

THE REGIONALISATION OF COMPETITION LAW AND POLICY WITHIN THE ASEAN ECONOMIC COMMUNITY

This edited volume of essays examines a wide range of issues related to the regionalisation of competition policy in South East Asia, where the ten member states of ASEAN have launched the ASEAN Economic Community (AEC). Written by a diverse group of academics, practitioners and policy-makers, this book explores issues such as the role of competition policy in facilitating the market-integration ambitions of the ASEAN member states, the challenges arising from divergences in the national competition law regimes of the ASEAN member states, the absence of a supranational legal framework and the future of ASEAN's competition policy in the light of the AEC Blueprint 2025. Given the nexus between regional competition policy and regional market integration, this book will be of particular interest to lawyers, economists and policy-makers working in the fields of competition law and regional trade law.

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For Joyce, Sebastian and Philippa

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FOREWORD

The development of competition law and policy in the ASEAN region is one of the most interesting case studies of our times. The economic crisis of the late 2000s has called into question many of the (apparent) verities of our times such as demonopolisation, liberalisation, privatisation and globalisation. Belief in ‘the market’ as a tool for maximising consumer welfare spread with extraordinary rapidity in the 1990s and 2000s. A map of the world today shows very few outliers in this respect. Of course markets may fail, or be abused by market participants, which is why we have more than 130 domestic systems of competition law today, spread throughout the world geographically and in all types of economy. The international growth of competition law has been remarkable. More has been achieved, more quickly, than I could have imagined to be possible, for example, at the time of the fall of the Berlin Wall in 1989.

My own acquaintance with competition law began, as a student, in 1977, when I took an option quaintly known as ‘Monopolies, Mergers and Restrictive Trade Practices’ while studying for the Bachelor of Civil Law at Oxford University. At that time the UK had been a member of the (then) European Economic Community for a mere four years. An exciting period of regional economic integration was under way in Europe. The six founder member states of the EEC had begun this project in 1957 with the Treaty of Rome (a more limited one had preceded this for coal and steel with the Treaty of Paris a few years earlier). Today’s European Union (EU) consists of 28 member states, stretching from Cyprus, Bulgaria and Romania in the east of Europe to Sweden, the UK and Ireland in the west. Iceland, Norway and Liechtenstein are broadly affiliated with this system through the rules of the European Economic Area Agreement.

Institutionally, the EU competition rules are enforced by the European Commission, physically located in Brussels, in conjunction with the national competition authorities of the 28 member states. A European Competition Network formalises cooperation between the various

competition authorities that work closely with one another, for example, exchanging information and conducting investigations on behalf of one another; a secure intranet puts them within a click of one another. Above the competition authorities (and the national courts of the member states) the Court of Justice in Luxembourg oversees the EU legal system, interpreting the Treaties and derivative legislation and ensuring consistency across a market of more than 500 million people. To my mind, this is a quite extraordinary supranational achievement. From the devastation of 1945, when Europe lay literally in ruins, the nation states of Europe have succeeded in creating a single market of relatively frictionless trade (the project remains unfinished), overseen by institutions committed to ensuring fair competition and the promotion of consumer welfare.

However, all is not well. In 2016, the UK took the momentous decision to withdraw from the EU. Political movements exist in several EU member states that could lead to further withdrawals. Nation states in the EU are having to battle with secessionist movements. Globalisation harms as well as hurts, and it is not only in the EU that a backlash is under way. Many citizens across the world feel that they are victims of the powerful economic forces at play today, and it is not surprising that they ask for protection. The cry for protection can easily morph in the hands of government's into protectionism, and this can find expression in competition laws, for example, that adopt broad 'public interest' criteria for the supervision of mergers or specifically inhibit foreign direct investment.

It is against this backdrop that this book explores current developments in the ASEAN region. It could hardly be more timely. As Burton Ong, the editor of this series of excellent essays on the regionalisation of competition law and policy in the ASEAN region notes in his Preface, competition law has taken root in the region only in the last ten years or so, with most of the domestic laws of the ten member states of ASEAN being of more recent origin than that. The regional competition policy of ASEAN was launched as recently as 2015. What can we expect of an ASEAN competition policy? How did this policy originate? Can there be a successful ASEAN approach to competition policy if the national laws of the constituent member states are significantly divergent? What lessons can be learned from other regional arrangements (the EU being one such system, but there are several others, for example NAFTA, COMESA and CARICOM)? These are among the topics that are explored in this book. I will not outline the contents of each of the chapters, as Professor Ong does this very elegantly in his initial chapter.

From my perspective – as a citizen of the EU and an admirer of the supranational system that is the EU – the essay in this book that I find the most fascinating is that of Professor Eleanor Fox, who asks ‘Can ASEAN achieve a single market with national-only competition law?’ I have briefly described the EU system and its ambitious architectural machinery that subordinates national sovereignty in the interest of the wider European project. ASEAN’s goals are ambitious, but they do not stretch as far as the EU’s: specifically there are no plans for a supranational, ASEAN-wide, competition law (as opposed to policy), and there will be no overarching institutions with the power to ensure conformity and consistency. As Fox succinctly puts it, ‘ASEAN has a different vision – national-only law and a network without a centre.’ Her essay discusses what can be achieved in such circumstances, and concludes that the answer is ‘quite a lot.’ The ASEAN states can take a number of steps – for example not tolerating export cartels that could harm other community members, and refraining from conferring privileges on state actors that give them significant competitive advantages over others within the region – that could help to develop a single, ASEAN competitive market.

In recent months, I have had to spend a disproportionate amount of my time considering the dispiriting subject of what Brexit means for the competition law and policy of the UK. For me it will be of much greater interest to watch developments in the ASEAN region. The ten member states differ from one another in many ways – legally, economically and culturally – and one cannot take for granted that the road ahead will be smooth. On the other hand, the EU has demonstrated what can be achieved, even if Brexit slightly tarnishes the project. I congratulate Professor Ong on the production of this excellent book, which provides a splendid account of the challenges of implementing a regional competition policy.

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PREFACE AND ACKNOWLEDGEMENTS

Competition law in South East Asia has only taken root, formally, in the legal systems of the ten member states of the Association of South East Asian Nations (ASEAN) over the last fifteen years, with a majority establishing national competition law frameworks only in the last five years. At the regional level, the development of an ASEAN-wide competition policy framework has been pursued in earnest by ASEAN member states in tandem with the development of the ASEAN Economic Community, which was formally launched at the end of 2015. The dynamic interplay of legal and policy reforms in this field of law at both the regional and national levels, with the divergent socio-economic and political landscapes of these countries, presents an interesting opportunity to examine the extent of the role that competition law and policy may play in achieving the economic development goals of states that introduce such regimes.

This book aims to explore the different facets of the development of competition law and policy within the ASEAN region, with chapters authored by a diverse group of accomplished legal scholars, legal practitioners and policy-makers. Based on their expertise and ability to provide complementary perspectives, from both within ASEAN and from an international and comparative perspective, these contributors were selected to participate in a research project supported by the EW Barker Centre for Law and Business (EWCLB) at the National University of Singapore (Research Grant Number C-241-000-506-001) which hosted a conference (“The Regionalisation of Competition Law and Policy: Implications for the ASEAN Economic Community”) in April 2016. The papers presented by them at this conference were subsequently edited and integrated into the chapters of this book. Thank you for making the effort to travel to Singapore from New York, London, Glasgow, Dublin, Munich, Sydney, Bangkok and Kuala Lumpur.

My thanks are also due to the following people for their invaluable assistance towards the completion of this project. The managers at the EWCLB,

especially Finna Wong, who facilitated the conference in Singapore which brought the contributing authors of the chapters in this book together to present their work for discussion, did an outstanding job in managing and coordinating the logistics for this event. I am also extremely grateful for the invaluable research, administrative and editorial assistance ably provided by Jeremiah Lau, Benjamin Wong and Jasmine Foo. In addition, credit must be given to Joe Ng and his colleagues at Cambridge University Press who played a key role in bringing this book to fruition. Finally, I would like to acknowledge the support and encouragement of my family and friends throughout the entire process.

ABBREVIATIONS

ACAP 2025	ASEAN Competition Plan 2025
ACCC	Australian Competition and Consumer Commission
ACF	African Competition Forum
ADB	Asian Development Bank
AEC	ASEAN Economic Community
AEGC	ASEAN Experts Group on Competition
AER	Australian Energy Regulator
AFSA	ASEAN Multilateral Agreement on the Full Liberalisation of Air Freight Services
AMS	ASEAN Member State
APBSD	ASEAN Policy Blueprint for SME Development
APSC	ASEAN Political Security Community
ASA	ASEAN Multilateral Agreement on Air Services
ASCC	ASEAN Socio-Cultural Community
ASEAN	Association of South East Asian Nations
ASEAN MNPA	ASEAN Agreement on the Movement of Natural Persons
ATIGA	ASEAN Trade in Goods Agreement
ATP	absolute territorial protection
BNM	Central Bank of Malaysia
CARICOM	Caribbean Community
CCPC	Competition and Consumer Protection Commission
CCS	Competition Commission of Singapore

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ABBREVIATIONS

CFTA	Continental Free Trade Area
CJEU	Court of Justice of the European Union
CLMV	Cambodia, Laos, Myanmar and Vietnam
CMA	Competition and Markets Authority (UK)
COMESA	Common Market for Eastern and Southern Africa
CPL	competition policy and law
DG	Directorate-General
EAC	East African Community
ECM	Energy Commission (of Malaysia)
EC DG	Directorate General – European Commission
ECN	European Competition Network
ECOWAS	Economic Community of West African States
EEC	European Economic Community
EGAT	Electricity Generating Authority of Thailand
EU	European Union
FDI	foreign direct investment
FTA	free trade agreement
GC	General Court (of the EU)
GDP	gross domestic product
GIC	Government of Singapore Investment Corporation
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
GLC	government-linked company
GLIC	government-linked investment company
HRS	Hotel Reservation Service
IAI	Initiative for ASEAN Integration
ICN	International Competition Network
IDR	Indonesian Rupiah
IP	intellectual property
JCC	Joint Collaboration Committee

ABBREVIATIONS

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JFTC	Japan Fair Trade Commission
KPPU	Indonesian Supervisory Commission for Business Competition
M&A	merger and acquisition
MAS	Malaysian Airline System Berhad
MAVCOM	Malaysian Aviation Commission
MCMC	Malaysia Communication and Multimedia Commission
MERCOSUR	Common Market in South America
MFN	most favoured national clause
NCA	National Competition Authority
NAFTA	North American Free Trade Agreement
NEP	National Economic Policy
OECD	Organisation for Economic Co-operation and Development
OECS	Organisation of Eastern Caribbean States
OFT	Office of Fair Trading (UK)
OTA	online travel agent
PAP	People's Action Party of Singapore
PASA	ASEAN Multilateral Agreement on the Full Liberalisation of Passenger Air Services
PCA	Philippine Competition Act
PETRONAS	Petroleum Nasional Berhad (Malaysia)
PTT	Petroleum Authority of Thailand
RCC	Regional Core Competencies
RIA	regional integration arrangement
ROTD	Restraint of Trade Doctrine
RPM	resale price maintenance
SADC	Southern African Development Community
SACU	Southern African Customs Union
SC	Securities Commission (of Malaysia)
SEDC	state economic development corporation

SGEI	services of general economic interest
SME	small and medium-sized enterprise
SOE	state-owned enterprise
SPAD	Land Public Transport Commission
SPAN	National Water Service Commission
TAC	Treaty of Amity and Cooperation in Southeast Asia
TCA	Trade Competition Act (Thailand)
TCC	Trade Competition Commission (Thailand)
TFEU	Treaty on the Functioning of the European Union
TPP	Trans-Pacific Partnership
UEMOA	Union Economique et Monétaire Ouest Africaine
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
US	The United States of America
UWB	Gesetz Gegen den Unlauteren Wettbewerb
VCA	Vietnam Competition Authority
WAEMU	West African Economic and Monetary Union
WTO	World Trade Organization