CROSS-BORDER PLATFORM MERGERS IN ASEAN'S DIGITAL MARKET

Mergers involving online platform companies may generate innovation and consumer welfare. However, platform mergers raise concerns about the increasing market power of the merged platforms resulting from network effects and big data, particularly when these mergers take place in multiple jurisdictions. This article examines how cross-border mergers in ASEAN's digital market should be assessed. The 2018 Grab–Uber merger in several ASEAN Member States ("AMSs") is discussed to analyse merger control regulations in AMSs that reviewed the Grab–Uber merger differently. This article argues that ASEAN's merger control regulations need to be harmonised.

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I. Introduction

1 Digital platform companies are remarkably active in merger and acquisition activities, and constantly search for relevant start-ups to be merged or acquired for various reasons.[1] Platform mergers may be conducted to improve the quality of the acquirer's products by securing new technologies developed by start-ups to be incorporated into these products. Such mergers may generate innovation and consumer welfare that can be regarded as pro-competitive.

2 Platform mergers, however, may have anti-competitive effects when they are intended to reduce competition. By acquiring start-ups that challenge its products, the acquirer may successfully eliminate existing or potential competitors. Such mergers may also raise the ability of the merged platform in collecting and processing big data of their users that can be significant in increasing the market power of the merged platform due to network effects. Accordingly, competition authorities should closely scrutinise platform mergers, particularly when they involve multiple jurisdictions, either at the international market

1 Elena Argentesi *et al*, "Merger Policy in Digital Markets: An *Ex Post* Assessment" (2020) 17(1) *Journal of Competition Law & Economics* 95 at 98.

or a regional one, such as the Association of Southeast Asian Nations ("ASEAN") market.

3 This article examines how cross-border mergers in ASEAN's digital market should be assessed. The 2018 merger between two ride-hailing platforms, Grab and Uber, in several ASEAN Member States ("AMS") is discussed to analyse merger control regulations ("MCRs") in ASEAN. In the absence of a regional merger control regime in ASEAN, the Grab–Uber merger was reviewed by national competition authorities that approached the merger differently. This article argues that ASEAN's MCRs need to be harmonised in order to be in line with the goal of economic integration in ASEAN, particularly in the digital age.

4 Part II of this article addresses several issues to be considered by competition authorities and courts in assessing platform mergers. The Grab–Uber merger is not merely a platform merger but also a complex cross-border merger in ASEAN. Thus, Part III discusses MCRs in ASEAN including ASEAN's competition laws, divergence of MCRs, and the Grab–Uber merger in several AMSs. The Grab–Uber merger also highlights the issue of harmonisation of MCRs in ASEAN. Hence, this issue is discussed in Part IV. Part V concludes.

II. Assessment of platform mergers

5 In assessing whether or not platform mergers have anti-competitive effects in relevant market(s), competition authorities and courts in AMSs should consider specific features of platform enterprises including multi-sided markets, network effects and big data in digital markets along with the issue of cross-border mergers.

A. Multi-sided markets

6 Since the last two decades, platform companies have changed people's behaviour in consuming and sharing information, goods and services. By considering the markets they serve, platform companies are different from each other. Platforms can be categorised as search engines (*eg*, Yahoo! and Google), ride-hailing (*eg*, Uber and Grab), e-commerce (*eg*, Amazon and Alibaba), social networks (*eg*, Facebook and TikTok), operating systems (*eg*, Windows and Android), video-streaming (*eg*, YouTube and Netflix) and many others.

7 Platform companies serve and connect two or more distinct groups of users[2] that are dependent on each other.[3] For example, Google connects advertisers and users of online search engines; Facebook facilitates interaction between advertisers and users of social media; Grab brings together drivers, passengers, retailers and consumers. The demand for the platform product by one user group is dependent on the demand for the platform product by another user group because of externalities between these two distinct user groups.[4] Accordingly, platform companies operate in two-sided or multi-sided markets and they are termed as two-sided platforms or multi-sided platforms ("MSPs").

8 The assessment of the anti-competitive effects of platform mergers begins with a market definition that consists of relevant product market and relevant geographic market. A critical issue in defining the relevant product market(s) of a platform is whether the platform is categorised as a multi-sided market or it is a one-sided market. In other words, the question is whether the platform offers one product to all user groups; or it offers distinct products to users in its different sides. There is no consensus among scholars, courts and competition authorities in addressing this issue.

9 Rochet and Tirole in their seminal papers consider multi-sidedness not merely on the existence of distinct groups in a platform since all markets connect a group of sellers and a group of buyers.[5] According to Rochet and Tirole, a two-sided market is "one in which the volume of transactions between end-users depends on the structure and not only on the overall level of the fees charged by the platform".[6]

10 For example, a platform charges sellers $1.00 on one side and buyers $0.00 on another side for transactions concluded through the platform, having the aggregate price level at $1.00. By modifying the

2 Michael Katz & Jonathan Sallet, "Multisided Platforms and Antitrust Enforcement" (2018) 127 *Yale Law Journal* 2142 at 2143.

3 David S Evans & Richard Schmalensee, "The Industrial Organization of Markets with Two-Sided Platforms" (2007) 3 *Competition Policy International* 151.

4 David S Evans & Richard Schmalensee, "Applying the Rule of Reason to Two-Sided Platform Businesses" (2017–2018) 26 *University of Miami Business Law Review* 1 at 5.

5 Jean-Charles Rochet & Jean Tirole, "Two-Sided Markets: A Progress Report" (2006) 37 *The RAND Journal of Economics* 645; Jean-Charles Rochet & Jean Tirole, "Platform Competition in Two-Sided Markets" (2003) 1 *Journal of the European Economic Association* 990.

6 Jean-Charles Rochet & Jean Tirole, "Two-Sided Markets: A Progress Report" (2006) 37 *The RAND Journal of Economics* 645 at 648; Jean-Charles Rochet & Jean Tirole, "Platform Competition in Two-Sided Markets" (2003) 1 *Journal of the European Economic Association* 990.

structure of prices but keeping the overall price level constant at $1.00, the platform charges sellers $1.25 and gives buyers a discount of $0.25. If this structure of pricing affects the volume of transactions, then the platform will be regarded as a two-sided market. Conversely, if the modified structure of prices does not vary the transaction volume, then the platform will be categorised as a single-sided market.

11 Rysman defines two-sided markets as "one in which (1) two sets of agents interact through an intermediary or platform, and (2) the decisions of each set of agents affects the outcomes of the other set of agents, typically through an externality".[7] A similar view has been provided by Evans and Schmalensee that also highlights the crucial existence of the platform to connect the two groups of users and to capture the benefits resulted from their interaction.[8] Usually, a user group on one side is monetised (such as advertisers) and the other user group on the opposite side is non-monetised (such as users of search engines).

12 A classic example of two-sided markets is the newspaper industry. The US Supreme Court explained in the case of *Times-Picayune Publishing Co v United States* that "every newspaper is a dual trader in separate though interdependent markets; it sells the paper's news and advertising content to its readers; in effect, that readership is in turn sold to the buyers of advertising space".[9] This view is consistent with the principle of substitution in competition law that includes two products in the same relevant product market if potential buyers consider that these products are substitutes.[10] Apparently, reading the paper's news and buying advertising are not substitutes.

13 The German Cartel Office (*Bundeskartellamt*) employs a different approach in defining multi-sidedness. According to the *Bundeskartellamt*, matching platforms that offer direct interaction between two or more user groups as the actual product can be defined as one-sided markets.[11] Under this definition, a hotel booking platform that connects hotels and travellers for the purpose of direct interaction in the reservation of hotel rooms will be seen as a one-sided market. This approach, however, cannot

7 Marc Rysman, "The Economics of Two-Sided Markets" (2009) 23 *Journal of Economic Perspective* 125 at 125.

8 David S Evans & Richard Schmalensee, "The Industrial Organization of Markets with Two-Sided Platforms" (2007) 3 *Competition Policy International* 151.

9 345 US 594, 610 (1953).

10 Michael Katz & Jonathan Sallet, "Multisided Platforms and Antitrust Enforcement" (2018) 127 *Yale Law Journal* 2142 at 2154.

11 *Working Paper – The Market Power of Platforms and Networks* (Bundeskartellamt, June 2016) at p 5.

be applied if user groups can find substitutes offered by the platform.[12] Accordingly, whether or not a platform is defined as a MSP should be decided on a case-by-case analysis.

14 Another critical issue in assessing platform mergers is whether a merger involves one market or two markets. For example, in a merger between two hotel-booking platforms, the question is whether the relevant market(s) would be a market for hotel-booking services (single market); or a market for hotel-booking services to hotels and a market for hotel-booking services to travellers (two markets). Filistrucchi and others suggest that in such a merger a single market encompassing the two sides of a platform should be defined.[13] Thus, under this approach the relevant market for this merger would be a market for hotel-booking services offered to hotels on one side and travellers on the opposite side. Accordingly, the competitive conditions on both sides of the platform would be assessed jointly.

15 In contrast, Katz and Sallet define the relevant market for multi-sided platforms as "multiple separate, yet deeply interrelated, markets".[14] Under this approach, therefore, two markets would be defined in the above merger case. This approach carefully considers the linkage between the two markets and fully recognises that users on these distinct markets have different interests, and that the competitive conditions on both markets are different.[15]

16 Evans and Schmalensee also reject the single-market approach that restricts market definition to the market on which the alleged anti-competitive conduct occurs and thus, ignores the competitive effects on the opposite market.[16] This view considers that the benefits received by each group in consuming the product are not interchangeable although the product itself is subject to competition with products offered by other matching platforms. Ignoring the competitive effects of the alleged

12 *Working Paper – The Market Power of Platforms and Networks* (Bundeskartellamt, June 2016) at p 5.

13 Lapo Filistrucchi *et at* "Market Definition in Two-Sided Markets: Theory and Practice" (2014) 10 *Journal of Competition Law & Economic* 293 at 301–302.

14 Michael Katz & Jonathan Sallet, "Multisided Platforms and Antitrust Enforcement" (2018) 127 *Yale Law Journal* 2142 at 2145.

15 Michael Katz & Jonathan Sallet, "Multisided Platforms and Antitrust Enforcement" (2018) 127 *Yale Law Journal* 2142 at 2145.

16 David S Evans & Richard Schmalensee, "Applying the Rule of Reason to Two-Sided Platform Businesses" (2017–2018) 26 *University of Miami Business Law Review* 1 at 3.

conduct on one market would result in a false conclusion that condemns pro-competitive conduct or clear anti-competitive conduct.[17]

17 In addition, the single-market approach cannot recognise competitive conditions on both sides of the platform that can prevent the platform to raise prices on one or both sides.[18] To illustrate, if the platform increases transaction fees for buyers, then buyers will shift their transactions to other platforms. As a result, sellers will also depart to other platforms. Thus, the fees the platform could charge will decrease. The competitive condition on the seller's side, therefore, prevents the platform from earning profits by increasing transaction fees for buyers. Nevertheless, the relationship between the alleged conduct and the cross-side competitive conditions will vary in every case. Accordingly, a case-by-case analysis should be conducted.[19]

18 For example, in the GIMD–Socpresse merger,[20] the European Commission employed the two-market approach by defining a market for magazine readers and a market for advertisers. Nonetheless, in the Google–Doubleclick merger,[21] the Commission applied the single-market approach as it defined online advertising as the relevant market instead of distinct markets for advertisers and web viewers.

B. Network effects

19 Network effects arise when the value of a product increases with the increase in its usage. There are direct and indirect network effects. Direct network effects exist when a product is increasingly valuable for a specific user group since the number of users in the same group grows.[22]

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17 David S Evans & Richard Schmalensee, "Applying the Rule of Reason to Two-Sided Platform Businesses" (2017–2018) 26 *University of Miami Business Law Review* 1 at 9.

18 David S Evans & Richard Schmalensee, "Applying the Rule of Reason to Two-Sided Platform Businesses" (2017–2018) 26 *University of Miami Business Law Review* 1 at 13.

19 David S Evans & Richard Schmalensee, "Applying the Rule of Reason to Two-Sided Platform Businesses" (2017–2018) 26 *University of Miami Business Law Review* 1 at 13.

20 Commission Decision 2004/C 265/03 of 16 June 2004 declaring a concentration to be compatible with the common market (Case No COMP/M.3420 GIMD/SOCPRESSE (4064)) according to Council Regulation (EEC) No 4064/89.

21 Commission Decision of 11 March 2008 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case No COMP/M.4731 Google/Doubleclick).

22 Kenneth A Bamberger & Orly Lobel, "Platform Market Power" (2017) 32 *Berkeley Technology Law Journal* 1051 at 1068.

For example, the value of a mobile phone network for its users increases as more people use the same network.

20 Discussions of network effects in the context of platforms or multi-sided markets refer to indirect network effects, by which the value of a product for a user group increases because of the growing number of users in another interdependent group.[23] For instance, the service provided by a ride-sharing platform is increasingly valuable for drivers as more riders use the platform.

21 Some platforms, however, pose both direct and indirect network effects. Social networks such as Facebook and Instagram are more valuable for users on one side since the number of users increases (direct network effects). On the other side, the growing number of users makes the platforms more attractive for advertisers (indirect network effects).

22 The specific feature of indirect network effects raises a concern for market entry barriers. A new entrant faces high barriers to entry since it has to get a significant number of users on both sides of the platform to be successful in a multi-sided market.[24] Evans notifies that platforms have "a chicken-and-egg problem when they start as a result of what they are trying to accomplish".[25] Such a situation can be described as follows: a ride-sharing platform provides services for drivers and riders. On one side, drivers will use the platform if a significant number of riders use it. On the opposite side, riders will consider the platform if a significant number of drivers use it. Accordingly, a new entrant has to employ a good strategy to attract both user groups in significant numbers in order to make the platform valuable for both of them.

23 Next, indirect network effects can trigger "feedback loops" referring to the circular process, [26] in which a growing number of non-monetised users on one side will attract more monetised users on the opposite side of the platform and thus, the platform will receive more financial resources. In turn, the platform will improve the service quality offered to non-monetised and monetised users, which will attract more users on both sides of the platform.

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23 Kenneth A Bamberger & Orly Lobel, "Platform Market Power" (2017) 32 *Berkeley Technology Law Journal* 1051 at 1068.

24 Kenneth A Bamberger & Orly Lobel, "Platform Market Power" (2017) 32 *Berkeley Technology Law Journal* 1051 at 1070.

25 David S Evans, "Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-Based Firms" (2016) 753 *Coase-Sandor Working Paper Series in Law and Economics* 1.

26 Andres V Lerner, "The Role of 'Big Data' in Online Platform Competition" (26 August 2014) at pp 19 and 40.

24 Moreover, indirect network effects can exhibit switching costs, in which consumers must bear direct costs to collectively switch away from the incumbent platform and to gain benefits from another platform.[27] Such switching of costs can lock-in consumers to the incumbent platform that can lead to monopolisation of the market. Even when switching costs are low and consumers multi-home or use other platforms with similar products, such consumers may be reluctant to switch away from the incumbent platform if other platforms do not bring incremental innovation.

25 In assessing the competitive constraint of a platform merger, however, the specific features of consumer lock-in and indirect network effects must be considered along with the interdependent character of distinct groups on all sides of the platform.[28] Such interdependencies can result in pro-competitive constraints and increase consumer welfare as the platform can limit price increase on the non-monetised side to retain demands on the monetised side. They can also promote incremental innovation offered by the incumbent platform to retain and attract all user groups on all sides of the market. For this reason, it can be understood why online platforms are aggressive in acquiring new start-ups that bring incremental innovation and which may potentially challenge their products.

26 Notwithstanding the above pro-competitive effects, the elimination of existing and potential competitors will eventually reduce competition and potentially increase the market power of the merged platform. It has been observed that platforms with strong indirect network effects induce a high level of market concentration or even tight oligopolies in the case of matching platforms.[29] The assessment of platform mergers, therefore, needs to consider all relevant issues relating to network effects.

C. Big data

27 The emergence of digital platforms that can easily collect and process their users' data and information has generated massive amounts of data known as big data. The term "big data" stresses on the volume

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27 Joseph Farrell & Paul Klemperer, "Coordination and Lock-In: Competition with Switching Costs and Network Effects" in (2007) 3 *Handbook of Industrial Organization* 1970 at 1974.

28 Kenneth A Bamberger & Orly Lobel, "Platform Market Power" (2017) 32 *Berkeley Technology Law Journal* 1051 at 1071.

29 *Working Paper – The Market Power of Platforms and Networks* (Bundeskartellamt, June 2016) at pp 8–9.

rather than on the content of the data. The content can be varied, such as internet users' behaviour or preferences, information on weather, location or markets, *etc*.[30] The vast amounts of data can be collected by digital and non-digital platforms but only specific digital platforms that offer speed and accuracy can process and analyse the data for it to be valuable information. Accordingly, several characteristics of big data are commonly termed with "four Vs", which are volume, velocity, variety and veracity.[31]

28 Big data plays an important role in improving the quality of platforms' products. Stucke and Grunes observe the correlation between the usage of big data and the improved quality due to "learning-by-doing" network effects.[32] According to Stucke and Grunes, "as more people use the search engine and the more searches they run, the more trials the search engine's algorithm has in predicting consumer preferences, the more feedback the search engine receives of any errors, and the quicker the search engine can respond with recalibrating its offerings".[33] Thus, big data can create feedback loops that have the potential to reduce competition in the market.

29 Online platform mergers involving big data raise concerns on the ability of the merged platforms in increasing their market power and practicing new anti-competitive conduct. Considering the above "learning-by-doing" network effects in multi-sided markets, such mergers can induce high barriers to entry. To compete with the merged platforms, actual or potential competitors have to possess big data. There are possible strategies in acquiring data: either by a "user-to-data" strategy, or a "data-to-user" strategy or by using both strategies.[34]

30 A competitor may employ a "user-to-data" strategy, in which the competitor develops an innovative product to attract vast amounts of users, whose data are valuable to improve the quality of the product.[35] Alternatively and/or consecutively, the competitor may employ a "data-to-user" strategy, in which the competitor makes significant investments

30 Daniel L Rubinfeld & Michal S Gal, "Access Barriers to Big Data" (2017) 59 *Arizona Law Review* 339 at 341.

31 Daniel L Rubinfeld & Michal S Gal, "Access Barriers to Big Data" (2017) 59 *Arizona Law Review* 339 at 345.

32 Maurice E Stucke & Allen P Grunes, *Big Data and Competition Policy* (Oxford University Press, 2016) at p 174.

33 Maurice E Stucke & Allen P Grunes, *Big Data and Competition Policy* (Oxford University Press, 2016) at p 175.

34 Ben Holles de Peyer, "EU Merger Control and Big Data" (2017) 13(4) *Journal of Competition Law & Economics* 767 at 771.

35 Ben Holles de Peyer, "EU Merger Control and Big Data" (2017) 13(4) *Journal of Competition Law & Economics* 767 at 771.

to acquire data from another competitor or a data broker that are significant to improve the quality of the product in order to attract more users and to create competitive constraint for the merged platform.[36]

31 The Organisation for Economic Cooperation and Development ("OECD") also noted that markets involving big data can cause a "winner-takes-all" phenomenon as a result of market concentration.[37] Conversely, Rubinfeld and Gal identify access barriers to big data including technological, legal and behavioural barriers, besides the character of data that is "unique and not easily replicable".[38]

32 Yet, the above concerns on high entry barriers are debatable. Tucker and Wellford claim that big data does not exhibit high entry barriers by considering specific features of big data that are non-exclusive and non-rivalrous.[39] Data is not exclusive as competitors may gather, store and manage data by themselves or by buying it from another competitor or a data broker. The various contents of big data may be used by a wide range of markets. Each market needs a specified type of data that is different from the other. Thus, users of big data in one market do not compete with users of big data in other markets.

33 De Peyer asserts that entrant platforms usually employ a "user-to-data" strategy instead of a "data-to-user" strategy.[40] This means that an innovative product is more significant than the possession of big data to effectively compete with the merged platform. Big data may become a valuable asset only if it can improve the quality of the product offered by the entrant platform.

34 In the Google–DoubleClick merger, the US Federal Trade Commission ("FTC") cleared the merger as it found that the merging parties' data did not constitute an entry barrier in the digital advertising market, since "neither the data available to Google, nor the data available to DoubleClick, constitute[d] an essential input to a successful online advertising product".[41]

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36 Ben Holles de Peyer, "EU Merger Control and Big Data" (2017) 13(4) *Journal of Competition Law & Economics* 767 at 771.

37 *Data-Driven Innovation for Growth and Well-Being: Interim Synthesis Report* (OECD, October 2014) at p 7.

38 Daniel L Rubinfeld & Michal S Gal, "Access Barriers to Big Data" (2017) 59 *Arizona Law Review* 339 at 357.

39 Darren S Tucker & Hill B Wellford, "Big Mistakes Regarding Big Data" (2014) 14 *Antitrust Source* 1 at 6–9.

40 Ben Holles de Peyer, "EU Merger Control and Big Data" (2017) 13(4) *Journal of Competition Law & Economics* 767 at 772–773.

41 "In the matter of Google/DoubleClick F.T.C. File No. 071-0170: Dissenting Statement of Commissioner Pamela Jones Harbour" <https://www.ftc.gov/

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35 In assessing the Facebook–Whatsapp merger, the EU Commission recognised the risk of possessing big data in competition. The Commission approved the merger on the ground that a number of competitors in the digital advertising market possessed and collected their own users' data.[42] Moreover, commissioner Margrethe Vestager pointed out the approach employed by the Commission in examining big data mergers: "We shouldn't be suspicious of every company which holds a valuable set of data. But we do need to keep a close eye on whether companies control unique data, which no one else can get hold of, and can use it to shut their rivals out of the market. That could mean, for example, data that's been collected through a monopoly."[43]

36 While data is non-exclusive and non-rivalrous, access barriers to unique data should be considered in the assessment of platform mergers involving big data. The OECD has suggested competition authorities to "carefully examine on a case-by-case basis to what extent business performance depends on the ability to collect data; evaluate the degree of substitutability between different datasets; and identify the amount of data required for an entrant to compete".[44]

D. Cross-border mergers

37 The number of countries adopting competition laws including merger control rules has increased sharply. The Global Competition Review reported that more than 200 countries across the world have adopted competition laws and established competition enforcement authorities as well.[45] AMSs are among these countries. It can be assumed that the significance of regulating competition in the market by every country has been increasingly recognised.

38 In the meantime, economic globalisation along with trade and investment liberalisation has increased cross-border mergers that

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sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf> (accessed 18 August 2022).

42 European Commission, "Mergers: Commission Approves Acquisition of WhatsApp by Facebook" *European Commission* (3 October 2014) <http://europa.eu/rapid/press-release_IP-14-1088_en.htm> (accessed 18 August 2022).

43 Margrethe Vestager, "Making Data Work for Us" *European Commission* (9 September 2016) <https://web.archive.org/web/20200221215700/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/making-data-work-us_en> (accessed 18 August 2022).

44 *Big Data: Bringing Competition Policy to the Digital Era* (OECD, 29–30 November 2016) <https://one.oecd.org/document/DAF/COMP/M(2016)2/ANN2/FINAL/en/pdf> (accessed 18 August 2022).

45 *Handbook of Competition Enforcement Agencies 2016* (Global Competition Review, 2016) at p 4.

involve multi-jurisdictions. A cross-border merger takes place when two companies from different jurisdictions combine their assets and operations either by establishing a new company or by absorbing one of companies by the other company. For example, Grab (a Singaporean ride-hailing platform) acquired assets and operations of Uber (an American ride-hailing platform) in ASEAN's digital market in 2018. Such a merger can involve a local company and a foreign company (such as the Grab–Uber merger in Singapore) or two foreign companies (such as the Grab–Uber merger in Indonesia, the Philippines and Vietnam).

39 The proliferation of merger control regulations and cross-border mergers[46] has increased concerns about divergence of regulations and contradictory decisions among jurisdictions.[47] Such concerns can be found in the Grab–Uber merger that was differently examined by competition authorities in several AMSs. It has been argued that "successive reviews of the same merger by eight or ten different national authorities could delay or even defeat a merger that is substantively unobjectionable".[48] Single competition authority cannot handle this issue exclusively by itself alone.

40 In order to address cross-border competition enforcement, international co-operation among competition authorities plays a fundamental role. The OECD has recommended that international co-operation in the competition field employs both negative comity and positive comity.[49] Negative comity involves a country's consideration of how to prevent its laws and law enforcement actions from harming another country's important interests.[50] Positive comity involves a request by one country that another country undertakes enforcement activities in order to remedy an allegedly anti-competitive conduct that is substantially and adversely affecting the interests of the referring country.[51] International co-operation requires similar rules and procedures. Consequently, it leads to the issue of harmonisation of merger control rules among jurisdictions.

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46 *World Investment Report 2019: Special Economic Zones* (United Nations Conference on Trade and Development, 2019) <https://unctad.org/system/files/official-document/wir2019_en.pdf>.

47 Thomas K Cheng, "Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law" (2012) 12 *Chicago Journal of International Law* 433 at 434.

48 Daniel K Tarullo, "Competition Policy for Global Markets" (1999) 2 J Int'l Econ L 445.

49 *Challenges of International Co-operation in Competition Law Enforcement* (OECD, 2014) at p 13.

50 *Challenges of International Co-operation in Competition Law Enforcement* (OECD, 2014) at p 13.

51 *Challenges of International Co-operation in Competition Law Enforcement* (OECD, 2014) at p 13.

III. ASEAN merger control regulations

A. ASEAN Economic Community

41 Since 2015, ASEAN has transformed into the ASEAN Community. Unlike the EU, the ASEAN Community is not a supranational entity but a legal entity consisting of three pillars: the ASEAN Security Community, the ASEAN Economic Community ("AEC") and the ASEAN Socio-Cultural Community.[52] The AEC aims to "implement economic integration initiatives" to create a single market across AMSs.[53] The AEC Blueprint 2015 adopted in 2007 sets out the AEC as a single market and production base, a highly competitive economic region, a region of fair economic development, and a region fully integrated into the global economy.

42 Following the establishment of the AEC in 2015, the AEC Blueprint 2025 was adopted, which succeeded the AEC Blueprint 2015. The AEC Blueprint 2025 "will not only ensure that the ten AMSs are economically integrated, but are also sustainably and gainfully integrated into the global economy, thus contributing to the goal of shared prosperity".[54]

43 The AEC Blueprint sets out Competition Policy and Law to play a fundamental role in the achievement of economic integration and a competitive economic region in the AEC. Accordingly, when the AEC was launched in 2015, nine out of ten AMSs adopted competition laws. Indonesia and Thailand became the first in the region to introduce competition laws in 1999. Competition laws were adopted by Singapore and Vietnam in 2004, followed by Malaysia in 2010; and just before the AEC was launched, Brunei, Lao PDR, Myanmar and the Philippines enacted competition laws in 2015. Cambodia finally adopted its competition law in October 2021.

44 In general, competition laws in ASEAN have been similar. All countries have provisions on anti-competitive agreements and abuse of dominance. Only Malaysia has no MCR, whereas Indonesia, Thailand and Vietnam do not regulate leniency programs. Nevertheless, the details

52 *The ASEAN Charter* (ASEAN Secretariat, 2007) <http://www.aseansec.org/AC.htm.> (accessed 15 August 2021).

53 *ASEAN Economic Community Blueprint* (ASEAN Secretariat, 2008) <http://asean.org/wp-content/uploads/archive/5187-10.pdf> (accessed 15 August 2022).

54 *ASEAN Economic Community Blueprint* (ASEAN Secretariat, 2008) <http://asean.org/wp-content/uploads/archive/5187-10.pdf> (accessed 15 August 2021).

of each category are different. This section discusses the divergence of MCRs in ASEAN.

B. Divergence of ASEAN merger control regulations

45 Although all of the AMSs have adopted competition law, only Indonesia, Singapore, Thailand, the Philippines and Vietnam have effective MCRs. Brunei, Cambodia, Lao PDR and Myanmar have not implemented their MCRs,[55] whereas Malaysia has not adopted MCRs.

46 Since the AEC is not a supranational body, there are no regional MCRs in ASEAN. As a result, MCRs in AMSs are divergent and each competition authority reviews cross-border mergers independently. There are numerous differences among MCRs in AMSs, in particular regarding the notification system, thresholds for notification and the substantive test to decide whether or not a merger is pro-competitive.

47 In Singapore, a merger notification to the Competition and Consumer Commission of Singapore ("CCCS") of the Ministry of Industry and Trade is voluntary. However, the CCCS requires self-assessments for pre- and post-merger by the merging parties that must be conducted in line with the merger guidelines provided by the CCCS.[56] In Indonesia, pre-merger notification to the Indonesian Competition Commission (Komisi Pengawas Persaingan Usaha – "KPPU") is voluntary, whereas post-merger notification within 30 days of the merger is mandatory.[57] In the Philippines, a proposed merger must be notified to the Philippine Competition Commission ("PCC"). Likewise, Vietnam adopts a mandatory pre-merger notification to the National Competition Commission ("NCC"). Whereas Thailand adopts pre-merger filling for mergers that result in a dominant position and post-merger notification to the Trade and Competition Commission ("TCC") for mergers that substantially lessen competition.

48 Singapore and Myanmar use a specific market share of the merged company as the threshold for merger notification. In Singapore, a merger should be notified to the CCCS if the combined market share reaches 40% or more; or between 20% to 40% when the concentration ratio of the three

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55 Udin Silalahi, "The Harmonization of Competition Laws towards the ASEAN Economic Integration" (2017) X *Journal Economic and International Law* 1 at 117.

56 Anna Maria Tri Anggraini, "Merger Control Based on Anti-Monopoly Law in Indonesia: Comparison in Some Asean Member States" (2022) 5(1) *Jurnal Meta Yuridis* 83.

57 Anna Maria Tri Anggraini, "Merger Control Based on Anti-Monopoly Law in Indonesia: Comparison in Some Asean Member States" (2022) 5(1) *Jurnal Meta Yuridis* 83.

largest companies is 70% or more. In contrast, Indonesia, Thailand and the Philippines use a specific asset or turnover value of a merged company as the threshold for merger notification. In Indonesia, a merger must be notified to the KPPU if the asset value reaches IDR2.5tn (approximately USD170m) or more; or the turnover value reaches IDR5tn (approximately USD340m) or more. Thailand sets a sales turnover of at least THB1bn as a threshold for merger notification. In the Philippines, the amount of the asset or turnover value of a merged company as a threshold for merger notification depends on its gross domestic product.[58] In Vietnam, under the 2004 Competition Law, a merger plan must be notified to the Vietnamese Competition and Consumer Authority ("VCCA") of the Ministry of Industry and Trade for investigation if the market share of the merged company will be 30% to 50%.[59] The Vietnamese Competition Council ("VCC") will decide whether or not a merger is pro-competitive. Under the 2018 Competition Law, Vietnam uses both a specific market share and a specific asset or turnover value; and the functions of the VCCA and the VCC are transferred to the NCC. Since the NCC has not been established, the VCCA and VCC are still active in enforcing competition law.

49 The substantive test to ban mergers adopted by Brunei, Cambodia, Singapore, Indonesia, the Philippines and Vietnam is the substantial lessening of competition ("SLC") test, whereas Myanmar employs the dominant position ("DP") test. Thailand employs both the DP test and the SLC test. Under the SLC test, a merger will be banned if it may result in a substantial lessening of competition in the relevant market. The DP test assesses the impact of a merger if a merged company will reach a dominant position in the relevant market.

50 The divergence of ASEAN MCRs can be an obstacle to achieving economic integration in the AEC. Moreover, in addressing cross-border transactions within ASEAN, the diversity will create uncertainty and make the ASEAN market unpredictable for investors or business actors engaging in business in ASEAN. The case of the Grab–Uber merger in several AMSs has shown problems resulting from the divergence of ASEAN MCRs.

58 Yungshin Jang & Gu Sang Kang, "Merger Review Regimes in the ASEAN Region and Case Analysis of Grab-Uber Merger" (2021) 11(39) *World Economy Brief* 1 at 2.

59 Yungshin Jang & Gu Sang Kang, "Merger Review Regimes in the ASEAN Region and Case Analysis of Grab-Uber Merger" (2021) 11(39) *World Economy Brief* 1 at 2.

C. The Grab–Uber merger

51 On 26 March 2018, Grab announced that it had acquired Uber's Southeast Asian assets and operations, particularly those located in Cambodia, Indonesia, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. By this acquisition, Uber's ridesharing and food delivery businesses in Southeast Asia were integrated into Grab's existing multi-modal transportation and financial technology platform.[60] Following the acquisition, Uber would take a 27.5% stake in Grab and the Uber CEO would join Grab's board.[61] Not all of the respective countries addressed this cross-border transaction. The cross-border merger that could have anti-competitive effects had been examined by competition authorities in Singapore, Indonesia, the Philippines and Vietnam.

(1) Singapore

52 Prior to the Grab–Uber merger, on 9 March 2018, the CCCS sent a letter to Grab and Uber to explain Singapore's merger notification regime and the Commission's "corresponding powers to investigate, give directions, impose financial penalties and/or impose interim measures".[62] The CCCS suggested Grab and Uber to notify it of their planned merger, for clearance purposes. However, they only sought the CCCS's confidential advice before the merger was completed. The merger was completed without notification to the CCCS.

53 The CCCS started an investigation on 27 March 2018 on the ground that the merger could have anti-competitive effects and violated the Competition Act. The investigation was completed on 5 July 2018, and a Proposed Infringement Decision was issued against Grab and Uber.[63] In this investigation, the CCCS defined two relevant markets, namely a platform market and a rental market. In analysing the platform market, the CCCS defined the relevant market as "two-sided platforms matching

60 "The Acquisition of Uber Assets in Indonesia" *Komisi Pengawas Persaingan Usaha* (26 April 2018) <http://eng.kppu.go.id/the-acquisition-of-uber-assets-in-indonesia/> (accessed 18 August 2022).

61 "The Acquisition of Uber Assets in Indonesia" *Komisi Pengawas Persaingan Usaha* (26 April 2018) <http://eng.kppu.go.id/the-acquisition-of-uber-assets-in-indonesia/> (accessed 18 August 2022).

62 "Grab-Uber merger investigation: A timeline" *Channel News Asia* (24 September 2018) <https://www.channelnewsasia.com/news/singapore/grab-uber-merger-investigation-a-timeline-10751796> (accessed 18 August 2022).

63 "Grab-Uber Merger: CCCS Imposes Directions on Parties to Restore Market Contestability and Penalties to Deter Anti-Competitive Mergers" *Competition & Consumer Commission Singapore* (24 September 2018) <https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/grab-uber-id-24-sept-18> (accessed 18 August 2022).

drivers and riders for the provision of booked chauffeured point-to-point transport services in Singapore",[64] in which Grab held around 80% of the market share. The CCCS considered the competitive effect of the merger on the two sides of the merged platform and found that the platform had strong network effects that created high entry barriers for new entrants to set up similar networks of drivers and riders. The CCCS also found that Grab's exclusive arrangements with drivers, taxi companies and car rental partners made it difficult for drivers to multi-home and for new entrants to access drivers and vehicles.

54 On 24 September 2018, the CCCS issued an Infringement Decision and held the merger violated s 54 of the Competition Act by substantially lessening competition in the market of ride-hailing platform services in Singapore. Despite this violation, the CCCS did not stop the merger. As for remedies, the CCCS issued directions to Grab and Uber to lessen the anti-competitive effect of the merger and to make the market open and free for new entrants, including removing Grab's exclusive arrangement with drivers and with other taxi fleets. Besides these remedies, the CCCS imposed penalties amounting to S$6,419,647 on Grab and S$6,582,055 on Uber.[65]

(2) Indonesia

55 Following the announcement of the Grab–Uber merger, on 28 March 2018, the KPPU requested Grab to give it an official notification. In its response, Grab explained that the merger involved only an asset acquisition and it did not take over the control of Uber. Grab also reported that the assets acquired included various equipment, contracts and employees of Uber, whereas information technology and intellectual property rights were still owned by Uber, which was legally still active.[66]

56 In its investigation, KPPU found that the merger was "purely an asset acquisition and without any transfer of control from Uber Indonesia

64 Nasarudin Abdul Rahman *et al*, "E-Hailing Services: Antitrust Implications of Uber and Grab's Merger in Southeast Asia" (2020) 28(S1) *International Islamic University Malaysia Law Journal* 373 at 380–382.

65 "Grab-Uber Merger: CCCS Imposes Directions on Parties to Restore Market Contestability and Penalties to Deter Anti-Competitive Mergers" *Competition & Consumer Commission Singapore* (24 September 2018) <https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/grab-uber-id-24-sept-18> (accessed 18 August 2022).

66 "The Acquisition of Uber Assets in Indonesia" *Komisi Pengawas Persaingan Usaha* (26 April 2018) <http://eng.kppu.go.id/the-acquisition-of-uber-assets-in-indonesia/> (accessed 18 August 2022).

to Grab Indonesia".[67] Since the legal entity of Uber still existed, the KPPU considered that the merger was not a business combination. Accordingly, the KPPU concluded that the merger was not under the meaning of a merger which should be notified to the KPPU, since it was "beyond the scope of the definition of business combination, consolidation or acquisition" governed by the Competition Act[68] and Merger Control Regulation.[69]

57 Article 28 of the Competition Act and Art 1 of the MCRs regulate share acquisitions without addressing asset acquisitions since these merger provisions refer to the arrangements of mergers, consolidations and acquisitions under the Limited Liability Company Act[70] and Government Regulation on Mergers, Consolidations and Acquisitions,[71] which focus on corporate control transactions. Merely asset acquisitions do not take over the control of the acquired company (target company). Hence, these transactions are excluded from the arrangements of corporate control transactions.

58 After the Grab–Uber merger, KPPU issued KPPU Regulation No 3 of 2019 regarding Assessment of Mergers, Consolidations, and Acquisitions to include asset acquisitions in the definition of acquisition considering the competitive effect of such transactions in the relevant market. Previously, the KPPU found that Grab's market share increased after acquiring Uber's assets and operations. The market leader of ride-hailing platforms was Gojek with market share of 79.20%. Grab's pre-merger market share reached 14.69%, whereas Uber held 6.11% of the market share. Thus, Grab's post-merger market share became 20.80%.[72] Despite this increase, the merger had no anti-competitive effect since Gojek's market share remained the largest.

(3) The Philippines

59 The PCC began to review the Grab–Uber merger on 3 April 2018 on the ground that the merger could result in a substantial lessening,

67 "The Acquisition of Uber Assets in Indonesia" *Komisi Pengawas Persaingan Usaha* (26 April 2018) <http://eng.kppu.go.id/the-acquisition-of-uber-assets-in-indonesia/> (accessed 18 August 2022).

68 Law No 5 of 1999 (Indonesia).

69 Government Regulation No 57 of 2010 (Indonesia).

70 Law No 40 of 2007 (Indonesia).

71 Government Regulation No 57 of 2010 (Indonesia).

72 Dityasa H Forddanta, "Go-jek masih menjadi pemimpin pasar transportasi online" *Kontan.co.id* (5 September 2018) <https://amp.kontan.co.id/news/go-jek-masih-menjadi-pemimpin-pasar-transportasi-online> (accessed 18 August 2022).

prevention or restsriction of competition.[73] On 6 April 2018, PCC issued an order imposing seven interim measures to be adopted by Grab and Uber during the review process, which included, among others, "maintaining independent business operations and other conditions (platforms, pricing and payment policies, incentives, promotions, database, on boarding of drivers, *etc*) prior to the merger on 25 March 2018 and refraining from executing any final agreement or contract that will transfer any asset, equity, interest, including the assumption by Uber of a board seat in Grab".[74]

60 In this review, the PCC defined the relevant market as "the on-demand car based private transportation online booking service through a mobile rides-hailing application in Metro Manila, its surrounding areas and Cebu".[75] The PCC found that the merger created or strengthened Grab's dominant position in the relevant market by owning 93% of transport network vehicle services. The merger also led to price increases and barriers to entry for new entrants to effectively compete with Grab. The PCC concluded that the merger "has resulted and will likely continue to result in substantial lessening of competition in the relevant market".[76]

61 The PCC approved the Grab–Uber merger in the Philippines on 9 August 2018 after the merging parties signed voluntary commitments to remedy, mitigate or prevent the negative effects on competition, such as preventing any exclusive agreements with drivers and operators that would ban or penalise multi-homing, improving the service quality for customers and ensuring that pre- and post-merger pricing behaviour would not be unreasonably different. Nonetheless, the PCC then found that during the review process, Grab and Uber combined their businesses and Uber became a member of Grab's board. Accordingly, the PCC

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73 "Commission Decision No. 26-M-12/2018, Acquisition by Grab Holdings, Inc and Mytaxi.PH Inc., of Assets of Uber B.V. and Uber Systems, Inc." *Philippine Competition Commission* (10 August 2018) <https://www.phcc.gov.ph/commission-decision-no-26-m-12-2018-acquisition-by-grab-holdings-inc-and-mytaxi-ph-inc-of-assets-of-uber-b-v-and-uber-systems-inc/> (accessed 18 August 2022).

74 "PCC imposes P16-M fine vs Uber, Grab on Merger Deal" *Philippine News Agency* (2018) <https://www.aseanlip.com/philippines/competition/news/pcc-imposes-p16m-fine-vs-uber-grab-on-merger-deal/AL45402> (accessed 18 August 2022).

75 "Commission Decision No. 26-M-12/2018, Acquisition by Grab Holdings, Inc and Mytaxi.PH Inc., of Assets of Uber B.V. and Uber Systems, Inc." *Philippine Competition Commission* (10 August 2018) <https://www.phcc.gov.ph/commission-decision-no-26-m-12-2018-acquisition-by-grab-holdings-inc-and-mytaxi-ph-inc-of-assets-of-uber-b-v-and-uber-systems-inc/> (accessed 18 August 2022).

76 "Commission Decision No. 26-M-12/2018, Acquisition by Grab Holdings, Inc and Mytaxi.PH Inc., of Assets of Uber B.V. and Uber Systems, Inc." *Philippine Competition Commission* (10 August 2018) <https://www.phcc.gov.ph/commission-decision-no-26-m-12-2018-acquisition-by-grab-holdings-inc-and-mytaxi-ph-inc-of-assets-of-uber-b-v-and-uber-systems-inc/> (accessed 18 August 2022).

issued a resolution on 11 October 2018 and held that Uber and Grab violated two of its seven interim measures imposed on 6 April 2018. The PCC imposed penalties totalling PHP16m for violation of the interim measures.[77]

(4) Vietnam

62 On 27 March 2018, the VCCA requested Grab to provide information on the merger. The VCCA commenced a preliminary investigation on 16 April 2018 and the result of which showed that the post-merger market share of Grab–Uber in Vietnam exceeded 50%.[78] The VCCA, therefore, started the official investigation into the Grab–Uber merger on 18 May 2018. The VCCA defined the relevant market as "the intermediary services connecting passengers transport between the riders and the drivers of cars below 9 seats on the software platform in Hanoi; and … in Ho Chi Minh".[79]

63 The VCCA in December 2018 announced that the merger violated the 2004 Competition Law for failure to notify market regulators.[80] According to the 2004 Competition Law, if the post-merger market share of the merging parties exceeds 50% of the relevant market, the merger can only be completed after having express permission from the authorities.

64 On 19 June 2019, however, the VCC held that the merger did not constitute economic concentration that had to be reviewed by the authorities. Thus, the merger did not violate the 2004 Competition Law. The VCC also found that the merger had no anti-competitive effect in the

77 "Commission Decision No. 26-M-12/2018, Acquisition by Grab Holdings, Inc and Mytaxi.PH Inc., of Assets of Uber B.V. and Uber Systems, Inc." *Philippine Competition Commission* (10 August 2018) <https://www.phcc.gov.ph/commission-decision-no-26-m-12-2018-acquisition-by-grab-holdings-inc-and-mytaxi-ph-inc-of-assets-of-uber-b-v-and-uber-systems-inc/> (accessed 18 August 2022).

78 Nguyen Hoai, "Grab-Uber deal comes under fresh antitrust scrutiny in Vietnam" *Viet Nam Express* (13 February 2019) <https://e.vnexpress.net/news/business/companies/grab-uber-deal-comes-under-fresh-antitrust-scrutiny-in-vietnam-3880280.html> (accessed 18 August 2022).

79 Nasarudin Abdul Rahman *et al*, "E-Hailing Services: Antitrust Implications of Uber and Grab`s Merger in Southeast Asia" (2020) 28(S1) *International Islamic University Malaysia Law Journal* 373 at 382-383.

80 Nguyen Hoai, "Grab-Uber deal comes under fresh antitrust scrutiny in Vietnam" *Viet Nam Express* (13 February 2019) <https://e.vnexpress.net/news/business/companies/grab-uber-deal-comes-under-fresh-antitrust-scrutiny-in-vietnam-3880280.html> (accessed 18 August 2022).

Vietnamese under-nine-seat automobile passenger market since Uber had not provided ride-hailing services in Vietnam.[81]

(5) Summary

65 Four jurisdictions in ASEAN examined the Grab–Uber merger. It is interesting to note that the same merger reviewed by four different authorities had four different results. All authorities allowed the merger but they had different approaches. The definition of a merger under the MCRs in Indonesia at that time covered only share acquisitions; thus, asset acquisitions were excluded from the application of MCRs. Besides that, the market shares of the merging parties were not dominant in the ride-hailing platform market in Indonesia. Likewise, in Vietnam the merger did not fall within the meaning of economic concentration that warranted notification to the authorities, so there was no violation of MCRs.

66 On the contrary, in Singapore, the merger had anti-competitive effects and violated MCRs. Since reversing the completed merger was not an appropriate remedy, the merger was allowed but several remedies and financial penalties were imposed on the merging parties. In the Philippines, the merger also had anti-competitive effects but there was no infringement decision. Conditional approval for the merger was granted after voluntary commitments by Grab were accepted. Although the merger did not violate MCRs, the merging parties were sanctioned because of their anti-competitive conduct during the review process.

67 Notwithstanding these differences, in defining the relevant market for this matching-platform merger all authorities employed the single-market approach by defining a single product (ride-hailing services) offered to different users (drivers and riders) on the two sides of the platform as the relevant product market. Next, both Singapore and the Philippines considered that network effects of the merged platform created barriers to entry for new entrants.

68 The Grab–Uber merger shows the complexity of ASEAN merger control regulations. Not only were the substantive and procedural laws divergent, but so too were the methods of analysis, market structures pre- and post-merger, and economic conditions of the respective countries. Thus, the merger had anti-competitive effects in Singapore and the Philippines, but not in Indonesia and Vietnam. It should be realised,

81 VNA, "No violation found in Grab-Uber deal: VCC" *Vietnamplus* (20 June 2019) <https://en.vietnamplus.vn/no-violation-found-in-grabuber-deal-vcc/154689.vnp> (accessed 18 August 2022).

however, that competition law is relatively new in the region. ASEAN competition laws are still in the early stages of development and need to be improved for the sake of economic integration in the region.

IV. Harmonisation of ASEAN merger control regulations

A. Cross-border competition enforcement

69 Competition policy and law has a significant role in the achievement of economic integration in the AEC. Nonetheless, ASEAN competition laws are challenged by the increasing number of cross-border transactions that may have anti-competitive effects on competition in the AEC. Consequently, competition authorities in the AEC have to enforce cross-border transactions consistently with the aim of economic integration.

70 Differences in competition laws in AMSs can be an obstacle for investors in conducting cross-border transactions in the AEC. Investors have to deal with complex national competition law in each AMS. The Grab–Uber merger in ASEAN's digital market is an example of this phenomenon. The diversity of ASEAN merger control rules has also become an obstacle for competition authorities in AMSs when co-ordinating the enforcement of ASEAN cross-border mergers that affect more than one jurisdiction or one national market, since these require similarity in legal substance and procedure among AMSs.[82]

71 In 2007, the ASEAN Expert Group on Competition ("AEGC") was established in the AEC. The establishment of the AEGC was endorsed by economic ministers from the AMSs, as a regional forum for discussing and coordinating to promote "a healthy competitive environment in the ASEAN region".[83]

72 The AEGC consists of AMSs' representatives from competition authorities and agencies responsible for competition policies in their respective countries.[84] Even though the AEGC consists of competition

82 "Agenda Item 3c. Enhancing International Cooperation in the Investigation of Cross-Border Competition Cases: Tools and Procedures" (Intergovernmental Group of Experts on Competition Law and Policy, 5–7 July 2017) <https://unctad.org/meetings/en/Contribution/ciclp16th_c_Indonesia_en.pdf> (accessed 18 August 2022).

83 "ASEAN Experts Group on Competition (AEGC)" (AEGC, 2007) <https://asean-competition.org/aegc> (accessed 18 August 2022).

84 Burton Ong, *Competition Law and Policy in the ASEAN Region* (Cambridge University Press, 2018) at p 8.

authorities from AMSs, it is not a regional competition commission or a supranational body responsible for enforcing cross-border competition in ASEAN. Accordingly, the enforcement of cross-border transactions is carried out by the competition authority of each AMS.

73 In 2010, the AEGC issued the ASEAN Regional Guidelines on Competition Policy ("Regional Guidelines"). The Regional Guidelines serve as a non-binding reference guide for AMSs in introducing, implementing, and developing competition policy in line with "the specific legal and economic context of each AMS".[85] These Regional Guidelines are based on country experiences and international best practices.[86] The Regional Guidelines suggest that national competition legislation provides provisions on, *ie*, prohibition on anti-competitive agreements, prohibition of abuse of dominant position, prohibition on anti-competitive mergers, exemptions from the application of the national competition law, leniency and settlement, investigation and enforcement power of national competition authority, appeal process and co-operation between national competition authority and overseas competition authorities.[87]

74 The Regional Guidelines were useful as a reference guide for the adoption of competition laws in Brunei, Cambodia, Lao PDR, Myanmar and the Philippines. The Regional Guidelines, however, cannot reduce the diversity of ASEAN competition laws. Since the AEGC is not a supranational body in the AEC, it could issue only non-binding guidelines on competition policy. Despite this, the AEGC has a great concern in harmonising ASEAN competition laws.

75 In 2016, the AEGC produced the ASEAN Competition Action Plan 2025 ("ACAP 2025"). ACAP 2025 transforms the strategic measures stated in the AEC Blueprint 2025 into more detailed initiatives. It sets out the AEC's goals in the field of competition policy and law for the period between 2016 and 2025.[88] ACAP 2025 sets five strategic goals derived from the AEC Blueprint 2025, namely:

> (a) effective competition regimes are established in all AMSs;

85 *ASEAN Regional Guidelines on Competition Policy* (ASEAN Secretariat, 2010).
86 *ASEAN Regional Guidelines on Competition Policy* (ASEAN Secretariat, 2010) at p ii.
87 *ASEAN Regional Guidelines on Competition Policy* (ASEAN Secretariat, 2010) at p 22.
88 *An ASEAN Competition Action Plan 2016–2025* (ASEAN Secretariat, 2016).

(b) the capacities of competition-related agencies in AMSs are strengthened to effectively implement competition policy and law;

(c) regional co-operation arrangements on competition policy and law are in place;

(d) fostering a competition-aware ASEAN region; and

(e) moving towards greater harmonisation of competition policy and law in ASEAN.

76 The fifth strategic goal emphasises the need for harmonisation of competition laws in ASEAN. In order to achieve this goal, the AEGC identifies four steps towards convergence, namely: (a) recommend procedures for joint investigations and decisions on cross-border cases; (b) commonalities and differences in competition legislation; (c) substantive as well as procedural standards in competition policy and law enforcement; and (d) strategy paper on areas feasible for regional convergence.[89]

B. Measures of harmonisation

77 Along with the AEGC's efforts to converge competition laws in AMSs, some scholars have also expressed their ideas to deal with this issue. Thanadsillapakul proposes three measures for the harmonisation of ASEAN competition laws.[90] The first is the co-ordinated or sovereignty model, under which a Member State can apply its national competition law in co-ordination with other Member States based on positive agreements. The second is the harmonised law model, under which AMSs can harmonise their national competition laws based on international guidelines. The last is an agreement on international competition laws that reflects the idea of supranationality, which is recognised as the highest level of collaboration. Thanadsillapakul argues that the harmonised law model is the most suitable for ASEAN competition laws, considering the diversity of economic conditions, legal systems, social and political values among AMSs.[91]

89 *An ASEAN Competition Action Plan 2016–2025* (ASEAN Secretariat, 2016).

90 Lawan Thanadsillapakul, "The Harmonization of ASEAN Competition Laws and Policy from an Economic Integration Perspective (2012) 1(2) MFU Connexion: J Humanities & Social Sci 11.

91 Lawan Thanadsillapakul, "The Harmonization of ASEAN Competition Laws and Policy from an Economic Integration Perspective (2012) 1(2) MFU Connexion: J Humanities & Social Sci 11.

78 Likewise, Luu observes that for the time being, it is more desirable for ASEAN to rely on non-binding guidelines or "soft law" approaches rather than on a binding agreement on competition law or "hard law" approach.[92] According to Luu, ASEAN is committed to the "ASEAN Way" which emphasises the consensus in the decision-making process, non-interference in the domestic affairs of each AMS and non-binding agreement for its policies. Besides that, the economic condition and competition regime in each AMS is different, thus it is difficult and costly to make a binding agreement on competition law and policy. Moreover, the level of ASEAN integration is still low and there is no supranational body or a binding dispute settlement system which is essential for the application of a binding agreement on competition law and policy.[93]

79 In contrast, Silalahi suggests shifting from the "ASEAN approach" to "rule-based approach".[94] Thus, the harmonisation of ASEAN competition laws shall be based on comprehensive law and judicial systems to enforce the law, instead of non-binding agreements. Silalahi points out that "the rules-based approach" is consistent with the ASEAN Charter and the AEC Blueprint that require ASEAN to adhere "to rules-based systems for effective compliance and implementation of economic commitments" in establishing the AEC. Moreover, the absence of a supranational body to enforce the law creates differences in interpreting and implementing competition law in each AMS for the same cross-border cases that could increase transaction costs for investors doing business in ASEAN.[95]

80 It should be noted, however, that the supranational body within ASEAN at the time being is not feasible. The ASEAN Charter did not establish ASEAN as a supranational entity. Besides that, the ASEAN leaders have repeatedly rejected to turn ASEAN into a supranational organisation.[96] Moreover, the diversity of economic conditions, legal

92 Luu Huong Ly, "Regional Harmonization of Competition Law and Policy: An ASEAN Approach" (2012) 2 *Asian Journal of International Law* 291 at 321.

93 Luu Huong Ly, "Regional Harmonization of Competition Law and Policy: An ASEAN Approach" (2012) 2 *Asian Journal of International Law* 291 at 321.

94 Udin Silalahi, "The Harmonization of Competition Laws towards the ASEAN Economic Integration" (2017) X(1) *Journal Economic and International Law* 117 at 133.

95 Udin Silalahi, "The Harmonization of Competition Laws towards the ASEAN Economic Integration" (2017) X(1) *Journal Economic and International Law* 117 at 134.

96 Ioannis Kokkoris, "Regional Economic Integration: The Role of Competition Law", paper presented at the 9th Annual Conference in Hong Kong (7–10 December 2013) <http://www.asiancompetitionforum.org/docman/the-9thannual-asian-competition-law-conference/power-point-slides-3/176-14-y302-sandra-marco-colino/file> (accessed 24 April 2021).

traditions, social and political systems within ASEAN remains an obstacle for ASEAN to step to the highest level of integration. As has shown by the Grab–Uber merger, one decision could not fit with all affected countries since the market shares of the merging parties in the respective countries were different. Consequently, the merger was considered competitively harmless in Indonesia and Vietnam but competitively harmful in Singapore and the Philippines.

81 Although ASEAN is not a supranational entity, ASEAN leaders can conclude agreements to be implemented in each national jurisdiction. These agreements are not legally binding and cannot be enforced, but all Member States are committed to implement their consensus. Such agreements include the ASEAN Agreement on Custom, ASEAN Trade in Goods Agreement, ASEAN Framework Agreement on Services, ASEAN Comprehensive Investment Agreement, ASEAN Free Trade Area, the ASEAN Charter, and most importantly the agreement to establish the ASEAN Community. Accordingly, an agreement on Merger Control Regulation could be a possible measure of harmonisation (*ie*, top-down approach).

82 The 2010 Guidelines provided by the AEGC (*ie*, bottom-up approach) are not effective in harmonising merger control regulations in ASEAN since the AEGC is not a supranational body in ASEAN and its members have no legislative power in their national jurisdictions. Thus, a top-down approach could be more effective than a bottom-up approach, considering the legislative power of ASEAN leaders in the respective Member States to issue a new merger control regulation or reform an existing one.

83 The agreement on MCRs may be divided into two categories, which are young merger control regimes and new merger control regimes. Member states that have implemented MCRs (*ie*, Indonesia, Singapore, Thailand, the Philippines and Vietnam) are included in the first category; whereas others that are still preparing MCRs (*ie*, Brunei, Cambodia, Lao PDR, Malaysia and Myanmar) belong to the second category. For the first category, the agreement should resolve differences on the merger definition, the notification system, thresholds for notification and the substantive test to assess the competitive effect of a merger. In addition, the agreement should facilitate joint investigations conducted by competition authorities in some Member States in reviewing cross-border mergers that affect more than one jurisdiction or one national market along with joint decisions to avoid duplication of efforts. For the second category, the agreement should provide a reference to the establishment of a national merger control regime along with recommendations to resolve obstacles in forming such a regime. After the establishment of MCR, a Member State may follow the first category.

84 By providing two different categories, the agreement recognises the diversity of economic conditions, legal traditions, social and political systems among AMSs that make it impossible to form one set of rules that fits to all AMSs. In this sense, harmonisation is not unification; rather, it is a mechanism to reduce inconsistencies of ASEAN MCRs with the goal of economic integration. Thus, the agreement on MCRs could be adopted by all AMSs more easily in line with the "ASEAN Way", which stresses on a consensus, non-interference policy and non-binding agreement. When all Member States have reached the same level of economic conditions as well as social and political systems, this dual system should be replaced by the single merger control regime that has no contradictory rules and procedures among AMSs in assessing mergers.

V. Conclusion

85 Network effects and big data can play significant roles in increasing the market power of multi-sided platforms. Nevertheless, platform mergers do not necessarily indicate that such mergers create high entry barriers. The interdependent character of distinct user groups on multi-sided platforms can prevent anti-competitive effects of these mergers and promote incremental innovation and consumer welfare. In assessing platform mergers in digital markets, therefore, competition authorities and courts in ASEAN should carefully examine all relevant issues relating to network effects and big data on a case-by-case basis.

86 The Grab–Uber merger case demonstrates the complexity of ASEAN MCRs in assessing a cross-border platform merger. The diversity of MCRs in ASEAN can be an obstacle to achieving economic integration, whereas in the digital market, platform companies are remarkably active in merger and acquisition transactions. It is inevitable that ASEAN needs to harmonise its MCRs.

87 The 2010 Regional Guidelines as a bottom-up approach cannot harmonise ASEAN MCRs. An agreement on MCRs concluded by ASEAN leaders as a top-down approach could be more effective in harmonising ASEAN MCRs. Competition authorities in AMSs could easily arrange joint investigations and joint decisions in handling cross-border mergers that involve more than one jurisdiction since AMSs have similar rules and procedures, particularly relating to the merger definition, the notification system, thresholds for notification and the substantive test to assess the competitive effect of a merger. In the long run, the risk of inconsistency with the goal of economic integration could be reduced effectively.