

EU Competition Law: A Roadmap for ASEAN?

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*European Commission, Directorate-General for Competition, Brussels
Photo Source: Author's personal collection*

ABSTRACT

The European Union's competition policy and legal regime is instrumental in the functioning of the single market in the EU. The member states accepted to transfer decision-making power to the European Commission to allow for effective enforcement of competition law, crucial for the well-functioning of the Single Market. In contrast, there is not yet a region-wide ASEAN competition legal regime and the policy landscape in ASEAN is quite different from that of the EU. However, ASEAN in moving towards an ASEAN Economic Community, have acknowledged the need to introduce nation-wide competition law and policy by 2015 in its Economic Blueprint. One of the objectives of the ASEAN Economic Community is to create a competitive economic region which promotes a culture of fair competition. Nevertheless, there are fears that without reforms in the institutional arrangements on compliance and enforcement of rules and regulations, the developments in the field of competition law will remain words, without any teeth.

This working paper aims at analysing whether EU competition law could serve as a template for ASEAN. It argues that ASEAN can look at the EU experience and use the EU competition law regime as a source or reference for developing its own model of competition policy and legal instruments. However the development of ASEAN's own competition regime will not follow exactly the roadmap of the EU due to the different approaches towards regional economic integration, legislative frameworks and institutional structures. The paper also examines possible lessons from EU competition law regime and the most appropriate solutions for a successful ASEAN competition law regime.

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EU COMPETITION LAW: A ROADMAP FOR ASEAN?

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1. Introduction

"I think we will have an ASEAN Community by the end of the year. What the quality is depends on how hard we work. There are outstanding things to be done. The more we can do the better community we will have."

Singapore Prime Minister, Mr Lee Hsien Loong,
June 2015²

The ASEAN Economic Community (AEC) is expected to be implemented by the end of this year and its objective is to create a competitive region which promotes a culture of fair competition. Thus, in the AEC blueprint, the ASEAN Member States (AMS)³ have decided to introduce nation-wide competition law and policy in 2015. However, there are fears that without reforms of institutional and enforcement arrangements in ASEAN the developments in the field of competition law will remain words, without any teeth. The EU Member States (MS) allowed the European Commission (EC) to enforce competition law, with investigative powers, and with the possibility to override the decisions of national authorities. Are AMS prepared to follow the EU example, adopt a hard law approach and extend the enforcement and investigative powers to a

¹ Intern, EU Centre in Singapore. The author would like to thank Dr Yeo Lay Hwee for her comments on the paper. The views expressed in this working paper are those of the author and do not necessarily reflect the views of the EU Centre in Singapore. Any shortcomings or errors are solely the author's.

² Source: ASEAN community 'hinges on hardwork': <http://www.todayonline.com/singapore/quality-asean-economic-community-depends-how-hard-we-work-pm-lee>

³ Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam

central entity which would be able to punish possible transgressions across ASEAN?

For the purpose of this paper, competition law is understood as a major component of competition policy. Competition law includes rules, "legislation, judicial decisions and regulations specifically aimed at preventing anti-competitive business practices, abuse of market power and anti-competitive mergers."⁴ Competition policy is a broader concept consisting of various measures and instruments that governments may pursue in order to promote and protect competition.⁵

EU competition law and policy have always played an important role in the progression towards a single market in the EU. The latter is often considered to be the world's most successful example of regional economic integration⁶ and the Directorate-General for Competition (DG Competition) of the EC is considered as one of the most sophisticated antitrust enforcers in the world. When it comes to ASEAN, as in many of its policy areas, the competition law and policy landscape is still inconsistent. However, by adopting the EU lexicon of creating an ASEAN Economic Community, expectations have been raised. Some businesses may be hoping that in the area of trade and investments, ASEAN will move closer to the EU model. The EU experience suggests that new mechanisms and institutions are instrumental as regional integration deepens. Since the EU competition law regime is such an integral part of the EU's single market, could it serve as a template for ASEAN as it pursues greater

⁴ Article 2.1.1.2 of ASEAN Regional Guidelines on Competition Policy (2010)

⁵ For instance, deregulation and efforts to privatize state-owned enterprises

⁶ This underlying assumption has been questioned in the context of the European sovereign debt crisis, and the refugee and migrant crisis. Some academics even argue that not only has the EU failed to manage these crises but it has become part of the problem (Borzell, 2015).

economic integration with the inauguration of the ASEAN Economic Community?

This paper argues that ASEAN can learn from the EU experience and use the EU competition law regime as a source or reference for developing its own model of competition policy and legal instruments. However the development of ASEAN's own competition regime will not follow exactly the roadmap of the EU due to several factors which will be subsequently discussed.

The paper first analyses the different regional impulses leading to different approaches towards regional economic integration and competition law. The second part studies their legislative frameworks and the third part focuses on their institutional structures. The paper concludes with a discussion on possible lessons from the EU and the most appropriate solutions for a successful ASEAN competition law regime.

1. Two different contexts

a. EU Competition Law

i. Historical Context

The European competition law was formulated and put into effect in the 1960s with the adoption of regulation 17/62.⁷ In the beginning, the first function of competition law within the framework of the Treaty of Rome 1957 was that of integration, because it was envisaged as a tool to achieve the common market and to enhance the fundamental principle of free movement which underpinned the European Community. Subsequently, the Single European Act 1986 and the progress towards the single market opened up competition in new markets, in particular, the service markets monopolized by State-owned

⁷ Council Regulation (EEC) No. 17/62 of 6 February 1962: First Regulation implementing Articles 85 and 86 (now 101 and 102) of the Treaty

enterprises.⁸ This gave rise to a second function of European competition law, that of regulation. As a consequence, EU competition law was one of the earliest supranational policies in the European Community, along with the common agricultural and cohesion policies.

ii. Goals of EU Competition Law

Even though the debate is not fully settled when it comes to the goals of EU competition law, authors have mostly discussed four of them: fairness, economic freedom (plurality and consumer choice), economic efficiency and consumer welfare (Geradin et al., 2012). There are two dimensions to the goal of fairness: first, to whom an undertaking must be 'fair' and secondly, what makes the conduct 'fair' or 'unfair'. It affirms the ordoliberal view that rules of the competitive 'game' should be the same for all undertakings. This is put in place when the European Commission decides that a firm in a dominant position has to share its intellectual property rights or to increase its prices in order to assist the entry of its competitors. Economic freedom refers to the idea that market players must be free to operate on the market because, as emphasized by the 'Harvard School' in the 1950s, the less concentrated a market, the better the price and choices for the consumer. Finally, it is understood that enhancing economic efficiency will ultimately also promote consumer welfare which is referred to in numerous Commission documents as the ultimate goal of EU competition law.

From a broader perspective, these goals stem from the purpose to establish a single market with a free flow of goods, labor, services and capital and to create "an ever closer union among the peoples of Europe".⁹ The European Court of Justice (ECJ)

⁸ Such as telecommunications and energy
⁹ Preamble of the Treaty of Rome (1957)

affirmed in 1999 that the Article in the Treaty Establishing the European Community (TEEC) ensuring that competition is unrestrained is “a *fundamental* provision [...] essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the *internal market*”.¹⁰ Due to this relation of the competition policy with the original goals of the European Community, EU competition law is mainly a public policy tool to achieve the goals of the EU, and competition policy is considered to be one of the most fundamental policies underlying the European integration.

b. Towards an ASEAN competition legal regime?

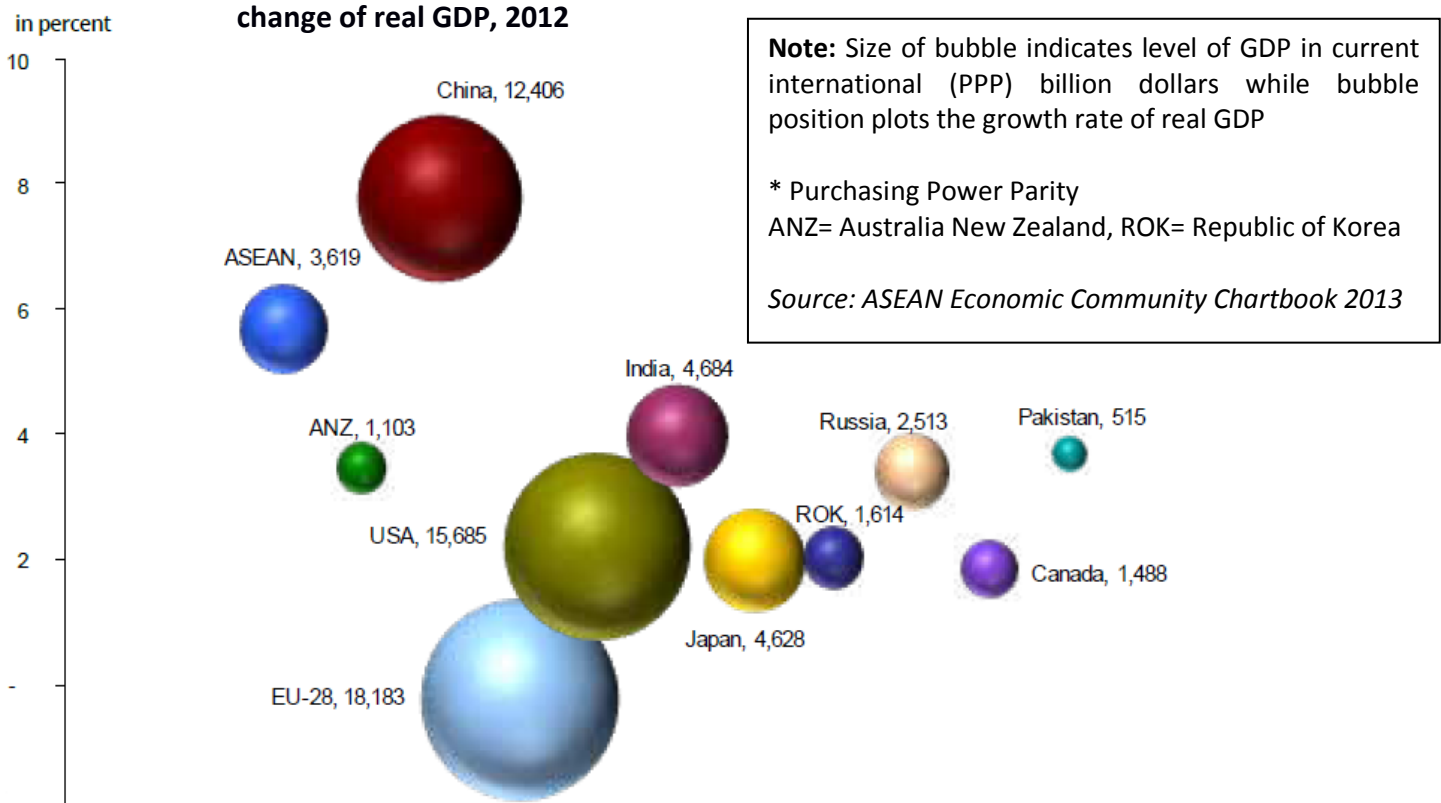
i. Differences between the EU and ASEAN

In considering realistically what ASEAN can learn from the EU, there is need to be fully aware of the differences between the two entities. First and foremost, while ASEAN is a region comprising a large maritime territory and states very protective

of their sovereignty, the EU constitutes a contiguous land mass with a long coastline, more homogeneous (in terms of socio-economic environment and political and legal structures). The different geography and historical contexts impact the approaches taken towards regionalism by Southeast Asian and European states.

Both the EU and ASEAN are also at very different stages of economic development. ASEAN is a small economy compared to the EU. The graph below shows that in 2012, ASEAN’s nominal GDP (in PPP dollars) amounted to 3.6 trillion Dollars which is 20 percent of EU’s nominal GDP (in PPP dollars) that amounted to 18.183 trillion Dollars. But in real terms, ASEAN’s GDP growth at 5.7 percent was second to China’s 7.8 percent. This has an impact on their respective regional integration and renders ASEAN more outward-looking which is illustrated by the fact that intra-ASEAN trade accounts for only about 1/4 of its global trade compared to 2/3 in the case of the EU.

Figure 1: Gross Domestic Product (GDP), in billion PPP* Dollars and rate of change of real GDP, 2012



Second, EU and ASEAN represent different models of regional cooperation. Yeo (2015) asserts that ASEAN is a classical realist type of intergovernmental regional organization, founded in 1967 around the idea of autonomy and regional cooperation, not integration. The word 'integration' was not mentioned in any of the key ASEAN documents before 1992. There are no supranational institutions within ASEAN, but occasionally the AMS do pool their sovereignties when national and regional interests converged in order to speak with one common voice to confront a common threat. Regionalism in ASEAN was conceived to support national development and not to tame sovereignty. It was after the Asian financial crisis of 1998 that ASEAN in coping with the reality of economic interdependence started to talk about being more institutionalized. It was in 2003 that the idea of creating an ASEAN Community was formally adopted in the Bali Concord II.

On the other hand, the EU was built with the aim of ending the frequent wars between neighbors, and was seen first and foremost as a peace project. As of 1952, the European Coal and Steel Community began to unite European countries economically and politically in order to secure lasting peace. In 1957, the Treaty of Rome created the European Economic Community (EEC) with the goals of achieving customs union and common market. In 1993, the single market was completed with the 'four freedoms' of movement of goods, services, people and capital. Subsequently, the EU became a monetary union but without fiscal policy. The Treaty of Lisbon which came into force on 1 December 2009 provided the EU with modern institutions and more efficient working methods.

The differences in the subjective environments facing the EEC in the 1950s and ASEAN today were extensively discussed by Plummer (2009). He argues that nation-state formation in ASEAN is

much younger than was the case in the EEC, and that it is therefore still a strong priority in some AMS. He further emphasizes that the international economic environment is much different today than it was in the 1950s as the current global marketplace is now extremely open. Thus, the underlying need to create AEC was due to different reasons than the creation of the EEC (Plummer, 2009).

Moreover, in terms of economic development, ASEAN encompasses greater diversity.¹¹ Singapore is considered a more developed economy, Indonesia, Malaysia, and Thailand are somewhere in the middle, Cambodia and Laos are less developed economies and Vietnam and Myanmar are transitional economies. Regarding their economic structures, Brunei is a small, rich, oil country, Singapore is a commercial economy, Malaysia is an industrial/commercial economy but enriched with natural resources and Thailand, Indonesia and Philippines are mixed agricultural/industrial/commercial economies (Thanadsillapakul, 2010). Diversity also exists when it comes to AMS' political regimes.¹²

As a consequence, it was not so much the goal to pursue regional integration, but to strengthen regional cooperation. ASEAN is too diverse to have a structured approach to regionalism like the EU. AMS are little inclined to compromise their independence by pooling sovereignty with their neighbors, not least because several Southeast Asian nation states have only recently emerged

¹¹ Even with the latest EU enlargements (in 2004 including 10 Central and Eastern European countries, in 2007 including Romania and Bulgaria and in 2013 including Croatia) the EU is much less diverse than ASEAN.

¹² Myanmar government just signed a cease-fire agreement with representatives of 16 armed ethnic groups in March 2015 aiming at ending decades of violent clashes. Laos and Vietnam are communist states and Thailand just emerged from a political crisis. Moreover, several AMSs will hold elections in 2016 which might alternate their position towards ASEAN.

from colonialism and hence the need to focus on nation-building. Therefore, in Southeast Asia, regional economic integration has been shaped more by market forces than by governments.

Another major difference between the ASEAN and the EU is the 'open regionalism' approach taken by ASEAN in view of its orientation and dependence on the global market.

ii. Why AEC is not the EU single market

The above-mentioned differences between the EU and ASEAN have shaped a different approach towards a single market. A theoretical definition of a single market comprises several criteria. First, removal of barriers at the border, beyond the border, and across borders to create a genuine Free Trade Area (FTA). To pass the test of a single market, i.e. one price across countries, fiscal and monetary union would also be necessary. Fiscal union would remove price distortions arising from application of unequal tax rates and monetary union would eliminate any cost of foreign exchange transactions (Reyes, 2004).

Following this strict definition, the EU still has not fulfilled all these criteria as it does not currently have a fiscal union. The Single European Act defines the single market as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty" (Article 8A). This is commonly known as the Four Freedoms embodied in the Single Market of the EU.

As regards ASEAN, the key goals of the AEC are creating (i) a single market and production base, (ii) a highly competitive economic region, (iii) a region of equitable economic development, and (iv) a region fully integrated into the global

economy.¹³ However, there is no evidence that there is any political desire by ASEAN leaders to establish an EU-style single market. ASEAN leaders have agreed on the formation of the AEC as a single market but not to the extent of forming a fiscal and monetary union, and is not even a customs union. In fact, national external trade policies are to be coordinated rather than replaced by a customs union. Thus, in ASEAN, a single market and production base, with free (or rather freer) movement of goods, services, capital and skilled labor includes the following measures: eliminating intra-ASEAN tariffs and non-tariff barriers, establishing an 'ASEAN Single Window' as a single point of contact for intra-ASEAN customs clearance procedures, harmonizing technical standards, and introducing mutual recognition of professional qualifications in certain sectors rather than general labor mobility.

Therefore, ASEAN is not aiming at an EU-style single market but rather at an 'FTA plus' or a 'common market minus' arrangement. The 'FTA plus' approach would envisage a zero-tariff ASEAN FTA and some elements of a common market, such as freer movement of capital and skilled labor. The 'common market minus' approach would aim at a fully integrated market which nevertheless allows members states to reserve deeper integration for a later stage.

Furthermore, in contrast to the founding fathers of the EEC, ASEAN leaders do not consider the AEC as a stepping stone to closer political integration, even though economic cooperation may "spill over" into other policy areas. In addition, both the AEC and the ASEAN Charter provide neither for supranational institutions nor for enough resources to support an EU-style single market.

Finally, according to Kimura (2013), a single market in ASEAN's case cannot be literally achieved until

¹³ ASEAN Economic Community Blueprint (2008)

geographical and industrial development gaps are filled. He therefore argues that achieving 'integrated production base' must be prioritized in the AEC, as it can effectively help to narrow the development gaps.

iii. Why ASEAN needs competition law?

While ASEAN is not aiming for an EU-style Single Market, it has signaled the intent to deepen economic integration in the region as a way to boost the region's competitiveness. Thus, there is also increased expectation for ASEAN to create conducive conditions for trade and investments. Having a transparent competition legal regime can support the implementation and elaboration of trade and investment liberalization within the ASEAN market.

The characterization of the AEC implies that competition law is necessary to maintain a competitive environment within the region. This objective is very similar to that associated with competition law and policy in the EU. It aims at reducing market barriers, discouraging anti-competitive behaviour, benefiting both the consumers and local small to medium enterprises (SMEs) within ASEAN, and therefore facilitating regional integration and creation of a single market.

However, in the case of ASEAN, there is a third objective of competition law. ASEAN economic regionalism is a response by the Southeast Asian governments to a fear of marginalization from foreign direct investment (FDI) (Nesadurai, 2005). The attractiveness of ASEAN as a destination for FDI saw a drop in the immediate aftermath of the Asian financial crisis. The rise of China has led to a rush of foreign investments into China, many at the expense of ASEAN. It was only at the beginning of the second decade of the 21st century that FDI into ASEAN is starting to catch up with China, and

in 2013, ASEAN-5 (Indonesia, Malaysia, the Philippines, Singapore and Thailand) attracted more FDI than China (\$128 billion versus \$117 billion).¹⁴

Since a stable competition regime is important in order to attract investors, the need for regional competition law is acknowledged. As the Prime Minister of Singapore, Lee Hsien Loong put it at the 25th ASEAN Summit in Myanmar in 2014: "an ASEAN that is economically integrated, strong and united can better attract investments, create jobs, manage regional challenges, as well as be an effective platform to engage larger powers".

Furthermore, given ASEAN's 'open regionalism' which aims for the least discriminatory impact on non-members, ASEAN regional competition law and policy is important for the promotion of a proper competitive balance between intra- and extra-ASEAN business enterprises.

2. Diverging legislative frameworks

a. EU's choice: hard law

EU opted for supranational competition rules because of its institutional set-up emphasizing integration. They are enshrined in the Treaty on the Functioning of the European Union (TFEU) with a major aim of speeding up market integration. The TFEU is complemented by a number of regulations and directives intended to be followed by all MS. The EU has exclusive competence in the establishment "of the competition rules necessary for the functioning of the internal market" (Art. 3 TFEU). Nevertheless, at the same time MS have separate and distinct national competition laws and national competition authorities which may converge on some points and diverge on others.

¹⁴ Source: McKinsey http://www.mckinsey.com/insights/public_sector/understanding_asean_seven_things_you_need_to_know

EU competition law consists of two main provisions namely controlling anti-competitive practices arising from restrictive agreements (Article 101 TFEU) and preventing the abuse of a dominant position (Article 102 TFEU). Article 107 of the TFEU deals with state aid and stipulates that aid distorting competition should not be attributed by the government of MS to businesses. Control of mergers, acquisitions and joint ventures is covered by Regulation 139/2004. A principle of particular importance in the field of competition law is the non-discrimination principle contained in Article 18 TFEU prohibiting discriminations on grounds of nationality.

In addition, EU competition rules uphold the doctrines of direct effect and supremacy. The principle of direct effect was established by the European Court of Justice (ECJ) in *Van Gend en Loos*¹⁵ and entails that EU provisions can create rights which EU citizens may rely on before their domestic courts. According to the doctrine of supremacy, when there is conflict between European law and national law, European law prevails. This has been affirmed by the ECJ in several decisions.¹⁶

The EC also issues guidelines and notices which are not binding but explain the scope and application of the different Articles and Regulations. As a result of Article 3 of Council Regulation (EC) No. 1/2003 of 16 December 2002 (the so-called 'modernization regulation', effective 1 May 2004), national competition rules must be applied in tandem with Community rules which makes EU competition law not only uniform at the EU level, but also at national level (Luu, 2012; Jones, 2006). In consequence, EU competition law is a complex and comprehensive set of rules bringing a high

degree of convergence of competition laws across the EU.

b. ASEAN's choice: soft law

Contrary to the EU, and expectedly, ASEAN has chosen a soft law approach to competition. The latter has been promoted by ASEAN Experts Group on Competition (AEGC) which is a regional forum established in 2007 to discuss and co-operate on competition law and policy. It has developed the ASEAN Regional Guidelines on Competition Policy (2010) and compiled a Handbook on Competition Policy and Law in ASEAN Member states for Business (launched in 2010 and updated in 2013). It has also drafted Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN (2012), based on the experiences of AMSs and internationally recommended practices.

By providing a general framework, these guidelines promote cooperation, the sharing of best practices among the AMS, and the creation of a competition law culture. Their effectiveness has been questioned by many. According to Carol Osborne (Economist, Partner, HoustonKemp, Singapore, 2015), "the guidelines may be part of the process of drafting political and legal decisions on competition issues in the ASEAN countries, but it is difficult to expect them to be an efficient tool for economic integration of the less developed ASEAN countries".

To date, nine of ten AMS have comprehensive national competition laws. Cambodia is the only one out. Most recently, the Philippine Competition Act was signed into law on 21 July 2015 and the Laos Business Competition Law was passed on 16 July 2015. The competition laws of AMS originate from different stimuli. Both Indonesia and Thailand have implemented and enforced competition law since 1999 as they were urged by IMF to reform their economic and legal

¹⁵ Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1

¹⁶ See *Costa v. ENEL*, *Simmenthal II* and *Marleasing*

systems during the Asian financial crisis. In Vietnam, the implementation of competition law was accelerated by the accession to WTO and in Singapore, enforcement of competition law stems from legal obligations set out in the US-Singapore FTA (2003).

Laws adopted by the nine AMS have similar objectives in that they all prohibit anti-competitive agreements in the private sector and abuse of dominance. However, variations remain, especially in terms of threshold levels and sanctions.¹⁷ These differences may have implications on transaction costs and cross-border investments.

A unique regional competition law seems too ambitious a goal for ASEAN for the time being, not only because of legal differences in the AMS but also given the disparities in size,¹⁸ economic weight, and level of industrialization among AMS. This diversity of economic structures within ASEAN has an impact on the competition regime in each AMS. Therefore, it would be difficult to implement competition law through EU style hard approach until national economies are more evenly developed. The guidelines also expressly state that the implementation of competition policy should not prevent AMS from “pursuing other legitimate policies that may require derogations from competition policy principles” (Art. 3.5.1). As a consequence, AMS may adopt exemptions or

exclusions aimed at specific industries or activities. In this regard, hard law approach might not be flexible enough to allow these differences and might also be too costly for AMS because “the lack of substantive convergence in some areas of antitrust across jurisdictions (particularly but not exclusively in the area of monopolization) may suggest high costs for a binding commitment” (Niels and Kate, 2004).

Consequently, ASEAN harmonized approach to competition law aims only at narrowing the distinctions between national laws while leaving variations of detail to national legislators. Thus, it is less than the uniform EU competition law and relies on the network model based on mutual assistance and cooperation. Given the diversity of AMS, this model seems suitable for ASEAN for the time being because as Frederic Jernny (2002) put it: “any solution to the general problem of promoting the complementarity of trade liberalization, regulatory reform (regional economic integration) and competition policy must be flexible enough to allow such national differences to continue to exist”.

3. Key question of institutions

a. EU institutions

In the EU, the enforcement of international competition rules has been assigned to several supranational institutions, with the main one being the Commission, in particular the Directorate-General (DG) for Competition. The Commission is the competition regulator for the single market possessing extensive investigative powers including requesting information from relevant parties, calling parties to oral interviews and conducting unannounced investigations at corporate as well as private premises. It makes decisions in the areas of antitrust (cartels and abuse of dominance), mergers and state aid. The

¹⁷ Concerning penalties, some AMSs apply criminal sanctions (such as Thailand), some only apply administrative sanctions (such as Singapore), and some combine both types of sanctions (such as Indonesia). AMSs also chose different thresholds for merger notification and the latter is voluntary in Singapore.

¹⁸ The implementation of competition law in some AMSs such as Brunei, Cambodia and Lao PDR needs to take into account their small size as it is difficult to achieve scale economies in small market economies which also tend to be dominated by a few large firms. In practice, these AMSs may opt for merger controls that are more accommodating of efficiency defenses, and less focus on *per se* rule prohibitions on cooperative agreements related to SMEs (Lee & Fukunaga, 2014; Gal, 2001, 2003).

organization of DG Competition is sector-specific, and covered all three areas of antitrust, mergers and state aid.¹⁹ DG Competition employs around 745 relatively young staff with legal, economic, engineering and other backgrounds. It is allowed to impose fines amounting to a maximum of 10% of the overall annual turnover of entities found guilty of infringing competition law. Over the period 2005-2014, it has dealt with an average of 305 mergers per year and it has made an average of 12 cartel and antitrust interventions per year.

Thus, DG Competition offers great expertise and wields substantive power with regards to the functioning of the Single Market.²⁰ Case-handlers of each unit face tight deadlines and work under the Head of unit and Deputy-Head of unit who are under the authority of the Director and are responsible for the management of the cases assigned to them and the other operational matters of the unit. Given the expertise and the sophisticated logistics of DG Competition, it is questionable whether this model would be replicable in the case of ASEAN. The overall EU bureaucracy is well-staffed and the European Commission itself employs 30 000 staff. In contrast, the ASEAN Secretariat only has 300 professional staff. The capacity of ASEAN Secretariat is further hampered by its meager financial resources. The 2014 budget of the whole ASEAN Secretariat is EUR 15.22 million, and this is in contrast to the EUR 142 billion allocated to the EU, with EUR 7.23 million just for the DG Competition. Budget and lack of qualified staff with technical skills are two instances that hinder

¹⁹ See the organigramme of DG Competition for more information:

http://ec.europa.eu/dgs/competition/directory/organi_en.pdf

²⁰ A case may be initiated in several ways: via a complaint from an aggrieved party/ MSs/ ordinary persons with a legitimate interest or of EC's own accord. In case of mergers, the Commission mainly examines larger mergers with an EU dimension, which is determined by turnover thresholds.

national competition authorities within ASEAN from fully exercising their mandate. Therefore, even if ASEAN decided to create a supranational entity in the future, there would be a risk of drain on human capital detrimental to domestic policy priorities, which is an important consideration especially for the less developed CLMV (Cambodia, Lao PDR, Myanmar, and Vietnam) countries.

Two other EU institutions dealing with competition law are the General Court (EGC) and the European Court of Justice (ECJ). Following a decision taken by the DG Competition, parties may appeal the decision to the General Court of First Instance which may annul the decision, order a new investigation, or uphold the Commission's decision. The parties or the Commission may appeal further to the ECJ of final instance, which may reverse the decision of the General Court (Luu 2012). The ECJ is also competent to give preliminary rulings which are decisions on the interpretation of EU law, made at the request of a court or tribunal of an EU MS.

Regulation 1/2003 also established a network of competition authorities called the European Competition Network (ECN). The latter is a mechanism for an optimal allocation of cases among the Commission and national competition authorities and sets rules for the exchange of information²¹ as there is a decentralized arrangement for decision making and enforcement in the area of competition law and policy within the EU. This means that national competition authorities and courts have been empowered to apply European law, even in cases which have an effect outside the national border. This was part of the 2004 reform with the new Regulation 1/2003.

²¹ National competition authorities may share information, including confidential information, which may be needed to deal with cases related to Articles 101 or 102 of the TFEU.

Under Article 15(1) of the modernization regulation, national courts may ask the Commission for information or for its opinion when it comes to the application of competition law and are expected to cooperate with the Commission and the competition authorities of the other MSs in order to promote uniform application of the competition rules. In addition, the Commission can also act on its own initiative (Art. 15(3) of the Regulation). Thus, the Commission still plays a central role as it may intervene in local proceedings. At the same time it helps to strengthen the capacity of local competition institutions (authorities and courts).

To sum up, EU MS have to follow the TFEU and therefore have to revise their own national law and policy in parallel to it. In order for the regional harmonization to be effective, there needs to be a strong domestic enforcement of competition law (Kunzlik, 2003), which is the case in the EU. This implies that if member states within the region do not strictly enforce competition law at a national level, even with a supranational decision-making authority, enforcement would be difficult as well. This would be the case in ASEAN, as national capacity and national will is all the more important for any enforcement of their competition laws.

b. ASEAN institutions

While the EU consists of a hybrid system of supra-nationalism and inter-governmentalism and is sometimes considered as “perhaps the most ‘legalized’ international institution in existence” (Alter, 2000), ASEAN still operates primarily by the ‘ASEAN way’. The latter is based on decision-making by consensus and non-interference in each other’s domestic affairs which often results in informal and non-binding agreements. Therefore, the EU built cooperation top-down, whereas ASEAN approaches issues horizontally and has just

recently started to adopt a ‘consensus-based but not necessarily unanimity’ in certain areas of decision-making.

Thus, ASEAN does not have any regional mechanisms such as DG Competition or the Court to implement or enforce competitions law. The ASEAN experts group on competition (AEGC), with the support of ASEAN Secretariat (which however does not have any powers to make decisions),²² primarily focus on advocacy work and strengthening competition-related policy capabilities and best practices among AMS. It has organised various region-wide socialisation workshops in several AMS for government officials and the private sectors, intended to help foster a level playing field and raise awareness concerning fair business competition. Other activities promoted by AEGC include: capacity building and intra- and extra-regional networking. A multi-year program is currently being implemented in order to improve and enhance competition-related institutional building, legal framework and, advocacy and awareness for regional- and national-level in AMS.

The necessity of a central regional entity similar to the European Commission which would supervise the promotion and protection of market competition and enforce competition law in ASEAN was underlined by Vu Ba Phu, Deputy Director General of the Vietnam Competition Authority and Deputy Chair of AEGC in 2009. However, there is no political will to develop such a supranational

²² “The ASEAN Secretariat's mission is to initiate, facilitate and coordinate ASEAN stakeholder collaboration in realizing the purposes and principles of ASEAN as reflected in the ASEAN Charter. The ASEAN Secretariat's basic function is to provide for greater efficiency in the coordination of ASEAN organs and for more effective implementation of ASEAN projects and activities. “ Source: ASEAN Secretariat <http://www.asean.org/asean/asean-secretariat/about-asean-secretariat>

organization right now²³ given the fact that ASEAN countries still hold a very traditional view on sovereignty.

The ‘ASEAN way’ involves a high degree of informality, expediency, consensus-building and non-confrontational bargaining styles,²⁴ often contrasted with the formal bureaucratic structures and legalistic decision-making procedures in the EU (Acharya, 1997). AMS still remain very protective of their sovereignty, and reluctant to forego any part of it to a supranational institution.

Following the guidelines, AMS may choose the way the national competition regulatory body will work (e.g. the establishment of one or multiple independent statutory authorities or the retention of regulatory body functions within the relevant Government Department or Ministry). The risk is a dispersion of power among different institutions.

Moreover, ASEAN countries vary significantly in how effectively they enforce competition law. There are some newer regimes, such as in Singapore and Malaysia, which are being enforced rigorously while others are less effective. There are also some well-established regimes, such as Indonesia, which has shown a great interest in pursuing bid-rigging cases, but the weak Indonesian court system continues to undermine the effectiveness of the Indonesia Competition Commission (the KPPU).

Furthermore, the development of competition law and its enforcement in some AMS may be slowed down by relationship-based systems rather than rules-based systems. In this matter, Mcwin (2014) argues that “In Thailand, the act has proved to be non-effective, partly due to the numerous exemptions accorded to state-owned companies

and, de facto, to companies own by influential individuals, as well as the lack of enforcement of the act due to pressure from big business and lack of concern by government.” He also highlights that from October 1999 until August 2013 there were 18 complaints of abuse of a dominant position, 22 restrictive agreements complaints and 52 unfair trade practices complaints, but there has not been a single successful prosecution. There have not been any merger complaints during this period, as the criteria for mergers had not been set. Similarly, according to Nikomborirak (2013), an absence of rules and regulations to ensure transparency makes enforcement in Thailand selective and arbitrary.

Under these circumstances, it would be difficult to create a supranational regional competition regime at this stage. Therefore, harmonization of substantive national competition law together with the network model may be the most suitable to ASEAN’s ‘open regionalism’ infrastructure and its ‘ASEAN way’.

4. What Next?

a. Possible lessons from the EU?

While recognizing that the supranational EU model of competition regime may not be entirely suitable for ASEAN, the EU’s experience in trying to create a more level playing field through harmonizing regulations or mutual recognition could offer some template for ASEAN’s own experimentation with a competition regime that can serve the region well. Currently, there are four main weaknesses in competition law and policy within ASEAN: (i) lack of an appropriate institutional framework, (ii) lack of an enforcement mechanism, (iii) governments’ unwillingness to let state enterprises be subject to same competition law, and (iv) asymmetries between consumer lobbies and business power (Briguglio, 2012). It is worth analyzing them in

²³ This lack of political will to create a central competition entity is implied in the guidelines.

²⁴ Even though there has been legalization with the ASEAN Charter (2007) which turned ASEAN into a legal entity.

more detail as they seem instrumental for a well-functioning competition law and policy.

Regarding institutions and enforcement mechanism, as have already been discussed above, nine AMS have developed overarching competition acts, but contrary to the EU, ASEAN does not have a highly skilled competition directorate and a well-developed judicial framework. Briguglio (2012) argues that successful competition law and policy that strengthens the common market requires a strong institutional framework. While creation of an efficient centralized entity with the power of enforcement is highly improbable for the time being, AMSs could seek inspiration in the European Competition Network. The latter significantly facilitates the work of national competition authorities on cross-border issues while promoting a culture of information-sharing. This could serve as an inspiration for deepening cooperation among competition authorities of different AMS.

Apropos of exclusion from compliance by government authorities and state enterprises, according to the Article 106-1 TFEU, government authorities and state enterprises in the EU are subject to the same legal provisions as private undertakings. The logic behind is that public undertakings may negatively affect competition and thus the same legal provisions apply to private and public undertakings. There are some exceptions, for instance if the state undertaking is providing a service of general economic interest,²⁵ but the EC applies the case by case analysis in order to prevent abuses by public companies that may distort competition within the EU. However, according to Article 3.5.4 of the ASEAN Competition Guidelines, government authorities

²⁵ Service of general economic interest (SGEI) consists of economic activities identified by public authorities as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there were no public intervention (e.g. transport networks, postal services and social services).

and state enterprises may not be considered as economic players to be constrained by competition law.²⁶ This might contribute to the restriction of market access.

Finally, Briguglio (2012) argues that ASEAN could learn from the EU that laws and regulations must be supported by strong advocacy and empowerment of civil society, which is not the case in all AMS, especially those with no or only recently created overarching competition act. Civil society is important as it can offer countervailing pressure to business interests. However, he observes that consumer groups tend not to be well organized in some AMS and the business milieu does not always incline towards competition culture because of vested interests, corruption, lack of transparency, or weak and non-independent judicial system. The EU has promoted an ingrained competition culture and put in place strong enforcement arrangements to reduce possible business vested interest, such as leniency policy²⁷ in the case of cartels. Within ASEAN, only two AMS (Singapore and Malaysia) have leniency provisions so far. Consequently, it is important to work on the advocacy and empowerment of civil society because as John Davies (Head, Competition Committee, OECD, Paris) highlighted: “The 2015 deadline brings some formal convergence but success in catching and deterring cartels depends on so much more than just having a law.”

b. Appropriate solutions for the near future of ASEAN competition law and policy?

According to Luu (2012), ASEAN’s choice of a soft law approach with the guidelines and a networking

²⁶ State and state-owned enterprises play a dominant role in ASEAN, and tend to enjoy monopoly powers often restricting market access.

²⁷ A policy whereby companies that provide information about a cartel in which they participated might receive full or partial immunity from fines.

and co-operation process is appropriate for the time being. This is because ASEAN is constrained by the traditional 'ASEAN way', the diversity in economic conditions and competition regimes among AMSs, and "is still at a low level of integration with neither a supranational body nor a compulsory dispute resolution mechanism. These elements are considered, from the experiences of other regional arrangements, to be essential elements for the effectiveness of binding arrangements on competition law and policy". This rational conclusion is applicable for the present state of affairs, as the AMS first need to develop their own systematic set of competition law and policy and enforcement procedures. However, can we expect more legalization in the area of competition law and policy in the future?

First, AMS do not necessarily need to rely upon soft multilateral enforcement but could hybridize different approaches (hard and soft approach or bilateral and multilateral approach) which could be effective and could help lower transaction costs (Devahastin Na Ayudhaya, 2013). Waller (2003) points out that with the soft regional harmonization it may take longer time to cooperate effectively as states act upon national interest, which may include maintaining strong relationships with the domestic private sector. With the hybrid approach, an AMS could conclude a bilateral agreement with other members on certain private sectors that both have similar level of maturity, while also opt for the soft law approach at a regional level based on guidelines rather than formal rules and regulations (Devahastin Na Ayudhaya, 2013).

In the short and medium term, AEGC, with the support of ASEAN Secretariat, will continue to play a crucial role in regional harmonization of competition law, not only by providing a framework through its publications but especially by organizing networking events. These allow

representatives of different AMS to meet and exchange their views and practices and to adopt a more coordinated approach and push those who launched their competition regimes more recently.

Such networking and cooperation efforts started with the establishment of the AEGC through conferences and annual meetings of the heads of the national competition authorities, but it seems important to intensify these meetings. Many speakers at the 'ASEAN Antitrust: Issues and Challenges' conference in April 2015 advocated enhanced cooperation between the national competition authorities in order to avoid unnecessary burden and uncertainty. In case of mergers, Herbert Fung (Director Business and Economics, Competition Commission of Singapore) explained that among 49 mergers notified to the national competition authority only 8 cases were purely local. With the increasing number of cross-border transactions, competition authorities "would benefit from enhanced cooperation in terms of investigative efficiency and could reduce the substantive gaps and develop a mutual understanding of their legislations, share more information, and align the timing of merger control".

Furthermore, Ken Chia (Principal, Baker & McKenzie Wong & Leow, Singapore) emphasized that the principle of transparency should be further developed in AMS, as "there are many countries where the rules are not clear and would require further explanations by the national competition authorities". While there is no 'one-size-fits-all' solution for the design of competition authorities and their powers, as they depend on a country's history and political, legal and economic systems, all competition regimes should have the following fundamental attributes: independence and accountability, fairness and credibility and transparency, safeguard for confidentiality and effective powers, influence and resources (Toh

Han Li, Professor of Economics, New York University). However, the development of rules on transparency and their application may take some time in some AMS.²⁸

Much of what needs to be done in ASEAN depends on national political will and capacities. There are still many gaps that need to be filled. Working to close these gaps will take time, and in the long run, there is still the question whether ASEAN will be able and willing to follow the EU hard approach once there is more convergence and cooperation among AMS on the issue of competition law and policy.

c. Is EU's present ASEAN's far future?

Opinions have been raised that, in the long term, ASEAN may need a Regional Competition Committee to oversee and enforce competition law for cross-border cases and to coordinate across all national competition authorities in order to create one competitive region like the EU (Thanadsillapakul, 2010; Vu, 2009). The role of the AEGC could be expanded to become this Committee, which would be an initial step towards further development of common regional institutions designed to lead ASEAN to a higher degree of economic integration.

Nevertheless, according to Severino (2015), ASEAN institutions can work well only if the nation states want them to and if they have their own well-functioning institutions in order to implement the decisions effectively. Let us suppose that national competition authorities within ASEAN become well functioning in the future thanks to the efforts of AEGC and ASEAN Secretariat, then, the next step will be for ASEAN and national leaders to consider

what AEC means for their countries and how much regional centralization and coordination is needed or desirable. Most probably a compromise will be needed so that AMS become willing to pool their sovereignty to create a central competition entity that could work in favor of making ASEAN an attractive investment area.

In order to gain the trust of ASEAN leaders, the Regional Competition Committee may function as a kind of an 'eminent persons group' representing a "permanent body made up of former government officials, academics, and other highly respected ASEAN nationals, supported by a professional staff" (Inama & Sim, 2015), which would oversee and enforce competition law for cross-border cases, coordinate national competition authorities, and monitor and comment on AEC developments. Such a group has been frequently used in ASEAN's history and the use of such groupings is in line with Southeast Asia's largely agrarian system "whereby major decisions and disputes in the *kampong* (village) were resolved by consulting with the local elders" (Inama & Sim, 2015). Thus, decisions and analysis from this body could be more acceptable to AMS.

In fact, the soft approach seems appropriate for the time being but may be insufficient in the long term. It seems that only by moving beyond the *status quo* can the full harmonization of the competition law and policy in ASEAN be achieved in the future. The Regional Competition Committee would not necessarily need to follow the example of the EC and DG Competition but could develop its own style adapted to the Southeast Asian context.

According to Inama & Sim (2015), following this logic in its integration, ASEAN could establish a *sui generis* entity which would be "an economic integration model that blends selected aspects of the EU institutions with selected aspects of the

²⁸ In Thailand for instance, in a paper funded by the World Bank, S. Takasila and R. Chitmunchaitham found considerable conflict of interest problems among the commissioners (Mcewin, 2014).

NAFTA model.²⁹ In this way ASEAN could chart its own course by creating an AEC that achieves a single production base, and ultimately a single market, but *based on considerations of sovereignty and economic development which are appropriate for the region*". This might be seen as too ambitious at present but might not be impossible in the far future of ASEAN.

Conclusion

EU competition law regime is an effective and well-functioning mechanism essential for the operation of the Single Market. There is much that ASEAN can learn from the EU experience as it proceeds tentatively toward deeper economic integration. However, how the EU competition law is derived cannot be a roadmap for ASEAN due to divergent regional, economic, political and legal factors. In addition, AMS are not yet fully willing, or ready, to forgo certain level of their sovereign rights in exchange for legal integration in this policy area. Therefore, the use of hard law approach with a single competition entity is not appropriate for the time being.

In the future, when the constraints are overcome and strong domestic enforcement of competition law is put in place, further legalization in the area of ASEAN competition law will be welcome if more convergence is still needed. This could be done in several ways, such as by hybridizing hard and soft approach, bilateral and multilateral approach, and drawing from both the EU and NAFTA model and creating an 'eminent persons group' as a central competition entity.

More time and financial and human resources may be needed for ASEAN to have a systematic harmonization of competition law. However, if it manages to do it successfully in a way that is the most appropriate for the region, the AEC could even serve as a role model for other developing nations facing similar concerns.

²⁹ NAFTA lacks the common (supranational) institutions of the EU and (except in certain narrowly defined areas) it also lacks the common competition rules present in the EU. These differences have grown as Regulation 1/2003 has increased the uniformity of competition rules in the EU while NAFTA has not refined its competition rules. See Jones (2006).

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