Chapter 14

Trade and Competition: Working Together to Advance the ASEAN Economic Community

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This chapter should be cited as
Stone, S.F. (2025), 'Trade and Competition: Working Together to Advance the ASEAN Economic Community', in Rillo, A.D and B. Shepherd (eds.), *Where Next? Priorities for the ASEAN Economic Community Post-2025*. Jakarta, Indonesia: Economic Research Institute for ASEAN and East Asia, pp. 342-367.

14.

Trade and Competition: Working Together to Advance the ASEAN Economic Community

Susan F. Stone

1. Introduction

It is a generally accepted principle that competition fosters improved outcomes for consumers, sparks innovation, and delivers stronger economic growth. Traditionally, competition has been the domain of domestic policymakers. However, the continued spread of global supply chains, the rising dominance of selected players in the technology field, and the pervasiveness of the digital economy mean that competition authorities must concern themselves with behaviour both within and across national borders. In today's global markets, the instances of interaction between trade and competition are more widespread than ever. [1]

A robust competitive environment is essential for economic growth, innovation, and rising standards of living. The seminal work by Nickell (1996) found that competition, as measured by increased numbers of competitors or lower levels of rents, is associated with a significantly higher rate of total factor productivity growth. Whilst these essential principles remain true, the way we look at competition and the identification and measurement of products and markets has changed considerably over the years. This has made applying competition and trade policy increasingly co-dependent and complex. The need to be clear about the goals of competition policy in this complexity becomes more important than ever.

[1] This issue concerning trade and competition has been long recognised. The Charter for an International Trade Organization (Havana Charter), which entered into force in 1948, provided a framework for international cooperation on anti-competitive business practices. Although the Havana Charter was never adopted, it set the tone for dealing with this issue (Anderson et al., 2019).

This chapter will provide a summary of the current state of trade and competition issues both across the Association of Southeast Asian Nations (ASEAN) and the broader global community. This section outlines current issues in competition policy that have a particular impact on trade. Section 2 presents the current treatment of these issues within ASEAN, whilst section 3 takes a broader perspective, discussing how they are treated by countries outside ASEAN. Section 4 presents a potential way forward for ASEAN, considering this discussion, and section 5 provides concluding remarks.

ASEAN states that competition law 'primarily prohibits anti-competitive agreements, abuse of dominant position and anti-competitive mergers and acquisitions' (ASEAN, n.d.-b). The need to eradicate anticompetitive behaviour is crucial when trying to promote and protect the competitive process and provide a level playing field for all enterprises. Establishing and protecting market conditions that allow firms to grow and improve profitability motivates these firms to undertake research and development and engage in innovation to meet changing consumer needs.

An economy with robust competition not only experiences rising living standards, but also improves consumer choice and the quality of goods and services. This standard of consumer choice, or consumer sovereignty, in judging standards of competitiveness in markets is well established (Lande, 2001). Consumer sovereignty can be thought of as the ability of consumers to satisfy wants at a competitive price. A robust competitive environment is essential to achieve this goal.[2]

It is the ambition of domestic policymakers to maintain sufficient levels of competition to achieve innovation and growth. However, as the impact of government domestic policies is increasingly being felt under the scope of international trade, more attention – both at the World Trade Organization (WTO) and in trade agreements – has focused on competition and (potentially) restrictive business practices more generally. Whilst the WTO identified trade and competition policy as part of its negotiating agenda in 1996, it was later abandoned as a specific topic for negotiation.[3] Concerns included a lack of consensus on negotiating targets as well as the basic desire amongst the trade community to negotiate this issue. Countries were concerned about their capacity to engage in meaningful negotiations on competition law, and there were further concerns over 'policy space' stemming from potential domestic policy implications (Anderson et al., 2019).

Nonetheless, substantial policy overlap between the two areas remains. The goals of trade policy and competition policy are the same: to promote economic growth and welfare. Both focus on non-discrimination though through different means. Competition policy can be found throughout many WTO agreements, including Trade-Related Aspects of Intellectual Property Rights, sanitary and phytosanitary measures, technical barriers to trade, national treatment, most favoured nation principles, and others. Verghese (2023) outlined examples of how competition issues have been brought before the WTO due to inconsistencies with WTO articles and annexes. Indeed, as more firms organise their activities on a global basis, they increasingly find themselves subject to the regulatory systems and business practices of different countries. Trade policy is not sufficient to deal with the potential for the disparities that often arise across these regimes. By incorporating competition policies in the trade mix, more balanced and effective outcomes can be achieved. Likewise, effective competition law enforcement can ensure that the benefits of trade liberalisation are fully realised (Hong, 2022).

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[2] The standard of consumer welfare as the optimal goal of competition law is not universally accepted. See OECD (2023) for a recent discussion.

[3] At the WTO Ministerial Conference in Singapore in 1996, trade and competition policy was nominated as one of four 'Singapore issues'; the other three were trade and investment, transparency in government procurement, and trade facilitation.

However, the relationship between trade and competition policy is not straightforward. One source of this complexity is the difference in the institutional structures and processes through which each is developed and enforced. Trade and competition decision-making processes are usually separated and rarely coordinated. Competition policy tends to concern itself more with consumer welfare and judicial reviews, whilst trade policy focuses on industry and domestic problems, resulting in outcomes where not all parties (i.e. foreign interests) are always sufficiently consulted (Spier, 1997). However, the commonality of their objectives provides justification for the need for these two policy areas to work together. Coordinated approaches will lead to mutually reinforcing outcomes as opposed to policies that undermine and counteract each other. For example, imports, or the potential for effective import competition, can stop the exercise of market power in the domestic market. Conversely, in certain jurisdictions, anticompetitive tendencies are sometimes tolerated to gain advantages in global markets. A cooperative approach across jurisdictions is the most practical method, given the differing business and economic systems.

1.1. Issues in Global Competition

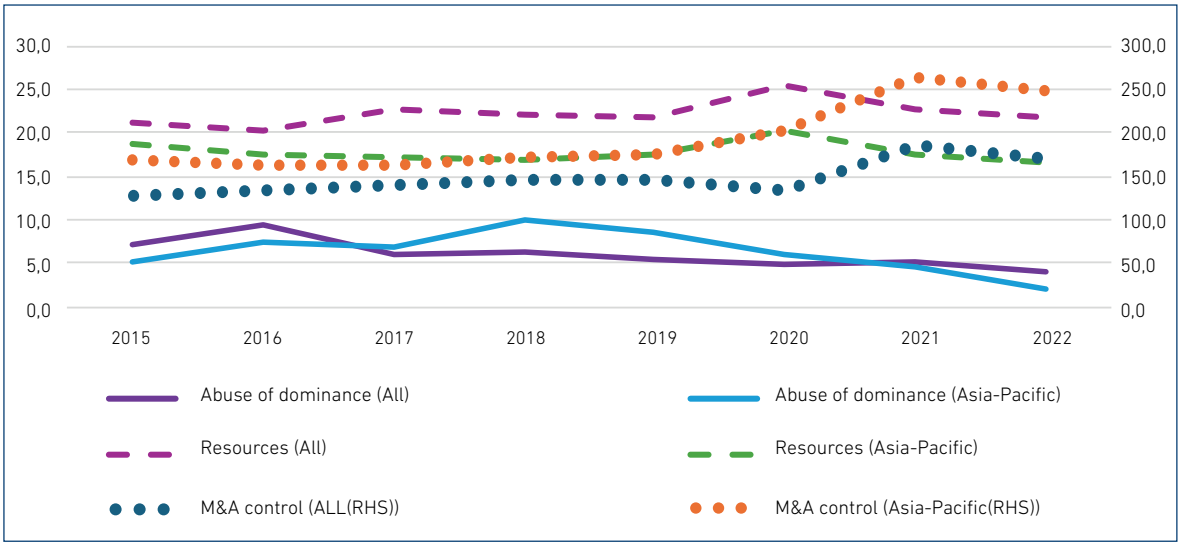
As markets have become global, more competition authorities have come under pressure to manage markets that may go beyond their jurisdiction. This is especially true in mergers and acquisitions (M&A). Globally, the number of cross-border M&A increased from 7,523 per year over the 5 years from 2007 to 2011 to an average of almost 10,000 over 2021–2022 . Cross-border M&A were valued at US$1.57 trillion worldwide in 2022, down from an all-time high of US$1.7 trillion in 2021, but well above the average of just over US$1 trillion in 2000 (UNCTAD, various).

This rise in M&A activity is adding to concerns about increasing market power globally. There is growing evidence that rising markups by firms has led to a decline in market innovation and business dynamism. Markups generally stem from excessive market concentration and go a great deal further in telling us about market power than concentration ratios. Concentration ratios tell us what share of the markets the biggest players have, but they do not tell us how much they use their size to influence the market price. Markups – the gap between a firm's costs and what they charge buyers – is a much more direct link to market power (IMF, 2019).

Whilst much of the literature has been focused on markets in the United States (US), studies have looked at this phenomenon globally. De Loecker and Eeckhout (2018) found that average markups increased globally from around 10% in 1980 to 60% in 2016. Similarly, the International Monetary Fund (IMF, 2019) found that globally, markups increased 8% between 2000 and 2015, mainly in advanced economies. This trend seems particularly true in digitally intensive firms. These results, as well as others, point to a decline in competitive pressures and loss of firm dynamism. One factor contributing to these trends is the rise of M&A – especially by dominant players. Whilst M&A can yield cost savings and better products, they can also weaken incentives for innovation and strengthen a firm's ability to charge higher prices. Worryingly, analysis shows that M&A by dominant firms contribute to an industry-wide decline in business dynamism – as competitors across the board suffer declines in growth and research and development spending. This is particularly worrisome in a world of low productivity growth.

The IMF (2021) recommended that competition authorities concentrate on four areas: merger control or enforcement of abuse of dominant position, input markets, digitally intensive sectors/firms, and ensuring adequate resources. Since 2015, the Organisation for Economic Co-operation and Development (OECD) has been tracking statistics on competition authorities across 77 jurisdictions, including 15 agencies in the Asia-Pacific. Six ASEAN Member States (AMS) are included in these statistics.[4] According to the OECD (Figure 14.1), competition authorities in the Asia-Pacific have had a greater number of merger control cases than the average for the group, whilst resources have generally been fewer. Abuse of dominance cases experienced a rise between 2017 and 2018 but have been declining since then and fell below the average for the jurisdictions covered in 2021.

Figure 14.1. Performance of Competition Authorities



M&A = mergers and acquisitions, RHS = right-hand side.

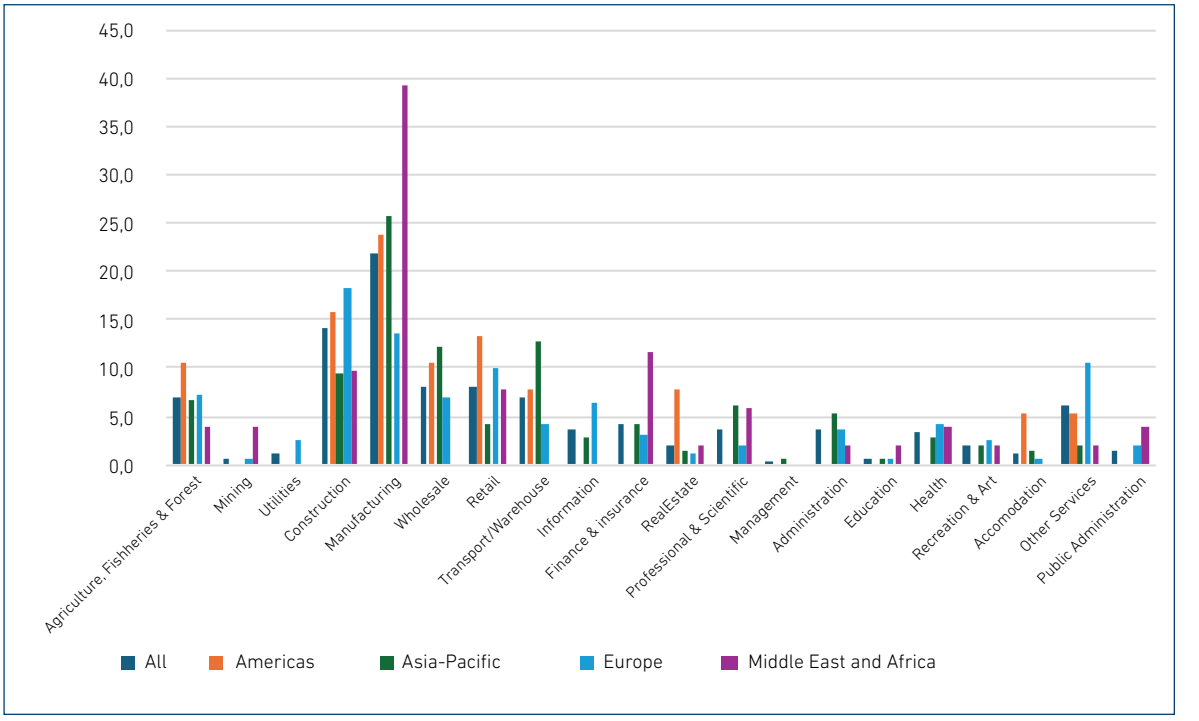
Notes: Abuse of dominance is measured as an average across jurisdictions of abuse of dominance investigations launched by the competition authority; M&A control is the average number of merger decisions across jurisdictions; and resources is measured as the ratio of the nominal competition authority budget per €1 million in gross domestic product.

Source: OECD (2024), Competition Trends data set https://www.oecd.org/en/publications/oecd-competition-trends-2024_e69018f9-en/support-materials.html (accessed 8 March 2024).

Looking at the sectors where cartels or other forms of market dominance have been found (Figure 14.2), we see that manufacturing dominates all jurisdictions – accounting for almost 40% of all cartel decisions. Outside manufacturing, the sectors of concern for Asian authorities have been transport and warehousing at 13%, wholesale at 12%, and construction at almost 10% of findings. Indeed, Asia has the highest number of transport and wholesale sector findings of all jurisdictions. This could have large implications for Asian consumers as these sectors are involved early in the value chain and can inflate prices across any number of other sectors using their services.

[4] The AMS covered are Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore, and Viet Nam. Other countries included as part of the Asia-Pacific are Australia, Bangladesh, Hong Kong, India, Japan, Kazakhstan, New Zealand, the Republic of Korea, and Taiwan.

Figure 14.2. Sector Share of Cartel Decisions
(%)



Notes: Years 1999–2016; individual years vary depending on the jurisdiction.

Source: OECD (2024), Competition Trends data set https://www.oecd.org/en/publications/oecd-competition-trends-2024_e69018f9-en/support-materials.html (accessed 8 March 2024).

Having market dominance in any sector has been shown to create significant costs to a market. Evidence by Nickell (1996) from the United Kingdom found that for every 25% increase in market share, firm level productivity fell by 1%. The benefit of a strong competitive environment is that firms tend to innovate more and improve productivity when there is competition (Hong, 2022; OECD, 2014). Aghion et al. (2003; 2009), using firm-level data, found that competition significantly raises both the level and growth of productivity. Buccirossi et al. (2013) estimated the impact of competition policy on productivity growth using a sample of 22 industries in 12 OECD member countries from 1995 to 2005, finding a positive and highly significant effect. Januszewski, Köke, and Winter (2002) similarly reported a positive link between productivity growth and competition for a survey of firms in the United Kingdom. Using micro-level productivity growth at the firm level and patent panel data following reforms that introduced greater competition in the economy, he found that entry of foreign firms led to greater innovation and faster total factor productivity growth of domestic incumbents, and thus to faster aggregate productivity growth.

These results apply in open markets as well. Evidence has shown that reducing barriers to entry for foreign products and firms has an overall positive effect on innovation and productivity growth (Aghion and Griffith, 2008). The trade literature on this is vast. In general, more openness to trade seems to be associated with faster growth, although the evidence is mixed and effects depend on many factors other than product market competition (Berg and Krueger, 2003). Focusing on competition, Griffith, Harrison,

and Simpson (2006) used the introduction of the European Union (EU) single market to model the effects of increased competition, finding evidence that the reforms carried out under the Single Market Programme were associated with increased product market competition and an increase in innovation intensity and productivity growth for manufacturing sectors.

The institutional environment in which firms function has an impact on whether they benefit from trade liberalisation (Ahn, 2002). Studies have found that competition restrictions imposed by governments can be a key constraint on growth. Cole et al. (2005) argued that the international and domestic competitive barriers in Latin America, compared with Western and East Asian countries, has limited growth and explains lower productivity levels in the region. In contrast, in some Latin American countries, liberalisation has produced significant economic gains, showing that the role of competition in promoting productivity growth is not limited to the most advanced economies (Pavcnik, 2002). There is a rapidly increasing literature studying the effects of increased market openness in India. For example, Aghion et al. (2003) found positive effects of liberalisation on economic performance across manufacturing sectors and states in India during 1980–1997. A study on South Africa (Aghion, Braun, and Fedderke, 2008) argued that competition policy (i.e. a reduction of markups) would have largely positive effects on total factor productivity growth in South Africa – in particular, a 10% reduction in the markups would increase productivity growth by 2.0%–2.5% per year. That does not mean that the poorest countries should necessarily emphasise competition policy over other economic reforms. In the poorest countries, any economic reform that results in workers moving from essentially zero-productivity subsistence farming into productive work can cause large increases in output. In a study covering 179 countries, Gutmann and Voigt (2014) found strong effects on low-income countries through lower perceived corruption levels and higher levels of total investment with the introduction of competition laws. They concluded that 'introducing competition laws to lend a hand to the invisible hand is a viable policy recommendation not only, but especially in developing countries' (Gutmann and Voigt, 2014: 16).

2. ASEAN – Where Do Things Stand?

ASEAN is a major player in global markets, accounting for almost 12% of global trade in 2022.[5] Intra-ASEAN trade is a significant part of that, making up 24% of total ASEAN trade, more than any of ASEAN's major bilateral trade partners (China, Japan, and the US). Given the importance of intra-ASEAN trade, and the stated objective of the ASEAN Community to increase harmonisation, the issue of competition policy has risen in prominence. Indeed, effective competition policy is clearly articulated as part of the ASEAN growth strategy (ASEAN, 2015). This strategy states that 'Enforceable competition rules that proscribe anti-competitive activities are an important way to facilitate liberalisation and a unified market and production base' (ASEAN, 2015: 2). In its 2025 blueprint, the ASEAN Economic Community (AEC) nominated five areas to further the goal of achieving deeper economic integration: (i) achieving an integrated and cohesive economy; (ii) enhancing connectivity and sectoral cooperation; (iii) building a resilient, people-centred ASEAN; (iv) building a global ASEAN; and (v) developing a competitive, innovative,

[4] Based on author's calculation of ASEAN trade of $3.8 trillion and global trade of $32 trillion.

and dynamic ASEAN (ASEAN, n.d.-d). In the context of competition, the AEC set out five strategic goals as part of the ASEAN Competition Action Plan, 2016–2025:

1. For all AMS to have a competition regime in place.
2. To continue to strengthen and enhance the capabilities of competition-related agencies.
3. To put in place a regional cooperation arrangement.
4. To support and promote competition awareness in the region.
5. To promote greater harmonisation of competition policies and laws in the region.

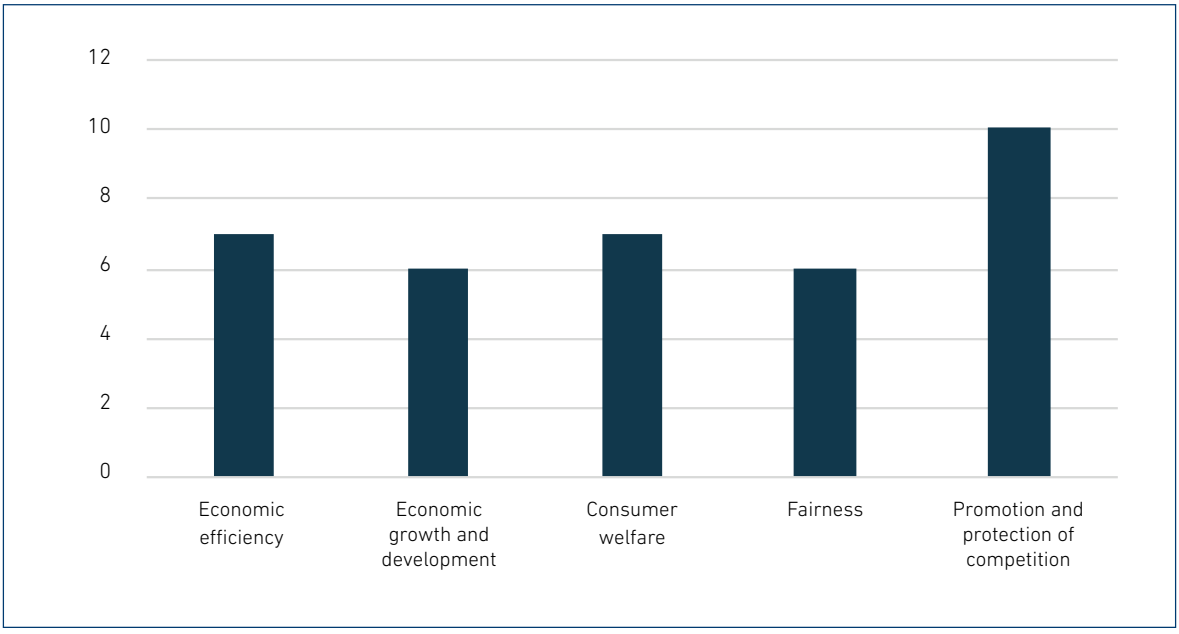
As of 2021, all AMS have competition laws in place, whilst nine of the 10 have a competition regulator (ASEAN, 2022b). The introduction of a regulator has been a relatively recent endeavour for half of the AMS, which is likely the reason for the second strategic goal: enabling competition agencies. The ASEAN Capacity Building Roadmap for competition (ASEAN, 2022b), developed in 2016, noted the ongoing need for training in competition law for both new and mature agencies. Together with the Australian Competition and Consumer Commission, the ASEAN Community developed the Competition Law Implementation Programme. Between 2014 and 2021, the programme delivered over 116 training activities, including placement opportunities for ASEAN competition authority staff within the Australian Competition and Consumer Commission, training for judges, and high-level meeting opportunities for competition agency heads. The ASEAN Community, under the ASEAN Capacity Building Roadmap, has carried out 42 activities, with the major focus on enforcement (ASEAN, 2022a).

These efforts bolster and support the third strategic objective of building regional cooperation in competition law. In 2018, the ASEAN Competition Enforcers Network (ACEN) was established as well as the Virtual ASEAN Competition Research Centre. The ACEN was set up to support the exchange of information amongst AMS and to integrate enforcement actions whenever possible (ASEAN, n.d.-c). The virtual centre acts as a reference for researchers and competition authorities to examine competition issues in the region, building a database and promoting research collaboration in the region. The AMS also established the ASEAN Expert Group on Competition (AEGC), which has produced biennial reports since 2016 (ASEAN, n.d.-a). These reports provide information on the work the AEGC has undertaken to support the implementation of the ASEAN Competition Action Plan 2025.

The fourth goal was to promote competition awareness in the ASEAN Community. To this end, ASEAN has published several editions of the Handbook on Competition Policy Law in ASEAN for Business (e.g. ASEAN, 2019). The AEGC regularly meets with other ASEAN bodies, notably consumer protection regulators (ASEAN, 2020). In 2023, the AEGC held its 10th Competition Conference, which acts as a platform for raising awareness of, and exploring issues in, competition policy and law in Southeast Asia (ASEAN, 2023). It is also undertaking work to improve communication with the business community through its ASEAN Competition Business Perception Index.

The fifth strategic goal has some of the largest implications for trade. This goal aims to promote harmonisation amongst competition policies and laws. Through harmonisation, ASEAN hopes to create a seamless policy environment that facilitates investment, improve the allocation of resources, and enhance enforcement (ASEAN, 2022b). Whilst AMS developed the Guidelines on Competition Policy, they have chosen not to adopt a supra-national competition regulator to enforce a regional competition law (ASEAN, 2013). This means that the region still needs to deal with 10 separate law and enforcement regimes. In addition, whilst the ACEN was created to facilitation cooperation, nothing is binding on AMS. However, individual laws have a fair amount of overlap in policy objectives (Figure 14.3).

Figure 14.3. AMS Policy Objectives in Competition Law (number)



AMS = ASEAN Member State/s, ASEAN = Association of Southeast Asian Nations.

Source: ASEAN (2022b).

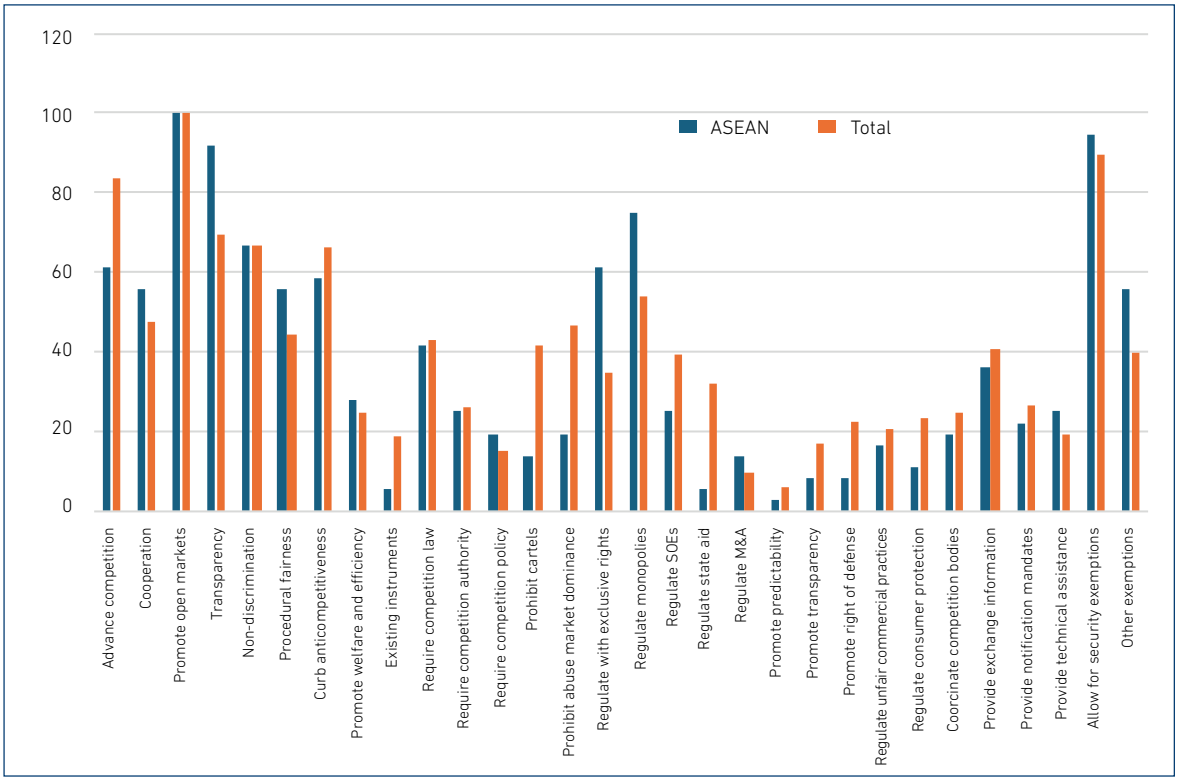
2.1. ASEAN Experience in Competition and Trade

ASEAN has five regional trade agreements (RTAs) that include some aspect of competition policy. These are with Australia–New Zealand; Japan; the Republic of Korea (henceforth, Korea); China; and India (World Bank, 2020). Whilst only the Australia–New Zealand agreement contains a provision explicitly promoting and advancing the condition of competition between the parties, they all have provisions promoting transparency and pledges to keep markets open economy wide.

Whilst ASEAN as a community has undertaken only a handful of agreements that contain competition provisions, individually, AMS have signed nearly 30 agreements containing competition chapters. Singapore is the most active in this space, followed by Malaysia (World Bank, 2020). Individually, all these agreements contain a specific provision to promote and advance competition. These individual agreements have led many AMS to adopt competition laws domestically and continue to strengthen competitiveness by developing their competition policies (Choi and Heinemann, 2020).

As shown in Figure 14.4, all trade agreements that include a chapter on competition have a specific provision to promote open markets, including those by AMS. The AMS agreements, however, more frequently include broad aspirational measures such as advocating transparency, welfare and efficiency, and procedural fairness. They also more often include specific provisions requiring the existence of competition policies and on the regulation of monopolies and M&A. As noted above, the IMF has recommended that these provisions be included in trade agreements to control the rise of dominant firms in a sector (IMF et al., 2022). However, ASEAN agreements allow exemptions (including security exemptions) at a higher rate than other agreements.

Figure 14.4. Comparison of Competition Chapters in Trade Agreements
(%)



ASEAN = Association of Southeast Asian Nations, M&A = mergers and acquisitions, SOE = state-owned enterprise.

Note: 'ASEAN' includes agreements by the Community as well as individual ASEAN Member States.

Source: Compiled by the author from World Bank (n.d.), Deep Trade Agreements (DTA), https://datatopics.worldbank.org/dta/overview.html (accessed 16 April 2024).

Non-ASEAN agreements include specific provisions at a greater rate than ASEAN agreements. These include specific provisions to advance competition and curb anticompetitive behaviour as well as promote transparency. In addition, more non-ASEAN agreements have prohibitions of cartels and abuse from market dominance, which, as noted above, are pivotal for preventing the growth of market dominance. Also, AMS agreements include provisions for regulating state aid and state-owned enterprises (SOEs) at a lower rate than other regional agreements.

As noted, ASEAN agreements tend to remain at a broader aspirational level. This can be seen when looking at the enforceability of these provisions. The few AMS agreements that include more specific provisions often do not include specific requirements for enforcement, and those that do are generally rated a '2' (out of 5) by the World Bank's Deep Trade Agreements (DTA) database (World Bank 2020). [6]

ASEAN undertook a recent review of the status of competition policy in the Community. The study found that regional convergence can be achieved through converging policy objectives, the development of soft law (e.g. guidelines), and coordination and cooperation amongst the AMS regulators (ASEAN, 2022b). However, it identified concerns in the implementation of many parts of AMS competition law, where multiple policy objectives were stated. This raises difficulties for individual AMS to determine which policy objective should apply in a given situation (ASEAN, 2022b). The report recommended the expansion of the ASEAN Regional Guidelines on Competition Policy (2010) to focus on cooperation to help facilitate issues in relation to cross-border mergers and cartels, establish regular meetings between representatives of the AMS competition authorities, increase training on the commonalities and differences in ASEAN competition laws, and develop a framework for dealing with differences that arise across regimes (ASEAN, 2022b).

The review also identified five strategic goals for the ASEAN Competition Action Plan. Included in these goals are specific actions stemming from, or relating to, trade activities. They are in anticipation of (i) the growing importance of cross-border mergers; (ii) activities of multinational companies and the rise of 'private international' cartels; (iii) the abuse of dominance in export, regional, or global markets; and (iv) competition issues surrounding foreign direct investment activity. The fact that these are global trends illustrates the importance of increasing convergence in competition rules amongst AMS to support growing trade and supply chain activity. Cooperation on competition law and policy is necessary to ensure the benefits of trade and foreign direct investment liberalisation are not compromised by cross-border anticompetitive behaviour. The ASEAN Competition Action Plan notes the potential danger that the dismantling of state-constructed trade barriers will only be replaced by individual restrictive practices and thus there is a need to create region-wide competition policies and institutions to help achieve goals of regional growth.

3. Experience in Competition and Trade

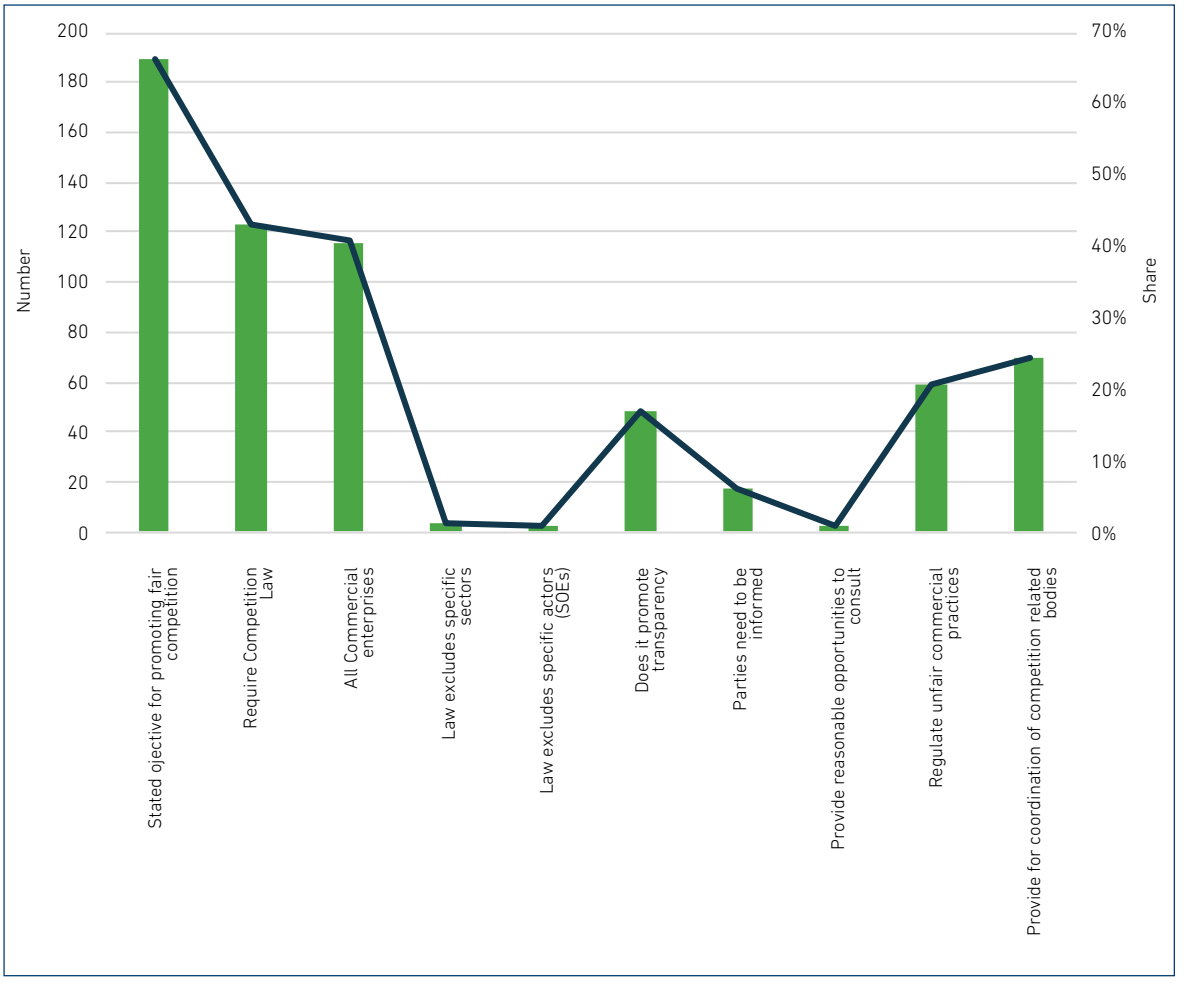
The World Bank's DTA database tracks the various provisions of preferential trade agreements to measure the extent to which agreements are 'deep' (Mattoo, Rocha, and Ruta, 2020), meaning agreements that go beyond traditional trade policy areas to include provisions on issues like investment, labour, the environment, intellectual property, and competition (World Bank, n.d.). Through a series of questions, the database attempts to ascertain what is included in these provisions, and judges, amongst other things, how binding they are. As these nontraditional issues have become more mainstream over the years, the degree to which parties are willing to make binding agreements in a preferential trade agreement has increased. The level of enforcement and accountability can thus provide an indication of the level of maturity and acceptance of an issue in the trade community.

[6] The exception is the revised competition policy between Thailand and Australia, which was rated a '5' for its promotion of open markets and the level of exemption in the agreement.

As already noted, competition is increasingly part of the modern trade agreement. As recently as 2000, only six trade agreements directly addressed competition policy. As of 2020, of the 296 RTAs notified to the WTO, around 80% contained either dedicated chapters or provisions on competition policy, whilst roughly 55% recognised the importance of competition policy for trade (Anderson et al., 2019). Not only is the number of RTAs, including competition policy provisions, growing, but the content of these provisions is evolving significantly. Initially, RTA parties only recognised the importance of competition policy for trade and did not include self-contained chapters on competition policy. This began to change, particularly after 2004, when the WTO's Working Group on the Interaction between Trade and Competition Policy was disbanded and cooperation on competition issues was relegated to the accession process. RTAs adopted since then increasingly incorporate comprehensive coverage of issues pertaining to competition policy, such as obligations to have in place some sort of legal framework, especially regarding merger activity.

Much progress has been made on other provisions apart from simply promoting competition, to include legislation and institutional requirements, principles for competition law enforcement, specific anticompetitive practices, provisions for SOEs and designated monopolies, and cooperation/coordination on competition law enforcement. By 2016, 238 agreements had a provision that 'Promotes and advances the conditions of competition between parties' (Licetti, Miralles, and Teh, 2020: 549). The issues covered by these agreements vary, but most contain a stated objective for promoting fair competition (Figure 14.5). However, despite the significant progress made, less than half of these agreements (45%) include a provision that requires a dedicated competition law. Nevertheless, most have few exclusions (e.g. sectors and SOEs) and apply across all enterprises. Finally, to be truly effective, these agreements need to include provisions that allow for the exchange of information. As shown in Figure 5, only 25% of the competition chapters in trade agreements contain a provision that provides for coordination between competition-related entities.

Figure 14.5. Competition Issues Covered in Trade Agreements



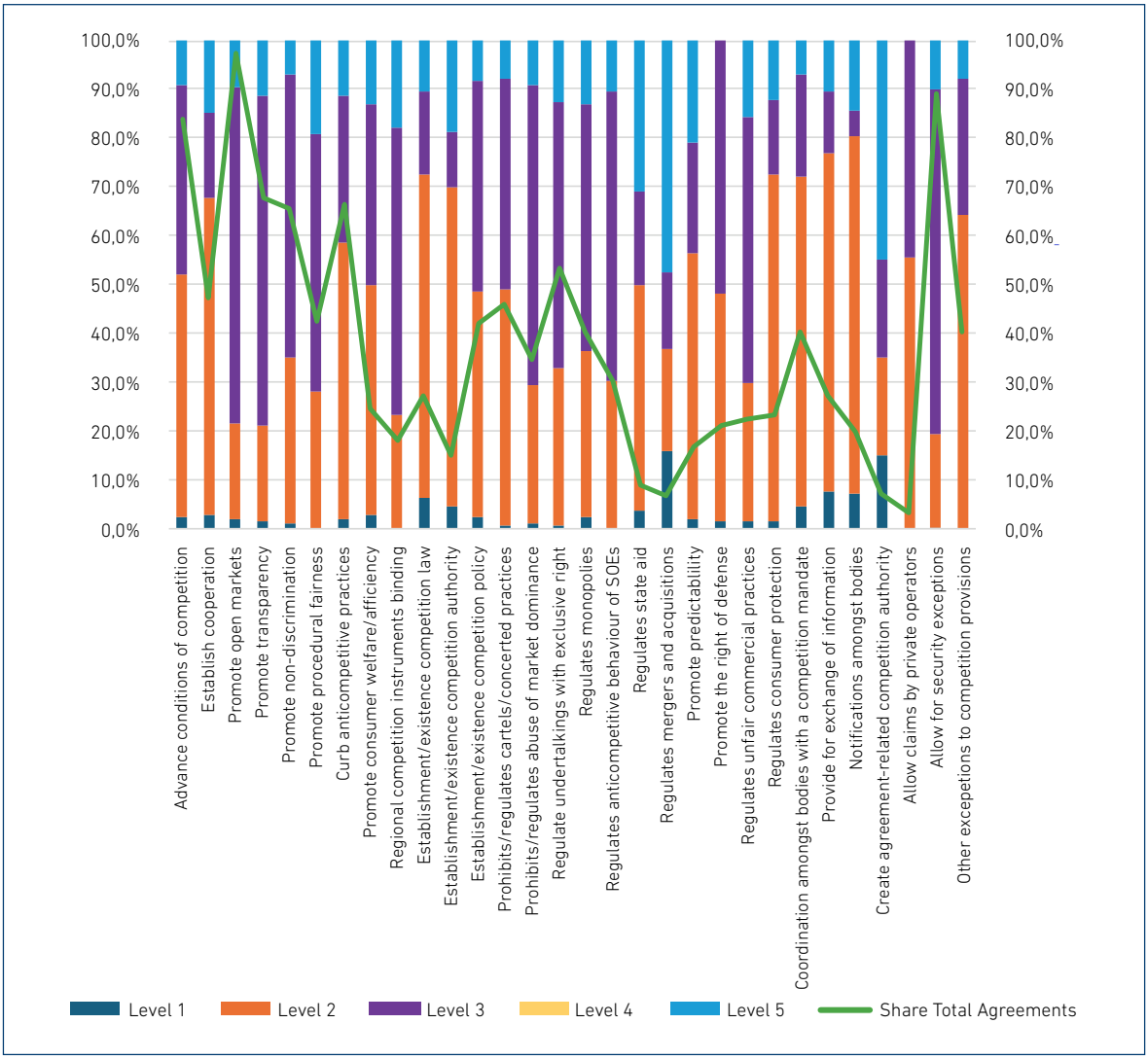
SOE = state-owned enterprise.

Source: Compiled by the author from World Bank (n.d.), Deep Trade Agreements (DTA), https://datatopics.worldbank.org/dta/overview.html (accessed 16 April 2024).

Most of these chapters remain aspirational in nature, using the word 'promote' rather than 'require'. Each of the various provisions included in the competition chapters of the World Bank's DTA database is rated on a scale of 1 to 5 for its level of enforceability. The least stringent is rated '1', the least enforceable, whilst a '5' is considered the most enforceable. Figure 14.6 shows the results for the provisions measured in the competition chapters. Very few agreements are rated a '5' when it comes to enforcement (Figure 14.6). The one area with the most (almost 50%) agreements rated a '5' is the inclusion of regulations

regarding M&A. None of the ASEAN competition provisions covered in the database were rated a '5';[7] most areas are rated a '2' or a '3'. Only around 34% of RTAs with dedicated competition chapters subject competition policies to full RTA dispute settlement procedures (Anderson et al., 2019). These agreements often involve the EU or European Free Trade Association as well as some RTAs amongst the Commonwealth of Independent States and MERCOSUR (Southern Common Market). Other RTAs, though exempting competition chapters from dispute settlement, still provide for consultations. This is the case for more than half of RTAs with detailed competition chapters.

Figure 14.6. Levels of Enforcement for Competition Provisions



Source: Compiled by the author from World Bank (n.d.), Deep Trade Agreements (DTA), https://datatopics.worldbank.org/dta/overview.html accessed 16 April 2024.

[7] The revised Thailand–Australia agreement was rated a '5' for the enforceability of the provisions allowing exceptions.

In the absence of an international standard for competition-related obligations in trade agreements, these obligations vary by agreement. The EU, for instance, advanced its goal of regional integration by promoting the establishment and enforcement of national competition policies that were in harmony with the EU's overall objective of reducing market distortions to achieve a more integrated economy. Following the European example, the Caribbean Community and Common Market (CARICOM), Eurasian Economic Union (EAEU), West African Economic and Monetary Union (WAEMU), and Common Market for Eastern and Southern Africa (COMESA) incorporate fairly comprehensive competition frameworks as a tool for economic integration. The competition provisions included in these agreements serve the dual purpose of creating national and supranational competition legal/institutional frameworks, whilst harmonising sector regulations and eliminating technical barriers to entry. Building on these examples, the competition-related obligations included in RTAs can be classified into various groups generally falling under three headings: economy-wide obligations, sector-specific obligations, and enforceability. Whilst ASEAN contains economy-wide and some sector-specific guidelines on competition, there are no obligations and enforcement remains with individual AMS.

3.1. Cooperation in Competition Policy

As issues of market access and market dominance across national boundaries increasingly draw the attention of policymakers, the instances of cooperation in competition have increased. Whilst regional groupings like the EU have long-standing institutional structures regarding competition across individual countries, a growing number of countries is participating in other forums, notably the International Competition Network, Asia-Pacific Economic Cooperation (APEC), the OECD, the Seoul International Competition Forum, and the East Asia Top Level Officials' Meeting on Competition Policy.

Whilst the EU model is often copied, it continues to be debated. Those who favour the active role the European Commission often plays argue that Europe's competition policy not only favours consumers' interests but also supports dynamic innovation and investment – fostering economic opportunity at a rate higher than that of the US, which is seen as being plagued with concentrated markets characterised by high entry barriers, especially in the technology sector. Those supporting a softer approach argue that the current policy often gets in the way of firms achieving economies of scale and note that all the technology giants are based in the US. This argument points out that Europe has made few contributions to technological and industrial renewal and that overly strict competition law undermines domestic firms' ability to compete in international markets, e.g. China in the rail sector.

The International Competition Network, launched in 2001, provides competition authorities with a dedicated venue for addressing practical competition concerns. The purpose is to build consensus towards sound competition policy principles across the global antitrust community. It is the only global body devoted exclusively to competition law enforcement, and its members represent national and multinational competition authorities (International Competition Network, n.d.).

The APEC Competition Policy and Law Group, originally known as the Competition Policy and Deregulation Group, was established in 1996 to promote understanding of regional competition laws and policies, identify areas for technical cooperation and capacity building amongst APEC member economies, promote exchanges on experiences and best practices on competition policies and competition law enforcement, and build networks amongst competition agencies of member economies (APEC, n.d.).

The Seoul International Competition Forum is a venue for officials of competition agencies across the globe to share views on diverse and current issues in competition law and policies (Korea Fair Trade Commission, n.d.). This differs from the East Asia Top Level Officials' Meeting on Competition Policy, which focuses on issues of cooperation, aiming to strengthen the cooperative relationship amongst competition authorities as well as reviewing developments in competition law (Japan Fair Trade Commission, n.d.).

The OECD's Global Forum on Competition is an annual event that brings together officials from over 100 competition authorities and international organisations worldwide. Participants debate and discuss key topics on the global competition agenda, with the objective of providing wider dialogue that encompasses the linkages between competition policy and other cornerstones of economic development, including trade.

3.2. Issues in Competition and Trade Policy

Discussion and cooperation are fundamental to furthering progress on issues where trade and competition policy interact. This is often difficult because competition authorities are primarily responsible for domestic markets, whilst in today's marketplace, competition takes place on a global stage. In an environment where firms are increasingly organising their operations on a global scale and where trade barriers between nations are falling, firms are more exposed to the regulatory systems and business practices that exist in different countries. Trade policy is not sufficient, on its own, to deal with the frictions that result. By incorporating, in appropriate circumstances, the application of competition principles to the policy mix, balanced and desirable outcomes can be achieved more readily.

Some of the key issues competition authorities face when dealing with firms (both domestic and foreign) operating in global markets is the challenge of not only defining but also identifying what a competitor is. As markets evolve, goods and services that were distinct and identifiable now overlap or are embedded in other goods and services. We see more cases of services that are embedded in goods (e.g. electronic reading devices and the content that is accessed on them). Often, these goods become intertwined, and associated issues of first-mover advantage can limit or stifle innovation and competition.

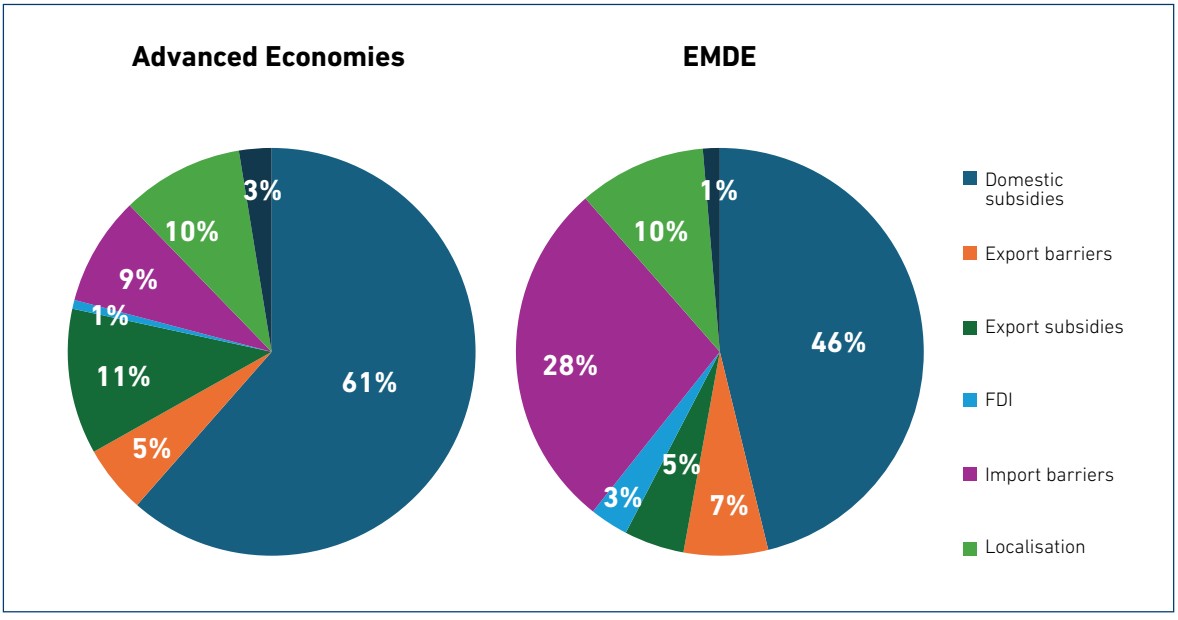
Issues around market power and subsidies, as well as increasing scepticism regarding supporting institutions, create a market environment that is challenging for policymakers. Competition policy can be distortive, and the notion of a level playing field is far from straightforward. Significant market distortions may arise when some firms benefit from competitive advantages conferred by state actions, e.g. based on their ownership, nationality, or activity in the market. These distortions can prevent competition from reaching its potential for economic growth, productivity, and innovation. They also spill over into other markets through trade. These policies can discourage investment, create regulatory uncertainty, and encourage trading partners to adopt similar distortions that undermine global markets. Competition authorities have a role to play in promoting the application of competitive neutrality principles, including addressing distortions through their enforcement tools and advocating for neutrality in state actions.

The WTO places limits on the degree of influence that state-sponsored firms can have on the market, but it does not cover the full scope of these enterprises. In a joint study on subsidies and trade, international organisations argued that the growing use of distortive subsidies, especially through state-invested enterprises, alters trade and investment and undermines tariff bindings, market access commitments, and undercuts public support for open trade (IMF et al., 2022). This is important because most

merchandise trade takes place in products and markets in which at least one subsided firm operates (OECD, 2021). Many recent trade agreements have attempted to address this issue by going beyond the provisions of the WTO to provide discipline on the behaviour of SOEs and including more extensive lists of prohibited subsidies. The landscape for competition policy is growing more complex. Global value chains, digital markets and their related network concentration effects, and the growing importance of economies in which the state plays a central role all combine to create an overlapping and interwoven competition terrain which is difficult to manage by a single competition authority. However, the urgent challenge of climate change, and the recognition that well-crafted subsidies can be an important part of the public response to economic and health emergencies, muddies the waters and can create contradictory objectives across the competition and trade landscape.

In a post-coronavirus disease (COVID-19) world, the use of industrial policy, and the accompanying subsidies, has reached a level not seen for decades (Evenett et al., 2024). This renewed interest stems from overlapping and reinforcing trends and differs distinctly from the policy goals of industrial policy in the past – that is, it is less about protecting infant industries or increasing productivity and more about pulling back global value chains, maintaining technological advantages, and attempting to gain more control over external shocks. It is also motivated by China's use of industrial policy and outsized influence on global markets. Given the cross-border nature of supply chains, some governments are attempting to coordinate their industrial policies with key partners, as opposed to implementing everything at the national level. Finally, the climate change crisis is also playing a central role in modern industrial policy initiatives where 'green' subsidies are rising significantly (Evenett et al., 2024). Another key difference from the past is that these policies, for the most part, are found in advanced economies (Figure 14.7). Domestic subsidies are being used at a rate of 3:1 in advanced economies, where emerging and developing economies, whilst using domestic subsides, rely more heavily on import barriers.

Figure 14.7. Incidence of Subsides Across Economies, 2023

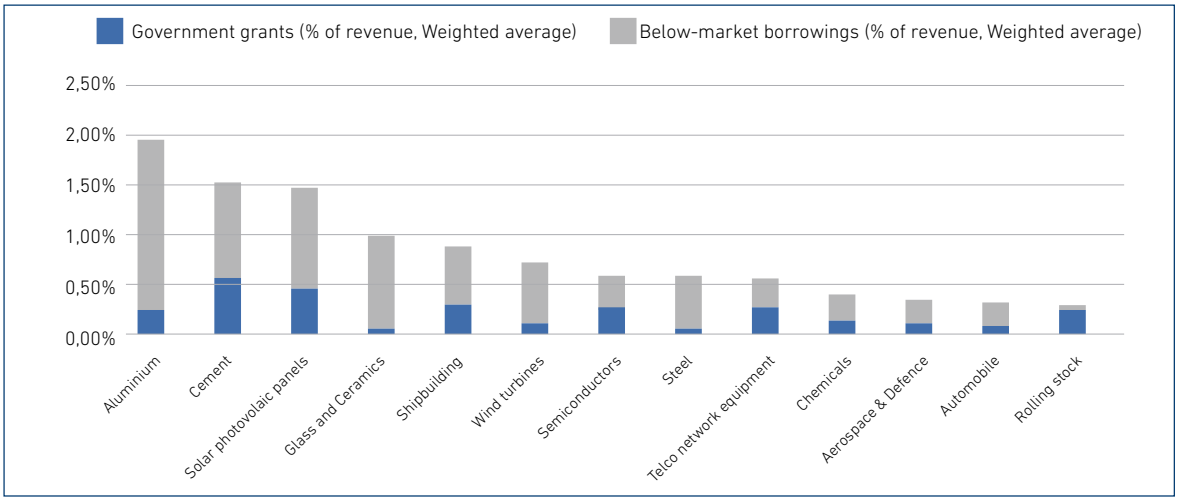


EMDE = emerging markets and developing economies, FDI = foreign direct investment.

Source: Evenett et al. (2024).

These subsidies not only distort domestic markets but also alter incentives globally for investment, output, employment, and trade. By altering a firm's cost and revenue stream, they also change where and how they invest, often leading to a long-term need for subsidies in industries. These can become costly to governments and consumers over time, leading to entrenched structures that are very difficult to remove. In many heavy manufacturing industries, subsides have long played a major role. Recent work by the OECD (2021) showed that whilst government grants (a traditional form of domestic subsidy) are significant in some sectors (e.g. cement, solar panels, semiconductors, and rolling stock), they are often insignificant compared with favourable financing deals (Figure 14.8). Providing financing at levels that fall below market rates allows firms to engage in investment that may not be profitable over time and entails the need for further subsides down the line. These subsidies can then have a permanent impact on competition, both domestically and globally.

Figure 14.8. Examples of Subsidies Expressed as a Share of Firm Revenue by Manufacturing Sector (averaged for 2005–2019)



Source: OECD (2021).

3.3. ASEAN–Australia–New Zealand Free Trade Area

One ASEAN trade agreement that has made considerable strides in competition policy is the ASEAN–Australia–New Zealand Free Trade Area agreement. The chapter on competition highlights the importance of cooperation in the promotion of competition, economic efficiency, consumer welfare, and the curtailment of anticompetitive practices. The chapter on competition also provides for a framework for cooperation on competition and, importantly, the designation of contact points for technical cooperation and information exchange.

This agreement flows from the success of the Australia–New Zealand cooperation on competition. The Australia–New Zealand Closer Economic Relations Trade Agreement (CER Agreement) was one of the first agreements, outside Europe, to include specific provisions for competition. The 1983 agreement set out four objectives, including developing trade between New Zealand and Australia under the rules of fair competition (Department of Foreign Affairs and Trade, 1997). When the agreement was signed, only CARICOM and the Central American Common Market in Latin America and the European Community and European Free Trade Association in Europe had specific provisions dealing with competition policy. The CER Agreement remains one of the most comprehensive trade agreements in the world, covering almost $30 billion in trade and $185 billion in investment in 2021–22.

The CER Agreement recognised that addressing matters of standards, technical specifications, labelling, testing, etc. was necessary to create an effective free trade and competition regime. The agreement requires the two governments to work together towards the harmonisation of such requirements. Through a series of side agreements and memoranda, the two countries adopted similar approaches to not just competition law but also commercial law more broadly. A significant step was taken in 1990 when the two countries moved from a reliance on anti-dumping legislation to a reliance on competition law provisions. The provision removed Australia from New Zealand's Trade (Anti-dumping and Countervailing Duties) Act, 1988 and created a new trans-Tasman provision on anticompetitive use of monopoly power. This applied to both the use of dominant position in trans-Tasman markets as well as the misuse of market power – treating actions in one, the other, or both markets the same. Thus, it moved from defining injury to a specific firm or domestic competitor to looking at injury to competition in the whole market.

The nature of the provision of many services provides a potential avenue through which restrictive trade practices by services businesses can influence the competition in a goods market.[8] However, the CER allows these activities to be addressed through this new regime. Further, with New Zealand adopting the basic approach of Australia's laws, court precedents and commission procedures from Australia could be recognised and adopted by New Zealand, greatly expanding the investigatory and enforcement powers of the two countries. This forces regulators to regularly review competition law for consistency across both markets whilst allowing for regular assessment of international innovation and regulatory practices, keeping the countries' competition policies at the forefront of best practice.

Harmonisation is not an end in itself but rather a way of furthering the economic goals of productive, efficient, and improved competition. In 2013, the two nations developed a cooperation agreement that allowed New Zealand's Commerce Commission to share compulsorily acquired material and to provide investigative assistance to the Australia Competition and Consumer Commission. This then allows New Zealand, whose law had previously applied strict limitations on the ability to share such information with an international agency, to improve efficient competition enforcement. Although many AMS have the power to cooperate with foreign competition agencies, there are significant barriers to sharing confidential information. Developing such protocols and agreements within the ASEAN Community would go a long way to achieving a more effective competition regime.

[8] An example may be the preferential provision of financing terms or access to certain software.

4. ASEAN into the Future

Given the multitude of critical changes that have impacted the underpinnings of the AEC, the post-2025 AEC agenda cannot be business as usual. Instead, it should adopt a more dynamic approach to market integration, i.e. one that can implement measures in response to changing market and economic conditions. A good example is the use of digital technologies in promoting supply chain resilience in ASEAN, which was not considered before in the AEC agenda.

The key concern is whether competition policy can achieve its objectives in today's markets. Existing competition law may quickly become outdated and, thus, no longer conform to current economic reality. Whilst it has come a long way, ASEAN needs to address this policy area in the context of other policy areas – notably trade. Increasing difficulties in defining markets and thus identifying concentration levels are only going to grow. Ensuring national economic competitiveness includes the ability to spur increases in domestic productivity and standards of living. In the domestic realm of competition policy, governments can take clear measures to improve productivity and innovation with limited effects on other nations, e.g. investment in the education system. However, fields like technology are harder to contain. The idea of global technology leadership and the appropriate role of government action to encourage this development is a much-debated topic. Developing consistent approaches on which institutions, policies, and governments can rely, needs to be undertaken. These approaches need to consider a range of issues from broad market conditions to specific policies that support individual technologies or economic sectors. But even more than with exports or investment, tracing the pathway from government action to success in the field of technology is difficult, and has had mixed results when implemented (Shatz, 2020).

The digital economy is a leading driver of economic growth, but it can also lead to economic upheaval and significant societal changes. The evolution of the digital economy facilitates the entry and growth of internet-based suppliers and distributors as well as access by consumers to a vast global product market. Such potential benefits are particularly attractive to AMS, where the digital economy is seen as having boosted economic development, improved the productivity of capital and labour, lowered transaction costs, and facilitated access to global markets (Choi and Poramamond, 2023). Southeast Asia has encountered rapid economic growth, primarily driven by the digital economy, which is projected to reach US$240 billion by 2025 (Choi and Poramamond, 2023).

However, technology will remain a major challenge to competition authorities. Goods and services such as cars, medical devices, financial transactions, and phones all rely on software that makes them harder to understand or, in some cases, control. The rise in complexity, with a corresponding decline in control and transparency, is, in some markets, leading to a rise in the concentration of economic power. Indeed, Korea has included in its competition law multiple goals dealing with the dispersion of economic power, protection of small and medium-sized enterprises, and assurance of free competition. However, these goals can often be conflicting, with no clear guidance on which should be prioritised.

Along with the rise of the digital economy came concerns about the data that is both collected and generated. Singapore adopted the first data protection law of AMS in 2012: the Personal Data Protection Act. Since then, AMS have either adopted a version of the Personal Data Protection Act or implemented some form of data protection legislation (Thio, 2018). The Digital Markets Act (DMA), adopted by the EU

in 2022, broadly prohibits various types of conduct by digital platforms, the so-called gatekeepers.[9] The DMA prohibits, for example, the conduct of 'self-preferencing' and the collection and combination of users' data. The European approaches in the DMA can be considered as a new trend in digital competition law, but they also may harm dynamics in the digital market if the new act excessively prohibits the conduct of platforms. Such a line of inquiry should also be discussed within ASEAN.

The questions that AMS are grappling with include the extent to which vigorous enforcement of competition law in the context of digital markets stifles innovation and competition, and the extent to which a consistent approach should be part of the fundamental design of an ASEAN policy on the digital economy. It is important to have an effective competition law that only prohibits the conduct of gatekeepers that can potentially harm competition and distort market integration, especially when the conduct impedes access to the ASEAN market. Nonetheless, it is crucial to acknowledge the notable benefits of vertical arrangements that have the potential to achieve efficient results and improve inter-brand competition. Moreover, the conduct of digital platforms may involve dynamic efficiency. Therefore, ASEAN needs to adopt a balanced view in providing guidance for competition law enforcement related to digital cases.

According to a European Commission report, the primary issues facing competition policy regarding the digital sector are issues that define the main characteristics of the digital economy, such as extreme returns to scale, network externalities, and the role of data (Crémer, de Montjoye, and Schweitzer, 2019). These characteristics influence the enforcement of competition law and can provide contradictory evidence as to their benefits or costs to consumers. In this regard, the European Commission has made notable decisions against Google and has initiated several investigations of large platforms for possible violations of existing law (Choi and Porananond, 2023). Likewise, the Korea Fair Trade Commission concluded that one of the large search engines in Korea, Naver, infringed its Monopoly Regulation and Fair Trade Act, 1981. In addition, both the Chinese and Japanese competition authorities have made important decisions against several digital undertakings for violations of their competition rules (Choi and Porananond, 2023). These cases reveal the increasing importance of competition policy for the digital economy.

More generally, ASEAN's competition regimes often suffer from two major shortcomings. First, competition law objectives are often unclear and suffer from an overemphasis on fairness, which can have many meanings across different jurisdictions. Second, this ambiguous terminology can lead to biased interpretation of the rules. The principle of fair competition has been noted as a primary objective of AMS (Choi and Porananond, 2023). However, ASEAN's recent approaches do not always define or focus on fair competition. The Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN (ASEAN, 2012) highlighted the goal of promotion and protection of a competitive process that includes the improvement of economic efficiency, economic growth, and consumer welfare. By emphasising consumer welfare, however, it is unclear whether the law should protect the competitive process, the outcome, or the individual competitors, all of which have different meanings with respect to 'fair' competition. Importantly, the guidelines oppose 'additional objectives' because the additional objectives or sociopolitical goals can trigger incoherent applications of competition law amongst AMS (Choi and Porananond, 2023). So, there continues to remain much room in the guidelines for individual interpretation and application. A more coherent approach is needed to ensure a more consistent application across jurisdictions.

[9] Digital platforms or gatekeepers refer to software or technology used to unify and streamline business and information technology (IT) activity. They include Amazon, Facebook, Quora, Airbnb, and many others.

Another important question that needs to be considered is information sharing. Without meaningful information sharing amongst AMS, the ability to engage in regional cooperation, or achieve significant regional convergence, cannot be achieved. Both the benefits and the risks of cross-border sharing of information will need to be considered. As seen in the Grab/Uber case, there is an immediate need for such cooperation in relation to cross-border mergers, and the same point is relevant to cross-border cartels (ASEAN, 2018).

ASEAN should focus on the recommendations made in its recent review of competition policy in the region (ASEAN, 2022b). The priority list, given the discussion above, should be:

(i) Establish informal, but precisely articulated, ASEAN-wide competition policy goals.
(ii) Prioritise collaborative efforts on enforcement priorities to ensure common policy objectives and their enforcement.
(iii) Establish collaborative frameworks on proposed remedies for cross-border cases, where possible, including established channels for information exchange.

The ASEAN Community needs to focus on collaboration and information sharing. This is an area where ongoing discourse between the AMS competition regulators will be important. AMS should continually stress the commonality of the stated goals of competition law and work towards a consistent application (and potential narrowing) of these policy goals in practice.

In addition, a priority area for competition regimes in the region is the digital economy. As the discussion has illustrated, this area permeates all aspects of the economy and has a major impact on competition. Furthermore, given that the digital market is inherently global, trade policy needs to be an integral part of the development of a coherent competition regime.

5. Conclusion

Trade policy and competition law can complement the advancements made by the other, but they can also act as barriers to achieving their joint objectives of improved welfare and more efficient allocation of resources. The liberalisation of trade policy is widely credited for reducing global poverty in the past 30 years; improving efficiency; and increasing product specialisation, innovation, and choice. This has provided consumers and business with greater access, at lower prices, to a larger variety of goods and services improving welfare. Competition law, by applying rules to ensure that businesses compete fairly, helps ensure the same outcomes, i.e. wider choice for consumers, business efficiency, and improved quality at a lower price.

To ensure that open trade remains competitive trade within the Community, ASEAN needs to work to develop a common approach to competition policy with similar levels of enforcement. The growth of digitally enabled and driven commerce will continue to grow, and ASEAN needs to be prepared by working cooperatively and engaging in international dialogue to ensure its approach to this issue is forward looking.

ASEAN needs to provide guidance to avoid AMS adopting different, potentially innovation-deterring regulations rather than a consistent gatekeeper-controlling rule. Despite soft law's absence of binding commitments, guidelines set by ASEAN could assist AMS to establish a legal framework for the digital economy and avoid conflicts in the enforcement of competition law amongst them.

The ASEAN Community needs to develop a common understanding of the meaning of fair competition and abuse of market power. Moreover, AMS that do not have sufficient resources for policy development and enforcement could more easily implement competition policy by accepting ASEAN-established rules and guidance. At the ASEAN level, AMS could pool their resources of legal techniques and approaches to many competition issues, notably to the digital market. AMS could then fully or partially adopt or adapt the ASEAN guidelines by considering their own circumstances.

Regional guidelines, as a form of soft harmonisation, can be considered an important basis for future binding (hard law) commitments. Although soft law can have limited effectiveness, it can provide important improvements by enhancing cooperation amongst AMS and signalling future policy and law enforcement pathways to the market, thereby offering legal certainty or predictability for markets. The absence of effective cooperation without guidance from ASEAN could cause divergent competition law and policy, resulting in incoherent implementation of the law amongst AMS. This lack of clarity and coherence could limit the amount of investment and trade within, and outside, the region.

Finally, ASEAN must engage in international cooperative efforts between competition regulators and trade policy (and vice versa). International cooperation in competition law takes place in several forums, from APEC to the OECD. These arenas provide a venue for working out mutually advantageous forms of cooperation, as well as frameworks of operations, and adopting best practice. To ensure the effectiveness of any outcomes, it is essential that trade officials take part in these discussions. ASEAN, with its commitment to trade and collaboration amongst policy areas, is in a strong position to lead the global debate on these issues.

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