

UNDERSTANDING OUR NEIGHBOURS

BY CHESTER TOH

The wide development gaps between Asean member states and diversity in legal, social and political factors mean that there is no one-size-fits-all approach when expanding into the region

AS WE enter the second half of 2015, all eyes are on the Asean Economic Community (AEC). Singapore businesses have long been investors in neighbouring countries. As our domestic economy is limited in size and growth potential, venturing into the region is now seen as a survival essential. If Asean were one single country, it would presently be the seventh largest economy in the world, with projections to become the fourth largest by 2050 according to a McKinsey 2014 study. Eighty-nine per cent of respondents to a recent AmCham 2015 Asean Business Outlook Survey expect investment in the region to increase over the next five years. The potential in this region is clearly immense.

Before one jumps onto the Asean expansion bandwagon, the first question to ask is, how well do you understand the regulatory environments of countries in the region? Here's a reality check. From our experience, we often see clients struggling in three main compliance areas of anti-corruption, competition and data protection because they fail to appreciate the subtleties and differences in the laws of each Asean member country. In fact, the wide development gaps between Asean member states and diversity in legal, social and political factors mean that there is no one-size-fits-all when expanding into Asean. Managing regulatory risks associated with your business is therefore critical.

ANTI-CORRUPTION LAWS

On paper, all Asean member states have enacted domestic legislation on anti-corruption and anti-money laundering. Myanmar for example, which is ranked 156 out of 175 countries on the latest Transparency International Corruption Perceptions Index 2014, enacted its Anti-Corruption Law in 2013. All Asean countries are signatories to the United Nations Convention on Anti-Corruption. However, the reality is that corruption continues to manifest in different degrees and in varying forms across Asean member states.

Other than Singapore and Brunei, most of the other Asean countries rank relatively poorly on the Transparency International Index. Corruption is still one of the key obstacles which threaten regional integration at the AEC level. The lack of a harmonised Asean anti-corruption framework and substantive differences in each

country's domestic anti-corruption legislation mean that companies need to adopt compliance programmes tailored to the laws and practices of each jurisdiction. For example, only a few countries in Asean have laws targeted at private sector bribery as opposed to bribery of public officials. In Malaysia, the Malaysian Anti-Corruption Commission Act 2009 (MACCA) makes it an offence to offer or receive gratification in respect of both private transactions and dealings with public bodies. Interestingly, MACCA also specifically covers bribery of foreign public officials within Malaysia, a feature not covered by most anti-corruption laws in Asean.

Small and medium-sized enterprises (SMEs) looking to enter developing markets in the region need to remain vigilant and keep abreast with their company's dealings and transactions on the ground. It can often be a challenging task for investors to differentiate between gifts that are customary in nature (particularly during festivals or weddings) versus illegal bribes. Different positions taken under each country's anti-bribery law can also pose a challenge. In Thailand for example, a public official receiving gifts of up to 3,000 baht (S\$120) is not required to inform his superior of such gifts. This may suggest some form of tolerance for facilitation payments to the extent that the gift is intended to speed up the performance of duties which a public official is bound to perform in any case. In Myanmar and Cambodia, any facilitation payments of this nature are prohibited. In Vietnam, one-off payments of two million dong (S\$122) or more can be prosecuted as a criminal act of bribery. SMEs should always remain cautious when faced with local customs and traditions in relation to gifts and "tea monies" paid to government officials to expedite governmental approval processes.

COMPETITION LAWS

SMEs represent over 95 per cent of the organisations regulated by competition authorities in the Asia-Pacific region but SMEs in Asean by and large remain unfamiliar with antitrust compliance. The AEC Blueprint commits all Asean member states to put in place a national competition policy by end-2015. To date, Singapore, Malaysia, Vietnam, Thailand and Indonesia have established cross-sector competition laws, with Myanmar and Brunei being the latest additions this year to the list. Cambodia and Laos are still in the process of finalising their competition laws before the end-2015 deadline. The current competition regime in the Philippines is constructed upon various sector-specific competition-related laws although a draft Fair Competition Act is in the process of being enacted. Naturally, considering the differences in the stage of development of each member state's competition law regime, the enforcement pattern in more advanced or long-standing regimes such as those of Singapore, Malaysia and Indonesia are likely to differ from regulatory actions in countries such as Myanmar.

There are generally three main pillars of a

competition law regime: the prohibition of anti-competitive agreements; prohibition of abuse of dominance; and control of anti-competitive M&A transactions (ie merger control). It is important for investors to note that these three pillars are not always a consistent feature in every Asean country.

Malaysia for instance, does not have a merger control regime. In relation to anti-competitive agreements, Singapore prohibits restrictive agreements, principally those among competitors but exempts agreements that are vertical in nature unless one of the parties is dominant. Indonesia on the other hand, prohibits anti-competitive horizontal agreements and agreements with suppliers or distributors which cause unfair competition (ie vertical agreements), as is the case with Malaysia. A noteworthy point is that certain jurisdictions, such as Myanmar and Vietnam, expressly give the relevant competition authority powers to exempt SMEs from the domestic competition regime. It remains to be seen whether competition laws will be used in such countries to target foreign companies that flout the laws.

DATA PROTECTION LAWS

Singapore, Malaysia and the Philippines are the only Asean nations so far which have enacted a cross sector personal data protection law. Given that data protection legislation is a relatively new and constantly evolving concept even among more mature Asian jurisdictions, it is conceivable that enacting generic data protection laws will not be at the top of the legislative agenda for countries such as Cambodia and Brunei. Nonetheless, SMEs are advised to stay one step ahead in their companies' data protection policies. With the emergence of the AEC 2015 and increased integration among member states, it is foreseeable that the increase in data flows could justify a re-look into data protection compliance in the region.

Singapore SMEs looking to increase cross-border activities in the region must also understand certain implications of the Singapore Personal Data Protection Act (PDPA) back home. Section 26 of the PDPA provides that a company cannot transfer personal data to any country outside Singapore unless the recipient is bound by legally enforceable obligations to provide a standard of protection comparable to that under the PDPA. This transfer limitation obligation means that SMEs must be cautious when transferring any personal data belonging to its customers or employees outside Singapore, even to an affiliate, and must institute relevant contractual arrangements or binding corporate rules to adhere to this obligation.

LOOK BEFORE YOU LEAP

There is no doubt that expansion into the Asean region is the way forward, particularly for SMEs. It is equally important that SMEs fully understand both the legal and practical complexities and peculiarities of each Asean jurisdiction before taking the leap. Companies should therefore identify major red flags particular to each country and develop country-specific strategies in their regional investments. With an effective compliance programme in place, it remains possible to tap the potential of the region without ending up on the wrong side of the law. ■

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