan Suesh Kumar Pandey, "Cross Border M&A's in ASEAN and India: A Comparative Critique", *Journal of Advanced Research in Law and Economics*, Vol. 11, No. 2, 2020, https://doi.org/10.14505/jarle.v11.2(48).33.

[5] Lampiran Peraturan KPPU No. 1 Tahun 2009 tentang Petunjuk Pelaksanaan Pra-Notifikasi Penggabungan, Peleburan, dan Pengambilalihan, p. 4.

The data on the growth of cross-border M&A transactions that continue to increase among ASEAN countries is not accompanied by the availability of legal instruments, especially at the ASEAN regional level. Particularly regulations related to the impact of business competition from mergers and acquisitions. Meanwhile, ASEAN member countries in 2015 have agreed to form the ASEAN Economic Community (AEC) which is committed to encouraging the creation of effective competition policies.[6]

The absence of such regulation will render difficulty to enforce healthy business competition, which will open up the potential for large companies, especially multinational corporations, to engage in anti-competitive activities and create bias or negative impacts on ASEAN member countries.[7] Melamed defines three issues that arise from anti-competitive actions carried out by multinational companies as follows:[8]

1. Price collusion and international mergers and acquisitions;
2. Anti-competitive actions that affect a country but the evidentiary procedure needs to be carried out in the country where the company's head office (which committed the anti-competitive action) is located;
3. Anti-competitive actions that pose different levels of negative impact in different countries, for example, import barriers can affect consumers in importing countries and affect producers in exporting countries.

In addition, not all ASEAN member countries implement rules related to merger control in their competition laws, such as Malaysia[9] and Cambodia.[10] The Malaysian

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[6] The ASEAN Secretariat, AEC Bluprint 2025, Part II, Subpart B, p. 12.

[7] Zulheri, "Competition Merger Review for Cross-Border Mergers and Acquisitions in Indonesia", *Indonesia Law Review,* Vol. 7 No. 3, 2017, p. 398.

[8] Phanomkwan Devahastin Na Ayudhaya, "ASEAN Harmonization of International Competition Law: What is The Most Efficient Option?", *International Journal of Business and Law,* Vol. 2 No. 3, 2013, p. 1.

[9] Malaysian Competition Act 2010 does not contain any requirements or options for companies to seek prior permission for merger, acquisition or joint venture plans http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Competition%20Act%202010%20-as%20at%2015%20August%202016.pdf accessed on 1 December 2024.

[10] The Asean Secretariat, Annex II *Comparative Table on Competition Law Frameworks in ASEAN* dalam *Handbook on Competition Policy and Law in ASEAN for Business* 2017, Jakarta, Januari 2018. See also Phanomkwan Devahastin Na Ayudhaya, *Op.Cit,* p. 4. Regarding merger and acquisition of companies in Cambodia, it is regulated in the *Law on Commercial Enterprises* (LCE). Based on Article 245 of the LCE, a merger transaction must be approved by a resolution of the GMS representing at least 2/3 of the constituents and must be filed and registered with the Ministry of Commerce. The Ministry of Commerce will issue a merger certificate. However, the LCE does not regulate turnover tests, substantive tests, or specific exemptions for foreigners. See Darwin Hem, et.al, "Doing Business in Cambodia: Overview", https://uk.practicallaw.thomsonreuters.com/3-524-4317?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1 accessed on 29 April 2019.

Competition Act of 2010 merely regulates the prohibition of anti-competitive agreements and abuses of dominance. However in Malaysia, there are competition regulations related to mergers in several specific sectors, for example the aviation services sector and the communications and multimedia sector.[11]

Essentially, ASEAN provides guidelines related to business competition policy (ASEAN Regional Guidelines on Competition Policy) which were published in 2010. In this case, ASEAN does not use a "hard-law enforcement" approach at the regional level so that the ASEAN Regional Guidelines on Competition Policy are guidelines for member countries in developing their respective business competition laws. [12] Therefore, the substance in it remains general and lack of comprehensiveness.

In the ASEAN Guidelines, it is stated that anti-competitive mergers are prohibited, however, it does not regulate in greater detail and state what sanctions will be imposed if the country does not comply with the said provision. Another thing contained in the ASEAN Regional Guidelines on Competition Policy is that member countries must provide specific procedures that require that competition institutions or authorities conduct merger assessments based on voluntary or mandatory notification.[13] These Guidelines do not specify in further detail which method the member states are obliged use to carry out the assessment, meaning that the merger assessment is left to the authority of each member state.

This is different from the practices at the regional level of the European Union wherein there are several regulations relating to cross-border merger and acquisition transactions in business competition, such as instructions (EU Directives) or standards (Guidelines).[14] In regards to these regulations, there are provisions that are legally

[11] Shanti Kandiah, "The Merger Control Review – Edition 9", in https://thelawreviews.co.uk/edition/the-merger-control-review-edition-9/1172951/malaysia accessed on 18 April 2019.

[12] Phanomkwan Devahastin Na Ayudhaya, *Ibid.*

[13] The ASEAN Secretariat, "ASEAN Regional Guideline on Competition Policy", Chapter 3, Sub Chapter 3.4, No. 3.4.2, 2010, p. 11.

[14] The regulations regarding cross-border mergers and acquisitions at the regional level of the European Union are: Commission Implementing Regulation (EU) No. 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 Implementing Council Regulation (EC) No 139/2004 on The Control of Concentrations between Undertakings; Directive (EU) 2017/1132 of The European Parliament and of The Council of 14 June 2017 relating to Certain Aspects of Company Law; dan Guidelines on The Assessment of Horizontal Mergers under The Council Regulation on The Control of Concentrations between Undertakings (2004/C 31/03).

binding as well as those that are non-binding. These non-binding provisions which are often referred to as soft law include guidelines, recommendations, declarations and opinions. This is as regulated in Article 288 of the Treaty on the Functioning of the European Union stating the validity of a legally binding provision or a non-legally binding provision.[15]

It should be noted that the procedures in force prior to the implementation of Directive 2005/56/EC were very complex.[16] The complexity of these procedures creates legal uncertainty[17] high transaction costs and the potential for transactions unable to be executed.[18] Ultimately, Directive 2005/56/EC became the harmonization of cross-border merger rules for all member states of the European Union and the European Economic Area. The implementation of the EU Directive 2005/56/EC had a positive impact with the increase in cross-border merger activity since the implementation of Directive 2005/56/EC, reaching 173% in the period 2008-2012.[19] Another impact of the implementation of Directive 2005/56/EC is that it is able to reduce cross-border merger transaction costs.[20]

What needs to be underlined is that both the European Union and ASEAN have differences despite the similarity that they share in which both implement a single market economic policy.[21] One of the differences is that the European Union

[15] Art. 288 TFEU states that "A regulation must be generally applicable. It must be binding in its entirety and directly applicable in all Member States. A directive shall be binding, for the purpose to be achieved, on each Member State, but the choice of its form and method shall be left to the national authorities of the Member States. A decision shall be binding in its entirety. A decision that is specifically addressed to a particular party shall be binding only on those referred to in the decision. Meanwhile, recommendations and opinions shall not have legally binding force."

[16] There are three procedures, namely the formation of a European company (Societas Europaea); seat transfer (moving the company's head office or headquarter); and the possibility of a non-harmonised merger. See in Bech-Bruun dan Lexidale, *Study on the Application of the Cross-Border Mergers Directive,* Study for the Directorate Generale for the Internal Market and Services, European Commission, 2013, p. 90.

[17] The procedures or rules on cross-border mergers and acquisitions in Directive 2005/56/EC can only apply between certain member states whose national laws apply or permit such transactions, including Greece, Cyprus, Malta, Italy, and France. Meanwhile, countries whose national laws do not permit cross-border merger transactions, Directive/56/EC does not apply, for example Austria, Belgium, Bulgaria, Estonia, Finland, Germany, Hungary, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Rome, and the United Kingdom. See in *Ibid.,* p. 44.

[18] Stephane Reynolds and Amandine Scherrer, *Ex-post Analisys of the EU Framework in The Area of Cross-Border Mergers and Divisions*, Ex-Post Impact Unit of the Directorate for Impact Assessment and European Added Value, European Parliamentary Research Services, European Parliament, 2016, p. 23.

[19] In 2008 the number of transactions was 132 and reached 361 in 2012. This means that every year there was an increase of around 35%. in *Ibid.,* p. 25.

[20] Bech-Bruun dandan Lexidale, *Op.Cit.* p. 7.

[21] European Commission, "The European Single Market", https://ec.europa.eu/growth/single-market_en accessed on 24 June 2019. The ASEAN single market was achieved with the establishment of the ASEAN Economic

implements a single currency, namely the Euro, and a single monetary policy under the responsibility of the European Central Bank, [22] whereas ASEAN is yet to implement such policy. [23] In addition, ASEAN member states tend to be more heterogeneous while the European Union is quite the opposite, for example, in terms of religious differences and political environment. [24] The level of heterogeneity of ASEAN is also indicated by the different levels of economic openness.

Moreover, the regional approach used for the integration of the European Union leans more towards supranationalism (although initially it also used an intergovernmental approach) while ASEAN emphasized and adopted an intergovernmental approach.[25] This is apparent from the more structured institutional structure of the European Union, as indicated by the existence of 4 (four) primary institutions at the regional level of the European Union, namely the Council of Ministers, the European Commission, the European Parliament, and the Court of Justice.[26] Meanwhile, at the ASEAN regional level, the similar institutions do not exist, although, there is the ASEAN Coordinating Council whose membership consists of the foreign ministers of member countries.[27]

Basically, institutional organs in ASEAN are lacking in the authority to enforce the law in general. Meanwhile, the institutional structure of the European Union as mentioned earlier has their own authority, one of which is to enforce competition law.[28] Despite the fact that ASEAN lacks a supranational institution, in the context of

Community (AEC) in 2015, especially the ASEAN Single Window, ASEAN Single Aviation Market, ASEAN Single Shipping Market. See The ASEAN Secretariat, AEC Blueprint 2025.

[22] European Parliament, *The Euro at 20: Benefits of the Single Currency for Citizens,* in http://www.europarl.europa.eu/RegData/etudes/ATAG/2019/631049/IPOL_ATA(2019)631049_EN.pdf accessed on 1 December 2024.

[23] This can be seen from the different currencies of each ASEAN member country, for example, Indonesia's currency is the Rupiah, Malaysia's is the Ringgit, Singapore's is the Singapore Dollar, and Thailand's is the Baht.

[24] Maneesha Tripathi, *Op.Cit.,* p. 380.

[25] Virginia Zaharia and Veronica Pozneacova, "Supranationalism vs. Intergovernmentalism the Actual Organization of EU", *Political Sciences and European Studies*, Vol. 6. No. 2, 2020.

[26] European and ASEAN Integration Processes: Similar Models? H.E. Mr. Pierre Gramegnaand H.E. Mr. Lim Chin Beng http://archive.unu.edu/unupress/lecture18.html accessed on 1 December 2024.

[27] ASEAN, ASEAN Coordinating Council, in https://asean.org/asean/asean-structure/asean-coordinating-council/ accessed on 1 December 2024.

[28] There is Directorate-General for Competition under the European Commission.

the AEC, however, without supranational authority, the AEC becomes powerless.[29] The approach used by ASEAN also tends to emphasize the process rather than the results which will have an impact on the ineffective implementation of ASEAN documents. This is due to "the ASEAN way" which is fundamental in the implementation of ASEAN. According to Bahana Manggala Bara, one of the weaknesses of "the ASEAN way" is the ineffective structure in ASEAN so that there is a need for a supervisory body within ASEAN and must focus more on efforts to emphasize the results rather than the decision-making process.[30] This body or institution not only functions to supervise the implementation of policies but also to enforce them, or in other words, ASEAN, apart from realizing normative actions, needs to realize pragmatic actions as well. If ASEAN is able to create a varieties of mechanisms to achieve consensus, why is it unable to design the much needed mechanisms to enforce the implementation of that consensus.[31]

Derived from the discussion above, this study shall specifically address the questions related to what are the weaknesses of the ASEAN Guidelines on Competition Policy (as the only reference related to cross-border merger and acquisition) if analyzed from the authority of the institution, substantive assessment, and notification when compared to the European Union; and how should the ASEAN Guidelines on Competition Policy be in the future based on lessons learned through the regulatory studies in regards to the European Union.

METHODOLOGY

This is a normative research. The normative method used in this research is to analyze the data contained in the regulations at the ASEAN and European Union regional levels and to address the legal problems that have been brought forward previously.

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[29] Bayu Sujatmiko, et.al., "ASEAN Challenges Toward Supranational Organization", *Russian Law Journal,* Vol. 11, No. 5, 2023, p. 239.

[30] Bahana Menggala Bara, "The Weakness in the ASEAN Way", https://www.thejakartapost.com/news/2014/05/10/weaknesses-asean-way.html accessed on 1 December 2024.

[31] *Ibid.*

The type of data used is secondary data and the data were analyzed using the qualitative methods.

RESULT AND DISCUSSION

The Weaknesses of the ASEAN Regional Guidelines on Competition Policy

Based on the results of the regulatory study in the European Union, there are two fundamental weaknesses in the ASEAN Regional Guidelines, namely weaknesses related to nature and weaknesses in substance.

a. Weaknesses related to the nature of the ASEAN Regional Guidelines

ASEAN Regional Guidelines that were published in 2010 is a form of competition policy and law at the ASEAN regional level which is the initial step to achieve ASEAN as a region with high economic competition. These Regional Guidelines consider the different levels of competition policy development of member countries. Essentially, these Regional Guidelines contain directives or standards for ASEAN member countries in designing and implementing their national competition laws.

The scope of competition policy and law as contained in Chapter 3 of the Regional Guidelines consists of 6 sub-chapters, namely:[32]

a. implementation of competition policy;
b. prohibition of anti-competitive agreements;
c. prohibition of abuse of dominant position;
d. prohibition of anti-competitive mergers;
e. exemptions or exclusions from application of competition law; and
f. providing guidance to businesses.

In addition to the above scope, member states may also apply prohibitions on other restrictive trade practices. It is stated in the Regional Guidelines that member states

[32] Point 3.1.1, Chapter 3 Scope of Competition Policy and Law, ASEAN Regional Guideline on Competition Policy, p. 6.

may consider prohibiting merger that lead to substantial lessening of competition or significantly impede the effective competition in the relevant market.[33]

The definition of merger in the Regional Guidelines refers to a situation where there are two or more businesses/companies which previously stood alone and then merged into a single entity.[34] This definition includes transactions in which two companies legally merge into one company ("merger"); one company takes sole control of all or part of another company ("acquisition" or "takeover"); two or more companies gain joint control ("joint control") over the other company ("joint venture"); and other transactions in which one or more companies acquire control over one or more other companies as related entities.[35]

Furthermore, due to its nature which only provides guidelines for the development of competition law in its member countries,[36] the narratives that are generally constructed in the Regional Guidelines are indeed leaning more towards providing the notion that "states may" implement certain provisions as described in the Regional Guidelines. This is reflected in one of the provisions in the Regional Guidelines as follows, "*A specific procedure **may be established** by which the competition regulatory body is tasked to assess mergers,.....*".[37] Another example in the *Regional Guidelines* that reflects provisions of a recommendatory or indicative nature is, "*The competition regulatory body **may implement** a simplified filing system for cases that,...*".[38] This is a stark contrast from the provisions in the regulations in the European Union which are firmer and clearer, for example in Article 2 of Council Regulation (EC) 139/2004 which states: "*Concentrations within the scope of this Regulation **shall be appraised** in accordance with the objectives of this Regulation.....*".

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[33] Point 3.41, Chapter 3 Scope of Competition Policy and Law, ASEAN Regional Guideline on Competition Policy, p. 10.

[34] Point 3.4.1.1, Chapter 3 Scope of Competition Policy and Law, ASEAN Regional Guideline on Competition Policy, p. 11.

[35] *Ibid.*

[36] Cenuk Sayekti, "Competition Law harmonization: What Asean Can Learn From Others?", *Refleksi Hukum,* Vol. 4 No. 2, 2020.

[37] See point 3.4.2 Chapter 3 Scope of Competition Policy and Law, ASEAN Regional Guideline on Competition Policy, p. 11

[38] See poin 3.4.5 Chapter 3 Scope of Competition Policy and Law, ASEAN Regional Guideline on Competition Policy, p. 12.

The word "may" in the phrase "may implement" implies that member states have no obligation or duty to implement the provisions in Regional Guidelines. According to the Grand Dictionary of the Indonesian (*Kamus Besar Bahasa Indonesia*, KBBI), the word "*dapat*" means able, capable, can, may, or possible. It is entirely different from the phrase "*shall be appraised*" which implies the existence of obligations (states must not). Meanwhile, the word "*wajib*" according to KBBI refers to something that must be done or must not be done. Thus, to implement or not to implement a provision in the Regional Guidelines is left entirely up to member states.

Given its nature which only provides guidelines for the development of competition law in its member countries,[39] the narratives constructed in the Regional Guidelines aim to provide direction for member states to implement certain provisions as described in the Regional Guidelines. The implications of the nature of the Regional Guidelines have an impact on the diversity[40] and the national laws of member states as presented in the following table.[41]

Table 1.

Differences in Competition Laws Related to Merger Provisions in ASEAN Member States

State	Prohibition on anti-competitive merger	Substantive Assessment	Merger Notification	Foreign Merger
Brunei Darussalam	Exists	Harmful to public	Voluntary	Not specified

[39] Cenuk Sayekti, *Op.Cit.*

[40] In terms of the time of implementation of the law, Indonesia and Thailand have already implemented competition law. Singapore first implemented competition law in 2004, but it was revised in 2006. Malaysia implemented *The Competition Act of 2010* (*Malaysian Competition Act*), which only came into effect in 2012. The Philippines implemented its competition law in 2015 through *The Philippine Competition Act* (*Republic Act No. 10667*). Vietnam began implementing competition law in 2004 through the *Vietnam Competition Law* (No. 27/2004/QH11), but it has been revised and came into effect on the 1st of July 2019. Brunei Darussalam implemented its competition law through the *Competition Order 2015*. Laos (Lao People's Democratic Republic) has had competition regulations since 2004, but it has been revised in 2015 through the *Law on Business Competition No. 60/NA*. Myanmar has also enacted its *Competition Law of 2015* which came into effect on 24 February 2017. Meanwhile, Cambodia does not yet have an organic law governing business competition in its country. However, Cambodia has a *Draft Law on Competition of Cambodia* (version 5.7) which has not yet come into effect, last updated on 13 February 2018. See *Ibid.*

[41] The ASEAN Secretariat, Attachment II *Comparative Table on Competition Law Frameworks in ASEAN* dalam *Handbook on Competition Policy and Law in ASEAN for Business* 2017, Jakarta, January 2018, p. 11-72.

		interest (PI test)		
Cambodia	Does not exist	Does not exist	Does not exist	Does not exist
Indonesia	Exists	SLC test	Voluntary pre-merger notification, mandatory post-merger after 30 days of effective merger.	Yes
Laos	Did not exist	Restraining competition	Mandatory	Yes
Malaysia	There is nothing in the Competition Act of 2010 but there are merger regulations in the Malaysian Aviation Commission Act of 2015.	SLC Test (in aviation industry)	Does not exist. For aviation industry, voluntary notification applies	Not available
Myanmar	Exists. However, there is no specific definition of merger in the Myanmar Competition Law of 2015.	Dominant position test and lessening competition.	Not specified	There is no difference between local-to-local, local-to-foreign, or foreign-to-foreign mergers.
Philippines	Exists	SLC test (substantial	Mandatory notification for	Yes

		prevent, restrict or lessen competition)	transactions with a value of more than 1 million Pesos.	
Singapore	Exists	SLC test	Voluntary self-assessment – for pre & post-merger	Yes when it impacts in the substantial lessening of competition in the Singapore market.
Thailand	Exists	Mergers that impact monopolies and dominant positions.	Mandatory post-merger notification	There is no difference between national and foreign mergers.
Vietnam	Exists	Market concentration exceeding 50% (dominant position)	Mandatory	Yes

Source: Handbook on Competition Policy and Law in ASEAN for Business 2017

This diversity actually emerged after the publication of the Regional Guidelines in 2010, where ASEAN member states began to enact and implement their respective competition laws. If we look at it from the perspective of the timeframe of the implementation of the law, Indonesia and Thailand had already implemented their competition law.[42] Singapore first enacted its competition law in 2004, but it was amended in 2006.[43] Malaysia implemented The Competition Act of 2010 (Malaysian

[42] Competition law in Indonesia is regulated by Law No. 5 of 1999, while Thailand has implemented.. The Trade Competition Act of 1999.

[43] Provisions regarding business competition are contained in Chapter 50 Competition Act, in https://sso.agc.gov.sg/Act/CA2004 accessed on 29 July 2019.

Competition Act), which only came into effect in 2012.[44] The Philippines implemented its competition law in 2015 through The Philippine Competition Act (Republic Act No. 10667).[45] Vietnam started enforcing competition law in 2004 through the Vietnam Competition Law (No. 27/2004/QH11), but it has been amended and came into effect on the 1st of July 2019.[46] Brunei Darussalam enforces its competition law through Competition Order of 2015.[47] Laos (Lao People's Democratic Republic) has enacted its competition regulations since 2004, but they have been revised in 2015 through Law on Business Competition No. 60/NA. Myanmar has also enacted its competition law, namely the Competition Law of 2015, which came into effect on the 24th of February 2017.[48] Meanwhile, Cambodia does not yet have an organic law governing business competition in its country.

Although 9 out of 10 ASEAN countries have implemented their competition laws, there remain variations or diversity in terms of the regulations, especially in regards to the thresholds and sanctions.[49] The diversity of regulations implemented by the ASEAN member countries has drawn criticism that the Regional Guidelines have not gone far enough in promoting regional integration, considering the standards or provisions contained therein are still very general and loose.

In other words, the Regional Guidelines do not provide provisions that are required to be regulated by member countries, this is due to the narratives contained therein serves merely as a recommendation. Furthermore, the Regional Guidelines may be part of the decision-making process in competition issues in ASEAN countries, but

[44] The ASEAN Secretariat, *Handbook .... Op.Cit.,* p. 27.

[45] *Ibid.,* p. 44.

[46] Koushan Das, "Vietnam's Competition Law and its Impact on Foreign Companies", in https://www.vietnam-briefing.com/news/vietnam-competition-law-impact-foreign-companies.html/ accessed on 1 December 2024.

[47] The ASEAN Secretariat, *Handbook.... Op.Cit.,* p. 72

[48] *Ibid.,* p. 41.

[49] Some ASEAN member states apply criminal sanctions (such as Thailand), some apply only administrative sanctions (such as Singapore), and there are countries that apply both types of sanctions (such as Indonesia). Countries also apply different thresholds for merger notification, for example Singapore applies voluntary notification. See Barbora Valockova, "EU Competition Law: A Roadmap for ASEAN?", *Working Paper No. 25,* EU Centre in Singapore, 2015, p. 8.

these Guidelines are yet to be effective enough for the economic integration in ASEAN.[50]

In contrast to other regional cooperation such as the European Union and NAFTA which both use a "hard law" approach, where ASEAN uses a "soft law" approach.[51] This approach, according to Luu, is due to the traditional ASEAN way"[52]; differences in economic conditions and competition law regimes among member states; and the lack of a supranational body with the authority to enforce competition law in general or at least a mechanism for dispute resolution.[53] The soft-law approach implemented by ASEAN is due to the characteristics of the "ASEAN way" which has an impact on the resulting policy and legal products. Therefore, to determine a policy or law or even to make changes in ASEAN requires a strong political will from member countries.[54]

A treaty with a soft law approach usually includes various forms of cooperation or assistance from other member countries. There are several views on soft law, namely the positive concept of soft law, the rational concept of soft law, and the constructive concept of soft law,[55] but in essence the term soft law refers to the instrument that possess a degree of legal content but is not formally binding.[56] Francis Snyder defines soft law as "*rules of conduct which in principle have no legally binding force but which nevertheless may have practical effects*".[57] Although some international agreements or cooperation use a soft law approach, there are several criticisms, including:[58]

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[50] *Ibid.* see also Udin Silalahi and Dian Parluhutan, *Op.Cit.*, p. 220.

[51] *Ibid.,* p. 2.

[52] There are three essential aspects of "the ASEAN way" namely: first, the desire not to lose reputation or good name in public or to tarnish the good name of other members in public. Second, prioritizing consensus rather than confrontation or conflict. Third, the rejection of the idea that a country has the right to interfere in the affairs of another country without the consent of that other country. See Walter Woon SC and David Marshall, "Dispute Settlement The ASEAN Way", 2012, in https://cil.nus.edu.sg/wp-content/uploads/2010/01/WalterWoon-Dispute-Settlement-the-ASEAN-Way-2012.pdf accessed on 1 December 2024.

[53] Bayu Sujadmiko, *Op.Cit.*

[54] Hoang Thu Ha, et.al, "ASEAN's Reflections from Brexit": ASEAN and The EU Perspective (Brexit and Beyond), *ASEAN Focus,* ISEAS Yusof Ishak Institute, August 2016, p. 19 in https://www.iseas.edu.sg/images/pdf/ASEANEUAUGISSUE.pdf 1 December 2024.

[55] Pawel Kwiatkowski, "Soft Law in International Governance", *Adam Mickiewicz University Law Review*, Volume 7, 2017, p. 93-96.

[56] Kena Zheng & Francis Snyder, "China and EU's Wisdom in Choosing Competition Soft Law or Hard Law in The Digital Era: A Perfect Match?", Vol. 9, 2023.

[57] *Ibid.*

[58] *Ibid.*

a. Soft law lacks the clarity and precision needed to provide predictability and a framework within which to provide action;
b. Soft law cannot prevent government deregulation in the business environment (race to the bottom);
c. Soft law cannot have any real impact, but is used as a strategy to lead to the use of hard law.

Apart from the different law enforcement approaches, another factor that causes the Regional Guidelines to be less effective according to the authors is the ASEAN regional cooperation model as an intergovernmental regional organisation (IGO).[59] IGO is formed based on an agreement which functions as a charter in its formation,[60] based on good faith, and established by the same interests.[61] However, the IGO model implemented by ASEAN is not accompanied by the existence of supranational institutions such as those implemented in the European Union region.

This is apparent from the organizational structure at the regional level that has been explained previously. Joseph Wailer stated that there is a general view regarding the supranationalism of a Community is that the said Community is at a higher level or above each country.[62] This view does not mean placating a Community institution as an institution that is completely above the member states since the member states are still entitled to their role and sovereignty.[63] This is what causes the diversity of competition laws among ASEAN member countries because countries are given free authority to draft them by considering whether or not to apply the provisions contained in the Regional Guidelines.

Weaknesses Related to the Substance of the ASEAN Regional Guidelines, Especially the Institutional Authority, Substantive Assessment, and Notification in Cross-Border Merger and Acquisition

[59] Barbora Valockova, *Op.Cit.,* p. 5. See also https://asean.org/wp-content/uploads/2017/06/Advert_Finance-Coordinator_201706.pdf accessed on 1 December 2024.

[60] Harvard Law School, "Intergovernmental Organizations (IGOs)", in https://hls.harvard.edu/dept/opia/what-is-public-interest-law/public-service-practice-settings/public-international-law/intergovernmental-organizations-igos/ accessed on 1 December 2024

[61] *Ibid.*

[62] *Ibid.*

[63] This is applied in the EU. See *Ibid.,* p. 96.

Reflecting on the European Union, overall the author is of the opinion that the regulations or guidelines applicable in the European Union are more detailed and clear compared to the Regional Guidelines. The author will explain the weaknesses of the Regional Guidelines when compared to regulations related to cross-border mergers and acquisitions in the European Union, especially related to institutional authority, substantive assessments, and merger notifications.

1) Institutional Authority

One of the criticisms of the Regional Guidelines is related to effectiveness.[64] Since the AEC came into effect in 2015 (after the Regional Guidelines were published in 2010), unfair competition may continue to occur among ASEAN member states, but the question is when unfair competition involves ASEAN member states (anti-competitive effect across jurisdictions), which competition law will be used and who (the authority) will enforce it.[65] What needs to be understood is that there is no institution or authority that enforces competition law at the ASEAN regional level. This assumption is proven by the fact that several structures at the ASEAN level such as the ASEAN Coordinating Councils, ASEAN Community Councils, and the Secretary-General of ASEAN and ASEAN Secretariat, do not even have the authority to enforce the law in general, especially competition law. Although there is an ASEAN Expert Group on Competition (AEGC), it likewise does not have the authority to make decisions.[66]

In relation to the authority of the competition institutions or authorities of member countries based on the Regional Guidelines, the authorities of each member country can determine specific procedures for canceling mergers, granting merger approval, imposing conditions on mergers, and requesting commitments or accountability from companies carrying out mergers for unfair competition arising from the merger.[67] The competition authorities of ASEAN member states may also apply a simplified filing

[64] Udin Silalahi dan Dian Parluhutan, "The Necessity of ASEAN Competition Law: Rethinking", *Hasanuddin Law Review,* Volume 3 Nomor 3, 2017, p. 220.

[65] *Ibid.*

[66] The ASEAN Secretariat, http://www.asean.org/asean/asean-secretariat/about-asean-secretariat accessed on 1 December 2024.

[67] Point 3.4.4. Chapter 3 Scope of Competition Policy and Law, ASEAN Regional Guideline on Competition Policy, p. 11.

system for cases where (based on turnover or market share thresholds) the merger does not result in serious competitive effects.

However, the Regional Guidelines do not provide provisions on the competence of competition authorities specifically to deal with cross-border mergers and acquisitions. Chapter 4 of the Regional Guidelines simply provides a general overview of the roles and responsibilities of the competition authority of each member state. It states that member states may mandate their national authorities to:[68]

1) implement and enforce national competition policies and laws;
2) interpret and elaborate competition policies and laws;
3) advocacy of competition policy and law;
4) provide advice relating to competition policy and law to legislators and governments;
5) act in international forums as a representative of the state in international competition issues.

In order to fulfill the mandates bestowed on it, the competition authority may carry out responsibilities such as:[69]

1) establish and issue regulations and other implementation and/or interpretative measures;
2) develop and disseminate plain language guidelines and publications for business actors and consumers on competition policy and law;
3) develop and publish comprehensive guidelines on how competition authorities will apply the law (including exceptions);
4) conducting advocacy and educational activities on competition law or conducting market competition studies and publishing periodic reports, to create a culture of compliance in all sectors of the economy;
5) conduct investigations into prohibited anti-competitive activities on its own initiative or act on complaints or information from third parties;
6) conduct investigations into alleged violations of competition law across all economic sectors, where price rigidity or other circumstances indicate that there is a restriction or distortion of competition;
7) enforce competition law by imposing penalties and administrative sanctions, as well as issuing orders and interim measures, based on reasoned decisions;

[68] Point 4.1.1 Chapter 4 Role and Responsibilities of Competition Regulatory Bodies/Institutional Structures/Sectoral Regulators, ASEAN Regional Guideline on Competition Policy, p. 15.

[69] Point 4.1.2 Chapter 4 Role and Responsibilities of Competition Regulatory Bodies/Institutional Structures/Sectoral Regulators, ASEAN Regional Guideline on Competition Policy, p. 15.

8) interpret competition law provisions or form the scope of competition policy and law based on legal precedents;
9) establish a mechanism for receiving and assessing reports for exemptions from competition policies and laws or notifications for merger assessments;
10) create and maintain a public register and database of reports received by the competition supervisory body and its decisions;
11) provide advice and opinions on changes or reviews of competition legislation or other related areas of competition regulation and policy;
12) promote the exchange of non-confidential information with other competition authorities and in international forums;
13) promote capacity building, sharing best practices, liaison, training and work updates with other competition authorities.

In addition, the Regional Guidelines provide the view that countries should include extraterritorial provisions or applications in their competition laws.[70]

The enforcement of competition law often overlaps with other legal regimes. In regulating the enforcement competition law, member states must decide whether violations of competition law constitute civil, administrative or criminal offences. This will affect the type of investigative and enforcement powers and the institutions involved in competition law enforcement.[71] In the context of civil or administrative wrongdoing, the sanctions imposed are imposed by civil or administrative authorities, such as competition authorities. If the context of the wrongdoing is a criminal law regime, the sanctions imposed are imposed by judicial authorities, or through judicial review.[72]

Apart from that, the Regional Guidelines offers the notion that member states may authorize competition authorities or other national law enforcement agencies with investigative powers, such as the authority to require a person or legal entity to provide information or any documents required and relevant during the investigation process. Such powers include obtaining documents in the form of copies or originals, or to obtain their reproduction; requesting explanations relating to relevant

[70] Point 5.1.2 Chapter 5 Legislation and Guidelines / Transitional Provisions, ASEAN Regional Guideline on Competition Policy, p. 21.
[71] Point 6.1.4 Chapter 6 Enforcement Authority, ASEAN Regional Guideline on Competition Policy, p. 24.
[72] Point 6.1.5 Chapter 6 Enforcement Authority, ASEAN Regional Guideline on Competition Policy, p. 24.

documents; requesting a relevant person to provide information where the required documents can be found; and requesting such person to provide information that is not already in recorded form.

Additionally, the Regional Guidelines allows the member states to be able to provide a series of sanctions, coercive and non-punitive measures, both criminal, civil and administrative, to ensure compliance with the law. Member states can also stipulate that sanctions can be reviewed judicially.[73] Sanctions may be imposed for substantive violations, such as a prohibition on making anti-competitive agreements, a prohibition on abuse of dominant position and a prohibition on anti-competitive mergers.[74] Sanctions may also be imposed for procedural violations, such as failure or refusal to provide information, destroying or falsifying documents, failure to comply with decisions or orders, or inducing or instructing others not to cooperate.[75]

Based on the Regional Guidelines, it is highly possible that the authority of institutions and procedures implemented by member countries differ from each other. This is distinguishable from the regulation in the European Union which is more structured with the existence of institutions and laws at the supranational level. With the existence of supranational institutions, the European Commission (EC)[76] as an institution at the regional level, the European Union has the authority to enforce laws relating to merger and acquisition transactions. The EC is authorized to handle merger and acquisition transactions involving two or more member states or involving other member states of economic cooperation with the European Union, more clearly and firmly stated. Enforcement of competition law is specifically related to merger and acquisition transactions involving member states of the European Union. However, it should be noted that in order to exercise its authority, there is a Directorate-Generale for Competition which is authorized to handle and assess mergers based on certain

[73] Point 6.7.1 Chapter 6 Enforcement Authority, ASEAN Regional Guideline on Competition Policy, p. 28.
[74] Point 6.7.2 Chapter 6 Enforcement Authority, ASEAN Regional Guideline on Competition Policy, p. 28..
[75] Point 6.7.3 Chapter 6 Enforcement Authority, ASEAN Regional Guideline on Competition Policy, p. 28..
[76] European Commission is the main executive body of European Union that promotes the general interest of the EU by proposing and enforcing legislation as well as by implementing policies and the EU budget. https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/types-institutions-and-bodies_en accessed on 20 December 2024.

thresholds, in other words, fulfilling the Community dimension (its institutional structure is under the European Commission). [77] In this case, the European Commission must make a decision regarding the merger transaction to be carried out within a certain period of time, namely 25 working days in the initial phase. Furthermore, the European Commission will decide whether the transaction is clear or the transaction requires further action (initiate proceedings) which will be carried out in-depth investigation.[78] When the European Commission decides to initiate an investigation, it should normally take no more than 90 working days to reach a final decision from the time the investigative action is initiated.[79] In essence, after the parties have notified, the duty of the European Commission is to assess the impact of the transaction or concentration to be carried out on the relevant market. The European Commission is also an institution that carries out substantive assessments of merger and acquisition.

Thus, it can be concluded that the weakness of the Regional Guidelines related to institutional authority is the absence of a supranational institution at the ASEAN regional level and the possibility that the authority held by ASEAN member state institutions differs from one another as previously explained. This is because the nature of the Regional Guidelines basically merely provides guidelines or frameworks to member states so that member states are free to determine what authority can be given to their national authorities. Moreover, the guidelines related to the authority for national authorities provided by the Regional Guidelines remains very general and broad as previously mentioned.

[77] Previously there was a Merger Task Force but this institution was dissolved in 2002 by the European Commission along with institutional reforms that integrated accountability related to merger and competition cases under directorates dealing with specific business sectors. News, Denis Staunton, "European Commission Disbands Merger Task Force", *The Irish Times,* 1 May 2003, in https://www.irishtimes.com/business/european-commission-disbands-merger-task-force-1.357498 accessed on 28 July 2019. EC will carry out a merger assessment in particular if the concentration meets the provisions contained in Article 2(2), Article 2(4), and the criteria set out in Article 81(3) of the Treaty, and the EC will issue a decision stating that the concentration is compatible with the common market.

[78] See Art. 10 (1) Council Regulation (EC) No 139/2004.

[79] Annex I Form CO Council Regulation (EC) No 139/2004.

2) Substantive Assessment

In relation to substantive assessment, the Regional Guidelines states that countries may consider whether the merger will have an impact on substantial lessening of the competition (SLC) or significantly impede the effective competition (SIEC). The SLC or SIEC assessment model is basically equivalent and widely used by countries in the world.[80] Basically, the authors are of the opinion that, when it comes to the substantive assessment in the Regional Guidelines, there are no significant weaknesses, although it is still farther away when compared to the European Union. The author argues that the Regional Guidelines have provided a guideline or view that countries use the SLC or SIEC assessment model. The hope is that member countries refer to one view of the assessment model offered by the Regional Guidelines, namely the SLC or SIEC test. However, the substantive assessment referred to in the Regional Guidelines is not described in detail.

Reflecting on the European Union, there are several guidelines in assessing mergers. The EU Merger Regulation implemented in 1990 prohibits mergers that "create or strengthen a dominant position that results in the obstruction of fair competition". Based on this understanding, there are two cumulative assessments that must be carried out (cumulative two-tier test), namely: concentration is prohibited if it leads to the creation or strengthening of a dominant position; and if the impact of changes in market structure has a "significant impediment of the effective competition" (SIEC) or significant obstacles to fair competition. Some opinions say that there is one important criterion, namely "dominance". However, "dominance" alone is not enough to prohibit mergers carried out by companies.[81]

The recent EU Merger Regulation adopted in 2004 (Council Regulation (EC) No 139/2004) reformulates the substantive test of SIEC as follow:[82] "*A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall*

[80] Iiris Tuohimaa, "Merger Control in the EU When is an Impediment to Effective Competition Significant?", *Thesis, Faculty of Law Lund University,* Spring 2022.

[81] *Ibid.*

[82] See Art. 2 (3) Council Regulation (EC) No 139/2004.

be declared incompatible with the common market". This reformulation of the SIEC test means that dominance is important but not the main thing to do in assessing a merger. "Dominance" leads to a merger assessment that focuses on the impact on market structure, not the impact on healthy competition. Meanwhile, the SIEC test is broader in scope, namely by eliminating the gap caused by the dominance test (used prior to the 2004 reformulation), and considering whether there are unilateral effects as a result of uncoordinated actions from companies that are not even dominant.[83] In essence, the SIEC test does not only focus on dominant position alone, but also takes into account the definition of the relevant market and market share and emphasizes the assessment of the nature and competitive advantages of the merging parties, the substitutive relationship of the goods produced by the merging parties, and any changes that may arise from the merger.[84] Thus, the authors believe that the merger assessment based on the reformulated SIEC essentially uses the rule of reason approach or by looking at the impacts arising from the merger.

Council Regulation (EC) No. 139/2004 is the primary basis in conducting the assessment, namely by looking at the concentration resulting from the merger and concentration with the "community dimension". To help the EC in assessing whether the formation of concentration will have a significant impact on limiting competition as a consequence of strengthening the dominant position in the common market, the Guidelines on The Assessment of Horizontal Mergers and Guidelines on The Assessment of Non-Horizontal Mergers were prepared. In the Guidelines, the EC in conducting the assessment requires a definition of the relevant product and geographic market as well as a competitive assessment of the merger to be carried out. In addition, there are provisions or limitations for measuring the level of market concentration using HHI. The EC is also required to consider whether the merger involves who the parties are, whether potential new business actors, important innovators, the existence of cross-shareholdings, whether one of the parties carrying

[83] Iiris Tuohimaa, *Op.Cit.*
[84] *Ibid.*

out the merger is a large company, the existence of affiliates, and how much market share is owned by the parties carrying out the merger.

Although they are mere guidelines, the substance of the Guidelines on the Assessment of Horizontal Mergers and Guidelines on the Assessment of Non-Horizontal Mergers actually provide detailed guidelines that can be used by the EC to carry out merger assessments.[85] Unlike the Regional Guidelines which only provide an overview of merger assessment using the SLC test or SIEC test, the Regional Guidelines do not provide further explanation of what the relevant authorities must do in carrying out a merger assessment.

3) Notification

In carrying out merger assessments, the competition authorities of ASEAN member countries can apply specific procedures related to notification or notice, whether voluntary or mandatory.[86] Mandatory notification will prevent or hinder a company from carrying out transactions until the company obtains a merger permit or approval (merger clearance) from the competent authority.[87] This can avoid situations where mergers are subject to difficult and expensive de-concentration measures imposed by the competent competition authority due to their impact on competition (anti-competitive mergers). Meanwhile, "voluntary notification" allows business actors to conduct self-assessment of the merger to be implemented.[88]

Meanwhile, the EU merger regulation requires businesses/companies that will merge to submit a notification to the EC if they meet the Community dimension criteria. A concentration will be declared compatible with the common market based on the decision of the EC decision through a substantive assessment and notification carried

[85] For example, in conducting a horizontal merger assessment as stated in the Guidelines on the assessment of horizontal mergers under the Council Regulation, specifically to assess market share and concentration levels, it is stated that the Commission uses HHI. To conduct a market share assessment, the Commission can assess based on a market share of more than 50% or in certain cases between 40%-50%, in other cases below 40%.

[86] Point 3.4.2. Chapter 3 Scope of Competition Policy and Law, ASEAN Regional Guideline on Competition Policy, p. 11.

[87] *Ibid.*

[88] *Ibid.*

out by the merging parties. The EU also provides procedures, guidelines, and what is done or prepared in carrying out merger notification as contained in Form CO.

Thereafter, similar to what is implemented in the European Union, the *Regional Guidelines* provide direction that mergers with a certain threshold or turnover threshold only require notification. ASEAN member countries can apply the threshold by referring to the turnover of the company both nationally and the accumulated turnover worldwide.[89] States may also impose provisions under which a merger cannot be implemented without obtaining approval from the competent competition authority.[90]

While the Regional Guidelines give Member States the freedom to implement mandatory or voluntary notification regimes, the European Union in Council Regulation (EC) No. 139/2004 stipulates that a concentration must be notified to the EC before its implementation and after the conclusion of an agreement, the announcement of a public offer, or the takeover of a controlling interest.[91] This indicates that the European Union applies mandatory pre-merger notification to all concentrations containing a Community dimension.

The EU Merger Regulation applicable in the European Union relating to notification also provides provisions relating to the parties making the notification. Concentrations consisting of mergers as defined in Article 3(1)(a) of Council Regulation (EC) No 139/2004 or joint control within the meaning of Article 3(1)(b) of Council Regulation (EC) No 139/2004 must be notified jointly by the parties carrying out the merger or by those carrying out the acquisition of joint control.[92] The next step would be, the notification which must be submitted in the manner specified in Form CO.

In essence, in the notification, the parties are required to submit all information related to the merger. For example, the identity of the parties to correspondence; concentration, share ownership and control; economic reasons for the concentration;

[89] See Art. 1 Regulation (EC) 139/2004

[90] Point 3.4.3 Chapter 3 Scope of Competition Policy and Law, ASEAN Regional Guideline on Competition Policy, p. 11.

[91] Art. 4 (1) Council Regulation (EC) No 139/2004.

[92] Art. 4 (2) Council Regulation (EC) No 139/2004.

transaction value; definition of relevant product and geographical markets; and affected markets and other markets. The information submitted is very useful for the EC to make an assessment. However, it should be noted that based on Article 17 (2) of Council Regulation (EC) No 139/2004 and other provisions such as in the EEA Agreement, it is required that the EC, Member States, EFTA Supervisory Authorities and EFTA States, their authorized officials and/or other officials not to disclose information they obtain from submitting this notification, the aim is to protect the confidentiality of the notifying parties.

In regards to the said notification, the framework contained in the Regional Guidelines is still far behind the notification provisions as applicable in the European Union. This is indicated by the provisions of the Regional Guidelines which still provide freedom or do not explicitly state which notification regime can be applied by member countries, namely mandatory or voluntary notification. Both notification mechanisms have their respective advantages. For example, mandatory notification is considered more effective in preventing anti-competitive impacts because it is almost impossible to cancel a merger once it has been notified and declared effective, thus it will provide more legal certainty. Meanwhile, voluntary notification is deemed more beneficial for merging parties and competition authorities since there is no threshold that must be satisfied, as applies in Australia, Chile and New Zealand.[93]

ASEAN Regional Guidelines in the Future Pursuant to the Lessons Learned from the Review of Regulation in the European Union

The proposals that the authors present forward broadly cover two aspects, namely those related to the nature and the substance of the Regional Guidelines.

a. Lessons learned in regards to the Regional Guidelines

The nature of the Regional Guidelines as a mere guideline for its member countries poses implications for the law enforcement approach that is used, namely the soft law approach. The intergovernmental and soft law approach model and cooperation currently adopted by ASEAN may be the most appropriate model, but not for a long

[93] *Ibid.*

period of time considering that ASEAN has agreed to the formation of the AEC which has come into effect in 2015. As the authors have presented in Table 1 regarding the comparison of competition laws of ASEAN member countries, the soft-law approach adopted by the Regional Guidelines creates diversity or legal diversity among ASEAN member countries. The soft-law approach is not formally binding, but this does not mean that soft-law is not normative.

However, on the other hand, the soft-law approach has several advantages or benefits of its own, such as:[94]

a. Soft law is considered easier to negotiate;
b. Soft-law imposes lower "sovereignty costs" for states when it comes to sensitive issues;
c. Soft law is more flexible for countries to overcome ambiguity and to make improvements as time goes by;
d. Soft law allows countries to strengthen or engage in deeper cooperation rather than having to think or worry about law enforcement;
e. Soft law can better address diversity;
f. Soft law is directly open to non-state actors, including international secretariats, state administrative agencies, business associations and non-governmental organizations.

ASEAN does not have to be guided by the application of soft law alone, but can also combine both (hybrid model by combining hard and soft approaches or bilateral and multilateral approaches). The hard-law approach is binding and to be binding, the rules require accuracy or precision (or at least have the higher potential for accuracy) and the delegation to an authority or institution to translate and implement them.[95] Binding norms provide justification for enforcing those norms, even if enforcement is necessary under coercion.[96]

[94] Giulia Bosi, "Overcoming the "Soft vs Hard Law" Debate in the Development of New Global Health Instruments", https://opiniojuris.org/2021/11/30/overcoming-the-soft-vs-hard-law-debate-in-the-development-of-new-global-health-instruments/, accessed on 1 December 2024.
[95] *Ibid.*
[96] *Ibid.*

Some of the advantages that he hard-law approach has in the context of international law according to the rationalist view are:[97]

a. Legal instruments with a hard-law approach allow countries to be more committed or subject to international agreements or arrangements that have been agreed upon. This is believed to reduce the occurrence of denial of a rule, because the country will consider sanctions or its reputation when proven to have violated the provisions of the norm.
b. Legal instruments with a hard-law approach are more credible as they have a direct impact on the national jurisdiction of the country or can force the country to enforce them.
c. Instruments with a hard-law approach can resolve problems of ambiguity in an international agreement or treaty by creating a mechanism for interpreting and elaborating the law.
d. Instruments with a hard-law approach enable countries to better monitor and enforce their commitments, including through the use of dispute resolution bodies such as courts.

According to some experts, both hard law and soft law are actually complementary to each other in terms of resolving international problems. These two approaches can raise each other up, especially through two features, namely: non-binding soft law can lead to the binding nature of hard law; and hard law can then be developed or elaborated through the initial soft law instruments.[98]

There are three views related to the relationship between soft-law and hard-law as something that is complementary to each other, namely the views of positive legal scholars, rationalist views, and constructivist views. Positive legal scholars view that soft-law inferior to hard-law, but this does not mean that soft-law should be removed or dropped from considered since soft-law can lead to hard-law. Nonetheless, rationalists view soft-law as a complement to hard-law since the choice to use a hard-law approach is not the first choice initiated. Meanwhile, constructivists view that soft-

[97] Kishanthi Parella, "Hard and Soft Law Preferences in Business and Human Rights", *Washington and Lee University School of Law*, 2020. https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1643&context=wlufac accessed on 1 December 2024.

[98] *Ibid.*

law as a complement to hard-law that can facilitate domestic discussions and processes that will change norms, understandings and perceptions of state interests.[99]

A hybrid model approach that combines both hard-law and soft-law can be found in Kunzlik's research on the hybridization of national competition law in Ireland and the United Kingdom (referring to the model approach taken by the United States) to criminalize anti-competitive actions, but on the other hand remains in line with the TFEU when cases occur that hinder competition at the regional level. The European Union likewise initially adopted a good number of soft-law instruments. The two primary underlying reasons are the lack of formal legislative competence to adopt hard-law provisions and the desire to ensure flexibility and diversity in the national laws of its member states.[100] However, since the Edinburgh Summit in 1992, legal integration coupled with binding instruments has been shown to be a form of suppressing cultural and political diversity, while non-binding laws are used to encourage legal integration without interfering with the autonomy of member states to regulate their national laws.[101]

The concept that combines hard law and soft law can basically be applied in ASEAN in the future to ensure legal certainty considering that the diversity of laws in ASEAN member countries actually arose after the enactment of the Regional Guidelines. Referring to the model applied in the European Union regarding the approach to law enforcement at the regional level, the European Union possesses both the binding legal instruments as well as the non-binding ones. The binding legal instrument in relation to mergers and acquisitions at the European Union regional level is the Council Regulation (EC) No. 139/2004, while the non-binding legal instrument refers to, for instance, the Guidelines on the Assessment of Horizontal Mergers.

The European Union has an institutional structure as discussed in the previous chapter, one of which is the European Council which in the context of this study is

[99] *Ibid.*

[100] Emilia Korkea-aho, "EU Soft Law in Domestic Legal System: Flexibility and Diversity Guaranteed?", Centre of Excellence in Foundations of European Law and Policy Research, University of Helsinki, 2015, p. 174 in http://www.scandinavianlaw.se/pdf/58-8.pdf accessed on 19 August 2019.

[101] *Ibid.*

also authorized to enforce competition law, especially related to merger and acquisition transactions involving EU member countries and fulfilling the Community dimension. What needs to be noted is that the adoption of hard law and soft law needs to be followed by the development of institutional structures at the regional level as is done in the European Union so that there are bodies or institutions that function to supervise and enforce the law. ASEAN needs to consider the formation of this institution at the regional level in the future to ensure legal certainty for transactions, especially merger and acquisition involving ASEAN member countries.

b. Lesson learned in Regards to the Substance of the Regional Guidelines

1) Aspects Relating to the Institutional Authority

The enforcement of competition law, particularly in relation to cross-border merger and acquisition, requires supranational institutions to deal with multi-jurisdictional issues between member states, as is the case in the European Union.

Referring to what is implemented in the European Union related to the authority of the institution, there is a supranational institution that has the authority to assess and enforce anti-competitive mergers, therefore, in the future ASEAN may consider forming one. At some point, ASEAN supranational institutions shall determine a certain threshold to be able to use their authority against anti-competitive mergers (jurisdictional threshold). As implemented in the European Union, the Commission has authority over a concentration if it meets the Community dimension. Likewise, ASEAN can apply a certain threshold so that ASEAN can have authority over a concentration by determining the "ASEAN dimension".

Regarding the concept of supranationalism that applies in the European Union, Wailer distinguishes between normative supranationalism and decisional supranationalism.[102] Normative supranationalism emphasizes the existence of a relationship and hierarchy between European Union policies and legal actions on the

[102] Rafael Leal-Acras, *Op.Cit.,* p. 97.

one hand and the policies and legal actions of member states on the other.[103] In other words, the laws and policies of the European Union and the member states must be interconnected. This means that even though there are supranational institutions in the European Union structure, they still involve the governments of the member states.[104] Supranationalism within the framework of a legal definition refers to the agreement of a sovereign state to adhere to or to adopt the laws of a higher organization (transfer of sovereignty).[105] In the context of the European Union, if there is a conflict between national law and Community law, then Community law shall prevail (doctrine of supremacy).[106]

Meanwhile, decisional supranationalism is related to the process of institutionalization and decision-making at the European Union level by initiating, debating, drafting, enacting and executing laws or policies.[107] In order to ensure that the interests of member states remain protected, member states retain an important role in decision-making, in their interactions with the European Commission and the European Parliament.[108]

Supranationalism can be applied in different integration methods and it does not mean that member states will lose their sovereignty completely. Supranationalism may reduce the sovereignty of a country, however, it depends on the collective will of member states to what extent supranationalism will be applied. Thus, according to the authors' view, it is imperative to establish a supranational authority or institution that

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[103] *Ibid.*

[104] *Ibid.*

[105] Marketa Maria Jerabek, "Supranationalism: A Model for Mercosur? Experiences from the European Union and the Debatable Adequacy for Mercosure", *Brazilian Journal of International Relations,* Volume 5 No. 2, 2016, p. 407.

[106] There are three important things in describing Weiler's theory related to supranationalism, namely the doctrine of direct effect (Community law grants rights to individuals which the courts of member states are bound to respect and enforce); the doctrine of supremacy; and the principle of pre-emption (the authority of the Community in terms of decision-making and EU member states are prohibited from implementing laws that contradict Community law). See Rafael Leal-Acras, *Op.Cit.,* p. 101.

[107] Marketa Maria Jerabek, *Op.Cit.*

[108] Regarding decision-making in the European Union, in the legislative process, it is regulated in Articles 289 and 294 TFEU. The legislative procedure based on TFEU is a draft submitted by the Commission; first reading in Parliament; first reading in the European Council; second reading in the European Parliament where Parliament accepts the Council's position on the proposal submitted by the Commission, then Parliament will make a decision either to accept or reject; second reading in the Council; conciliation (if no agreement is reached, if then agreed the next step is approval by the Council and Parliament); finally the conclusion or in the sense of adopting regulations. See in http://www.europarl.europa.eu/factsheets/en/sheet/8/supranational-decision-making-procedures accessed on 1 December 2024.

will enforce competition law in general, and cross-border merger and acquisition in particular.

ASEAN currently has legal personality as stated in the ASEAN Charter. Legal personality refers to the acknowledgement that an international organization not only has a separate personality from its member states, but it also has powers which its member states do not have.[109] Weissberg expressed his view regarding the relationship between personality and legal capacity that "an entity that exercises international rights and is bound by its international obligations or as a legal personality, thenceforth, it is given capacity in international law (international legal capacity)".[110] However, the legal personality of ASEAN is yet to be fully effective, which is indicative from several agreements signed by ASEAN which were ratified by member countries based on their individual capacity.[111] This means that the binding power of the agreement signed by ASEAN depends on the willingness of each member country. In the future, according to the authors, there needs to be a higher degree of serious willingness from ASEAN leaders to exercise the legal personality that they have in a more effective manner.

Subsequently, the question arises whether when there is a supranational institution that will enforce the law at the ASEAN regional level, thus, whether it is necessary to harmonize the laws of member countries with the laws at the ASEAN regional level in the future? In this regards, there are several studies which have concluded that harmonization is necessary, but several others concluded otherwise. Harmonization becomes necessary in ASEAN with the aim of avoiding legal uncertainty in the implementation of economic integration which causes a community to become ineffective.[112] Apart from avoiding legal uncertainty, the urgency of harmonization is to reduce transaction costs.[113] According to Cenuk Sayekti in his dissertation, harmonization of competition law in ASEAN is carried out by covering at least 3

[109] Fatima Idrees, "Legal Personality: Nature and Extent of Corporate Liability", 2024, http://dx.doi.org/10.2139/ssrn.4807096 accessed on 1 December 2024.
[110] *Ibid.*
[111] Cenuk Sayekti, *Op.Cit.*
[112] *Ibid.*, p. 106.
[113] *Ibid.*

important features, namely legal substance, law enforcement and competition authority.[114]

Another opinion is contrary to the need for harmonization of competition regulations in ASEAN. Enforcing competition laws with regional dimensions requires a long time, especially considering that member countries have diverse cultures, socio-economic environments, and politics. The most important agenda to pursue is not to harmonize, but rather, there needs to be basic principles of competition law that should be included in regional guidelines such as the prohibition of anti-competitive agreements, both horizontal and vertical; abuse of dominant position; and anti-competitive mergers and acquisitions. An example of successful economic integration with different competition laws is Australia and New Zealand's Closer Economic Relations Trade Agreement (ANZCERTA).[115]

Seeing the large gap both geographically and in industrial development among ASEAN member countries,[116] coupled with the absence of political will from ASEAN leaders to develop supranational institutions because ASEAN countries still adhere to their traditional views regarding state sovereignty, the author believes that harmonization is important by continuing to prepare supranational institutions at the ASEAN level to enforce competition law, especially anti-competitive merger.

2) Aspects Relating to Substantive Assessment

The Regional Guidelines should compile what indicators can be done by the Commission or member states in conducting merger assessments. Even so, it is necessary to clarify what assessment model is used by the (future) authorities and by member states whether it is necessary to conduct a dominant position test (DP test),[117]

[114] *Ibid.*

[115] *Ibid.*, p. 7

[116] Kimura F, "Reconstructing the Concept of "Single Market and Production Base" for ASEAN beyond 2015", ERIA discussion paper no. 2013-25, Jakarta, Economic Research Institute for ASEAN and East Asia, 2013, in http://www.eria.org/ERIA-DP-2013-25.pdf accessed on 1 December 2024.

[117] One of the indicators for assessing mergers in the European Union.

substantial lessening of the competition test (SLC est) [118] or SIEC test, [119] or harmful to the public interest (PI test).[120] As applied in the European Union, the substantive assessment of mergers utilises the SIEC test which focuses not only on the dominant position created by the merger, but also on other matters such as the definition of the product market and the relevant market, the level of market concentration, cross-shareholdings, and the substitutive relationship of the products produced by the merging parties.

3) Aspects Relating to the Notification

The *Regional Guidelines* in the future can determine which notification models are recognized by both regional and member state authorities. The *Regional Guidelines* should also determine the notification mechanism for businesses or companies that will carry out transactions as implemented in the European Union.

CONCLUSION

In principle, The ASEAN Regional Guidelines has several weaknesses. Such weaknesses of are broadly related to the nature and substance of the Guidelines. The weakness in regards to the nature of the ASEAN Regional Guidelines which uses a soft-law approach creates further variations or legal diversity among ASEAN member countries. Furthermore, the weaknesses related to the substance are: first, there is no institution at the ASEAN regional level that possess the authority to handle multijurisdictional issues, especially related to cross-border merger and acquisition transactions; second, there are no indicators or parameters used by the said (lacking) authority to conduct substantive merger assessments; third, the provisions in the ASEAN Regional Guidelines do not determine which notification model should be

[118] Indonesia can be said to use the SLC test even though it is not explicitly stated in PP No. 57 of 2010. There are at least factors to assess whether a merger has an impact on competition, namely: market concentration, barriers to entry, potential anti-competitive behavior, efficiency and/or bankruptcy.

[119] The PI test looks at whether the merger will harm the public interest, for example in relation to employment as applies in the United States.

[120] Anna Maria Tri Angraini, "Merger Control Based on Anti-Monopoly Law in Indonesia: Comparison in Some Asean Member States", Proceeding International Seminar on Competition Policy and Law, Komisi Pengawas Persaingan Usaha, 6 September 2017, p. 45.

used (either mandatory or voluntary) and it does not provide detailed parameters for conducting notifications.

In the future, the ASEAN Regional Guidelines can reflect upon the lessons learned from the study of regulations in the European Union, it is necessary to consider the use of soft-law and hard-law approaches. In addition, the next lesson learned is related to the substance, including: first, the need for an institution at the regional level that handles multijurisdictional problems such as the practice in the European Union; second, related to substantive assessments, in which it is necessary to determine what parameters or indicators are used in conducting a substance assessment; and third, it is necessary to determine which notification model to be used and what materials must be reported to the authority in detail.

COMPETING INTEREST

There is no conflict of interest in the publication of this article

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