COMPETITION LAW AND POLICY
IN THE EUROPEAN UNION -
SOME LESSONS FOR
SOUTH EAST ASIA

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Paper presented at the
37th FAEA Annual Conference
Manila-Philippines, November 28-29, 2012
1. Introduction

This paper describes the competition law and policy regime in the European Union (EU) from which it draws some lessons for the AESAN, mainly with regard to the development of a single market in the region.

In the EU competition law and policy is, by and large, consistently applied in member states and there is an effective enforcement mechanism with regard to practices that affect the internal market, and has been instrumental in the progression towards a single market in the EU. On the contrary, competition law and policy are not applied consistently throughout the ASEAN. Some member states (e.g. the Philippines) do not even have an overarching competition law in place. As the integration process within the ASEAN will develop, its regional market will require a regulatory regime that is consistent across the member states.

The paper is organized as follows. Following this brief introduction, the paper describes Competition Law and Policy in the EU, referring to the major institutions, and enforcement procedures within the Union. Section 3 deals with the enforcement collaborative arrangements relating to EU competition law and policy. Section 4 describes competition law and policy in the ASEAN, which section 5 derives some lessons for the ASEAN from the EU regime. Section 6 concludes the paper.

2. Competition Law and Policy in the EU

Competition law in enshrined in the Treaty on the Functioning of the European Union (TFEU) with the major objective of speeding up market integration through a regulatory framework with a centralized enforcement authority. The TFEU is supported by a number of regulations and directives intended to be observed by all member states.

Competition law and policy of the EU are built on two main pillars namely controlling of anticompetitive behaviour arising from collusion (Article 101 of the Treaty) and preventing abuse of dominance (monopolization) of the market (Article 102 of the Treaty).

Other relevant Articles of the TFEU are 106 and 107. Article 106\(^1\) states that public undertakings are caught by the same legal provision as private undertakings. However some exceptions are allowed in Article 106(2) when public undertakings are entrusted with the operation of services of general economic interest (water, energy, transport and telecommunications) so as not to

\(^1\) The Article states, *inter alia*, that “In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties ….Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.”
obstruct the particular tasks assigned to them. Nevertheless, the Article explicitly states that the
development of European trade must not be affected by aid to these undertakings to such an
extent as would be contrary to the interests of the Union. For this purpose, the European
Commission, while recognizing that genuine services of general economic interest can constitute
an exception in the context of Article 106, a case-by-case approach is adopted to eliminate
restrictive practices, so as to establish, for example, whether alternative service provision is
possible.\footnote{In December 2011 the European Commission adopted a revised package for public compensation for services of
general economic interest (SGEI). The new package clarifies key state aid principles and introduces a diversified
and proportionate approach with simpler rules for SGEIs that are small, local in scope or pursue a social objective,
while better taking account of competition considerations for large cases.}

Article 107 of the TFEU relates to state aid, and provides that, in principle, aid and other support
that distorts competition should not be given by the government of Member States to business.
For example aid that shelters inefficient firms is not permissible.\footnote{The European Commission demands a high degree of transparency of the financial relations between the
government and public undertakings in order to establish whether transfer of public funds to those undertakings are
in line with the competition provisions of the Treaty (Directive 2006/111).}

In addition, competition law and policy in the EU also covers control of proposed mergers,
acquisitions and joint ventures which could significantly impede effective competition,\footnote{EU competition law requires that undertakings intending to merge and have a Community dimension need to notify the Commission of the proposed merger and seek authorization from the Commission. Community dimension refers to the combined aggregate worldwide turnover of all the undertakings concerned and the aggregate Community-wide turnover of the undertakings concerned. For details about these thresholds see Council Regulation 139/2004, available at: \texttt{http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0139:EN:NOT}. Undertakings that have a community dimension and do not seek such authorization or if they are found to impede effective competition after they merge are subject to substantial fines (see Article 14 of the same Council Regulation).}
in particular as a result of the creation or strengthening of a dominant position.

\textit{The Relevant Institutions of the EU}

In the European Union, there are three main institutions involved in EU legislation:
\begin{itemize}
\item the European Parliament, which represents the EU’s citizens and is directly elected by them;
\item the Council of the European Union, which represents the governments of the individual
member countries. The Presidency of the Council is shared by the member states on a
rotating basis.
\item the European Commission, which represents the interests of the Union as a whole.\footnote{The European Commission is made up of 27 Commissioners, one from each EU country, appointed for a 5-year term, with each Commissioner being assigned responsibility for a specific policy area. The President of the current Commission is José Manuel Barroso.}
\end{itemize}

\textit{The European Commission}

The institution which is directly entrusted with the oversight of EU competition law is the
European Commission. Article 105 of the TFEU mandates the Commission to see to it that the
Articles relating to competition are not contravened and gives the Commission extensive
investigative powers, including through dawn raids, on undertakings suspected of breaking the law.

There are many ways in which the European Commission could become aware of a potential violation of the Treaty of the related regulations. The European Commission may carry out investigation or inspections of its own accord (even following an anonymous tip) or through a complaint from an aggrieved party or from member States or from ordinary persons with a legitimate interest.

The Commission\textsuperscript{6} may impose fines in line with Articles 23 of Regulation 1/2003.\textsuperscript{7} These fines can be very large, amounting to a maximum of 10\% of the turnover of undertakings infringing competition law. There are also fines levied for every day an undertaking fails to comply with Commission decision. These fines pose a major deterrent against infringing EU competition law.\textsuperscript{8} The Commission intervenes if it has evidence of an infringement of competition rules that affect cross-border trade, and its decisions are subject to appeal before the Court of Justice of the European Union.

\textit{Sector enquiries}

Article 17 of Regulation 1/2003 gives powers to the Commission to conduct inquiry, including inspections, within a specific economic sector when there is reasonable suspicion that competition may be restricted or distorted within the common market. In other words the investigation will not relate to a single possible transgression but to a possible transgression by a whole sector. A sector inquiry that received a lot of attention was the pharmaceutical sector inquiry which took place in 2008 and 2009 in which the European Commission used dawn raids after a suspicion that competition was distorted within the EU in that sector.\textsuperscript{9} Other such sector enquiries related to the electricity and gas sector,\textsuperscript{10} the business insurance sector\textsuperscript{11} and the retail banking sector.\textsuperscript{12}

\section*{3. Cooperation within the EU}

\textit{Decentralized Arrangement}

There is a decentralised arrangement for competition law and policy within the EU, so that

\begin{itemize}
\item In matters related to competition, the Commission operates through the Directorate-General for Competition. For more information about this directorate visit: \url{http://ec.europa.eu/dgs/competition/factsheet_general_en.pdf}
\item Articles 23 of Regulation 1/2003 states: \textit{“In order to achieve these objectives, it is appropriate for the Commission to refer to the value of the sales of goods or services to which the infringement relates as a basis for setting the fine. The duration of the infringement should also play a significant role in the setting of the fine. It necessarily has an impact on the potential consequences of the infringements on the market. It is therefore considered important that the fine should also reflect the number of years during which an undertaking participated in the infringement.”}
\item Private parties may also sue for treble damages (as in the US) through the national courts. This would act as an additional deterrent against breaching the competition law. However such court suits are not common in the EU.
\item Available at: \url{http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/}
\item Available at: \url{http://ec.europa.eu/competition/sectors/energy/inquiry/index.html}
\item Available at: \url{http://ec.europa.eu/competition/sectors/financial_services/inquiries/business.html}
\item Available at: \url{http://ec.europa.eu/competition/sectors/financial_services/inquiries/retail.html}
\end{itemize}
national competition authorities and national courts can ensure compliance with EU law within a particular member state. This is in line with EU Council Regulation 1/2003.\textsuperscript{13}

This arrangement means that national competition authorities and courts have been empowered to apply European law, including in cases which have an effect outside the national border. In any case, national courts may ask the Commission for information or for its opinion on points concerning the application of competition law and are expected to collaborate with the Commission and the competition authorities of the other Member States so as to promote uniform application of the competition rules. National competition authorities may also share information, including any confidential information, which they may require when dealing cases relating with Articles 101 or 102 of the TFEU.

*European Competition Network*

Regulation 1/2003, to which reference has already been made, decentralized decision making, regard competition law, including enforcement, and established a network of competition authorities, called the European Competition Network (ECN), composed of the Commission and the competition authorities of the Member States, based on the principle that the best-placed authority would handle a case which affects the EU as a whole. This arrangement is especially effective to counteract cross-border practices which restrict competition. The ECN also helps ensure that competition law is effectively and consistently applied through the members states. The Network also provides a system of information between the competition authorities of member states, enabling the national competition authorities to pool their experiences and to gain knowledge of best practices, so as to promote a common approach in competition issues. The ECN may also support investigations by national competition authorities.

The cooperation and exchange of best practices in the area of merger control within the ECN has led to the setting up an EU Merger Working Group in 2010, which consists of representatives of the European Commission and the national competition authorities of the EU member states. The ECN also issues a periodic brief with very useful information about competition law and policy within the EU.\textsuperscript{14}

*Leniency Policy*

The Commission operates a leniency policy through which it offers immunity or a reduction of fines to undertakings which inform the Commission of the existence of a cartel in which these undertakings participate.\textsuperscript{15} The undertaking which first submits such information and collaborates with the Commission in order to prosecute the cartel in line with Article 101 of the treaty will be granted complete immunity. If the firm is not the first to denounce its existence, it

\textsuperscript{13} EU Council Regulation 1/2003 assigned enforcement powers relating to Articles 101 and 102 to Competition Authorities and national courts of the EU member states.

\textsuperscript{14} The fourth issue of the brief is available at: \url{http://ec.europa.eu/competition/ecn/brief/04_2012/brief_04_2012_short.pdf}.

\textsuperscript{15} See Commission notice on immunity from fines and reduction of fines in cartel cases available at: \url{http://lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC1208%2804%29:EN:NOT}
gets a lower reduction in fines. This means that is a major advantage in being the first to confess. This policy has been instrumental in detecting cartels.

4. Competition Law and Policy in the ASEAN

The Association of Southeast Asian Nations (ASEAN) was established in 1967 with the overarching aim of promoting social and economic development in South East Asian countries by furthering cooperation towards regional integration and promotion of competitiveness. Currently there are 10 member countries.16

The economies of the 10 member countries are very different in various aspects, including the rate of development, the institutional set-ups and the regulatory frameworks. There is however a high degree of liberalization in most ASEAN economies and as a result they have managed to attract considerable foreign investment.

Competition law and policy are considered to be of major importance for the liberalization process within the ASEAN, to discourage barriers to entry that distort competition and to further promote regional economic integration.

*Competition Law Developments within the ASEAN*

Since its establishment there were several developments relating to competition law and policy in the region. In 2007, the ASEAN leaders agreed to establish the ASEAN Economic Community by 2015, involving free movement of goods, services, investment and skilled labour. An important document entitled the Declaration on the ASEAN Economic Community Blueprint,17 agreed upon during the same year, further elaborated on the road towards economic integration. The blueprint also urged all members to ensure that there would be the development of competition law and policy in all member states.

The actions relating to competition, envisaged in the Blueprint, were the following:

(a) An endeavour to introduce competition policy in all ASEAN Member Countries by 2015;
(b) The establishment of a network of authorities or agencies responsible for competition policy to serve as a forum for discussing and coordinating competition policies;
(c) The encouragement of capacity building programmes/activities for ASEAN Member Countries in developing national competition policy; and
(d) The development of a regional guideline on competition policy by 2010, based on country experiences and international best practices with the view to creating a fair competition environment.

The main trust of this stance by the ASEAN is the premise that competition law and policy would reduce market barriers, including those cross-border barriers (often created by national

16 These are Brunei Darussalam, Cambodia, Indonesia, Loa PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.
17 [http://www.aseansec.org/5187-10.pdf](http://www.aseansec.org/5187-10.pdf). The Blueprint was accompanied by the ASEAN Regional Guidelines on Competition Policy.
governments, sometimes in response to lobbying by inefficient producers) and therefore facilitate regional integration. This objective is very similar to that associated with competition law and policy in the EU.

An important development which also occurred in 2007 with regard to competition law and policy, was the establishment of the ASEAN Experts Group on Competition (AEGC), recommended by the ASEAN Consultative Forum for Competition (ACFC) and endorsed by the ASEAN economic ministers. The AEGC is a regional forum to discuss and co-operate on competition law and policy. Since its inception, this regional forum has fostered awareness of the benefits of competition law and policy in the region and helped develop capacity in this regard, through various programmes. The forum has also served as an informal network that promoted and facilitated collaboration between the different competition agencies in the region, including by exchanging experiences.

The AEGC has developed the ASEAN Regional Guidelines on Competition Policy (ASEAN, 2010) and compiled a Handbook on Competition Policies and Laws in ASEAN for Businesses (ASEAN, 2010). Both the Guidelines and the Handbook were launched in 2010 during the 42nd ASEAN Economic Ministers in Vietnam. These two publications were intended to raise awareness relating to competition law and policy and to further help civil society and business to understand and appreciate the benefits of fair trading.

Competition Laws in the ASEAN Member Countries

Only five member countries of the ASEAN have an overarching competition act. These are Singapore, Indonesia, Thailand, Vietnam and Malaysia. The following table briefly describes the situation relating to competition legislation in the ASEAN member states.

Situation Relating to Competition Legislation in the ASEAN Member States

<table>
<thead>
<tr>
<th>Country</th>
<th>OCA*</th>
<th>Competition Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brunei Darussalam</td>
<td>No</td>
<td>Brunei Darussalam does not have a specific competition law but has various provisions to regulate the telecommunications sector</td>
</tr>
<tr>
<td>Cambodia</td>
<td>No</td>
<td>Cambodia plans to introduce competition legislation. However there are sector regulations on the telecommunications sector and the banking industry.</td>
</tr>
<tr>
<td>Indonesia</td>
<td>Yes</td>
<td>No. 5 of 1999 on the Prohibition of Monopoly and Unfair Business Competition Practices, which was introduced in March 1999 and entered into force in the year 2000.</td>
</tr>
<tr>
<td>Lao</td>
<td>No</td>
<td>Cambodia plans to introduce competition legislation. However there is a Decree that prohibits anti-competitive business practices.</td>
</tr>
<tr>
<td>Malaysia</td>
<td>Yes</td>
<td>The Competition Act 2010 which into force in January 2012.</td>
</tr>
<tr>
<td>Myanmar</td>
<td>No</td>
<td>Myanmar is passing through a transition stage</td>
</tr>
<tr>
<td>Philippines</td>
<td>No</td>
<td>The Philippines is yet to enact a specific competition law. However there constitutional provisions relating to competition policy</td>
</tr>
</tbody>
</table>

18 The ACFC was established in 2004.
II of the 1987 Constitution). There are also sector specific regulation.

<table>
<thead>
<tr>
<th>Country</th>
<th>Adopted</th>
<th>Competition Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Singapore</td>
<td>Yes</td>
<td>The Competition Act</td>
</tr>
<tr>
<td>Thailand</td>
<td>Yes</td>
<td>The Trade Competition Act 1999</td>
</tr>
<tr>
<td>Vietnam</td>
<td>Yes</td>
<td>Law of Competition. (no 27-2-4-QH11)</td>
</tr>
</tbody>
</table>

*Overarching Competition Act

Not all the five ASEAN countries that have adopted an overarching completion act have done so voluntarily as Thailand and Indonesia have had competition law practically forced upon them as a result of IMF conditionalities in exchange for financial support. Also the laws adopted by the five ASEAN member states vary, although the all prohibit anti-competitive agreements in the private sector and abuse of dominance. For a discussion on the similarities and differences between competition acts in the ASEAN countries see Savalingam (2006).

5. Main ASEAN Competition Weaknesses and some lessons from the EU

The main weaknesses in the ASEAN, with regard to competition law and policy are:
- lack of an appropriate institutional framework;
- lack of enforcement mechanism;
- governments unwilling to let state enterprises be subject to competition law;
- Asymmetries between consumer lobbies and business power

Lack of an Appropriate Institutional Framework

As we have seen, the EU has a centralized competition authority, namely the European Commission, with a highly skilled competition directorate, and a well-developed judicial framework. This is lacking in the ASEAN, considered as region, although, as we have seen some member states do have an overarching competition act.

One major lesson that can be learned from the EU is that successful competition law and policy, especially one that can also serve to strengthen the common market, requires a strong institutional framework, backed by appropriate legislative provisions.

Whether this can be done through the AEGC or the AFCF is debatable, although proposals have been made to create an institution that will supervise the promotion and protection of market competition in ASEAN economies, which could eventually develop into a fully fledge regional competition commission with power to enforce the competition rules to protect competition in ASEAN.19

Another lesson that can be learned from the EU relates to the European Competition Network which, as explained above, is instrumental in fostering consistency, across the EU, in matters

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19 The Va Ba Phu (2009) argues that the ASEAN requires an institution which will principally assumes the role the role of a regional Steering Committee, similar to the European Commission in order to
- To promote market integration in the lead up to the establishment of a common market in 2015; and
- To promote a culture of competition in the ASEAN region;
- To provide information to the member countries that have not yet decided to establish national Competition law and policy
relating to competition law and policy. Such a role can be carried out by the AEGC or the AFCF, but again here, the member countries must first accept to have a centralized entity with the power of enforcement.

**Weak enforcement of competition law and policy**

This weakness is related to the first weakness, lack of an appropriate institutional framework. There is no mechanism within the ASEAN to ensure that the regions law is enforced. In addition, within the ASEAN member states there still exist trade and industrial policies which conflict with a region-way competition regime law. Even those countries that have an overarching competition act, enforcement is sometimes weak. However, most importantly there is no region-wide enforcement structure - even the guidelines for competition that have been drawn up are only guidelines, as the name implies. In the EU, the behavior required by the Treaty and the Regulations is law for all member states, and these are very thoroughly enforced. The second lesson that can be learnt from the EU regime is that if competition law is to be uniformly applied throughout the region, is must be suitably enforced. This requires that each member state surrenders a portion of its sovereignty, something that is not likely to happen in the ASEA in the coming years.\(^{20}\)

**Exclusion from Compliance by Government Authorities and State Enterprises**

It is well known that in the ASEAN state enterprises tend to enjoy monopoly powers and often restrict market access. However, in those ASEAN countries which have adopted a dedicated competition law, government authorities and state enterprises are excluded from compliance with the law. Even the ASEAN competition guidelines, referred to above, do not consider government authorities and state enterprises as economic players to be constrained by competition law (see Article 3.5.4).

In the EU competition regime, government authorities and state enterprises, that may compete with actual and potential private undertakings, are, with some exceptions, subject to competition law (Article 106 of the TFEU). The underlying assumption is that public undertakings can negatively affect competition and therefore they fall under the same legal provisions as private undertakings (according to the principle of competitive neutrality between private and public undertakings). Admittedly there are exceptions, especially when it is established that the state undertaking is providing a service of general economic interest, but the European Commission is actively on its guard to detect and prevent abuses by public undertakings that may distort competition within the EU.

\(^{20}\) The expression “the ASEAN way” has been coined to refer to the manner in which the ASEAN arrives at cooperative arrangements. The ASEAN is sometimes perceived as a group of sovereign nations that never enter into binding agreements and only meet to draw up understandings and informal procedures. This contrasts with the EU, where most cooperative arrangements are formalised and are backed by legal provisions.
Asymmetries between consumer lobbies and business power

Although the AECG was an important institutional development in the ASEAN as this has increased awareness on competition law and policy in the region, one cannot say that there is a strong competition culture among the ASEAN population. Several studies, referring to developing countries in general e.g. Cook (2002) argue that civil society, which could offer countervailing pressure to business interests, such as consumer groups, tend not to be well organized in these countries. This is to an extent also true in the ASEAN economies (Rarick,2008), particularly those which have so far desisted from adopting competition law and policy.

In the ASEAN, particularly in those countries where an overarching competition act is absent, the business milieu tends not to be conducive to a competition culture because of corruption, lack of transparency and vested business interests. In addition the judicial system is not always sufficiently strong and independent to take decisions against big business and corrupt bureaucrats.

Such asymmetries also exist in the EU, but the strong enforcement arrangements reduce significantly the power associated with business vested interests. This is particularly so in the case of cartels and abuse of dominance. In the case of cartels, the leniency provisions, described above, often result in the detection and breaking of collusion between strong and influential companies.

In addition consumer organizations are generally well-organised in most EU member states\(^{21}\) and, this, together with the advocacy activities of the Commission\(^{22}\) have generated a well-rooted competition culture in the EU. This is yet another lesson that can be learnt from the EU competition regime, in that laws and regulations need to be supported by strong advocacy and empowerment of civil society, in particular consumer associations.

6. Conclusion

For those who accept that benefits can be derived from competition law and policy in a particular country by encouraging fair trading, efficiency and innovation and, in the context of regional integration, by creating better conditions for the existence of single market, the vision expressed in the ASEAN Economic Community Blueprint (ASEAN, 2010) was very welcome. However, there are fears that much of the desired developments in the field of competition law and policy are likely to remain just words, unless institutional and enforcement arrangements in the ASEAN are reformed (Hunter, 2012).\(^{23}\)

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\(^{22}\) See for example the Commissions website: [http://ec.europa.eu/competition/consumers/index_en.html](http://ec.europa.eu/competition/consumers/index_en.html)

\(^{23}\) Hunter (2012) believes that the problem is not just a delay in the schedule but more importantly the result of inward looking policies of most members of ASEAN.
The success of competition law and policy in the EU to further strengthen the single market can be mainly attributed to the fact that member countries accepted to forego part of their sovereignty and to allow a central entity (the European Commission) to enforce competition law, with investigative powers, and with the possibility of overriding the decisions of national authorities and national courts. The EU Commission has also been actively involved in competition advocacy and empowerment of civil society.24

The million dollar question in this regard is therefore “are the ASEAN member states prepared to sacrifice their sovereignty to allow the AEGC or the ACFC to enforce competition law across the region, with the power to investigate and punish possible transgressions in the member countries?” The ASEAN countries have accepted to create an economic community by 2015, but it would seem that this will not lead to a single market if these countries are not prepared to extend the enforcement and investigative powers to a central ASEAN entity.

References


24 The ASEAN can also learn from the EU in matters other than those purely related to the single market. The EU enlargement process which culminated in ten heterogeneous countries joining the Union, has shown that it is possible to foster regional integration among countries with different political heritage, stage of economic development and cultural environment. The process of screening of legislation and negotiated legal changes has enabled the ten countries to prepare themselves for membership by attaining what is known as the acquis communautaire (the EU body of legislation).