How far reach the goal of ASEAN market integration? : reflect through the readiness of ASEAN Competition Law and Policy in coping with an abuse of a dominant position

ความสำเร็จในการรวมตลาดอาเซียน อีกไกลแค่ไหน? : สะท้อนจากความพร้อมของกฎหมายและนโยบายการแข่งขันทางการค้าของอาเซียนในการจัดการปัญหาผู้ประกอบการที่มีอำนาจเหนือตลาด

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Abstract

The approach to regulate unfair competition and support a free market as a common market in the EU there has common rules which based on the Treaty on the Functioning of the European Union (TFEU) including a supranational institution as the EU Commission, Directorate-General for Competition and the Court of Justice of the European Union (CJEU) to enforce the laws. While the ASEAN has competition policy and law (CPL) which based on the ASEAN Charter and the AEC Blueprint; however, it does not have a supranational body to cope with a distorted market also CPL were not instrument of enforcement of anticompetitive conducts. As the dispute resolution mechanism, ASEAN relies on the traditional ASEAN Way which premised on the principle of consensus that might be an inappropriate approach in the reality in particular coping with the problem of the abuse of a dominant position by refusing to license Intellectual Property Rights (IPRs). To deal with this type of anticompetitive practice it needs ordering a compulsory licensing. Lacking of a supranational body to enforce common competition rules and diversity of competition laws among ASEAN Member States may obstruct the goal of regional economic liberalization and market integration. Eliminating or at least reducing anticompetitive practice will facilitate the regional market integration. The article concludes that to expect the ASEAN market integration in real it should look other regional models as the EU in coping with anticompetitive conducts and restrictions.

Keywords : anti - competition, dominant position, ASEAN, market integration

บทคัดย่อ

การจัดการกับปัญหาการแข่งขันทางการค้าที่ไม่เป็นธรรมและสนับสนุนการเป็นตลาดเสรีนั้น ในการรวมตลาดของกลุ่มสภาพยุโรปได้มีการควบคุมให้การแข่งขันทางการค้าเป็นไปอย่างเป็นธรรมโดยอาศัยอำนาจของสนธิสัญญาว่าด้วยการทำงานของสหภาพยุโรป (The Treaty on the Functioning of the European Union) และมีองค์กรในการบังคับใช้กฎหมายอย่างจริงจัง เช่น คณะกรรมาธิการสหภาพยุโรป กระทรวงการแข่งขันทางธุรกิจ และศาลยุติธรรมแห่งสหภาพยุโรป ซึ่งในประเด็นเดียวกันนี้ เมื่อเปรียบเทียบกับอาเซียนซึ่งมีเพียงนโยบายและกฎหมายการแข่งขันทางการค้าที่เป็นแค่กรอบความร่วมมือกันภายใต้กฎบัตรอาเซียน (ASEAN Charter) และพิมพ์เขียวเศรษฐกิจอาเซียน (The AEC Blueprint) ทั้งยังไม่มีองค์กรที่มีอำนาจในการกำกับและควบคุมบังคับเพื่อจัดการกับปัญหาของการผูกขาดตลาดหรือการแข่งขันทางการค้าที่ไม่เป็นธรรม นอกจากนี้เมื่อศึกษาถึงกลไกการระงับข้อพิพาทอาเซียนมีนโยบายที่จะใช้วิธีการเจรจาและยุติข้อพิพาทด้วยฉันทามติในรูปแบบของวิถีอาเซียน (ASEAN Way) ซึ่งวิธีการยุติข้อพิพาทเช่นนี้ไม่มีความเหมาะสมในการจัดการกับปัญหาของผู้ประกอบการที่ใช้อำนาจเหนือตลาดโดยมิชอบในการจำกัดการแข่งขันทางการค้า เช่น กรณีการปฏิเสธไม่อนุญาตให้ใช้สิทธิในทรัพย์สินทางปัญญา ซึ่งในการแก้ปัญหาลักษณะนี้จำเป็นต้องมีการสั่งบังคับให้ทำสัญญาอนุญาตให้ใช้สิทธิในทรัพย์สินทางปัญญา ซึ่งต้องมีองค์กรในการใช้อำนาจบังคับ เมื่ออาเซียนไม่มีองค์กรในการกำกับดูแลและควบคุมเพื่อให้การแข่งขันทางการค้าเป็นไปตามหลักของการแข่งขันที่เป็นธรรม ประกอบกับความแตกต่างของกฎหมายภายในแต่ละประเทศในอาเซียนน่าจะก่อให้เกิดอุปสรรคแก่เป้าหมายของการรวมตลาดและเปิดตลาดเสรีทางการค้าอาเซียน ดังนั้นเพื่อให้การเปิดตลาดเสรีทางการค้าอาเซียนเป็นผลสำเร็จควรต้องมีการขจัดปัญหาดังกล่าวหรืออย่างน้อยที่สุดคือลดการกระทำในลักษณะที่เป็นการแข่งขันทางการค้าที่ไม่เป็นธรรม บทความนี้จึงมีข้อเสนอแนะว่าการรวมตลาดเพื่อให้อาเซียนเป็นตลาดเดียวกันได้อย่างแท้จริงนั้นควรศึกษาแบบอย่างของกลุ่ม

สหภาพยุโรปในการจัดการกับปัญหาการผูกขาดทางการค้าและการแข่งขันทางการค้าที่ไม่เป็นธรรม

คำสำคัญ : การแข่งขันไม่เป็นธรรม, การมีอำนาจเหนือตลาด, อาเซียน, การรวมตลาด

Introduction

The three essential pillars, which comprise of regional Economic Community, Political-Security Community, and Socio-Cultural Community, are expected to work in tandem in establishing the ASEAN and shall be the goal of regional integration in 2020 (ASEAN, 2008 : 5). The economic integration is the most concrete and expects to lead the prosperity to ASEAN member countries. Consequently, the ASEAN Economic Minister Meeting (AEM) in 2006 agreed to develop coherent Blueprint for advancing the ASEAN Economic Community (AEC) as well as the 12th ASEAN Summit in 2007 accelerates the establishment of the AEC by 2015 (ASEAN, 2008 : 5). However, the regional economic integration shall be achieved by various policies. One of those policies which mentioned in the blueprint is the competition policy. Essentially, the framework on the competition policy does not establish an official ASEAN body or supranational institution for monitoring and regulating business activities on competitive market among ASEAN countries as of the EU Commission and the institution for dispute resolution as of the Court of Justice of the European Union (CJEU). Furthermore, it is not set out common rules on competition in the regional level. It is noteworthy that how the goal of the competition policy of AEC can be

achieved on the different regulators and national competition laws which are diverse also the problem on competition is increasing dramatically. As well as the introduction of dispute settlement is based on ASEAN Way which premised on the principle of consensus that might be an inappropriate approach to handle with anticompetitive practices and restrictions. Typically, even cartel and merger are not complicated problems but they are not the only anticompetitive conducts in the regional economy that need to cope with and also the abuse of a dominance dramatically increase and advance its form of conduct especially in a dynamic market as illustrated in the refusal to license of Intellectual Property Right (IPRs) that some right holders aim to occupy a dominant position or to be an incumbent of the market. It consequently eliminates a new entrant. On the EU resolution, this type of problem is solved by ordering a compulsory licensing when the case is deliberated upon the essential facility doctrine and is raised before the CJEU. On the other hand, ASEAN does not have any institutions as such in the EU. Subsequently, the consideration in question is that how this problem could be handled in ASEAN to ensure that competitive environment is encouraged as it is aimed in the policy. Specifically, the article considers the obstacles of ASEAN single market by reflecting the readiness of its competition law in coping with an abuse of a dominant position. It divides into 5 sections including introduction. The second section provides a brief overview of competition and its problem in particular anticompetitive conducts such an abuse of a dominant position by refusing to license. The third section discusses the approach

to cope with anticompetitive practices and restrictions both in the EU and the ASEAN. The fourth section considers and analyses the challenges of ASEAN competition law and policy. The last section shares some concluding thought of the approach of the regional economic integration which will strengthen and enhance economic growth across ASEAN it could be suggested to look toward the European Union as a model.

An overview of competition and a current problem in a dynamic market.

1. The significance of competition to market integration in the regional economic.

The advantage of competition not only promotes a fair market but it also creates an effective economy, due to the fact that a competition gives rise efficiency in production and allocation of resources. Subsequently, it decreases the risk of producing unwanted goods to the market and uses resources and raw materials in the most efficient production (Joanna and Albertina, 2009 : 9; Barry and Augus, 2004 : 9). It will benefit to customer because producers have to produce on the efficient basis for earning a larger profit; it thus contributes the lowest cost (Richard and David, 2012 : 5-6). Further, competition will stimulate enterprises to invest in innovation and continue the development for responding demands of consumers which change rapidly (Richard and David, 2012 : 6). As a result,

competition constitutes social and consumer welfare, it accordingly affects to an economic interest as a whole. It could be concluded that the competition law and policy had three mains objectives which were the prevention of the integration of market power, the prevention of barriers to trade and the protection of consumer welfare.

It is undeniable to state that competition policy is one of the EU's greatest success stories; also, it is one of the most consequences of integrated area of the EU. Murray A. points out that the crucial factor which contributes the long term health of European economy is an effective competition policy due to its benefits which incentives firms reducing cost, cutting price and improving the quality of their products (Alasdair, 2004 : 1). Competition law and policy maintains competitive and a fair market by controlling and regulating anticompetitive conducts such as cartels among business, an abuse of dominant market position, merger and acquisition which may affect undistorted market. According to the significance of law and policy, some scholar opines that to facilitate liberalisation in trade and investment as well as increase competitive business activities in the region it needs to control such anticompetitive practices by effective competition law (Lawan, 2004 : 479). Also, to strengthen economic integration in the ASEAN region it needs supranational body to enforce common competition rules (Pornchai and Nguyen, 2012 : 17-18).

2. An abuse of a dominant position and a refusal to license IPRs: anticompetitive conduct in a dynamic market.

How is it necessary to require a regional common rules or organ for regulating the competition across ASEAN countries? It could be illustrated in the problem of a firm which owned dominant intellectual property rights abused its dominant position by refusing others a license of IPRs or refusing to supply interface information. As examples, *Microsoft* (case T-201/04, 2007) where the company denied to disclose its software interoperability information that was held its trade secrets (Ioannis, 2008 : 1). In *Rambus* (case 522 F.3d 456, 2008), where the undertaking enjoyed its patent rights that covered in the invention of a faster architecture for dynamic random access memory ("DRAM") which was held as standardisation by refusing the disclosure of its technology. These two cases made firms in a relevant market unable to operate with technologies of the dominant firms; subsequently, they deter some potential competitors enter into the market.

In fact, it has a difficulty of consideration of such cases. This is because the exclusivity of intellectual property right grants to the pioneer of invention and innovation for compensating its investment in research and development. If such a right protection was not available; it would not encourage the inventors to create and carry on the technological development and innovation. This is because it does not have any security for the innovators from a free ridding. Nonetheless, the exclusive right in a form of patent or copyright inevitably brings

about the legal monopoly straight to the right holder. Therefore, to protect an undistorted market and incentives to innovation simultaneously; the competition law has to appropriately regulate the exercise of intellectual property rights by refusing to supply IPRs. In many cases, the Court of Justice of the European Union (CJEU) clearly stated that a refusal to grant a license or refusal to allow others accessing its intellectual property cannot in itself establish an abuse (cases C-238/87, 1989; C-241-242/91, 1995) due to exclusive rights are granted by national law to the owner for preventing others from using, producing, selling and exploiting the copyright or patent without consent. The court therefore deliberates this issue upon the doctrine of essential facility to order a compulsory licensing.[1] On the other hand, if this anticompetitive practice arises in ASEAN single market the consideration in question would be what was the approach of the dealing for ordering a compulsory licensing like the European Union did.

[1] The essential facility doctrine is initiated by the EU Commission in Stena Sealink case and further developed by the Court of Justice of the European Union (CJEU). The principle of essential facility is taken into account against an exercise of exclusive right of Intellectual Property Rights (IPRs). The court has set out exceptional circumstances for ordering compulsory licensing if a refusal to license prevented an emergence of a new product; excluded competition on a secondary market; no objective justification; and the facility of IPRs was indispensable for carrying on a competitor business.

The approach to deal with anticompetitive conducts and restrictions.

1. The EU approach

In the EU, competition law and policy are essential mechanisms for protecting an undistorted market and facilitating the EU common market integration (Giorgio, 2007 : 41). The significant enforcement of EC competition law is under the framework of the Council Regulation EC No 1/2003 on the implementation of the rules on competition and leads by the Commission that carries out the task by the Directorate General for Competition (DG Comp) associating with National Competition Authorities (NCAs) at the Member State level (Barry and Augus, 2004 : 31-35). The Commission has a key role to ensure that there has a proper competition within the common market by investigating until making a decision. Essentially, anticompetitive agreements are controlled by art 101 (ex art. 81 of the Treaty of the European Union (TEU)) and art 102 (ex art. 82 TEU) of the Treaty on the Functioning of the European Union (TFEU) which are common rules of competition to all EU member countries (EU Competition Commission, 2010). The rules can be applied by national courts, national competition authority and the Court of Justice (Luu, 2012 : 300). Some scholar points out that the valid objective of the EC treaty on competition is a safeguard of EC common market against the business interests that tempt undertakings to distort market (Hanns, 2005 : 11). The competition law and policy is regional rules that oblige all member

states crossing different economic boundaries; consequently, it assures the process of EU single market amalgamation (Hanns, 2005 : 18-19). By the mean of employing the regional competition law as TFEU mainly it is undoubted to conclude that it is an instrument of supranational institutions to eliminate market barriers and lead liberalisation and integration to the common market simultaneously. It is noteworthy that to mirror the EU's success whether it could be a model of ASEAN approach to eliminate anticompetitive conducts in the regional level.

2. The ASEAN approach

According to paragraph 41 of the blueprint on the issue of competitive economic region needs the establishment of an official ASEAN body for cooperative work on the competition law and policy (CPL). The ASEAN Expert Group on Competition (AEGC) is subsequently established (AEC Blueprint, 2008 para 41(ii)). In fact, AECG is a network of authorities which serves as a forum for discussing and coordinating competition policy, and it is the only main body. However, it is not the institution to monitor or regulate any anticompetitive conducts in the regional level. The powerless institution might be a consequence of lack of common rules or it might be a result of the fundamental principle of ASEAN that member states shall not intervene the internal affairs of other members and rely on peaceful settlement of disputes (ASEAN Charter, 2007 : art. 2(d) (e)).

On the matter of an anticompetitive conducts as the abuse of a dominant position by refusing to license IPRs such a case of

Microsoft could be reflected that this type of conduct is increasing in particular a dynamic market which demands of consumers change rapidly. It therefore tempts undertakings which hold significant IPRs or technology; that is needed by products of a neighbouring market, will abuse its dominance and hold IPRs for their own uses. As a result, it restricts competition and impedes new entrants to enter into the market. Essentially, the solution of this kind of dispute is compulsory licensing. The consideration in question is that if this case happens in ASEAN forum who will be the supranational institution to make a decision- to order a compulsory licensing and what is the effectiveness of controlling an abuse of dominant position among the diverse domestic competition laws. This concern will be furthered in the next part. As for the ASEAN Regional Guidelines on Competition Policy 2010, they were as reference documents for the member countries which have not develop their legislations following the required principles. It means that the regulations which deal with competition's problems will depend on domestic laws and competition authorities of each Member State.

The challenges of ASEAN Competition Law and Policy

However, although the guidelines are one of mechanisms for competition protection which expects to further encourage an improvement of regional market integration, but in fact of lack of a supranational institute and uniform competition law in regulating anticompetitive conducts across the region will obstruct the process of

ASEAN market liberalisation and integration. Accordingly, it will be the challenges of ASEAN competition law and policy when it regulates anticompetitive conducts and market restrictions in the regional level.

1. Diversity of domestic competition laws

Even though, each of member state stipulates its competition law relating the abuse of dominance by prohibiting dominant firms using their market power to establish a monopoly, but the determination of what is a dominant position varies significantly among different countries (Kala, Rajah and Tann, 2014 : 2). Despite a market share is a basic element of a dominance but some countries stipulate various levels of a dominant position or a market share threshold. For example, Thai Trade Competition Act refers to an undertaking which enjoys a market share in excessing of at least 75 per cent and has a sale volume of at least 1,000,000,000 Baht would be a dominant position if the undertaking was one of the top 3 business operator, or if the undertaking was individual business operator holding a market share of at least 50 per cent including a sales volume of at least 1,000,000,000 Baht, it would be a dominant position (Trade Competition Act, 1999 : art. 30). While Vietnam law presumes a dominance when a firm has occupied at least 30 per cent of market share in the relevant market (The Competition Law No. 27/2004/QH11, 2004 : art 11).

Moreover, taking into account of what is a conduct that amount to an abuse of dominance by refusal to deal also differing from state to state (Kala, Rajah and Tann, 2014 : 2). As examples, Indonesia specifies that any business activities that prevent other potential competitors from entering the relevant market; limit markets and technology development are deemed as the abuse of dominant undertaking (Law No. 5 of 1999 : art. 25(2)). Meanwhile the CCS guidelines under Section 47 of Singapore Competition Act stipulates that being a dominant firm which achieve or maintain the dominant position through conduct arising from successful innovation or economies of scale per se is not regard as an abuse. It will constitute an abuse if a dominant undertaking strengthens its position by unduly restricting competition; subsequently, it damages consumer interests (CCS Guidelines on the Section 47 Prohibition, 2006). Thailand is not specify the abusive conduct it thus can be assumed from Article 29 which mentions that *"any act that is not free and fair competition and has the effect of destroying, impairing, obstructing, impeding or restricting business operation of other business operators..."* (Trade Competition Act, 1999). However, this provision is very broad which will create a difficulty in interpretation because if it is broadly interpreted every conduct will be illegal as an abuse; on the other hand, if the interpretation is strict it will be difficult to deal with an abusive conducts of a dominant firm.

However, although ASEAN has guidelines on the competition policy, but the guidelines are just only the non-binding documents (Pornchai and Nguyen, 2012 : 14). In fact, there is a regional cooperation

which aims to harmonise competition laws and policy of all member states but it is challenging to achieve that aim because of the non-binding basis of the guidelines (Pierre, 2009 : 114). Consequently, it would not provide commitments to the member states transforming their approaches toward the creation of ASEAN market integration (Pierre, 2009 : 114). On the contrary, the EU Treaty such the TFEU is a binding agreement between EU member countries also the members can adopt the treaty as their legislations (Europa Union, 2014); it subsequently does not have diversity among laws of the EU member states.

2. Lack of supranational body

Lacking supranational institution which has authority over local organs of ASEAN countries would not accommodate effective development of competition laws and policy and regional market integration. Even it has AEGC which can be treated as a main authority of ASEAN[‡], but it was established as just a forum for discussing and exchanging policy experiences among ASEAN countries (AEC Blueprint, 2008 : para. 41). It is powerless in enforcing competition rules and investigating any anticompetitive conducts and restrictions across the region. On this circumstance, it could be doubted that how to handle

[‡] The ASEAN Experts Group on Competition (AEGC) is set up upon the AEC blueprint. By the action plans in the blueprint needed the agencies as a regional forum for exchanging of information, experiences and cooperation on competition policy.

with the case that needed ruling or making a decision as ordering a compulsory licensing such an abuse of a dominant position by refusing to license IPRs. If the answer left to national jurisdiction it would be risen the question of extraterritorial enforcement. On the side of the EU, apart from the Court of Justice of the European Union which is the institution to settle disputes it further has the EU Commission which is not only work in a policy level[2] to maintain and facilitate a fair and free market among the EU countries, but it is also able to investigate anticompetitive practices which are initiated to the Commission and then make a decision (European Commission, 2014). It could be stated that the EU Commission has a wide range of inspection and enforcement powers.

3. Dispute resolution mechanisms

By the context of ASEAN, it is not a supranational organisation (Luu, 2012 : 320). According to the principles of ASEAN cooperation is that its member states shall not interfere in the internal affairs of others and shall enhance consultations on matters seriously affecting the common interest of ASEAN (ASEAN Charter, 2007: art. 2). As for the settlement of disputes which may arise, the Charter desires that ASEAN shall maintain and constitute dispute settlement mechanisms in all fields of ASEAN cooperation and all disputes will be

[2] Basically, the Court of Justice of the European Union is seemed an appellate body when the case has passed from the General Court or Court of First Instance.

resolved peacefully through consultation and negotiation (ASEAN Charter, 2007: art. 22). Namely, there have three dispute settlement mechanisms. The first is the 1976 Treaty of Amity and Cooperation in Southeast Asia (TAC), or is known as ASEAN Way if disputes do not concern the interpretation or application of any ASEAN instrument (ASEAN Charter, 2007: art. 24(2)). The second is the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism (Vientiane Protocol) if disputes concern the interpretation or application of ASEAN economic agreements and do not specifically provide in otherwise (ASEAN Charter, 2007: art. 24(3)). Basically, the disputes under Vientiane Protocol will be settled through consultation at the first place before referring to panel and appellate body if it cannot be settled through amicable method. The last is the 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanism (DSM Protocol) if disputes do not fall within the TAC or the Vientiane Protocol such as concerning the interpretation or application of ASEAN Charter or any ASEAN instrument (DSM Protocol, 2010 : art. 2). Besides, if disputes whether they relate economic or not remain unresolved the Charter stipulates to refer them to ASEAN Summit for its decision (ASEAN Charter, 2007: art. 26).

According to the foregoing settlement mechanisms it would assume that if the disputes of an abuse of a dominant position by refusing to license arises ASEAN Way will be used for making a solution. The decision which based on ASEAN Way would be made by consultation and consensus because the principles of the TAC are non-interference in the internal affairs of other states and settling disputes by peaceful (Treaty of Amity and Cooperation in Southeast Asia, 1976 :

art. 2; Elizabeth, 2013 : 133). Some comments on this approach regard the discussion to reach a general consensus as an informal conduct when comparing to the judgement which results from court (Michael, 2008 : 231). In other words, ASEAN Way is less legalised than the western legal institutions (Michael, 2008 : 231). Based on values of ASEAN diplomacy, the principles of ASEAN Way is premised to respect sovereignty of each other, uphold non-intervention in the internal affairs of one another (Elizabeth, 2013 : 133). It is questionable that whether the implementation of one competition law over another territory is intruding into the other States'; subsequently, it is inconsistent with the principle of ASEAN Way.

It has a further consideration that whether ASEAN Way is appropriate to resolve the problem of the refusal to license by a dominant undertaking that needs to order compulsory licensing which may regard as intervention of national IP law of others. Some states that if encouraging ASEAN moving toward deeper economic integration whether it could study to the EU as a model which illustrates that its supranational institutions are the independent organ of national bureaucracies that advance regional economic integration (Lin, 2010 : 834). It could be further supported that foreign investors expect deeper regional integration which develops through a system of judicial decision rather than diplomatic resolution (Lay, 2004 : 935). Comparing with the EU, the ASEAN Charter gives responsibility of the disputes resolution to the ASEAN Summit which is the main forum for making decision based on consultation and consensus (ASEAN Charter, 2007 : art. 20). Nonetheless, it is unclear in the Charter that whether the

ASEAN Summit was an appellate body or was a key role in enforcing a decision (Michael, 2008 : 235).

As long as the ASEAN does not establish a supranational body and uniform rules for dealing with anticompetitive conducts and disputes resolution that is used on the same approach through all member states. The ASEAN competition law and policy is implausible to lead the region achieving the goal of regional economic liberalisation and integration. Some scholar further opines that if ASEAN disregards to set up such a formal institution like the EU Commission or the Court of Justice of the European Union. ASEAN will either leave regional investors with unpredictable remedy to disputes, or will disincentive investment (William, 2007 : 456). As a result, it will stifle economic development in the region. Apart from the abusive conduct as the refusal to license IPRs the region will face with complex and contentious on other matters due to the dynamic global.

In short, even though the ASEAN Charter has improved resolution system in some way, but it is neither sufficient to cope with a contentious problem of competition which may arise, nor effective to settle disputes in the long run.

4. Extraterritorial enforcement

As aforesaid, ASEAN is absent a uniform competition law; therefore, anticompetitive conducts and restrictions will be regulated by domestic competition laws of each member country. To apply each

competition law it has to response to the extraterritorial application of such laws that would have a problem in some degrees. In fact, some countries attempt to deal with cross border anticompetitive practices by exercising extraterritorial jurisdiction under the effect doctrine (Luu, 2012 : 294). Namely, to protect domestic undistorted market from anticompetitive practices that committed outside its territory the domestic competition law will be against foreign conducts if they seriously harm to internal trade (Haniff and Nasarudin, 2013 : 549; case U.S. v Aluminum Co. of America, 1945).

However, the application of the national competition law extraterritorially may create two issues of conflict. One concerns jurisdictional problems such as claims for State sovereignty, problem of collecting evidence, and enforcement of judgement. Another is the concern of a problem of non-tariff barrier to trade which may be contributed from excessive exercising of extraterritorial provision (Haniff and Nasarudin, 2013 : 549). It would be accepted that the enforcement of domestic competition law is not a simple matter. Some scholars remark that the exercising of extraterritorial may produce substantial conflicts between different jurisdictions according to commercial activities increasing globally and competition regimes are affected from beneficial conduct (Neil, 2008 : 267). It can be illustrated the conflicts across border as in *Westinghouse Electric Corporation v Rio Algom Ltd*. (case 617 F.2d 1248 , 1980) where Antitrust Division of Department of Justice (DOJ) applied Section 1 of the Sherman Act to control price-fixing cartel over Uranium producers of other countries. Some countries dissatisfied with this extraterritorial application of the US law that was

held that it used economic policy over another territory, also it was interference of other sovereignties; consequently, England created the Protection of Trading Interest Act 1980 to block the US legislation by hindering the discovery of documents and did not enforce judgments to another territory (Sakda, 2011 : 267).

To achieve regional economic integration through a true single market of ASEAN it could not deny that elimination or reduction of anticompetitive practices and restriction across border is a vital factor to support such an achievement. Indeed, removing anticompetitive conducts from a single market needs regional harmonisation of competition law, or in other words the occurrence of uniform competition law will drive the regional market integration rapidly. As well as it will overcome the conflicts that may occur from using the extraterritorial application of domestic competition laws.

Conclusion

As aforementioned, competition benefits to consumer interests and contribute to effective economic. Therefore, the subject matter is how to maintain a fair and free market in particular the regional level. The main mechanism is that effective controlling and regulating of anticompetitive conducts and restrictions in the single market. It consequently achieves regional economic integration. When regarding to ASEAN which lacks of either uniform competition law or supranational body that are vital mechanisms to support market liberalisation and

integration; as a result, it would be difficult to achieve the goal that set forth in ASEAN economic policy. However, although the ASEAN Regional Guidelines on the Competition Policy attempts to achieve the goal of transforming ASEAN into a competitive economic region, but the guidelines per se promote all Member States develop and create their competition laws consistent to ASEAN competition policy rather than designing itself to be an uniform competition law. Hence, the disputes of anticompetitive conducts which may arise will be resolved by local laws of each country which are diverse and will face the conflicts of extraterritorial application of domestic law and enforcement of foreign judgement. This can be reflected from the abusive conduct of the dominant undertaking by refusing to license which needs ruling or order a compulsory licensing which is an effective remedy (cases C-6-7/73 Commercial Solvents, 1974; C-241-242/91 Magill, 1995; IMS Health, 2004; Steven, 2011 : 119-120). It is inevitable for such that problem which will arise in ASEAN single market in the near future. Therefore, it has to pay attention on this concern how such of abusive conduct can be resolved in the regional level and how the lacks of supranational body and regional competition law will lead the achievement to the ASEAN region market and economic integration.

In so far Member States pursue their competition law and their own interest rather than harmonise the same competition rules. This is the challenge issue which creates significant difficulty for the use of the ASEAN Competition law and policy as a mechanism to facilitate regional market integration. For the effective development of the ASEAN single market, it needs regional uniform law applying to all member countries,

as well as, a supranational body for settling dispute across the region. Consequently, it will help to protect a fair competition within the region and lead to strong ASEAN economic integration in a long run.

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