

ASEAN HARMONIZATION OF INTERNATIONAL COMPETITION LAW: WHAT IS THE MOST EFFICIENT OPTION?

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ABSTRACT

As the world economy becomes more globalized and liberalized, small to medium sized firms, in both developing and developed countries alike, are facing greater challenges. Multinational firms, as leading firms in the world market, may undertake anti-competitive behavior that may hinder international competition if there are no clear regulations aim to protect fair competition at domestic and international level. Although competition law is usually enforced at a domestic level, the EU competition law is one of the exceptions. Since the enforcement of Treaty of Rome in 1958, the EU has been successful in harmonizing and enforcing competition law at a multilateral level, while also constantly revising rules and enforcement procedures throughout its establishment in order to promote fair competition for the benefit of the consumers and local businesses among member countries. As such, it is more important to set a clear guideline for ASEAN members to revise or create competition law to protect local firms and consumers' benefits from anti-competitive conduct of large firms as ASEAN is preparing for the establishment of economic community (AEC) in 2015. However, the "EU approach" may not necessarily be applicable to all region and states due to certain factors that may exclusively contribute to EU's success. The main objective of this paper is to discuss different alternatives and the feasibility in which ASEAN members can harmonize international competition law. ASEAN socio-economic environment will also be studied and compared with the EU's socio-economic environment in order to answer the main objective. Additionally, this paper will also include an analysis of ASEAN's readiness for harmonization, which can be observed through the ASEAN members' domestic legal and/or economic approach to anti-competitive conduct of private firms.

Keywords: anti-competition, antitrust, competition law, harmonization, ASEAN

INTRODUCTION

In today's economic environment, anticompetitive behaviors are no longer limited to domestic market but are also prevalent in international trade and investment. A single country will have more difficulties enforcing their domestic competition law in a globalized environment. Sweeney (2010) mentioned that there is a trend where developing nations, including socialist countries such as China and Vietnam, are relying more on market-driven approach for economic growth suggesting that fair competition can achieve efficient economic growth to developing and developed countries.

Multinational firms (MNC), as leading firms in the world market, may undertake anti-competitive behavior that may hinder competition if there are no clear regulations aim to protect fair competition at domestic and international level. Additionally, according UNCTAD, there are dramatic increases of FDI worldwide and, along with such increases, private anti-competitive behavior namely international cartel, vertical restraints, and cross-border mergers also increases (Papadopoulos, 2010). Thus, one of the solutions to curb this problem is to develop competition law or policy to regulate and control firms' behavior. ASEAN's need for clear regulation can be reflected in the introduction of ASEAN Regional Guideline on Competition Policy published in 2010, which aimed to guide member states to develop or revise law or its competition policy in preparation for the ASEAN Economic Community (AEC).

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The Need For Harmonization

Anti-competitive conduct by multinational firms can have negative impact at an international level. Melamed (1999) have defined three issues that arise from anticompetitive conduct, as follows;

- 1) Anticompetitive conduct that affects many countries such as collusion on prices and international merger and acquisition.
- 2) Anticompetitive conduct that affects a country but evidence seeking procedure needs to be done in the offending firm's headquarter country.
- 3) Anticompetitive conduct that has different level of negative effects on different countries, for example, private import barriers can affect consumers in the importing country and affect producers in exporting countries.

Many international organizations, such as OECD, WTO, and UNCTAD, have recognized that the most important issue is the difficulties in sharing information between affected country and the country whose the offending firm's headquarter is located.

Therefore, these international organizations usually encourage its members to cooperate and enforce its competition law against multinational firms with anticompetitive conduct together.

Additionally, in the European Union's (EU) perspective, two former commissioners for the Competition Directorate at the European Commission to the European Council, Sir Leon Brittan and Karel Van Miert have commented on the need for international enforcement of competition law (Osterud, 2010);

"[Liberalization and globalization] call into question the domestic nature of competition rules and the absence of binding rules at the international level. Many countries or regions have implemented comprehensive policies, but lack appropriate instruments to apply domestic competition rules to anticompetitive practices with an international dimension, as well as to obtain relevant information outside the jurisdiction. A framework is the necessary to enhance the effective enforcement of competition rules."

While the ASEAN Regional Guideline on Competition Policy also recognized the need for its members to develop effective competition law;

"To fulfill the goal of a highly competitive economic region, one of the action tasks identified under the AEC Blueprint is to develop by 2010 regional guidelines on competition policy, which would be based on country experiences and international best practices with the view to creating a fair competition environment. As outlined in the AEC Blueprint, all ASEAN member states will endeavour to introduce competition policy by 2015."

This implies that international organizations that aim for economic integration recognized competition policy as one of the tools used to maintain fair competition environment within the region. However, there are different approaches to internationalization of competition law. ASEAN may not necessarily need to harmonize its competition law in ways similar to the EU and could take a different cooperative approach.

Approaches To The Harmonization Of Competition Law

The Bilateral Approach

There are three main types of bilateral approaches which are informal cooperation, formal cooperation, and positive comity (Melamed, 1999).

Informal cooperation usually involves sharing information between governmental agencies that are not strictly confidential by nature, such as sharing public information on competition law or policy and providing technical assistance. Therefore it is considered to be the simplest and most common type of bilateral cooperation (Melamed, 1999).

Formal cooperation involves signing treaties between two states, and the nature of the treaty can be 'soft law' or 'hard law.' A treaty with 'soft' approach usually includes cooperation in sharing confidential information or requesting assistance from partner country. Whereas 'hard' approach may also include enforcement of the national law of affected country on the offending firm whose headquarter locates in the partner country (Melamed, 1999). This 'hard' approach, or extraterritoriality, can be a quick and effective way to punish anti-competitive MNCs than the 'softer' approach due to inconsistent legal standards and definition of anti-competitive behavior in different countries (Fox, 2003; Wallace, 2002). However, this meant that the partner countries may have to forgo its sovereign rights even if they have a national competition law, as opposed to the 'softer' alternative (Wallace, 2002).

Another type of bilateral approach is positive comity, which does not necessarily require treaties. While it may be similar to an informal cooperation, the level cooperation is far greater and could be as effective as formal cooperation. Although the term 'positive comity' has not been formally defined, the overall idea is that it is a type of cooperation where a country voluntarily cooperates with an affected country in securing evidences and may also aid in punishing anti-competitive firms. Additionally, according Winslow's (2000) paraphrase of Part I.B.5 of the OECD Recommendations on Cooperation, positive comity is described as *"the principle that a country should (1) give full and sympathetic considerations to another country's request that it open or expand a law enforcement proceeding in order to remedy conduct in its territory that is substantially and adversely affecting another country's interests, and (2) take whatever remedial action it deems appropriate on a voluntary basis and in considering its legitimate interests."*

The Multilateral Approach

The degree of multilateral cooperation can be at a regional level or a worldwide level. A worldwide level of cooperation usually involves international organization (IOs) such as the World Trade Organization (WTO), the Organization for Economic Cooperation and Development (OECD), and the United Nations Conference on Trade and Development (UNCTAD) as authorities in setting guideline for its members. However, this type of cooperation does not extend to information sharing and aiding in investigation procedures (Melamed, 1999). Unlike extraterritoriality, this is a 'soft' approach where countries are given the opportunity to discuss and cooperate voluntarily through a very broad guideline given by the organization. The use of 'hard' law is difficult to achieve at a worldwide level due to its need for unanimous agreement between members and also due to different national interests between states (Waller, 2003).

However, a regional level of multinational cooperation can range from 'soft' approach to 'hard' approach depending on the socio-economic environment of each region. At present, several free trade areas (FTAs), namely the European Union (EU), the

North American Free Trade Agreement (NAFTA), The Andean Community (CAN), and The Southern Cone Common Market (MERCOSUR) all have their own regional common competition policy but the degree of their enforcement is different (Luu, 2012). Based on Luu's (2010) studies, the EU, CAN, and MERCOSUR all have common competition rules, with the EU and CAN having a common competition authority, while the NAFTA only has a broad competition policy and are more focused on cooperation rather than strict enforcement. It could be said that the EU and the CAN has the "hardest" level of multilateral enforcement due to the presence of central authority (Luu, 2010).

Nevertheless, despite various approaches used by different states and IOs, there are no clear answer to which approaches is the best approach. This may be due to different cultures, socio-economic environment, and the national perception of anti-competitive conduct of the different states and different regions. Both the US and the EU uses different approaches to their enforcement procedure but both have greatly influenced the development international competition law. The US opted for bilateral approach that ranges from 'soft' to 'hard' enforcement. While the EU, a supranational institution, opted for a 'hard' regional approach to enforcement. However, in the ASEAN's context, Luu (2012) have described the implication of the ASEAN Regional Guideline on Competition Policy is to take the 'soft' regional approach. Assuming the ASEAN's main goal is to achieve a same level of integration similar to the European Economic Community (EEC), this is an opposite approach to the EU.

Comparative Analysis Of The EU And ASEAN

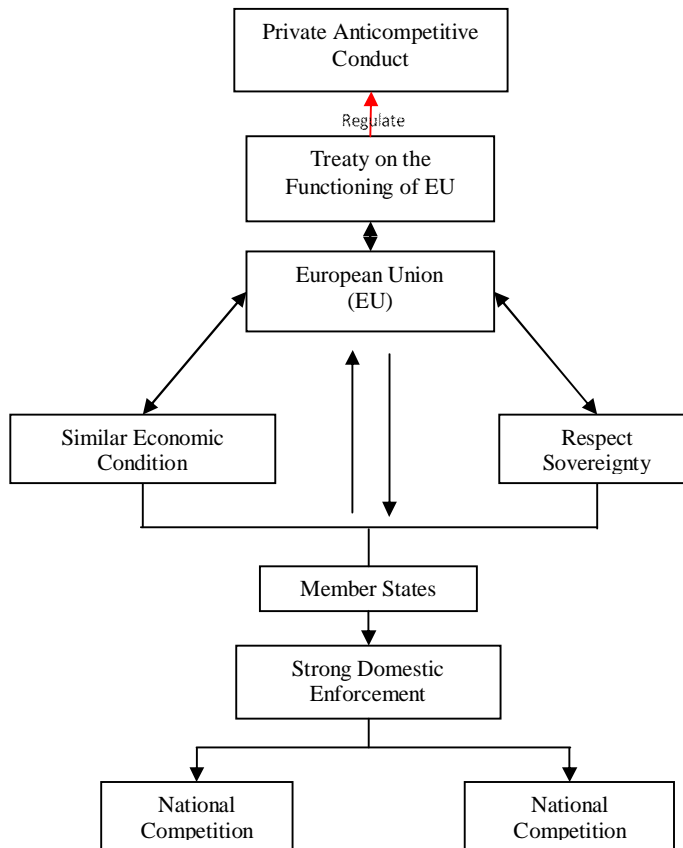
The European Union

The socio-economic environment and political structures among ASEAN members are largely different than those of the EU. Nevertheless, the EU Competition Law has been effectively enforced since its establishment of the European Economic Community (EEC) in 1957. Due to the EU's experiences in the regional enforcement of competition law, their enforcement procedure should be reviewed in ASEAN's context to determine if such approach is appropriate for ASEAN.

The EU has started developing its competition law beginning with Section 85 of Treaty of Rome and continues to revise and expanding EU competition law, latest being Article 101 to Article 105 of Treaty on the Functioning of the European Union (TFEU). EU members have to follow the TFEU, and therefore have to revise/adopt its own national law or policy in parallel to it. According to Figure 1, for the EU to achieve full harmonization, member states needs to be within the region and shares similar economic condition while the sovereignty of the states must be maintain (Melamed, 1999). To maintain certain degree of sovereignty, the TFEU allows member states to develop domestic competition law or competition policy (Geradin, Layne-Farrar, and Petit, 2012). A state may have an extensive set of competition law or a competition policy that parallels with the TFEU, they are free to enforce their domestic law within their jurisdiction but must cooperate with the EU commission in sharing its investigated information (Sweeney, 2010). Additionally, Kunzlik (2003) observed that members can choose to enforce its law domestically or to depend on the EU Commission to enforce the TFEU. Most importantly, there needs to be a strong domestic enforcement of competition law for a regional harmonization to be effective (Geradin et al., 2012; Kunzlik, 2003).

If most governments within the region view anti-competitive conduct by private firms as unimportant issue and/or do not strictly enforce competition law at a national level, a regional level of 'hard' law enforcement would be ineffective as well.

Figure 1: The EU harmonization of competition law



ASEAN

As mentioned previously, the ASEAN has no intention to use ‘hard’ enforcement of competition law at a multilateral level. Therefore, the ASEAN Regional Guideline on Competition Policy is simply a framework for member states to develop its own competition law or policy. This would allow flexibility for different states to take time to develop systematic set of law and enforcement procedures.

Table 1: ASEAN members’ national competition law

Prohibition	Abuse of dominant position	Merger & Acquisition	Restrictive Agreement (Cartel)	Collusion w/ foreign firms	Unfair Trade Practice
Countries					
Brunei					
Cambodia					
Indonesia	✓	✓	✓	✓	✓
Laos	?	?	?	?	?
Malaysia	✓		✓	✓	✓
Myanmar					
Philippines			✓	✓	✓
Singapore	✓	✓	✓	✓	✓
Thailand	✓	✓	✓	✓	✓
Vietnam	✓	✓	✓	✓	✓

Currently, some ASEAN members, which consist of Brunei Darussalam, Cambodia, and Myanmar, have yet to develop a systematic set of national competition law. While Laos does have a Decree on Trade Competition, it does not have a systematic enforcement procedure. Whereas some members did not include prohibition of all types anticompetitive conduct in their competition law (As shown on Table 1). However, even though some members have full systematic set of competition law that includes all types of anticompetitive conduct, the members’ government still loosely enforces the law and large private firms tend to avoid punishment through legal loopholes suggesting an unsystematic enforcement of a systematic law (Thanadsillapakul, 2004). This further implies that ASEAN may have difficulties in harmonizing competition law with ‘hard’ approach.

Luu (2012) has further pointed out that ASEAN's socio-economic environment consists of diversity in terms of political and economic development. To use the EU approach or hard law could be ineffective in ASEAN's environment, as there are substantial legal, political, and economic development gap between its member states, particularly the CMLV nations. Additionally, based on ASEAN Regional Guideline on Competition Policy, there is an implication that members are not yet fully willing, or ready, to forgo certain level of their sovereign rights in exchange for legal integration. Therefore, the use of 'hard' law is not appropriate in the culturally and politically diverse eastern economies.

However, this does not necessarily mean that ASEAN members need to exclusively use 'soft' multilateral enforcement. Kunzlik (2003) have studied upon the hybridization of national competition law in Ireland and the UK where they 'borrowed' from the US approach to criminalization of anticompetitive conduct (i.e. a hard law enforcement) while also effectively harmonized with the TFEU when cases could possibly obstruct competition at a regional level. Hybridization of different approaches could help lower transaction cost between enforcing the law at a national and regional level rather than only relying on the European Court of Justice (ECJ) which creates larger burden to the ECJ as the EU expands. While both the US and the EU uses 'hard' enforcement, it is still plausible for a country to hybridize 'hard' and 'soft' approach or bilateral and multilateral approach.

Waller (2003) also explains the shortfall of 'soft' regional harmonization; in that it may take longer time to cooperate effectively as all states act upon national interest, which may include maintaining strong relationship with the domestic private sector. Therefore, hybrid approach to cooperation and enforcing competition law could be effective. For example, an ASEAN member could opt for a bilateral agreement with other members on certain private sectors that both have similar level of maturity, while also follow the soft approach at a regional level based on the regional guideline. This may allow ASEAN to maintain a competitive environment and allow consumers in the region to benefit from it.

CONCLUSION

More time may be needed for ASEAN to have a systematic harmonization of competition law, as most ASEAN members have not yet able to develop a systematic set of law and enforcement procedure. To be able to harmonize law, whether through 'soft' or 'hard' approach, at a regional level all members need strong domestic enforcement. Additionally, ASEAN members have diversified cultures, socio-economic environment, and political environment; therefore it may be difficult to efficiently harmonized law similar to the EU.

Although the ASEAN Regional Guideline on Competition Policy implies that ASEAN will adopt soft law in regional enforcement of its competition policy, this is simply a framework for members to prepare for AEC by revising and developing competition law that could be applied at a regional level. Rather than exclusively rely upon 'soft' approach, members could try to adopt a hybrid approach to enforcing competition law whether through bilateral agreement on specific private sectors, or using hard law to enforce the law domestically. And, without a doubt, it is very crucial for members to develop a systematic set of competition law and enforcement procedures in preparation for the AEC in 2015. Without any systematic law and enforcement, whether domestically or internationally, an open economy country could be vulnerable to private anti-competitive conduct and may negatively affect consumers and non-monopolistic local firms. With a strong enforcement of competition law, it can discourage monopolistic firms to behave anti-competitively and maintain a fair competitive environment within the region; this will benefit both the consumers and small to medium sized local firms within ASEAN.

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