



Policy Dialogue

Unfair Trade Practices in Select ASEAN Economies

Ho Chi Minh City, Vietnam, September 12, 2012

A Rapporteur's Report

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CUTS held its 1st Policy Workshop in relation to a multi-year project to study on Unfair Trade Practices (UTPs) in select Association of Southeast Asian Nations (ASEAN) countries at Ho Chi Minh City, Vietnam, on September 12, 2012. The principal purpose of the workshop seems to have been to permit the participants who, as part of the project, had conducted surveys and investigations in relation to UTPs in their respective jurisdictions to discuss their results as well as to obtain comments from their respective regulatory authorities who were in attendance. If that was the principal purpose, the workshop was very successful as the participants' presentations provided useful background information, a feel for their respective regulatory environment as well as survey results and commentary from each of Thailand, Vietnam, Indonesia, Philippines and Malaysia.

In addition, very helpful perspectives were provided by regulatory authorities from Vietnam, Malaysia and the Philippines. Further, comments from non-presenting participants were actively encouraged bringing forth interesting perspectives and insights on the nature of UTPs and approaches to dealing with them.

The country presentations provided a wide scope of information differentiating UTPs and their treatment in the relevant jurisdictions. Further breadth of scope was provided by participants from international organisations and numerous comments arising from non-presenting participants. However, it seemed clear that a number of core issues arose from the workshop that warrant further investigation and consideration as the project continues. This brief report would focus on four of these issues:

1. The Definitional Issue – What are UTPs? How are UTPs defined? Are there differences between Business to Business (“B2B”) and Business to Consumer (“B2C”) UTPs and, if so, should they be treated differently?
2. The Concern – What were survey respondents in the respective jurisdictions concerned with? What is the magnitude of their concern? How pervasive as UTPs perceived as? Did they understand UTPs?

3. Treatment of UTPs – How should UTPs be treated from a regulatory perspective? How are UTPs currently treated in the survey countries? What lessons are to be learned from their experiences?
4. Relationship with Competition Law – How are UTPs and their regulation related to competition law? Are there any similarities/differences between the two that can assist in the effective treatment of UTPs?

Definitional Issues

Listening to the various presentations and discussions, I was struck by the lack of consensus on the definition of UTPs. Definitions seemed to vary by country and even between different laws within a single jurisdiction. It appears that a number of the statutes discussed during the workshop provide some form of definition of UTPs and that these are generally based on a concept of unfairness or breach of business standards. In some laws, UTPs are defined with respect to specific enumerated practices that are either an exhaustive or ejusdem generis (where the specific examples are meant to provide guidance to a more general concept of unfairness in relation to UTPs). UTPs may also be defined in a sectoral specific manner in order to address industry specific concerns.

Despite the scope of perspectives on this issue, there were a number of general conceptual points relating to the definition of UTPs that were echoed by various speakers during the workshop:

- UTPs generally involve fraudulent, deceptive or dishonest practices between parties that may or may not be bargaining with each other in any normal sense.
- UTPs may be B2B (between competitors or between businesses at different levels of a supply or production chain) or B2C. In some cases, UTPs may even arise from government action.
- UTPs may involve the breach or misuse of another statute or right in order to obtain an “unfair” competitive advantage – e.g. abuse of intellectual property rights.

As will be noted below, UTPs may or may not be identified as, or may even be confused with, anticompetitive practices which can lead to further confusion and divergence in how UTPs are perceived and dealt with among the relevant jurisdictions.

A significant consensus seemed to arise at the workshop that some form of standard definition of UTPs needs to be developed so that future discussions can be more focused around core issues. While some variations of the definition of UTPs may be necessary in order to accommodate specific legislative or jurisdictional goals; a number of participants observed that some core standards or principles could be set forth that would be equally relevant across ASEAN member nations. These core UTP principles would then be an important stepping stone towards more effective management of UTPs. Further, an understanding that the core principles were not exhaustive or restrictive would permit country or even industry specific issues to be dealt with separately at a national level, while permitting ASEAN member nations to develop common approaches to the core set of UTP issues.

In developing these core principles, it may be useful to distinguish UTPs as either B2B or B2C in nature. These often present distinct characteristics and, in a number of jurisdictions, are already dealt with through separate legislative frameworks. By creating discrete sets of core definitional principles, this may permit a more focused and coordinated approach to each of B2C and B2B UTP issues as well as the development of a more effective enforcement framework designed to specifically target the relevant set of core concerns. Further, it may be that greater convergence of views may be reached among ASEAN member nations with respect to only specific subsets of UTPs; this would be more easily accommodated where the framework for discussion already contemplates differing treatment of different UTPs.

In an ASEAN framework, attention may also be required to consider specific issues relating to small and medium-sized enterprises (SMEs) at a definitional level as, similar to consumers, SMEs may be more likely subject to asymmetric bargaining power or information than larger businesses and may therefore have a divergent set of core concerns than do larger businesses in a B2B UTP framework.

The Concerns

The survey results were very informative and revealed a wide scope of concerns that various respondents had with UTPs. Given the comments above relating to the lack of a clear definition of UTPs, it appears almost trite to observe that “fairness” is a very relative term and that survey respondents often seemed concerned with a very narrow focus of potential UTPs that were particularly relevant to their sector or nature.

A number of examples were provided of specific conduct with which survey respondents were concerned and identified as UTPs including:

B2B:

- Undue use of superior bargaining power;
- Defamation of competitors;
- Misappropriation of trade secrets or intellectual property rights;
- Undue interference; and
- Predatory Pricing.

B2C:

- Misleading advertisements;
- Bait & switch;
- Harassment and coercion;
- Unfair contracts; and
- Unduly high pricing.

There seemed to be significant number of survey respondents who felt that UTPs were prevalent and numerous respondents indicated that their interests were negatively affected by UTPs (regardless of the legal regime with respect to UTPs operating in their respective jurisdictions). It certainly appears that UTPs are a substantial concern among the survey respondents.

My impressions of the survey presentations and ensuing discussions is that, while many felt strongly that there was a pervasive degree of unfair actions by businesses that had a negative impact, there was still a great deal of confusion over the nature of UTPs, their origins and the identification of the most significant concerns. In part, my impression was that a combination of country specific issues, survey populations and the distinctions between B2B and B2C UTPs were partially related to this confusion. However, a number of participants noted that lack of education about UTPs and the relevant legislative frameworks was also a consideration. To restate my earlier comment, “unfair” is a very relative concept, but it seems that many respondents had ideas of what was unfair to them.

Despite a general lack of understanding about the nature of UTPs, survey respondents clearly were concerned with this issue. As one of the regulatory representatives in attendance opined consumer protection enforcement is possibly a greater issue than competition enforcement. In the face of pervasive, but poorly identified or defined UTPs, a consensus view among numerous survey respondents and workshop participants appears to be that more effective regulation and/or enforcement to address UTPs is required.

Treatment of UTPs

The treatment of UTPs varies considerably within each jurisdiction discussed. In some, UTPs or at least an identified subset of them are addressed within a more general Competition Law either through provisions addressing anticompetitive practices that may also be UTPs (such as an abuse of dominant position) or in specific provisions relating to fair competition or both (Vietnam’s competition law is an example where both approaches are taken). However, UTPs may also or instead be addressed within consumer protection legislation or sector specific or other more narrowly focused legislation. This can lead to overlapping jurisdictions among regulators, uncertainty under which law a specific conduct should be dealt, geographic or definitional gaps in enforcement and issues of quality of enforcement (e.g. in the latter regard, it was reported that Thailand provided an interesting example wherein business who are acting as consumers do not get protection under the relevant unfair contract legislation).

The comments from the participants from the jurisdictions reviewed varied considerably, but in almost each case, the presentations noted at least some of the above difficulties and similar concerns were expressed by a number of representatives of regulatory authorities in attendance. It should be noted that workshop participants from Vietnam cited some significant successes in dealing with UTPs, particularly against misleading advertising, even while noting that more work was required.

In attempting to develop a unified approach to enforcement, a number of substantive concerns were identified which may indicate that treatment of UTPs will remain country specific across ASEAN member nations including:

- differences in civil vs. common law;
- potential criminal standards of proof;
- concerns with developing sanctions that could be consistently applied across a range of UTPs;
- available resources for enforcement (both human and financial);
- relative effectiveness of private enforcement; and
- distinct jurisdictional or industry specific concerns.

However, a number of common concerns were identified that appear relevant across ASEAN member nations investigated in the project in the development of more effective management of UTPs including, in addition to the formulation of a core definition:

- the need to foster a greater focus on free market competition in many jurisdictions;
- the similar nature of many UTPs across jurisdictions (e.g. misleading advertising to consumers);
- concern with need to better educate consumers and business about the nature of UTPs and their respective enforcement regimes;
- the need to more effectively use existing enforcement tools to address UTP concerns;
- concerns with a lack of political will and/or corruption issues that prevent comprehensive control of UTPs;
- the need to develop additional legislative and administrative resources to provide a more comprehensive scope of UTP management and fill in existing geographic and definitional gaps in respective legislative and enforcement frameworks; and
- concerns with encouraging cooperation amongst actual or potential victims of UTPs who might currently be concerned with the repercussions of reporting inappropriate conduct to regulators or proactively cooperating with investigations.

Taking everything together, it appears that treatment of UTPs will remain country specific; however similar to the ASEAN Regional Guidelines on Competition, the development of ASEAN Regional Guidelines on UTPs may be an achievable goal. Such guidelines would incorporate the above referenced core principles as well as set out model standards for the treatment of UTPs. Issued addressed might include those noted above and set out best practices and models for enforcement and legislation.

The Relationship with Competition Law

While UTPs are often regulated within the broader scope of a general Competition Law and enforced by competition regulator, it is clear that many jurisdictions note the distinctions between UTPs and Anti-Competitive Practices by creating distinct legal regime or at least different enforcement standards for UTPs. The relationship between UTPs and Competition Law is referenced in the ASEAN Regional Guidelines on Competition which state that Competition Law ...”may include provisions on unfair trade practices”. Even where UTPs are addressed within a Competition Law, the legislation treatment may be unclear as UTP related provisions may either focus directly on the regulation of UTPs or may merely be intended to be a “basket clause” to cover issues not otherwise explicitly addressed or not easily enforced under the specific Anti-Competitive Practices provisions of the relevant Competition Law.

One perspective on Competition law is that it should be focused on protecting markets and competition as a whole – not specific competitors. In contrast, UTPs often focus on specific competitors without concern for effects on markets or on traditional metrics of competition enforcement such as price. Another contrast is that Anti-Competitive Practices are often concerned with unilateral or joint exercises of market power; whereas UTPs often includes actions by non-dominant competitors that may not otherwise infringe a Competition Law. However, despite these differences, Trinh Anh Tuan, Head of the International Cooperation Board of the Vietnam Competition Authority observed that dealing with UTPs is an important factor for the development of competition law regime in Vietnam.

Often noted as a prime underlying factor in legislative concerns with both UTPs and Anti-Competitive Practices is the protection and enhancement of consumer welfare and it is this commonality that may prove important. As competition policy is being promoted through the ASEAN Economic Blueprint, it may be useful to observe that many concepts of competition policy are either difficult for businesses and consumers to grasp or are otherwise hard for them to relate to. However, most businesses and consumers will understand the concept of unfairness; even though they may define what is unfair differently. UTPs are often more directly observable and understandable to businesses and consumers and their effects generally equally so. The link between UTPs and Competition Law may be leveraged to promote greater awareness of each and push public policy towards more effective enforcement regimes for both.

One long term goal of this project might be the development of regional guidelines as noted earlier. A treatment of UTPs at an ASEAN level in a manner similar to competition policy, in addition to the benefits cited above, would demonstrate the importance of effectively addressing UTPs to ASEAN member nations and their citizens. Such guidelines could also further develop the links with competition policy and provide guidance on how enforcement and educational initiatives with respect to each could be more effectively leveraged.

Importance of Addressing UTPs in an ASEAN Context

A number of workshop participants also discussed the ASEAN specific concerns relating to UTPs in commenting on the relevance of this project including:

- insufficient enforcement or lack of a developed commercial legal framework;
- corruption;
- lack of available relevant information for consumers and businesses;
- potential inability of small local businesses to defend against UTP.
- legal harmonisation vs. different economic development models and legal systems
- concerns with coordination & information sharing across ASEAN member nations; and
- importance of effect of UTPs on SMEs specifically as well as on economic development as a whole.

Clearly a number of ASEAN member nations are either developing economies or economies still transitioning to free market economies. As observed in the context of at least one jurisdiction during the workshop, this often means that there is no culture of free and fair competition within the country. This results in businesses and consumers having widely varied expectations about which behaviour is fair and where unfair behaviour should result in regulation or other enforcement. As noted above, effective regulation and enforcement in some ASEAN member nations may be substantially hindered by the lack of independent and secure legal framework which can ensure free market competition as well as more obvious effects of corruptions or simply lack of political will to focus on UTP related concerns.

While the importance of addressing UTPs is clear, the above issues as well as the legal independence of ASEAN member nations, in contrast to the European Union which has greater power to enforce policy throughout member nations within certain areas, seem to make moving forward with an ASEAN level initiative a daunting challenge. However, the common concerns observed above also seem readily apparent. A focus on the common concerns – for example those of SMEs and consumers – may assist in raising national awareness and concern in relation to UTPs. ASEAN member nations may also require proof of the impact of UTPs on SMEs, consumers and the economy in order to take action. At an ASEAN level, promoting the link to Competition Law in respect to both raising national awareness and using UTPs as a lever to promote competition policy may provide further incentive to move forward on these issues.

Conclusion

I have attempted to summarise my impressions of an information packed workshop herein and have noted a number of suggestions for further work. There is a clearly a lot of work ahead in both documenting the harms caused by UTPs and developing guidelines and principles that can be used across ASEAN. However, the workshop has provided a good foundation by documenting the pervasive concern with UTPs among numerous survey respondents and recognising the importance of addressing these concerns at both a national and ASEAN level.