

# PERSPECTIVE

RESEARCHERS AT ISEAS – YUSOF ISHAK INSTITUTE ANALYSE CURRENT EVENTS

Singapore | 9 September 2022

---

## **Sustainability Collaborations between Businesses: Proposing a Roadmap for Cooperation between ASEAN Competition Authorities**

*May Loh and Poh Lip Hang\**



*There is a strong imperative for ASEAN competition authorities to cooperate and examine how sustainability collaborations can be addressed without undermining fairness and market efficiency. In this picture, a worker standing beside floating solar panels for the Sirindhorn Dam hydro-solar farm run by the Electricity Generating Authority of Thailand (EGAT) in Ubon Ratchathani on 23 February 2022. Photo: Jack TAYLOR/AFP.*

*\*May Loh is Senior Advisor at Conservation International (Asia-Pacific) and the Albright Stonebridge Group where her advisory work covers the intersection of issues of public policy, philanthropy, corporate governance and sustainability. Poh Lip Hang is a competition economist with Baker McKenzie, Wong & Leow, and an Adjunct Faculty at the Singapore Management University School of Economics where he teaches Economics of Competition Law to postgraduate students. The views set out in this article are the authors' own and do not represent the views of the authors' respective organisations.*

## EXECUTIVE SUMMARY

- Abiding by competition laws could pose a challenge to business collaborations designed to meet environmental sustainability targets. Surveys of companies show that a majority choose not to pursue sustainability-related collaboration with other companies due to competition law compliance risk.
- Collaboration between competition authorities is crucial for the achievement of sustainability outcomes across territories. However, the cost-benefit analysis of relaxing competition laws to allow for sustainability collaborations between businesses is challenging due to the difficulties in quantifying environmental benefits. It is also unclear how a consideration of environmental sustainability targets features in competition authorities' assessment frameworks.
- As such, a roadmap is herein proposed which fosters collaboration between ASEAN competition authorities, and facilitates cross-border sustainability collaborations and sustainability collaborations that bring about extra-territorial environmental benefits.
- Recommendations include issuing guidance for businesses involved in sustainability collaboration. Such guidance should explain how the competition authority will assess environmental benefit claims under the relevant provisions in their competition legislation.
- A supportive policy environment in ASEAN, especially for sustainability collaborations which are at the intersection of ten sets of national competition laws and other national environmental laws, will advance businesses' efforts to pursue and implement sustainability collaborations in the region.

## INTRODUCTION

There is increasing debate globally on the intersection between competition law and sustainability in recent years. Countries want to promote free and fair marketplaces, but dealing with environmental challenges may require businesses to collaborate in a way that is contrary to most precepts of competition law. In Southeast Asia, the sustainability imperative is clear as the region is one of the most vulnerable to climate change and sustainable development has become a strategic priority outlined in the ASEAN Socio-Cultural Community Blueprint 2025. At the same time, ASEAN Member States have also committed to fostering a culture of fair business competition for enhanced regional economic performance in the long-term. To date, all ASEAN member states have enacted national competition laws, and initiatives are ongoing to strengthen enforcement. Herein lies a key question – while ASEAN continues to encourage open competition, will its laws and policies inhibit business collaborations designed to meet environmental challenges such as climate change?

Private sector-led initiatives are key to addressing urgent sustainability challenges, most of which are too large and interconnected to solve without collaboration between businesses across industries and supply chains. A report by IMAGINE and the University of Michigan highlights that persistent global problems require systems change through collective, collaborative action. It further notes that “collaborations present an opportunity for companies to expand their knowledge base, expertise, market reach and social impact”.<sup>1</sup> Pre-competitive collaboration is proposed by the report as a form of system change, which differs from other forms of private sector collaboration as it takes place before differentiation in the market occurs. For example, the Global Salmon Initiative (GSI) is a pre-competitive platform launched by aquaculture companies representing 70% of global production to advance sustainability practices in the sector. The GSI enabled information-sharing and drove the uptake of Aquaculture Stewardship Council (ASC) certified salmon, resulting in about 40% of the industry being certified today.<sup>2</sup>

Pre-competitive sustainability collaborations can therefore bring about positive, lasting impact when it is well-implemented across the value chain. Unfortunately, competition law enforcement can stymie sustainability collaboration between competing businesses. A 2020 survey of sustainability leaders in the UK, USA, France, Germany and the Netherlands found that over 90% of companies want to work together to address sustainability goals. However, almost 60% of these companies chose not to pursue sustainability-related collaboration with other companies due to competition law compliance risk.<sup>3</sup> Relatedly, more than half (57%) of the 800 business leaders in the Asia Pacific region surveyed in 2021 cite regulatory enforcement and investigations as a top “ESG” risk.<sup>4</sup> A key factor especially for multi-national organisations is the fragmented nature of ESG regulation across Asia Pacific where regional collaboration is not as well-established as for example, in the European Union.

## **COOPERATION BETWEEN COMPETITION AUTHORITIES IS KEY**

The OECD opined on the importance of international cooperation between competition authorities on sustainability collaboration between businesses. This is because even if a sustainability collaboration is not subject to competition law prohibition in one jurisdiction they might still be so in other jurisdictions. This can sometimes lead to perverse outcomes. For example, the OECD noted that Indonesia's competition authority (**KPPU**) "*faced pressure to prohibit a private standard for palm oil that reduced deforestation [and so the standard] was subsequently abandoned*".<sup>5</sup> This was the Indonesia Palm Oil Pledge (**IPOP**), an agreement between major palm oil companies aimed at fighting deforestation and forest fires. These companies agreed to not develop peatlands of any depth as peatland fires are a major source of the haze problem in Southeast Asia. The KPPU found that the IPOP has "*the potential to become a cartel that will lead to monopolistic practices and/or unfair business competition amounting to an infringement of Indonesia's competition law*."<sup>6</sup>

Certainly competition law should first and foremost be enacted and enforced to safeguard market competition and consumers in the jurisdiction. Southeast Asian countries' competition legislation are therefore aimed at safeguarding national interests and promoting free and fair markets. Competition authorities will be hard-pressed to explain why public resources are expended to intervene in market competition outcomes in other jurisdictions. A summary of the policy objectives of the 10 Southeast Asian member states' competition laws by Burgess (2020)<sup>7</sup> is set out in the table.

SE Asian Country	Economic Efficiency	Economic Growth and Development	Consumer Welfare	Fairness	Promotion and Protection of Competition
Brunei Darussalam	X	X	X	N/A	X
Cambodia	X	N/A	X	X	X
Indonesia	X	N/A	X People's welfare	X	X
Lao PDR	N/A	X	X Protect interests of State and businesses, as well as consumers	X	X
Malaysia	N/A	X	X	X	X
Myanmar	N/A	X	X Public interests also considered	X	X
Philippines	X	X	X	X	X
Singapore	X	N/A	N/A	N/A	X
Thailand	X	N/A	X	N/A	X
Vietnam	X	X	X Consumer interests and social welfare	X	X

However, it is short-sighted, like in the case of a prisoners' dilemma, if we consider the foregone extra-territorial environmental benefits that sustainability collaborations can bring about. For the sake of discussion, we use the IPOPOP as a hypothetical example. The benefit arising from IPOPOP's contribution to the reduction in environmental cost of transboundary haze pollution *e.g.* to neighbouring Singapore and Malaysia, should be weighed against costs of allowing IPOPOP to engage in monopolistic practices and/or unfair business practices in Indonesia. This cost-benefit analysis is nonetheless challenging due to difficulties in quantifying environmental benefits and externalities, especially those that are extra-territorial and long-term in nature.

Relatedly, it is unclear how the consideration of environmental issues feature in competition authorities' assessment frameworks. The OECD Competition Committee suggests that the interpretation of competition law to environmental issues can have two different outcomes:<sup>8</sup>

- (a) The extent that competition law provisions are to be interpreted so that environmental costs arising from prohibited agreements, conduct and mergers are prevented/prohibited.
- (b) The extent that competition law provisions can possibly be interpreted so that sustainability collaboration that brings about environmental benefits are allowed.

It may also be the case that the consideration of environmental issues fall outside the scope of the competition legislation. In order to steer Southeast Asia away from the sub-optimal prisoners' dilemma outcome, the current trajectory that ASEAN competition authorities with regard to sustainability issues has to change.

## **A ROADMAP FOR SOUTHEAST ASIAN COMPETITION AUTHORITIES**

We propose a roadmap for ASEAN competition authorities to ensure that sustainability collaborations, in particular those that lead to extra-territorial environmental benefits, are not stymied.

**Recommendation 1 (National Level): Recognise the importance of environmental issues in the competition authority's strategic plan.** The strategic plan will facilitate communication and accountability, and enhance business stakeholders' understanding of the competition authority's purpose and functions in relation to environmental issues. For example, the Malaysia Competition Commission noted in its Strategic Plan 2021 to 2025 that *"Investment in green technology can be cost-prohibitive and businesses may want to cooperate with their competitors to achieve the ESG agenda. The MyCC may need to study how Act 712 works to encourage the ESG agenda amongst businesses in Malaysia."*<sup>9</sup> This will set the "tone" of the competition authority, and promote consultative discussions between the competition authority and businesses looking to implement sustainability collaborations.

**Recommendation 2 (Individual Level): Issue guidance for businesses involved in sustainability collaboration.** The International Competition Network Special Project 2021 carried out by the Hungarian Competition Authority on "Sustainable Development and Competition Law" noted that 85% of the non-governmental advisors surveyed chose "more/better guidance documents" when asked to suggest ways that competition authorities can enhance transparency in their decision making.<sup>10</sup> Such guidance should explain how the competition authority will assess environmental benefit claims under the relevant provisions in their competition legislation e.g. cartel, abuse of dominance, mergers or unfair trade practices. Additionally, guidance on specific standards and/or quantification methodologies that are acceptable to the competition authority when assessing environmental costs and benefits should also be provided. This will alleviate compliance risk concerns that businesses have when pursuing sustainability collaboration. An example is the "Draft Guidelines on Sustainability Agreements" first published by the Netherlands Authority for Consumers and Markets (ACM) in 2020, which was followed by a revision in 2021 after public consultation.

The guidelines explain different types of sustainability agreements that are allowed and how environmental benefits should be substantiated. The ACM also jointly commissioned a technical report with the Greek competition authority elaborating on methods used to substantiate benefits of sustainability agreements.<sup>11</sup>

Where the consideration of environmental issues falls outside the scope of competition legislation and the providing of exemptions is not feasible, competition authorities should consider solutions to address the lacuna e.g. proposing legislative amendments or holding discussions with relevant regulatory authorities in their respective jurisdictions.

**Recommendation 3 (Individual Level): Cooperate with relevant regulatory authorities that have oversight of sustainability policy.** Apart from designing and administering environment-related regulations on businesses, regulatory authorities may also engage in public-private partnerships to address environmental issues. Where regulations or private-public partnerships have unintended adverse impact on market competition, competition authorities play an important role in the advocacy of pro-competition policy-making, and in assisting regulatory authorities with re-shaping policy options to mitigate the adverse impact. One example would be enabling a regulatory sandbox regime for pre-competitive collaboration. This in turn could strengthen competitive collaboration at the bilateral or regional level. For example, the Hellenic Competition Commission introduced the “Sustainability Sandbox” in June 2022 where businesses can request for *ex ante* evaluation of their pre-competitive collaboration. It is aimed at enhancing legal certainty and reducing regulatory risks for businesses engaging in green investments.

**Recommendation 4 (Bilateral or Regional Level): Initiate discussions on how ASEAN competition authorities can cooperate to assess cross-border sustainability collaborations, and sustainability collaborations that bring about extra-territorial environmental benefits.** As highlighted by the OECD, even if sustainability collaborations are not subject to competition law prohibition in one jurisdiction they might still be in other jurisdictions. Such cooperation is also consistent with the general thrust to promote greater harmonisation of competition policy, law and enforcement in the region, following the creation of the ASEAN Economic Community. The ASEAN Expert Group on Competition (AEGC) is an excellent regional platform to facilitate or join discussions on specific cross-border sustainability collaborations as they arise. Such initiatives can fall under the ASEAN Competition Action Plan 2021-2025’s Strategic Goal 3; namely, for steps toward ensuring that regional cooperation arrangements on Competition Policy and Law are in place.

**Recommendation 5 (Regional Level): Conduct a study to scope ASEAN-wide competition law and sustainability-related policy objectives.** The study should ideally commence with a survey of the sustainability-related key result areas and the corresponding strategic measures of the ASEAN Socio-Cultural Community Blueprint 2025<sup>12</sup> It is clear that private-sector involvement, and sustainability collaborations are crucial to achieving most of the strategic measures in the key result areas. The study can be part of the work under “Strategic Goal 3” of the ASEAN Competition Action Plan 2021-2025. Likewise, the AEGC would be the appropriate platform to engage with other relevant ASEAN-wide platforms e.g. the ASEAN Senior Officials on Environment to scope ASEAN-wide competition law and enforcement, and

sustainability-related policy objectives. Once these policy objectives are agreed upon, guidance on how (i) cross-border sustainability collaboration, and (ii) sustainability collaborations that bring about extra-territorial environmental benefits, are assessed, should be issued.

## CONCLUSION

There is a strong imperative for ASEAN competition authorities to cooperate and examine how sustainability collaborations can be addressed without undermining fairness and market efficiency. With increasing focus on region-wide initiatives such as the ASEAN Taxonomy for Sustainable Finance<sup>13</sup> and scaling-up carbon markets to unlock the potential of nature-based solutions, the cost of inaction is far too great to ignore.

A supportive policy environment in ASEAN, especially for sustainability collaborations which are at the intersection of ten sets of national competition laws and other national environmental laws, will advance businesses' efforts to pursue and implement sustainability collaborations in the region. To borrow from a popular Chinese proverb: "The best time to plant a tree was 20 years ago, the second best time is now."

## ENDNOTES

---

<sup>1</sup> Naomi Barker, Douglas Ely, Nicholas Galvin, Anya Shapiro, and Adrienne Watts (2021) *Enacting Systems Change: Precompetitive Collaboration to Address Persistent Global Problems* (Ann Arbor, MI: University of Michigan).

<sup>2</sup> WWF (2019). *The Business Case for Pre-Competitive Collaboration* (Global Salmon Initiative). Access: [https://c402277.ssl.cf1.rackcdn.com/publications/1283/files/original/GSI\\_Business\\_Case\\_07-19\\_v8.pdf?1576875829](https://c402277.ssl.cf1.rackcdn.com/publications/1283/files/original/GSI_Business_Case_07-19_v8.pdf?1576875829)

<sup>3</sup> Linklaters (2020), *Competition law needs to cooperate: companies want clarity to enable climate change initiatives to be pursued.*

<sup>4</sup> Baker McKenzie (2021), *From Strategy to Action - Advancing ESG in Asia Pacific.*

<sup>5</sup> Julian Nowag (2020). *Sustainability & Competition Law and Policy - Background Note.* 134th Meeting of the OECD Competition Committee 1-3 December 2020

<sup>6</sup> KPPU Tanggapi Keberadaan Indonesia Palm Oil Pledge (IPOP) (2016). Access: [https://www.kppu.go.id/id/blog/2016/04/kppu-tanggapi-keberadaan-indonesia-palm-oil-pledge-ipop/?utm\\_source=twitterfeed&utm\\_medium=twitter](https://www.kppu.go.id/id/blog/2016/04/kppu-tanggapi-keberadaan-indonesia-palm-oil-pledge-ipop/?utm_source=twitterfeed&utm_medium=twitter)

<sup>7</sup> Burgess (2020), *Commonalities and Differences across Competition Legislation in ASEAN and Areas Feasible for Regional Convergence*

<sup>8</sup> *Sustainability & Competition Law and Policy - Background Note.* Access: [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2020\)3&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2020)3&docLanguage=En)

<sup>9</sup> Malaysia Competition Commission Strategic Plan 2021 - 2025. Access: [https://www.mycc.gov.my/sites/default/files/pdf/newsroom/MyCC\\_Strategic%20Plan%202021-2025%20%28Public%20Ver.%29\\_English%20%2814%20Dec%202021%29.pdf](https://www.mycc.gov.my/sites/default/files/pdf/newsroom/MyCC_Strategic%20Plan%202021-2025%20%28Public%20Ver.%29_English%20%2814%20Dec%202021%29.pdf)

<sup>10</sup> ICN Special Project 2021 (NGA.II.B.% Ways of enhancing transparency). Access: [https://icn2021budapest.hu/site/assets/docs/spec\\_project/sustainability\\_survey%20REPORT%20\(2nd Ed%202021%2009%2030\)%20final%20PUBLIC.pdf](https://icn2021budapest.hu/site/assets/docs/spec_project/sustainability_survey%20REPORT%20(2nd%20Ed%202021%2009%2030)%20final%20PUBLIC.pdf)

<sup>11</sup> Guidelines on sustainability agreements are ready for further European coordination. Access: <https://www.acm.nl/en/publications/guidelines-sustainability-agreements-are-ready-further-european-coordination>

<sup>12</sup> ASEAN Socio-Cultural Community Blueprint 2025. See key results areas under Section C: Sustainable. Access: <https://www.asean.org/wp-content/uploads/2012/05/8.-March-2016-ASCC-Blueprint-2025.pdf>

<sup>13</sup> Introduced in 2021, the ASEAN Taxonomy for Sustainable Finance provides a common language to communicate and co-ordinate on labelling for economic activities and financial instruments, and thus can be used as a reference or starting point for competition authorities to understand the types of activities that are credibly considered ‘green’ across ASEAN.

<p><b><i>ISEAS Perspective</i></b> is published electronically by: <b>ISEAS - Yusof Ishak Institute</b></p> <p>30 Heng Mui Keng Terrace Singapore 119614 Main Tel: (65) 6778 0955 Main Fax: (65) 6778 1735</p> <p>Get Involved with ISEAS. Please click here: <a href="https://www.iseas.edu.sg/support/get-involved-with-iseas/">https://www.iseas.edu.sg/support/get-involved-with-iseas/</a></p>	<p>ISEAS - Yusof Ishak Institute accepts no responsibility for facts presented and views expressed.</p> <p>Responsibility rests exclusively with the individual author or authors. No part of this publication may be reproduced in any form without permission.</p> <p>© Copyright is held by the author or authors of each article.</p>	<p>Editorial Chairman: Choi Shing Kwok</p> <p>Editorial Advisor: Tan Chin Tiong</p> <p>Editorial Committee: Terence Chong, Cassey Lee, Norshahril Saat, and Hoang Thi Ha.</p> <p>Managing Editor: Ooi Kee Beng</p> <p>Editors: William Choong, Lee Poh Onn, Lee Sue-Ann, and Ng Kah Meng</p> <p>Comments are welcome and may be sent to the author(s).</p>
---	---	--