

In Search of a Competition Law Model for ASEAN through a Case Study of Singapore, Malaysia and Vietnam: Does the EU Competition Law Model Fit?

Abstract

The thesis aims to identify a fitting competition law regime for ASEAN countries. It operates upon presumption expressed in the scholarship on legal transplanting and competition law and development that for a transplanted competition law to be successful, it has to be tailored to fit the domestic environments. As the thesis observes that in adoption of their competition regulation, ASEAN member states resorted to legal transplanting of competition models from other jurisdictions, especially that of the EU, tailoring the EU model to fit their domestic conditions seems to be a key to their success. These differences in domestic conditions resulting in different national competition laws will also influence the design of a region-wide competition law regime that is being constructed.

To identify those market-related needs and pain-points of ASEAN members states, the thesis classifies them into clusters depending on their level of economic development. Singapore, Malaysia and Vietnam (the examined jurisdictions) were selected as representatives of the economies of ASEAN member states from the most developed to the least developed ones. The thesis first analyses market-related socio-economic background of the examined jurisdictions. It then continues to analyze respective competition laws applicable in those jurisdictions to evaluate to what extent are those laws shaped by the EU competition law model. It finds that the EU competition law served as an important inspirational model for all examined jurisdictions. Yet, it also observes that they introduced important modifications to the model justified by the need to tailor the law to the specifics of the relevant jurisdiction (such as small size or trade openness or pursuit of developmental goals). Hence, rather than simply contextualizing the EU model, they resorted to the tailor-made model.

The thesis continues to evaluate whether those modifications are indeed appropriate or suitable given the needs of examined jurisdictions, i.e., whether their competition laws fit so that they can be considered successful. This evaluation requires finding a definition of “fit” or “success” of transplanted competition law. Such definitions are currently missing in the scholarship on legal transplants and competition law and development. The thesis fills this gap by devising a new analytical framework under which the “fit” or “success” of transplanted laws may be evaluated. It then applies this framework to the examined jurisdictions. It thus evaluates the

“fit” from three different perspectives, i.e., instrumental (enquiring whether the motivation which has driven the legislators to resort to legal transplanting as opposed to purely domestic drafting was fulfilled), functional (enquiring whether the adopted competition law has potential to fulfil the functions that competition regulation is expected to fulfil given the policy and developmental goals of the examined jurisdictions), and cultural (enquiring whether the adopted competition laws fit within the cultural perceptions as to how market exchanges shall be organized). The analysis shows different results depending on the applied perspective and examined jurisdiction. Hence, the thesis notes that the conclusion as to whether competition laws in the examined jurisdictions fit or are successful will depend on the applied evaluative benchmark.

The thesis then elevates those findings to the ASEAN level by examining how ASEAN should reflect these different competition-related needs and disparities in the socio-economic conditions among its member states requiring different competition laws to ensure their success in designing its regional competition policy. This promises to provide a valuable empirically-tested input into the ongoing policy discussions on how to steer the future development of regional competition policy in ASEAN. The thesis finds that the EU model may not “fit” ASEAN. Given the uniqueness of ASEAN economic integration as compared to the EU both in terms of economic and socio-cultural disparities among the member states and unique operational modalities and integration goals, ASEAN is advised to find its own, *sui generis* approach. Such ideal model would strike the right balance between the need to respect those features of national competition policy that are crucial for national economic development of ASEAN member states and the need for a level of cooperation on a regional level to foster integration goals of ASEAN as a community. The thesis observes that the cooperation approach that is currently proposed in ASEAN’s strategic documents seem suitable. Going forward, any eventual deeper integration should be informed by the need to reflect the specific needs of ASEAN as regards the purpose of the regional competition policy, in a similar way as the domestic competition laws in ASEAN member states need to reflect needs of given economies.

Key words: ASEAN, competition law, economic development, EU, fit and success, legal transplants, Malaysia, Singapore, Vietnam