THE HARMONISATION OF COMPETITION POLICY IN ASEAN ECONOMIC COMMUNITY: PROBLEMS AND PROSPECTS

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Abstract

The main aim of this research is to examine the importance of competition policy harmonisation for regional economic integration and propose a workable framework of competition policy harmonization for ASEAN Economic Community (AEC). To comply with the objectives, this research proposes a possible approach for ASEAN to develop competition policy harmonisation. The method used in this research is qualitative data with rational choice theory analysis. Of the ten of ASEAN member states, only five have national competition policy with different substantive laws, procedural rules, and enforcement mechanism. Legal diversity was not the only factor that militates against ASEAN regional competition policy harmonisation. Different competition culture, economic development, and national political support are also significant barriers to the development of competition policy and law in ASEAN member states.

The thesis suggests that harmonisation in ASEAN can be achieved by following two alternative approaches: regional or bilateral cooperation. The regional approach requires ASEAN member states to change their competition policy and law to synchronize them with the regional competition policy and law. To implement this approach, ASEAN needs a regional competition authority which would require its member states to surrender their sovereign authority to make national competition policy and law. The regional approach also requires all member states to adopt uniform regional competition policy and law in their legal systems. These two requirements may render the regional approach very difficult to implement. Alternatively, bilateral cooperation between two member states is more lenient for ASEAN because it is not necessary to give up their sovereignty to a regional authority. It also gives an opportunity for other member states without competition policy and law to prepare for the development of national competition culture.

The latest movement of ASEAN Economic Community shows a sign that ASEAN still is not ready for the regional harmonization of competition policy and law. The regional competition law is usually monitored by a regional competition authority for enforcement across jurisdictions. At this stage, ASEAN does not have any such legal regime to achieve enforcement. The lack of such an institution is likely to create an

ineffective and flawed regime of competition law and policy in ASEAN. Another predominant factor is that ASEAN member states are too much concern about their national political interests. Consequently, bilateral cooperation is likely to work better than regional approach for harmonization. Should ASEAN want to develop its competition policy and law harmonisation on a regional basis, it may start gradually from bilateralism to limited multilateralism starting from Indonesia, Malaysia, Singapore, Thailand, and Vietnam which have competition authorities.

The research outcomes will provide an innovative framework for the progressive development of competition policy and law in ASEAN, which will be immensely rewarding for ASEAN member states' policy-makers, strategists, and negotiators in achieving this harmonisation. The research outcomes will also provide better understanding and experience for any existing and/or future regional economic integration/s desirous of pursuing competition policy and law harmonisation.

Keywords

ASEAN Economic Community, competition policy and law, harmonisation, and economic integration.

Statement of Candidate

I certify that the work in this thesis has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree to any other university or institution other than Macquarie University.

I also certify that the thesis is an original piece of research and it has been written by me. Any help and assistance that I have received in my research work and the preparation of the thesis itself have been appropriately acknowledged.

In addition, I certify that all information sources and literature used are indicated in the thesis.

Signed: _____ Date: _____

(Cenuk Widiyastrisna SAYEKTI)

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Publications and Grants

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List of Abbreviations

AANZFTA	ASEAN–Australia–New Zealand Free Trade Agreement
ACCC	Australian Competition and Consumer Commission
ACIA	ASEAN Comprehensive Investment Agreement)
ADBI	Asian Development Bank Institute
AEC	ASEAN Economic Community
AEGC	ASEAN Experts Group on Competition
AFTA	ASEAN Free Trade Area Agreement
AIA	ASEAN Investment Area
AMS	ASEAN Member State
ANZSCEP	Agreement between New Zealand and Singapore on a Closer Economic Partnership
ASEAN	Association of South East Asian Nations
CA 2010	Competition Act 2010 (Malaysia)
CAFTA-DR	Dominican Republic–Central America Free Trade Agreement
CARICOM	Caribbean Community and Common Market
CCC	COMESA Competition Commission
CCS	Competition Commission of Singapore
CEPT	Common Effective Preferential Tariff
CHFA	Cameron Highlands Floriculturist Association
CLMV	Cambodia, Laos, Myanmar and Vietnam
CLV	Cambodia, Laos and Vietnam
COMESA	Common Market for Eastern and Southern Africa
EC	European Community
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EFTA	European Free Trade Association
ERIA	Economic Research Institute for ASEAN and East Asia
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Area
GDP	Gross Domestic Product

GNP	Gross National Product
HDI	Human Development Index
HHI	Herfindahl-Hirschman Index
IAI	Initiative for ASEAN Integration
ICJ	International Court of Justice
ICPAC	International Competition Policy Advisory Committee
ICT	Information and Communication Technologies
IMF	International Monetary Fund
JSEPA	Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership Agreement
KPPU	Komisi Pengawas Persaingan Usaha (Supervisory Commission for Business Competition, Indonesia)
M&A	Merger and Acquisition
MCOT	Mass Communication Organisation of Thailand
MERCOSUR	Common Market of the Southern Cone
MPAC	Master Plan of ASEAN Connectivity
MRA	Mutual Recognition Arrangement
MyCC	Malaysia Competition Commission
MyCC	Malaysia Competition Commission
NAFTA	North American Free Trade Agreement
NDG	Narrowing the Development Gap
PTA	Preferential Trade Agreement
RTA	Regional Trade Agreement
SADC	South African Development Community
SCP	Structure-Conduct-Performance
SIEC	Significant Impediment to Effective Competition
SMS	Short Message Services
SOE	State-Owned Enterprise
TAFTA	Thailand–Australia Free Trade Agreement
TCA	Trade Competition Act 1999 (Thailand)
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UBC	United Broadcasting Corporation
UEMOA	West African Economic and Monetary Union

UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States
USD	US Dollar
VCA	Vietnam Competition Authority
VCAD	Vietnamese Competition Administration Department
VCC	Vietnamese Competition Council
WTO	World Trade Organisation

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Chapter 1

Competition Policy Harmonisation for the ASEAN Economic Community: An Introduction

1.1 Background of the Study

In 2003,[1] the Association of South East Asian Nations (ASEAN) began to move forward from the ASEAN Free Trade Area Agreement (AFTA) towards a single market, representing a new direction for open regionalism.[2] AFTA represented the main instrument through which ASEAN wished to achieve trade liberalisation via the removal of both tariff and non-tariff barriers.[3] After several years of development in trade liberalisation, the average tariff rates of the ASEAN countries have been significantly lowered; however, growth in foreign direct investment (FDI) has not matched the expectations of ASEAN leaders.[4] Since its implementation, AFTA has chiefly been effective in enhancing intra-regional trade.[5]

AFTA is chiefly concerned with liberalising tariffs. In contrast, the ASEAN Economic Community (AEC) is intended to go beyond free trade alone. The notion of open regionalism in ASEAN is increasingly 'in demand' due to the rise of the Chinese and Indian economies.[6] This is mentioned in the ASEAN Competitive Report 2010, which

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[1] The 9th ASEAN Summit, Bali, 7-8 October 2003: Declaration of ASEAN Concord II (*Bali Concord II*). In the 1990s ASEAN leaders decided to enjoy greater liberalization by establishing the ASEAN Free Trade Area (AFTA) in 1992, where the benefits and costs of participation and non-participation were individually enjoyed. The milestone of AEC is started in 1997, when the ASEAN Leaders adopted the 2020 Vision, where the notion of ASEAN single market was declared. The history of ASEAN milestone on economic integration provided in Chapter 2, page 149, table 2.

[2] Mari Elka Pangestu, 'Competitiveness Towards ASEAN Economic Community' (2009) 24(1) *Journal of Indonesian Economic and Business* 22, 22-32.

[3] Hadi Soesastro, 'Accelerating Asean Economic Integration: Moving Beyond AFTA' (Paper presented at the The Second ASEAN Leadership Forum, Jakarta, 2005) 1.

[4] Shandre M. Thangavelu and Aekapol Chongvilaivan, *Free Trade Agreements, Regional Integration and Growth in ASEAN* <http://www.paftad.org/files/33/Thangavelu%20%26%20Chongvilaivan.pdf> Access date January 15, 2013.

[5] Misa Okabe and Shujiro Urata, 'The Impact of AFTA on Intra-AFTA Trade' (2014) 35(0) (12//) *Journal of Asian economics* 12, 13-17.

[6] Ted C. Fishman, *China, Inc.: How the Rise of the Next Superpower Challenges America and the World* (Simon & Schuster, 2005). In China, Inc., Fishman describes the increasing influence China is having on the worldwide economy. Because China has an enormous labor force willing to work at low wages, its

states that ASEAN is facing profound changes in its economic environment accompanying the rise of China and India and weakened economic prospects in major advanced countries.[7] The ASEAN single market, known as the AEC, is destined to be implemented in 2015.[8] The aim is to create a single ASEAN market and production base, making ASEAN more dynamic and competitive with other economic regions, facilitating free movement of goods/services, movement of business professionals and skilled labour, facilitating free movement of capital and investment. It has been argued that the current framework, AFTA, is not effective in promoting economic welfare within ASEAN countries.[9] One of the imminent problems ASEAN countries must face is their current lack of a common competition policy. Such a policy represents a prerequisite for free trade and for keeping the market free from restrictive business conduct.[10] The impacts of this absence of a competition policy and law in market liberalisation are significant with regard to consumer welfare,[11] the protection of small firms[12] and the efficiency of the market itself.[13] In making the extraordinary decision to move from AFTA towards an economic community,[14] ASEAN faces a great challenge in issuing a joint competition policy in line with free trade.[15]

In this context, the dictates of domestic economic policy and the political considerations of individual member states are often opposed to the need for harmonisation within the ASEAN region. In fact, of the 10 ASEAN members, only five have national

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output forces prices down. The low cost of production encourages thousands of businesses to relocate in China, many of which would otherwise be located in America and Europe.

[7] Niranjan Rajadhyaksha, *The Rise of India: Its Transformation from Poverty to Prosperity* (John Willey & Sons (Asia) Pte. Ltd, 2007)

[8] ASEAN, 'ASEAN Economic Competition Blueprint' (ASEAN Secretariat, 2010).

[9] Soesastro, above n 3, 2.

[10] Cassey Lee and Yoshifumi Fukunaga, 'ASEAN Regional Cooperation on Competition Policy' (Discussion Paper-2013-03, Economic Research Institute for ASEAN and East Asia April 2013) 77-91.

[11] Alden F Abbott and Shanker Singham, 'Competition Policy and International Trade Distortions' in *European Yearbook of International Economic Law 2013* (Springer, 2013) 23, 24.

[12] Harold Demsetz, 'Industry Structure, Market Rivalry, and Public Policy' (1973) 16 *Journal of Law & Economics* 1.

[13] Joseph F Brodley, 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technoclogical Progress' (1987) 62 *New York University Law Review* 1020

[14] The loss of competitiveness to emerging market such as China has been the major driving force in ASEAN's efforts to accelerate economic integration. See Denis Hew, 'Introduction: Brick By Brick the Building of an ASEAN Economic Community' in Denis Hew (ed), (ISEAS, 2007) 2. Soesastro, above n 3. Pangestu, above n 2. Linda Low, 'Roadmap to an ASEAN Economic Community edited by Denis Hew' (2006) 20(1) (05) *Asian-Pacific Economic Literature* 74.

[15] Lawan Thanadsillapakul, 'The Harmonization of ASEAN Laws and Policy and Economic Integration' (2004) 3(1) *Uniform Law Review* 479, 480.

competition policies and laws.[16] There are also significant differences in the competition laws of the five ASEAN member states (AMSs) that have such laws.[17] Competition laws in AMSs differ according to a number of factors,[18] including the objectives of the law, its content and provisions, the legal standard (per se illegal or rule of reason), and the form as well as quantum of sanctions.[19] Disparities among the national competition policy frameworks of the member states could have a negative effect on trade mobility at the regional level.[20] Differing degrees of development and effectiveness of national competition policies in regulating important areal anti-monopoly practices have also become a major concern, and fundamentally may result in non-tariff barriers, creating major challenges for effective economic integration.[21] Moreover, these challenges are exacerbated by the lack of infrastructure in most AMSs.[22]

Imbalances between member states in their degree of economic development also become a stumbling block to achieving the advantages of a single market.[23] Competition policy and law exists to ensure effective market access for member states, and ensures that developing countries in particular are in a position to drive through parallel reforms in their own domestic economies.[24] In practice, the objectives of competition laws are very important in regional economic integration.[25] Achieving economic integration requires a certain degree of harmonisation in competition policy and law between ASEAN nations.[26] However, the dictates of domestic economic policy and political considerations are often opposed to this need for harmonisation within the

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[16] Lee and Fukunaga, above n 10.

[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] Ibid

[21] Ibid.

[22] Biswa Nath Bhattacharyay, 'Infrastructure for ASEAN Connectivity and Integration' (2010) 27(2) *ASEAN Economic Bulletin* 200, 201. Infrastructures in this context refers to cross-border infrastructure that connects two or more countries, as well as national infrastructure that influence cross-border trade. It means including airports, ports, roads, and railway.

[23] Gunter S Heiduk and Yiping Zhu, 'The Process of Economic Integration in ASEAN+3: From Free Trade Area to Monetary Cooperation or Vice Versa?' in Paul JJ Welfens et al (eds), *EU-ASEAN: Facing Economic Globalisation* (Springer, 2009) 262.

[24] Pascal Lamy, 'Stepping Stones or Stumbling Blocks? The EU's Approach Towards the Problem of Multilateralism vs Regionalism in Trade Policy' (2002) 25(10) (11) *World Economy* 1399.

[25] Claus-Dieter Ehlermann and Laraine L Laudati (eds), *European Competition Law Annual 1997: The Objectives of Competition Policy* (Hart Publishing, 1997).

[26] Lee and Fukunaga, above n 10.

ASEAN region. Competition policy and law harmonisation is a necessary measure to ensure that the single market functions effectively, by providing technical assistance for establishing and enforcing competition law among AMSs.[27]

These considerations suggest that, properly approached, harmonisation of competition policy in a regional single market is a more realistic strategy for developing countries than a series of national regimes.[28] As such, ASEAN must strengthen its regional economic integration using harmonisation as the instrument.[29] Since competition policy is the core instrument of free trade, it has a major role to play in the process of liberalisation within ASEAN,[30] to ensure that the ASEAN market is kept as wide open as possible for new entrants and to prevent the internal market from anti-competitive conduct, while protecting small-to-medium business practices and enhancing customer welfare.[31]

1.2 Justification for the Study

The main focus of this study is the importance of a common standard for competition policy and law within the AEC. The reason for this focus originates in the lack of regional competition policy and law since ASEAN liberalised its market. Common regulation is a requirement for establishing a regional single market. The claim that trade liberalisation and economic integration enhance the urgent call for a common standard of competition policy relies on the argument that members and anti-competitive conduct across jurisdictions will increase.[32] The main reason motivating the harmonisation of competition law and policy within ASEAN begins with ASEAN's commitment, in aid of economic integration via the AEC, to endeavour to introduce national competition law and policy by 2015. The merging of national markets in the

[27] Lamy, above n 24.

[28] Ibid.

[29] Huong Ly Luu, 'Regional Harmonization of Competition Law and Policy: An ASEAN Approach' (2012) 2(02) *Asian Journal of International Law* 291, 291.

[30] Thanadsillapakul, above n 15. Also see Kim Them Do, 'Competition Law and Policy and Economic Development in Developing Countries' (2011) 8(1) *Manchester Journal of International Economic Law* 18, 19-35.

[31] Thanadsillapakul, above n 15.

[32] Damien Neven and Paul Seabright, 'Trade Liberalization and the Coordination of Competition Policy' in W.S. Comanor et al (eds), *Competition Policy in the Global Economy: Modalities for Co-operation* (Routledge, 2005) 381, 389. According to Neven and Seabright, a supranational authority will perform better than decentralization decisions by national jurisdictions.

process of economic integration offers many opportunities for the extension of restrictive economic practices;[33] a diverse range of provisions in competition law can be regarded as restrictive practices in trade.

ASEAN's establishment of AFTA offers a source of previous experience to draw on; however, following AFTA, progress was disappointing. It is acknowledged that AFTA has achieved less than member states were expecting. One of the factors contributing to this failure is that ASEAN had no competition law to regulate cross-border transactions and protect the market from anti-competitive behaviours. In order to address this issue, this thesis aims to consider the benefits of harmonisation of competition policy for the ASEAN region. This research will also consider the present level of harmonisation of competition policy in the ASEAN region, the value of further harmonisation and how this may be achieved.

The term 'competition policy' captures laws and regulations that pertain to market conduct, such as rights of entry, mergers and acquisitions (M&As), agreements between firms (including collusion behaviour and cross-ownership), abuse of market dominance and predatory conduct.[34] Such rules regarding unfair business practices, which are very important in preventing potential market concentration, could hamper the implementation of economic integration.[35] It is becoming apparent that non-tariff barriers and quotas are key obstacles to eliminate. Disparity in competition frameworks is suspected to be one of these non-tariff barriers through which regulation might treat some member states unfairly, in cases where antitrust provisions are more vicious in one country than in another.[36] Blockages caused by disparities in competition policy may be even more effective than tariff barriers in impeding the market.

The situation above required ASEAN to form a regional competition law and harmonise the legal situation among its member states. There are two kind of harmonisation: first,

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[33] Richard M Buxbaum, 'Antitrust Regulation within the European Economic Community' (1961) 61(3) *Columbia Law Review* 402, 403.

[34] In this thesis, the term 'competition policy' includes both competition policy and law. As a result, the expressions 'competition policy and law' and 'competition policy' are used interchangeably in this thesis.

[35] Deswin Nur, 'Uniknya Aturan Merger di Asia Tenggara (The Unique of Merger in Southeast Asia)' in Ahmad Kaylani (ed), *Negara dan Pasar Dalam Bingkai Kebijakan Persaingan* (Komisi Pengawas Persaingan Usaha Indonesia, 2011) 133.

[36] Dennis Thompson, 'Harmonization of Laws' (1965) 3(3) *Journal of Common Market Studies* 302, 303.

between regional laws and national laws; and second, among the different national competition of ASEAN's various member states. One problem regarding the latter is that some AMSs have no competition laws: to date, only five member states have enacted competition laws in their legal system. For example, although competition regulations exist in the Philippines' legal system, it has no generic competition law; Brunei Darussalam, Cambodia, Laos and Myanmar do not even have overarching competition laws in place. Differing competition regulations, imbalances in competition law development, gaps in economic development and lack of political support to create a level playing field for businesses prevent ASEAN from protecting consumers and the market from anti-competitive conduct as a result of trade liberalisation.

To draw lessons from the experiences of the European Union (EU) and implement these in a similar way in ASEAN would be ineffective, due to the substantial legal gaps between AMSs. Efforts towards harmonisation in ASEAN are based on the idea of passing similar legal rules in each state; however, these efforts do not address the underlying differences in legal cultures among the different states. Further, insufficient political support from national leaders prevents the process of harmonisation of competition laws in ASEAN. Several economic communities have had similar experiences when they attempted to harmonise competition policy among their members: for example, ECOWAS,[37] the African Economic Community[38] and the Andean Economic Community all encountered difficulty in harmonising competition policy when faced with national interests and a lack of political will from member states.[39]

A strong argument can be made that the harmonisation of competition policy and law in the AEC must be implemented and solidified before ASEAN expands its regional economic integration.[40] Experience from other economic communities has shown that economic integration with neither the authority to develop and modernise a

[37] O Anukpe Ovrawah, 'Harmonisation of Laws Within the Economic Community of West African States (ECOWAS)' (1994) 6(1) *African Journal of International and Comparative Law* 76, 82.

[38] Muna Ndulo, 'Harmonisation of Trade Laws in the African Economic Community' (1993) 42 *International and Comparative Law Quarterly* 101, 104.

[39] Marco Botta, 'The Role of Competition Policy in the Latin American Regional Integration: A Comparative Analysis of Caricom, Andean Community and Mercosur' (Paper presented at the IX Annual Conference of the Euro-Latin Study Network on Integration and Trade (ELSNIT): Revisiting Regionalism. Appenzel, Switzerland, 2011).

[40] Lee and Fukunaga, above n 10.

comprehensive and harmonised competition policy, nor the power to enforce compliance with a regional competition regime, will be incapable of integrating the economies of its member states.[41] So far, the ASEAN harmonisation process has occurred through the promotion of the ASEAN Competition Policy Guidelines. The Guidelines served as a simple framework for AMSs to develop their own competition policy and law. The Guidelines do not establish parameters for substantive competition law, nor a formal procedure nor its enforcement. In this context, a study that examines a possible future framework for harmonising competition policy and law in ASEAN economic integration is necessary.

1.3 Significance of the Study

Three major reasons are provided for why this research is significant. First, the analysis and findings of this research will contribute to the existing literature on competition policy and law, particularly on the issue of harmonising regional law with national laws in economic community integration. In the context of economic communities, there has been much discussion of the proposal that competition policy among member states should be harmonised to avoid legal conflict. Eleanor M. Fox is a strong advocate of this view,[42] underlining that disharmony of law could be bothersome. According to Fox, harmonisation of competition policy and law may allow the economic community to avoid unnecessary transaction costs across jurisdictions. It may also avoid inefficiency for the economic community and its firms. However, Fox denies that harmonising different legal systems is a costly process. Further, the economic development gap becomes an influencing factor for harmonising competition laws among member states. In the ASEAN case, regional harmonisation will also be a source of difficulty for its member states.

Second, this study will provide an important perspective that will enable ASEAN policy makers to improve their understanding of developing competition policy harmonisation for the AEC. A good understanding of competition policy harmonisation will enable ASEAN policy makers to choose the right form of harmonisation. Third, this study

[41] Ndulo, above n 38. Louis F Del Duca, 'Teachings of the European Community Experience for Developing Regional Organizations' (1992) 11 *Dickinson Journal of International Law* 485, 512-534.

[42] Eleanor M Fox, 'Harmonization of Law and Procedures in a Globalized World: Why, What, and How?' (1991) 60(2) *Antitrust Law Journal* 593, 593-594.

offers useful lessons for economic integration in other communities by setting a framework for competition policy harmonisation aimed at maintaining the function of the market and protecting consumers.

1.4 Literature Review

Several previous studies on competition policy harmonisation have found that competition policy harmonisation is necessary for economic integration to progress to the status of a customs union. Cunningham and LaRocca offer a thoughtful discussion of the potential for competition policy harmonisation within regional trade arrangements.[43] According to Cunningham and LaRocca, harmonisation for regional competition policy may be established within three scopes: substantive law, procedural law and law enforcement. Using Cunningham and LaRocca's concept of competition policy harmonisation, this research analyses the importance of competition policy harmonisation for the AEC and methods of achieving harmonisation among the various competition policies of the AMSs. This thesis finds that competition policy harmonisation is a significant step in the establishment of an ASEAN single market. Its effects are to protect the market and consumers from cross-border anti-competitive conduct.

Lawan Thanadsilapakul advocates for the harmonisation of competition policy in ASEAN.[44] She proposes three options for the regional harmonisation of competition law: (1) the *co-ordinated* or *sovereignty model*, in which governments rely on the coordination of national competition laws based on positive comity agreements; (2) the *harmonised law model*, under international guidelines; and (3) the *supranational model*, under which governments sign an agreement on international competition laws. In another study, Luu emphasises the importance of competition policy harmonisation for ASEAN.[45] Luu compares the hard law in several economic communities and its applicability to ASEAN, and finds that soft law is a more flexible approach for ASEAN in harmonising competition policy. Luu agrees that, without supranational power, the AEC will be powerless. However, on this point, both Thanadsilapakul and Luu set out

[43] Richard O Cunningham and Anthony J LaRocca, 'Harmonization of Competition Policy in a Regional Economic Integration Perspective' (1996) 27 *Law & Policy in International Business* 881.

[44] Thanadsillapakul, above n 15.

[45] Luu, above n 29.

the determining factors in which AMSs are dominated by their national interests. To build a system of supranational law would mean that AMSs would be obliged to surrender their sovereignty to a supranational institution; such surrender does not conform to the principles of ASEAN. ASEAN requires legal measures that do not necessitate giving up member states' sovereignty to a supranational power. In this case, a bilateral approach may address the problem.

Different with previous researches, this study focuses how harmonisation of competition policy and law can be achieved and in what form it can be established. This thesis offers different way to harmonise competition policy and law in ASEAN member states by considering not only the legal aspects but also the legal culture and economic development. It provides the current problem of harmonisation of competition policy and law in ASEAN countries comprehensively. Furthermore, it divides three major fields of competition policy and law needs to be harmonised: substantive law, procedural law, and enforcement system. To achieve the harmonisation this thesis suggests two solutions: bilateral and regional cooperation.

1.5 Rationale for the Methodology of the Study

This study uses doctrinal legal methodology based on the normative character of the research problem.[46] After identifying current differences in competition regimes within ASEAN, the researcher introduces a methodology for unifying different systems into a common and integrated policy through a comparative law approach, with an emphasis on AMSs' competition law as the object of comparison.

As a result of regionalism, there is competition between legal systems due to imbalances in their degree of development.[47] To overcome this and achieve harmonisation of laws, it is necessary to explore the similarities and dissimilarities across legal systems and locate common conceptual ground, based on the assumption that the legal systems being compared are commensurable; that is, that they have criteria

[46] Doctrinal legal methodology defines as a research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and perhaps, predicts future developments, see Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83, 101.

[47] Anthony Ogus, 'Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law' (1999) 48(2) *The International and Comparative Law Quarterly* 405, 407.

that allow them to be meaningfully compared.[48] By examining the laws of other jurisdictions, the regulator or policy maker can observe how foreign legal systems approach and solve the common problem.

Zweigert and Kötz asserted that a comparative approach, revealing the ways in which legal systems are similar, would help to deepen notions of a unitary sense of justice.[49] To define the process of legal comparison involves an examination of the spirit and style of various legal systems, including a correlation of comparable legal institutions and legal problems within these systems.[50] One way to undertake the comparison is by *tertium comparationis*, or the concept of equivalence.[51] *Tertium comparationis* is used as a guideline for exploring similarities or dissimilarities across legal systems, to find common functions and comparable rules.[52] Connor and Moreno assert that the main function and basic concept of *tertium comparationis* is comparable cross-culturally, and can be established at a variety of levels of analysis.[53] *Tertium comparationis* is a relative concept, under which the original idea of identity gives way to the idea of maximum similarity.[54] This was also advocated by H P Glenn, who applied alternative paradigms to the *tertium comparationis* method, as follows:

> Making comparisons requires a search for the appropriate enabling information, to overcome initial incommensurability or ignorance. . . One method is to "dig deep enough into the conceptual soil of each theory so that eventually a layer of shared terms is unearthed." It is likely that these shared terms will be at a higher level of abstraction than those initially encountered, such that a more general theory or conceptual framework emerges, "which explains both or which contains each as a special case." A second method . . . would make a "more global inspection of the terrain, [aiming] to set up a lexical and semantic correspondence between the languages of rival theories, considered in their entirety." [These methods] renounce any effort to compare

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[48] Anna Conley, *Harmonizing Jurisdiction In Transnational Cases: A "Deep" Comparative Inquiry* (Doctor of Civil Laws Thesis, McGill University, 2011) 1-3.

[49] Hill Jonathan, 'Comparative Law, Law Reform and Legal Theory' (1989) 9(1) *Oxford Journal of Legal Studies* 101, 102-103.

[50] Erich Genzmer, 'A Civil Lawyer's Critical Views on Comparative Legal History' (1966-1967) 15 *The American Journal of Comparative Law* 87, 88.

[51] Tomasz P. Krzeszowski, 'Tertium Comparationis' in Jacek Fisiak (ed), *Constrative Linguistic Prospects and Problems* (Mouton Publisher, 1984) 301.

[52] H Patrick Glenn, 'Are Legal Traditions Incommensurable' (2001) 49 *American Journal of Comparative Law* 133.

[53] Ulla M. Connor and Ana I. Moreno, 'Tertium Comparationis: A Vital Component In Contrastive Research Methodology' in P. Bruthiaux et al (eds), *Directions in Applied Linguistics: Essays in Honor of Robert B. Kaplan. Clevedon* (Multilingual Matters, 2005) 153, 154.

[54] Ibid.

> against an external, objective structure of reality or an external invariant language. They renounce application of a *tertium comparationis*.[55]

The most recent study on the comparative law approach is by La Porta, Lopez-de-Silanes and Andrei Shleifer.[56] They found that though no two nations are alike some national legal systems are similar in certain respects, allowing classification of different national legal systems into unified law.[57] Comparison, which is the essence of comparative law, means to place comparable elements of two or more legal systems up against each other and determine their similarities and differences. The comparison may be bilateral or across multiple legal systems, and the subject of the comparison may be substantive law or the formal characteristics of legal systems.

Finally, a doctrinal analysis is necessary, as this study's critical analysis demands a theoretical synthesis in order to integrate, combine, formulate and reorganise the elements derived from the comparative analyses, in order to describe the process of harmonisation and determine how it can be achieved in the present case. This study will use theoretical frameworks as advanced by law scholars,[58] particularly rational choice theory, to examine the harmonisation of competition policy and law in promoting economic integration in ASEAN, as well as suitable legal measures for achieving this.

1.6 Method of the Study

Primarily, this study has been conducted through library-based research using relevant legal texts, documents and secondary resources. This research has identified data systematically and applied in-depth analysis to address the main issue in this thesis. This study critically examines secondary data consisting of primary, secondary and tertiary legal materials. The primary legal materials include EU regulations, the competition laws of AMSs, competition authorities' decisions, court decisions, jurist doctrines and other legal documents. The secondary legal materials include textbooks,

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[55] Glenn, above n 52.

[56] Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46(2) (05) *Journal of Economic Literature* 285.

[57] Ibid.

[58] Richard A Posner, 'Rational Choice, Behavioral Economics, and the Law' (1998) *Stanford Law Review* 1551; Richard J Herrnstein, 'Rational Choice Theory: Necessary but Not Sufficient' (1990) 45(3) *The American Psychologist* 356; Thomas S Ulen, 'Rational Choice and the Economic Analysis of Law' (1994) 19(2) (04) *Law & Social Inquiry* 487.

journals, articles, working papers, conference papers, seminars, workshops and other relevant documents on competition policy. Tertiary legal materials include articles from newspapers and magazines. Finally, the internet has been used as an important source of supporting data, including reports of non-governmental organisations, and empirical data related to the economic development of AMSs, including gross domestic product (GDP).

1.7 Outline of the Study

This thesis is divided into eight chapters. This first chapter has introduced the subject of the research, covering the significance of the study, rationale for the methodology, the method of research and a structural outline of the thesis.

Chapter 2 provides a theoretical foundation for the harmonisation of competition policies. It reviews theoretical frameworks addressing the problem of integrating regional free trade areas (FTAs) into single economic communities through the harmonisation of laws. The chapter includes outlines of the theory and practice of the harmonisation principle, providing a definition and related terminology; it also reviews harmonisation's conceptual distinction from legal approximation, and identifies the benefits of harmonisation of laws. Further, it examines the relationships between trade liberalisation, competition policy and economic integration. Finally, the chapter examines the function of harmonisation in an economic integration.

Chapter 3 examines the legal and non-legal barriers to applying competition policy and law in an economic community. The legal barriers include differing regulations on competition policy, differing prohibitions regarding anti-competitive conduct, differing degrees of enforcement of competition law, and also the issue of cross-border enforcement. The non-legal barriers include the culture and political will of the economic community's member states. Chapter 3 also justifies the importance of harmonisation for an economic community. Finally, the chapter offers basic argumentation for the establishment of competition policy in ASEAN by analysing other economic communities around the world.

Chapter 4 describes indicators influencing the establishment of competition policy for economic integration, particularly the AEC. Before submitting the indicators, the

chapter examines the possibility of assigning legal personality to a regional organisation, and legal status to its member states. This chapter shows that an economic community has the required legal personality to impose laws on its member states, such that it has rights to issue regulations binding the member states.

Chapter 5 examines the failure of AFTA, the weaknesses and reasons behind its failure, and the gap between its achievements and expectations. It is argued that the main reason for AFTA's failure is ASEAN's lack of regional competition policy to protect the market from tariff and non-tariff barriers. This constitutes a yet greater challenge as ASEAN moves to the next stage of economic integration—the single market. It is a sign that ASEAN must move towards a customs union, requiring harmonisation of some policies, specifically trade and competition policies. Nevertheless, ASEAN's published Blueprint guidelines only mention that member states shall enact competition law; there is no binding regulation that obliges them to do so. The legal implications are clear: there is a possibility that extraterritorial jurisdictions may be applied.

Chapter 6 offers an examination of the existing differences in the competition laws of AMSs. It is widely known that only five of ten AMSs have enacted competition laws. The Philippines have enacted several regulations on anti-competitive conduct, but no generic competition law. Meanwhile, Brunei Darussalam, Cambodia, Laos and Myanmar are still on their way to passing such legislation. In comparing existing competition laws, it is found that regional harmonisation is almost impossible to achieve. It is a huge challenge for ASEAN to develop harmonisation based on the EU approach to harmonisation of competition law. ASEAN must employ other measures to achieve harmonisation and avoid legal conflict in the future.

Chapter 7 examines and analyses possible measures that ASEAN can apply in its effort to harmonise competition law. This chapter provides that harmonisation can be approached via three fields: substantive law, procedural law and enforcement. ASEAN may choose which field they want to harmonise. To perform harmonisation, ASEAN has two options: a bilateral approach and a regional approach. Through cooperation and agreement, the bilateral approach does not oblige member states to change the substance of their existing competition law, and thus offers a rational alternative to a regional approach that obliges member states to change laws. Further, the bilateral approach enables member states to develop and strengthen their competition law.

Chapter 8 presents the findings of the study and offers conclusions and recommendations for ASEAN to harmonise the competition policies of its member states.

Chapter 2
Theoretical Framework for Competition Policy and Law Harmonisation

2.1 Introduction

The central objective of this chapter is to provide a foundational framework for the harmonisation of competition policy and law in economic integration. The specific aims of this theoretical chapter are fourfold. First, it provides a definition of competition policy and law from a rationalist perspective, including the scope of anti-competitive conduct, monopolisation, monopoly power and market power. This framework is utilised as a foundation for the analysis in the next chapter, which examines the current level of harmonisation in the AEC. It also introduces a theoretical framework governing the definition and concepts involved in the harmonisation of competition policy and law. This section equips the reader with an understanding of the important role of competition policy harmonisation in regional economic integration. Through these aims, this chapter provides a necessary foundation for the subsequent discussion of competition policy harmonisation in ASEAN.

Harmonisation has been considered by many scholars as a powerful and effective tool for promoting regional economic integration.[1] It also has an important role to play in the area of economic integration in terms of harmonising national regulations related to competition policy and law.[2] Promoting economic integration within a region provides the most obvious reason for undertaking harmonising measures within law as a whole, and especially within competition policy and law. It is acknowledged that there are advantages to having a region-wide system of competition policies. Having a uniform regulatory framework requires more than uniformity of language in governing rules. Regardless of the definition of harmonisation or its purposes, to be effective,

[1] Jagdish Bhagwati and Robert E. Hudec (eds), *Fair Trade and Harmonization: Prerequisite for Free Trade?* (The MIT Press, 1996),

[2] Arthur Rosett, 'Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law' (1992) 40 *American Journal of Comparative Law* 683, 685. Rosett claimed that harmonized codification of state law is derived from common economic market and the high degree of mobility of population.

harmonisation must take into account the fact that different cultures perceive law in different and inconsistent ways. Harmonisation is dependent on the degree of economic integration that the world trading system can tolerate. Rather than being an aim in itself, it constitutes a means of achieving certain goals, such as an effective AEC. Harmonisation is difficult to achieve in the absence of one commonly accepted regulatory framework encompassing all AMSs.

The role of competition policy harmonisation should be to promote efficient economic integration.[3] Well-designed competition policy supports economic policies including trade liberalisation, industrial development, promotion of innovation, increasing domestic and foreign investment and macroeconomic stabilisation policies.[4] Until now, even though the effectiveness of competition policy has remained unanswered, competition policy is widely recognised as a prerequisite for the operation of the open market.[5] In recent years, many empirical studies have been published in the field of competition policy in economic integration, particularly regarding developing countries in economic transition.[6] Strong competition in domestic markets prepares exporters for the competitive rigors of the international market.[7] Through reducing barriers to entry, competition policy promotes the establishment of a strong and sustainable small and medium-sized enterprise sector.[8]

A very broad rationale for harmonisation of competition policy is market integration: if basic obstacles to implementing the AEC can be found in national competition laws, or if they arise from the simple coexistence of divergent competition law regimes, then this

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[3] Donald Hay, 'The Assessment: Competition Policy' (1993) 9(2) *Oxford Review of Economic Policy* 1, 1. Michal S. Gal, 'Regional Competition Law Agreements: An Important Step For Antitrust Enforcement' (2010) 60(2) *The University of Toronto law journal* 239, 248-249.

[4] This thesis focused on the harmonization of competition policy rather than the effectiveness of competition law.

[5] Bhagwati and Hudec, above n 1.

[6] Ross C. Singleton, 'Competition Policy for Developing Countries: a Long Run-Based Approach' (1997) XV (April 1) *Contemporary Economic Policy* ; Lawrence H Summers, 'Competition Policy in the New Economy' (2001) 69 *Antitrust Law Journal* 353; Cassey Lee and Yoshifumi Fukunaga, 'Competition Policy Challenges of Single Market and Production Base' (Discussion Paper-2013-17, Economic Research Institute for ASEAN and East Asia, 2013); World Trade Organization (WTO), 'Report of The Working Group on The Interaction Between Trade and Competition Policy to The General Council-Note by the Secretariat' (WTO, 1998).

[7] Johannah Branson, Trinh Le and Megan Willcox, *Competition Policy in ASEAN: Case Studies* (Australia-Japan Research Centre, 2008), 1.

[8] Ibid.

constitutes sufficient motivation for establishing competition policy harmonisation.[9] It is well established that differences in the regulatory frameworks of AMSs have significant influences on the common market. Hence, harmonisation of competition policy in economic integration is commonly considered an effective tool, and its success is reflected in the EU case.[10] In the context of building a community of member states, harmonisation towards a single economic community standard will facilitate the creation of a more integrated community.[11]

2.2 Competition Policy: A Rationalist Approach

This section clarifies the theoretical framework for competition policy used in this thesis. In doing so, it is important to construct an approach that will be useful for the task at hand: assessing the harmonisation of competition policy in an economic community based on a rational choice approach.[12] Choice, in this case, is rational when it is deliberative and consistent. The decision maker deliberately can give a reasoned justification for his/her choice.[13] Similar to this argument, Posner pointed out his opinion on the rational choice approach:

> Choosing the best means to the chooser's ends. For example, a rational person who wants to keep warm will compare the alternative means known to him of keeping warm in terms of cost, comfort, and other dimensions of utility and disutility, and will choose from this array the means that achieves warmth with the greatest margin of benefit over cost, broadly defined. Rational choice need not be conscious choice. Rats are at least as rational as human beings when

[9] Carsten Gerner-Beuerle, 'United in Diversity: Maximum Versus Minimum Harmonization in EU Securities Regulation' (2012) 7(3) (July 1, 2012) *Capital Markets Law Journal* 317, 335.

[10] The EU competition law system is a unique. So far, it has been used to protect competition, but unlike national competition law systems, its primary objective has not been to obtain the generic benefits associated with competition such as lower prices to consumers and technological progress. Rather, it has been understood primarily as part of a program designed to achieve the specific goal of unifying the European market. See Barry E Hawk, 'Antitrust in the EEC--The First Decade' (1972) 41 *Fordham Law Review* 229. Also see Alissa A Meade, 'Modeling a European Competition Authority' (1996) 46 *Duke Law Journal* 153.

[11] Eleanor M Fox, 'Harmonization of Law and Procedures in a Globalized World: Why, What, and How?' (1991) 60(2) *Antitrust Law Journal* 593, 595.

[12] Rational choice theory is chosen because it is able to explain the connection between the law and economic basis of the benefit. This thesis analyses the importance and the benefit of competition policy and law for the ASEAN market integration. It also identifies the problems and challenges that ASEAN community may face in the future. However, there is no precise definition for rational choice theory, see Rusell B. Korobkin and Thomas Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88(4) *California Law Review* 1051, 1060.

[13] Thomas S Ulen, 'Rational Choice in Law and Economics', in Boudwijn Bockaert and Gerrit De Geest (eds), *Encyclopedia of Law and Economics*, (1999), 791.

> rationality is defined as achieving one's ends (survival and reproduction, in the case of rats) at least cost.[14]

Under this theory, harmonisation of competition policy and law are articulated as cooperative actions by states to provide welfare to their citizens normatively. Competition policy pertains to competition law and its enforcement,[15] and includes all government initiatives designed to increase competition in markets, such as deregulation, FDI and reduction of import restrictions.[16] In the United States (US), the Sherman Act describes antitrust as the Magna Carta of free enterprise systems, as stated in the case of *United States v. Topco Associates*:[17]

> Antitrust Law in general and the Sherman Act in particular are the Magna Charta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights to protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.

Competition law is the core instrument of competition policy and creates an environment conducive to sectoral deregulation.[18] Competition law refers to the sets of rules maintained by governments to outlaw or restrict anti-competitive conducts and protect the process of competition in order to maximise consumer welfare.[19] In other words, competition policy has wider scope than the competition law. Hoekman and Homes define competition law with more precision:[20]

> As the set of rules and disciplines maintained by governments relating either to agreements between firms that restrict competition or to the abuse of a

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[14] Richard A Posner, 'Rational Choice, Behavioral Economics, and the Law' (1998) *Stanford Law Review* 1551, 1551.

[15] Simon J Evenett, 'What is the Relationship between Competition Law and Policy and Economic Development?' in Douglas H Brooks and Simon J Evenett (eds), *Competition Policy and Development in Asia* (Palgrave Macmillan, 2005) 1, 9-10.

[16] In this thesis competition policy also cover the competition law.

[17] *United States v. Topco Associates, Inc*., 405 U.S. 596 (1972), 610.

[18] Andrew T Guzman, 'International Competition Law' in Andrew T Guzman and Alan O Sykes (eds), *Research Handbook in International Economic Law* (Edward Elgar Publishing, 2007) 418, 7.

[19] Richard Whish and David Bailey, *Competition law* (Oxford University Press, 7th ed, 2012), 1-2.

[20] Bernard Hoekman and Peter Holmes, 'Competition policy, developing countries and the WTO' (1999) 22(6) *The World Economy* 875, 876.

dominant position (including attempts to create a dominant position through mergers).

In particular, competition law is concerned with anti-competitive agreements or arrangements between two or more people or enterprises that contain provisions that: (a) substantially lessen competition or increase dominance in a market, including by mergers or acquisitions; (b) are exclusionary, in preventing or limiting dealing with a rival; (c) fix prices, volumes or other terms of trade among competitors. In addition, anti-competitive conduct also covers unilateral behaviour by a person or enterprise that takes advantage of market power for anti-competitive purposes, or sets the minimum price at which goods are supplied by the person or enterprise or can be sold by others.[21]

The theoretical study of competition law has traditionally been undertaken from within economic law theory.[22] Economic theory emphasises the gains that perfectly competitive markets represent over those in which market power exists, insofar as the existence of market power implies a net loss of social welfare.[23] While there is broad consensus that the core objective of competition law is to achieve economic efficiency,[24] there is little agreement on how competition rules can best promote such efficiency. A standard concept of efficiency is that of Pareto efficiency, which refers to the condition where it is impossible to make Pareto improvements, or reallocations of resources that would increase the welfare of least one person without decreasing the welfare of anyone else.

In addition, there are some fundamental types of economic efficiency: allocative, productive and dynamic efficiency. *Allocative efficiency* is achieved where market processes lead resources to be allocated to their highest valued use among all competing uses. Suppliers will allocate products to those consumers willing to attribute the highest value to them, maximising the welfare of both producers and consumers. *Productive*

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[21] Johannah Branson, 'Competition Policy in ASEAN: Case Studies ' (Australia-Japan Research Centre, Crawford School of Economics & Government, ANU College of Asia and the Pacific, 2008), 5.

[22] This thesis does not utilizing economic theory analysis to examine the harmonization of competition policy in ASEAN but rather by using comparative methodology, compare to other existing competition policy harmonization in other economic community. The economic theory in this chapter is only as a tool to understand the competition policy, particularly in regional economic integration.

[23] Joaquín Maudos, 'The Cost of Market Power in Banking: Social Welfare Loss vs. Cost Inefficiency' (2007) 31(7) (07) *Journal of banking & finance* 2103, 2103.

[24] Guzman, above n 18.

efficiency is achieved where products are produced at the minimum possible cost with available technology. Production is undertaken by least-cost firms using as few resources in production as possible. An improvement in productive efficiency will reduce production costs and shift the supply function, thereby increasing the total surplus. *Dynamic efficiency* refers to technological innovation: producers can utilise new technology to improve the quality of their products and increase productive efficiency. This type of efficiency ensures that firms continually innovate and develop better technology to reduce costs over time.[25]

To promote economic efficiency, competition law is strongly influenced by the different schools of thought that have emerged among economists regarding how competition rules should be implemented. For instance, the Harvard School, which emerged after the Second World War, gave great importance to placing limits on degree of concentration in industry, as concentration leads to monopoly profits.[26] In this area, a study by Mason, based on an idea developed by the neo-classical school, assesses the allocative and technical performance of the economy in evaluating the difference between monopoly and perfect competition.[27] This finding has affected the branch of economics known as industrial economics, and led to the development of the Structure-Conduct-Performance (SCP) paradigm.[28] Later, Bain's works indicated the strong relationship between market concentration and profitability of firms in the relevant market. [29] In this regard, entry barriers are assumed to be a necessary condition for the use of market power. Bain found that where the largest eight companies control 70% or more of the market, the

[25] For further explanation regards to dynamic efficiency refer to Josef C Brada and Jose A Mendez, 'An estimate of the dynamic effects of economic integration' (1988) *The Review of Economics and Statistics* 163.

[26] Richard A Posner, 'Economic Approach to Law' (1974) 53 *Texas Law Review* 757, 758.

[27] Perfect competition is used as a benchmark to compare with other market structures because it displays high levels of economic efficiency. In both the short and long run, price is equal to marginal cost (P=MC) and Allocative efficiency is achieved. Productive efficiency occurs when average costs are its minimum point. This is not achieved in the short run, but is tainted in the long run. The long run of perfect competition, therefore, exhibits optimal levels of economic efficiency.

[28] Edward S Mason, 'Price and Production Policies of Large-Scale Enterprise' (1939) 29(1) *The American Economic Review* 61, 66.

[29] Joe S Bain, 'Economies of Scale, Concentration, and the Condition of Entry in Twenty Manufacturing Industries' (1954) 44(1) *The American Economic Review* 15; Harold Demsetz, 'Industry Structure, Market Rivalry, and Public Policy' (1973) 16 *Journal Law and Economic* 1, 1.

gains are significantly higher than in a less concentrated market.[30] This approach was subsequently questioned by a group of economists known as the Chicago School.[31]

The Chicago school argued that there is no relationship between market concentration and high profitability.[32] It is hypothesised that market concentration is the result of firms with superior efficiency obtaining a large market share.[33] In this case, market share and profits will be correlated, but there will be no causal relation between market concentration and profits.[34] The Chicago school focused attention on the limiting of output, as provided in the US Sherman Act. Limiting output results in higher prices and also deadweight losses, which are then transferred to become a burden on the consumer. The aim of the Chicago school was to limit deadweight losses resulting from market power. Market power tends to create higher prices by limiting output and creating barriers to new entrants.[35]

However, a fundamental transformation occurred in the case of EU competition law. Here, the objective was no longer lowering prices and promoting consumer welfare; rather, EU competition law was understood as a tool for achieving the specific goal of EU, which was unifying the European market.[36] Competition law has become a juridical tool for restructuring the judicial system in the EU. Competition law served as a means of achieving economic integration. Moreover, the EU made several changes to its competition law, not to preserve competition or to benefit consumers, but to create a unified market.[37]

2.2.1 Anti-competitive Activities

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[30] Bain, above n 29.

[31] Robert H Bork, *The Antitrust Paradox: A Policy at War With Itself* (Basic Book, Inc., 1978).

[32] Armen A Alchian, 'Uncertainty, Evolution, and Economic Theory' (1950) 58(3) *The Journal of Political Economy* 211, 211-212.

[33] Yale Brozen and George Bittlingmayer, *Concentration, Mergers, and Public Policy* (Macmillan New York, 1982), 180.

[34] Michael Smirlock, 'Evidence on the (non) Relationship between Concentration and Profitability in Banking' (1985) 17(1) *Journal of money, credit and Banking* 69, 69.

[35] Richard A Posner, 'The Chicago School of Antitrust Analysis' (1979) 127(4) *University of Pennsylvania Law Review* 925, 929-930.

[36] David J Gerber, 'The Transformation of European Community Competition Law' (1994) 35 *Harvard International Law Journal* 97, 98-99.

[37] Ibid, 102.

Competition law assumes that the behaviour of business practitioners must be provided for in regulation to prevent them from increasing their individual or collective market power by engaging in anti-business conduct.[38] It also assumes that firms must be prevented from merging with other firms in a manner that unduly increases their market power. More specifically, competition law is aimed at regulating against the aggregation of market power, which is a result of imperfect competition and a cause of market failure.[39] Increased levels of market power attained by firms, accompanied by an increased ability to influence the market and prices, result in profit-maximising benefit, with the effect of creating market inefficiency.[40] As stated in the World Trade Organisation (WTO) panel decision in the case of Mexico—Measures Affecting Telecommunication Services:

> A firm has market power if it has the ability profitability to maintain prices above the competitive levels for a significant period of time which implies both the ability to maintain prices well above costs, and protection (either governmental limitations or market circumstances) against a rival's entry or expansion.[41]

The United Nations Conference on Trade and Development (UNCTAD) provides a list of firms' actions that can fall within the purview of competition law.[42] Although there is no agreed-upon list of the elements of competition law, the following five elements figure prominently in most accounts: (a) measures relating to agreements between firms in the same market to restrain competition, including provisions banning cartels or allowing cartels under certain circumstances; (b) measures relating to attempts by a large incumbent firm to independently exercise market power (sometimes referred to as an abuse of a dominant position); (c) measures relating to firms that, acting collectively but in the absence of an explicit agreement between them, attempt to exercise market power, sometimes referred to as measures against collective dominance; (d) measures relating to attempts by a firm or firms to drive one or more of their rivals out of a market, including, for example, laws prohibiting predatory pricing; (e) measures

[38] Guzman, above n 18, 16.

[39] Ibid.

[40] Ibid, 16.

[41] World Trade Organization WTO, 'Mexico– Measures Affecting Telecommunications Services' (WT/DS204/R, WTO, April 2 2004) <https://www.wto.org/english/tratop_e/dispu_e/204r_e.pdf> para. 7.153, 175.

[42] Ajit Singh, 'Multilateral Competition Policy and Economic Development: A Developing Country Perspective on the European Community Proposals ' (UNCTAD/DITC/CLP/2003/10 United Nations, 2004) <http://unctad.org/en/docs/ditcclp200310_en.pdf>

relating to collaboration between firms for the purposes of research, development, testing, marketing and distribution of products.[43] The aim of anti-competitive conduct by firms is to redistribute consumer welfare to firms in the form of supranormal profits (profits in excess or above the normal level) achieved through higher prices or reduced product availability, which can lead to market inefficiency.[44]

One anti-competitive practice that could harm the market is the formation of export cartels.[45] In 1996, competition law and policy were included on the agenda of matters to be discussed at the WTO. The WTO Working Group on Interaction between Trade and Competition Policy has issued several reports on this problem, in which it reviewed the types of anti-competitive behaviour that may threaten global trading.[46] A common example of these anti-competitive practices is the existence of international cartels.[47] Exporting states have economic incentives to encourage export cartels, because they continue to accrue export revenues and promote national prosperity. Importing states have incentives to prevent export cartels where they result in a reduction in the importing state's consumer welfare.[48]

Based on Sweeney's finding, there are two significant consequences of the fact that the cartel conduct takes place in the exporting country, but the negative effects are felt exclusively or predominantly in the importing country.[49] First, the exporting state, which has clear territorial jurisdiction over the association, has few incentives to regulate such conduct. Second, the importing state, which has the incentives to restrain the conduct, does not have the territorial jurisdiction. Therefore, the importing state must exercise its law extraterritorially if it wishes to regulate the cartel.[50]

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[43] Ibid.

[44] Edward Montgomery Graham and J David Richardson, *Global Competition Policy* (Peterson Institute, Illustrated ed, 1997), 60.

[45] Florian Becker, 'The Case of Export Cartel Exemptions: Between Competition and Protectionism' (2007) 3(1) *Journal of Competition Law and Economics* 97.

[46] (WTO), above n 6.

[47] Eleanor M Fox, 'Competition Law and the Millennium Round' (1999) 2(4) *Journal of International Economic Law* 665; Eleanor M Fox, 'Toward World Antitrust and Market Access' (1997) *American Journal of International Law* 1.

[48] Brendan Sweeney, 'Export Cartels: Is There a Need for Global Rules?' (2007) 10(1) *Journal of International Economic Law* 87, 88.

[49] Ibid.

[50] Ibid.

2.2.2 Perfect Competition

Both under the old SCP paradigm and in the new theory of industrial organisation, perfect competition appears as the benchmark for competition policy.[51] Joan Robinson argues that perfect competition is defined as a state of affairs in which the demand for the output of an individual seller is perfectly elastic.[52] Perfect competition is a form of market where there are many firms with the same types of business, where every firm freely exits and enters the market without restriction.[53] This condition will always create some form of balance between demand and supply, in order to reach an optimum level of satisfaction for consumers and producers.[54] The absence of entry barriers or discrimination of certain regulations for businesses ensures that prices or rates are fair and transparent to consumers, because firms will not be able to determine their own rates far above marginal cost and revenue. In a perfect market, where competition is absolutely perfect, the market no longer requires government intervention in terms of tariff setting. As Knight argues, perfect competition entails rational conduct on the part of buyers and sellers, full knowledge, absence of frictions, perfect mobility and perfect divisibility of factors of production, and completely static conditions.[55] His study shows that competition in a free market economy is the best method for achieving economic health.[56]

Similarly, Baye conceptualises perfect competition as having five main elements.[57] First, there are many small buyers and sellers in the market; this implies that no one firm is large enough to have an effect on the total market. Second, there is one homogeneous product being produced by all firms, meaning that the products are viewed by consumers as perfect substitutes. Third, the buyers and sellers in the market

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[51] Jean-Luc Gaffard, 'What's the Aim for Competition Policy: Optimizing Market Structure or Encouraging Innovative Behaviors?' (2006) 16(1-2) (04) *Journal of evolutionary economics* 175, 177.

[52] Joan Robinson, 'What is Perfect Competition?' (1934) 49(1) *The Quarterly Journal of Economics* 104, 104.

[53] George J Stigler, 'Perfect Competition, Historically Contemplated' (1957) 65(1) *The Journal of Political Economy* 1, 2.

[54] Louis Makowski and Joseph M Ostroy, 'Perfect Competition and the Creativity of the Market' (2001) 39(2) *Journal of Economic Literature* 479, 481.

[55] Frank H Knight, *Risk, Uncertainty and Profit* (Courier Dover Publications, 1st ed, 1921), 76-80.

[56] Ibid.

[57] Michael R Baye, *Managerial Economics and Business Strategy* (McGraw-Hill Higher Education, 6th ed, 2009) 255.

possess perfect information. Customers and firms, for example, know the price at which all products in the market are sold. Fourth, there are no transaction costs. This means that it costs nothing to do business with any firm in the market, thereby preventing local businesses from being able to charge more than more distant ones. The final element is free entry into and exit from the market, implying that firms can come and go according to the availability of economic profits.[58]

2.2.3 Monopolisation

Monopoly is defined as the power to control prices and eliminate competition.[59] An industry that produces a single product in which a business actor provides the entire quantity to be purchased by consumers, causing firms to control the price in the market. The output of monopoly industries is completely different from the output of an industry that is accompanied by competition.[60] Monopolist firms wish to produce goods and services at maximum profit and at the lowest possible cost. In doing so, businesses are required to achieve productive efficiency for the output.[61]

Although productively efficient,[62] the monopolist will produce an output that is not appropriate, because the monopolist chooses the level of output and charges a price that is higher than the marginal cost.[63] If price is equal to marginal cost, then what consumers pay for the last unit purchased is equal to the opportunity cost of producing those units.[64] However, in a monopoly market, prices are higher than marginal costs;[65] thus what consumers have to pay for the last unit is higher than the opportunity cost of producing the last unit.[66] Where firms have monopoly power over an industry, it will cause a restriction in the flow of resources to the industries that use fewer resources than

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[58] Ibid.

[59] Piraino Jr, Thomas A, 'Identifying Monopolists' Illegal Conduct under the Sherman Act' (2000) 75 *New York University Law Review* 809, 814.

[60] Richard G. Lipsey, *Economics* (HarperCollins College Publishers, 10 ed, 1993), 56.

[61] Ibid.

[62] Productive efficiency occurs when an economy cannot produce more of one good without producing less of another goods.

[63] Lipsey, above n 60.

[64] Ibid.

[65] Marginal cost refers to the change in total costs resulting from a one unit change in output.

[66] Richard A Posner, *Antitrust Law: An Economic Perpective* (The University of Chicago Press, 1976), 8-10.

should have been used in perfect competition. As a result, companies with monopoly power will be able to set higher prices and make profits that are greater than the opportunity cost.[67]

Essentially, when a company has monopoly power in the relevant market, the company will continue to maintain that power in ways that nevertheless violate the law.[68] This behaviour aimed at maintaining monopoly power is also called monopolisation. In general, prohibited monopolisation must consist of two elements:[69] First, the company has monopoly power in the relevant market. Second, the company gains or retains such power by limiting or blocking access to the market (entry barriers). Companies that engage in monopolisation may aim to take over the market, or to protect the monopoly power that they have earned with a wide variety of efforts.[70] Monopolisation clauses do not prohibit monopolies, but rather prohibit acquiring or maintaining them in ways that are anti-competitive or exclusionary.[71]

2.2.3.1 Monopoly Power

Monopoly theory identifies that companies with monopoly power could raise prices to achieve supranormal profits. For this to occur, first, firms must have the power to deter new players from entering the industry in the relevant market. Second, firms must be producing goods or services on a small scale, or where there is no substitution for the goods or services.[72] The term ‘monopoly’ in the field of law is used not as an analysis tool but rather as a standard assessment; this is because not all monopolies are bad, but rather only those monopolies that inhibit trade and involve anti-competitive conduct are prohibited.[73]

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[67] Lipsey, above n 64.

[68] Harold R Weinberg, 'Is the Monopoly Theory of Trademarks Robust or a Bust' (2005) 13 *Journal of Intellectual Property Law* 137, 146.

[69] Alan J Meese, 'Monopolization, Exclusion, and the Theory of the Firm' (2004) 89 *Minnesota Law Review* 743, 744.

[70] Cenuk Sayekti, 'Hukum Persaingan Usaha dan Pembangunan Ekonomi di Indonesia (Competition Law and Economic Development in Indonesia)' (2007) 14(4) *Jurnal Fakultas Hukum* , 610-625.

[71] Ibid.

[72] Thomas W Hazlett, 'Is Antitrust Anticompetitive' (1986) 9 *Harvard Journal of Law & Public Policy* 277, 282.

[73] Edward S Mason, 'Monopoly in Law and Economics' (1937) *Yale Law Journal* 34, 34.

To identify the monopoly power of a business, actors can undertake a few steps. The first step is to define the relevant market. Proving the presence of monopolisation requires an analysis of how companies achieve a monopoly.[74] First, it is necessary to determine the market, as monopoly power cannot exist where companies control only one of so many substitute products, and thus cannot use force to determine price.[75] In general, in determining the monopoly power of a company, it is significant to determine whether that company has achieved monopolisation of the relevant market.[76] Monopoly power is an important element of monopolisation, and can be observed via a firm's market share: the greater the market share, the greater the power of a firm to influence the market, and vice versa.[77]

To determine the market in which a business may have monopoly power, three criteria may be used. The first criterion is the product market. The product market includes goods and services or their substitutions. Analysis of the relevant market must begin by determining which products can serve as substitutions for goods or services sold by producers. Consumers may choose to switch among substitutes; these substitutes must also be found in the relevant product market.[78] The second criterion is usability and substitution. Based on the nature of the goods, the consumer needs to consider that certain items can be replaced with other items. In this case, what is important is the concrete use of the item by the buyer, not its intended or hypothetical use.[79] The third criterion is the cross-elasticity of demand. An elasticity test can be performed on the demand side, called demand substitutability. In a situation of demand substitutability, where there are rises in the prices of products and services, as businesses raise prices above the competitive price to obtain supernormal profits, the customer may switch to similar products in response.[80] Benchmarks for percentage increases in product prices are between 5–10%.

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[74] Robert W Crandall, 'Failure of Structural Remedies in Sherman Act Monopolization Cases, The' (2001) 80(1) *Oregon Law Review* 109, 112.

[75] Ibid.

[76] Richard S Markovits, 'Limits to Simplifying Antitrust: A Reply to Professor Easterbrook' (1984) 63 *Texas law review* 41, 58.

[77] Weinberg, above n 68, 146.

[78] Don T Hibner and Suzanne B Drennon, 'What Lawyers Should Know About Markets: the Good, the Bad, and the Ugly' (2002) 50 *Federal Lawyer* 38, 40.

[79] Ibid.

[80] Franklin M Fisher, 'Economic Analysis and "Bright-Line" Tests' (2008) 4(1) *Journal of Competition Law and Economics* 129, 134.

Having identified these aspects of the relevant market, the second step in analysing the monopoly power of a firm is to examine its level of market concentration, that is, the percentage of the total market share held by the company. This assigns a percentage value to the company's position in terms of competing with other companies in the relevant market.[81] Concentration of economic power implies a growth enterprise market on a large scale, and a decline in the level of competition on the relevant market.[82]

The third step in analysing the monopoly power of a firm is examining its corporate profits. Continuously achieving high levels of profit indicates that a firm has market power.[83] Without market power, a company cannot sustain its profits, as entrepreneurs will enter the relevant industry to compete using lower prices to attract consumers. Firms that have monopoly power may deter consumer groups with lower purchasing power who, although they want to consume goods or services from the company, are unable to due to higher pricing.[84] In terms of consumer economics, the entire loss incurs to consumer is called the deadweight loss. Conversely, there remain some consumers with higher purchasing power who benefit from purchasing the company's goods and services. The final step in the analysis is that of entry barriers. Entry barriers are a crucial factor in determining whether a company has sufficient economic power to deter new competitors from entering the market share.[85] A single company with more than 50% of the market share tends to impede new competitors from entering the market, because this company has sufficient market power to control access to the relevant industry.[86]

According to the Section 2 of the Sherman Act, it is unlawful for a firm to monopolise a market.[87] The offense of monopolisation has two elements: (1) the possession of monopoly power in the relevant market and (2) the wilful acquisition or maintenance of

[81] Lawrence Anthony Sullivan, *Handbook of the Law of Antitrust* (West Publishing Company St. Paul, 1977), 74. Relevant market will be discussed further in Chapter 4 to make assessment for harmonization of competition policy in ASEAN.

[82] Hazlett, above n 72, 283.

[83] Stephen F Ross, *Principles of Antitrust Law* (Foundation Press, 1993), 36.

[84] Terry Calvani and John J Siegfried, *Economic Analysis and Antitrust Law* (Little, Brown, 2nd ed, 1988), 8.

[85] Ibid.

[86] Sullivan, above n 81, 77.

[87] *US v. Microsoft Corp*., 253 F. 3d 34 - Court of Appeals, Dist. of Columbia Circuit (2001).

that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident.[88] In the case *US v. Microsoft Co*, Microsoft was charged for monopoly over operating systems by exclusionary means. Netscape, as a potential alternative platform, represented a nascent threat to the Microsoft monopoly; however, that threat would materialise only if the user base of the Netscape browser was sufficiently large to attract programmers.[89] The District Court found that Microsoft used its monopoly power in the business sector for Intel-compatible PC operating systems. The court also found that Microsoft maintained its power not through competition, but through illegal ways.[90] Defining the relevant market, the District Court found that Windows accounted for a share of the market greater than 95%. The court also found that, even if Mac OS were included, Microsoft's share would exceed 80%.[91]

Market share reflects current sales, but today's sales do not always indicate power over sales and prices tomorrow.[92] However, in this case the District Court was not misled. Considering the possibility of new rivals, the court focused not only on Microsoft's present market share, but also on the structural barrier that protects the company's future position. The applications barrier to entry stems from two characteristics of the software market which are: (1) most consumers prefer operating systems for which a large number of applications have already been written; and (2) most developers prefer to write for operating systems that already have a substantial consumer base. As the District Court pointed out that the barrier to entry gives opportunity for consumers to prefer the dominant operating system even if they have no need to use all applications:

> The consumer wants an operating system that runs not only types of applications that he knows he will want to use, but also those types in which he might develop an interest later. Also, the consumer knows that if he chooses an operating system with enough demand to support multiple applications in each product category, he will be less likely to find himself straitened later by having to use an application whose features disappoint him. Finally, the average user knows that, generally speaking, applications improve through successive versions. He thus wants an operating system for which successive generations of his favourite applications will be released—

[88] Ibid.

[89] Daniel J. Gifford, 'What is Monopolization Anyway? The D.C. Circuit Grapples with Some Perplexing Issues' (2001) 46(4) (12/22) *Antitrust Bulletin* 797.

[90] *US v. Microsoft Corp*., above n 87.

[91] Ibid.

[92] Ibid.

> promptly at that. The fact that a vastly larger number of applications are written for Windows than for other PC operating systems attracts consumers to Windows, because it reassures them that their interests will be met as long as they use Microsoft's product.[93]

Thus, despite the limited success of its rivals, Microsoft also gained advantages from the applications barrier to entry. The decision by the US Court of Appeals for the District of Columbia Circuit in the *Microsoft* antitrust case is a milestone in the development of the law of monopolisation.[94] Diversion of browser usage away from Netscape and to Microsoft threatened Netscape's critical mass. Behaviour bringing about such diversion was thus treated as 'anti-competitive' and thus prima facie as monopolisation.[95]

2.2.3.2 Market Power

Market is an economic concept that describes a composite of demand and supply interaction for a particular good or service, including its substitutes.[96] In the context of competition law, market is defined as any grouping of sales whose sellers, if unified by a monopoly or hypothetical cartel, would have market power in dealing with any group of buyers.[97] The term 'market power' refers to the ability of a firm (or a group of firms, acting jointly) to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded.[98] Market power is a key concept in antitrust law. Landes and Posner introduced a standard method of proving market power in antitrust cases. First is defining a relevant market in which to compute the defendant's market share. Second, computing that market share and third deciding whether it is large enough to support an inference of the required degree of market power.[99] Other evidence, such as of the defendant's profits, or of the ability of new firms to enter the market, or of price discrimination—may be presented to reinforce or refute the inference from market shares.[100] Market power is an essential concept,

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[93] Ibid.

[94] Gifford, above n 89, 797.

[95] Ibid.

[96] Paul Anthony Samuelson, *Economics* (Tata McGraw-Hill, 10th ed, 1976), 233.

[97] Hibner and Drennon, above n 78, 39.

[98] William M Landes and Richard A Posner, 'Market Power in Antitrust Cases' (1981) 94(5) *Harvard Law Review* 937, 937.

[99] Ibid.

[100] Ibid, at 938.

particularly for examining the monopoly power positions of firms. It is essential in determining whether firm activity will result in to increase prices or exclude competition, and thus place prices above the marginal cost.[101]

However, to date, some controversies continue regarding the concepts of market power and monopoly power. Some Courts appear of being befuddled about whether market power and monopoly power are similar or distinct concepts.[102] The reason is because the definitions between market power and monopoly power may be incompatible. Courts may face the difficult task of determining which standard is more appropriate for the different types of competition law violations.[103] The concepts of market power and monopoly power are qualitatively identical concepts—both terms refer to anti-competitive economic power that ultimately can compromise consumer welfare.[104] According to the Sherman Act, monopolisation in violation of Section 2 of the Sherman Act requires an initial determination that the defendant has monopoly power—a high degree of market power.[105]

The Horizontal Merger Guidelines of the US Department of Justice has impressive weight on market concentration in measuring market power in the case of mergers.[106] The Department of Justice of the US measures the lawfulness of corporate mergers against the guidelines whether that mergers should not be permitted to create or enhance market power or to encourage its activity.[107] Under the Sherman Act, competition law, also known as antitrust law,[108] provides general rules for monopoly power or monopolisation. In *Standard Oil Co. v. United States*, Standard Oil was convicted of violating Sections 1 and 2 of the Sherman Act, which respectively prohibit monopolisation as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade

[101] Hibner and Drennon, above n 97.

[102] Thomas G Krattenmaker, Robert H Lande and Steven C Salop, 'Monopoly Power and Market Power in Antitrust Law' (1987) 76 *Georgetown Law Journal* 241, 245.

[103] Ibid.

[104] Ibid, at 245-246.

[105] Landes and Posner, above n 98.

[106] Dennis L Weisman, 'Assessing Market Power: The Trade-off between Market Concentration and Multi-Market Participation' (2005) 1(2) (06) *Journal of Competition Law & Economics* 339, 339.

[107] Krattenmaker, Lande and Salop, above n 102, 242.

[108] In the United States, the term for competition law is antitrust law.

> or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanour, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. [109]

The company had grown to dominate important oil production and distribution markets by an elaborate series of M&As. This anti-competitive behaviour conducted by Standard Oil included:

> Rebates, preferences, and other discriminatory practices in favor of the combination by railroad companies; restraint and monopolization by control of pipe lines, and unfair practices against competing pipe lines; contract with competitors in restraint of trade; unfair methods of competition, such as local price cutting at the points where necessary to suppress competition, espionage of the business competitors, the operation of bogus independent companies, and payment of rebates on oil, with the like intent; the division of the United States into districts, and the limiting the operations of the various subsidiary corporations as to such districts so that competition in the sale of petroleum products between such corporations had been entirely eliminated and destroyed; and finally reference was made to what was alleged to be the enormous and unreasonable profits earned by the….Company as a result of the alleged monopoly.[110]

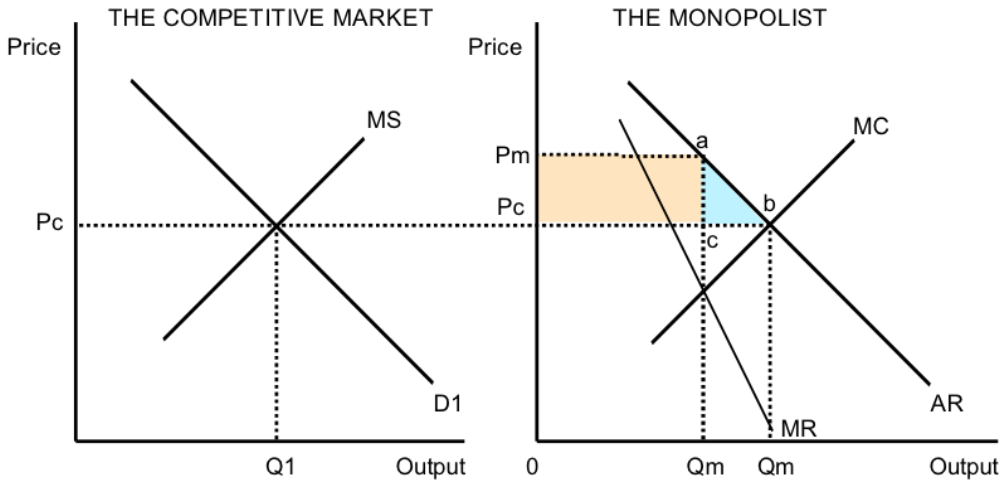
The court found that the combining of stocks of various companies into Standard Oil of New Jersey constituted a combination of restraint of trade and monopolisation, in violation of Sections 1 and 2 respectively of the Sherman Act.[111] The figure below explains the difference between a competitive market and a monopoly market where a firm has market power to place the price above the competitive level.

[109] *Standard Oil Co. of NJ v. United Sates*, 221 US 1, 50 (Supreme Court) (1911).

[110] Ibid.

[111] Ibid.

Figure 1: Comparison between Perfect Competition and Monopoly Market[112]



Source: Adopted from Hal R. Varian and Jack Repcheck, *Intermediate Microeconomics: A Modern Approach* (WW Norton New York, 2010).

The conventional view when comparing price and output under both pure monopoly and perfect competition is that a monopolist will produce a lower output at a higher price than a competitive industry.[113] In Figure 1's monopolist-structured market, the blue color represents the deadweight welfare loss, while the yellow color represents the monopoly profit gained by the monopolist in a relevant market. In the absence of competition, a monopolist can increase price above the average competitive price (Pc).[114] The ability of a firm to control prices above the competitive level may transfer welfare unfairly from the consumer to the firm, leading to welfare loss from consumers to firms.[115] Protecting consumers from such anti-competitive behaviour is one of the main objectives of competition policy and law. In fact, many scholars agree that the primary purpose of competition policy and law enforcement is to enhance consumer welfare.[116]

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[112] Hal R Varian and Jack Repcheck, *Intermediate Microeconomics: A Modern Approach* (WW Norton New York, 2010) 428.

[113] Abba P Lerner, 'The Concept of Monopoly and the Measurement of Monopoly Power' (1934) 1(3) *The Review of Economic Studies* 157, 160.

[114] Ibid.

[115] Landes and Posner, above n 98; also see Kirkwood, John B and Robert H Lande, 'The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency' (2008) 84 *Notre Dame Law Review* 09, 192-193.

[116] Robert H Lande, 'Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged' (1982) 34 *Hastings Law Journal* 65; Robert H Lande, 'Proving the Obvious: The Antitrust Laws were Passed to Protect Consumers (Not Just to Increase Efficiency)' (1998) 50 *Hastings Law Journal* 959.

2.3 Defining Harmonisation

Until now, no legal definition of the concept of harmonisation has existed, although it is widely used in the scientific debate.[117] Calderoni points out that the term does not appear once in the Treaty on European Union (TEU),[118] though it does exist in the Treaty Establishing the European Community (TEC).[119] A concept of harmonisation was developed in the Rome Treaty, which employs three different terms, all of which connote the reduction of differences among the laws of the various members: these are 'approximation', 'harmonisation' and 'coordination'.[120] However, the Treaty does not employ them consistently to indicate three different concepts, and this leads to the surprising conclusion that there is no significant difference between the three terms.

Although during the past two generations there has been a remarkable degree of harmonisation among nations in the law applicable to international commercial transactions,[121] the scientific literature has not compensated for this current lack of definition, specifically in the field of competition policy. According to Rosett, the motive behind the recent changes is simply local economic markets during the past two generations have been enlarged to national and international markets.[122] The trend of trade among nations has multiplied more than tenfold. The amount of barriers to trade, even though still significant, are very small if compare to the historic past.[123] Two other factors such as communication and transportation have supported the change of world markets for goods and services. [124] These commercial changes have created a competitive climate for legal rules and have fed the convergence of legal practices in trade transactions.[125]

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[117] Francesco Calderoni, *Organized Crime Legislation in the European Union* (Springer, 2010) 2-3.

[118] Ibid.

[119] Ibid.

[120] Also see James R Silkenat, 'Efforts Toward Harmonization of Business Laws Within the European Economic Community' (1978) 12 *International Lawyer (ABA)* 835, 835. Articles 100 through 102 of the Rome Trey have been used as the basis for directives harmonizing national laws relating to standards and technical and industrial requirements.

[121] Rosett, above n 2.

[122] Ibid

[123] Ibid

[124] Ibid.

[125] Ibid.

In order to understand the context of the current problem, the concept of harmonisation requires examination. In the present study, harmonisation is defined as the coordination of economic policy actions and measures in order to reduce international difference in such actions.[126] Harmonisation has its origins in the term 'harmony'.[127] The word harmony comes from the Greek *ἁρμονία* (*harmonía*), meaning a fastening or join.[128] In French the term has a root in the word *harmonie*,[129] and in Latin, *harmonia*, meaning joint, agreement, concord of sounds, music, fitting together or arrangement; it is found in Middle English as 'armony'.[130]

Figure 2: Etymology of Harmony

Source: Compiled by author, adopted from the Oxford Dictionary Online.

Harmony is used to refer to a connection between people joining in peace. Plato, in *The Timaeus*, as mentioned by Glenn, proposed the need for the good and the rational to control 'discordant and unordered motion', which means bringing about a harmony.[131] In music terms, harmony has been articulated as a simple 'reconciliation of opposites, a fitting together of disparate elements'. Glenn added that 'harmony is a process of discovery, based on the inevitable order of notes and the place of music in the cosmic

[126] Göte Hanson, *Harmonization and International Trade* (Routledge, 1 ed, 1990), 1.

[127] George Henry Lewes, *The History of Philosophy: Modern philosophy* (Longmans, Green, 1880), xx-xxi. Srilekha Bell, 'George Henry Lewes: A man of his time' (1981) 14(2) *Journal of the History of Biology* 277. Middle English *armony*, from Anglo-French *armonie*, from Lin *harmonia*, from Greek, joint, harmony, from *harmos*, joint. First time known used in 14th century.

[128] The Oxford Dictionary Online, available at https://oxforddictionaries.com/definition/english/harmony. Data accessed April 10, 2013. Harmony from word ***armonie*** (noun) it means (a) the action of singing or making music; harmonious sounds, song, music; (b) the combining of simultaneous musical notes to form chords; harmony; (c) a song, a musical composition; (d) the music of the spheres; also, as simulated by a man-made device.

[129] Richard Hooker, *Of the Laws of Ecclesiastical Polity* (Belknap Press, 1981), 75.

[130] Henry Colin Gray Matthew, Brian Harrison and R James Long (eds), *The Oxford Dictionary of National Biography* (Oxford, 2004). Meanwhile, the Black's Law Dictionary defines harmony as an agreement or accord; conformity. See Bryan A. Garner (ed), *Black's Law Dictionary*, Black, Henry Campbell (West Publishing, 4th ed, 2011) 348.

[131] H Patrick Glenn, 'Harmony of Laws in the Americas' (2002) 34 *University of Miami Inter-American Law Review* 223, 223-234.

pattern'.[132] Similar opinion also stated by Ilievski that the word harmony is refers to the reconciliation of opposites, a fitting together of disparate elements, whether in music, universe, the body politic, or the body of man.[133]

In turn, in law, the concept of harmonisation is frequently misconceived and is used in a sense that differs significantly from its general meaning, in that it aims at eliminating differences, not frictions, among different legal systems.[134] However, in the process of achieving a single market, which is influenced by political and legal discourse about globalisation and liberalisation,[135] harmonisation is often articulated as a process where everything is held to a similar standard, 'a sort of rush to the bottom to further facilitate the globalization of advanced capitalism'.[136] Recently, the term of harmonisation has been given a broader meaning, and is commonly defined as a combination or adoption of parts, elements or related things, so as to form a consistent and orderly whole; agreement; accord; congruity.[137] In general, harmony points to the circumstance where there is no conflict or friction. Difference is maintained in the harmony because it has essential function to harmony.[138]

Leebron defines the harmonisation of law as a normative assertion that the differences in the laws and policies of two or more jurisdictions should be reduced, whether by political authorities assigning decisions and policies or by different countries adopting

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[132] Ibid.

[133] Petar Hr Ilievski, 'The Origin and Semantic Development of the Term Harmony' (1993) *Illinois Classical Studies* 19, 19.

[134] Felicitas M Tadic, 'How Harmonious Can Harmonisation be? A Theoretical Approach Towards Harmonisation of (Criminal) Law' in Andrew Klip and HG van der Wilt (eds), *Harmonisation and harmonising measures in criminal law* (Royal Netherlands of Science, 2002) 1.

[135] Andrew McGee and Stephen Weatherill, 'The Evolution of the Single Market–Harmonisation or Liberalisation' (1990) 53(5) *The Modern Law Review* 578, 578.

[136] Laura Spitz, 'The Gift of Enron: An Opportunity to Talk about Capitalism, Equality, Globalization, and the Promise of a North-American Charter of Fundamental Rights' (2005) 66(2) *Ohio State Law Journal* 315. 319. Also see David W Leebron, 'Lying Down with Procrusters: an Analysis of Harmonization Claims' in Jagdish Bhagwati and Robert Hudec (eds), *Fair Trade and Harmonization: Economic Analysis* (The MIT Press, 1996) vol 1, 41. Lori M. Wallach, 'Accountable Governance in the Era of Globalization: The WTO, NAFTA, and International Harmonization of Standards' (2001) 50 *University of Kansas law review* 823, 823.

[137] Garner, above n 130, 350. Different definition of harmonization described in Collins English Dictionary, where harmonization means: a system, particularly used in the EU, whereby the blue-collar workers and the white-collar workers in an organization have similar status and any former differences in terms and conditions of employment are levelled up.

[138] Calderoni, above n 117. Martin Boodman, 'The Myth of Harmonization of Laws' (1991) 39(4) *The American Journal of Comparative Law* 699.

similar laws and policies even where there is no common authority.[139] Leebron gives limitations for harmonisation. He argues that harmonisation needs both a qualitative directional objective to make laws or policies less different. It also creates a degree to which that objective is pursued. For example, how similar the laws should be following the harmonisation.[140] Leebron asserted that making very different regulations more similar could bring substantial advantages for the countries involved; conversely, no benefit will be gained if the regulations or policies are different.[141] Similarly, Breton also places limitations on harmonisation, particularly in economic integration. He argues:

> I believe that the European Union is quite stable but that stability has been acquired by the virtual suppression of inter country competition through excessive policy harmonization. To prevent the occurrence of instability, competition is minimised through the excessive harmonization of a substantial fraction of social, economic, and other policies… If one compares the degree of harmonization in Europe with that in Canada, the United States, and other federations, one is impressed by the extent to which it is greater in Europe than in federations.[142]

Boodman argues that harmonisation consists of four related aspects, as follows:[143] (1) the diverse elements to be harmonised; (2) the rationale for, or the problem to be resolved by harmonisation; (3) whether and how diversity is problematic; and (4) the ultimate goal of harmonisation. Legal harmonisation has a significant role in market economies; the following detailed explanations can be made by leaning on the mainstream legal rules related to the role of harmonisation of law in economic transactions.

As Helmut Wagner puts it, there are two roles of legal harmonisation.[144] First, legal rules are fundamental framework requirements for trade transactions, particularly in

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[139] Leebron, above n 136, 43.

[140] Leebron makes an analogy reflecting the scope and degree of harmonization. The degree to which a harmonization requirement continues to tolerate the differences is called harmonization margin. The unification of law or the adoption of uniform laws is harmonization with a zero margin.

[141] Leebron, above n 139, 47.

[142] Albert Breton, *Competitive Governments: An Economic Theory of Politics and Public Finance* (Cambridge University Press, 1st Paperback ed, 1998), 275-276. In the European Union case, the excessive harmonisation result in instability of the Community. The excessive happens in the monetary union which raise instability in European Union.

[143] Boodman, above n 138, 708.

[144] Helmut Wagner, 'Is Harmonization of Legal Rules an Appropriate Target? Lessons from the Global Financial Crisis' (2012) 33(3) (2012/06/01) *European Journal of Law and Economics* 541.

large and complex markets where the participants often do not know each other.[145] In the case of legal harmonisation, a large variety of instruments are utilised to reduce disparities among regulatory frameworks, by harmonising national legal rules for the creation of a fair level playing field for cross-border transactions. Second, legal rules will have positive effects only if they are followed. If the participants in the markets are increasing it becomes more difficult to prevent somebody from violating a rule without undermining him with formal sanctions.[146]

Nevertheless, formal sanction can only be realised by an external authority to which the power of sanctioning is delegated. Within a nation, the authority is the state, which provides the compliance with legal rules. The national state can only fill this role if there is an inner-national harmonisation of laws. Otherwise, non-harmonised legal rules could be circumvented by evasion through arbitrage and exploiting of inter-legal loopholes. To put it in other words, to perform a private market economy it requires rules and institutions to protect competition, which have to be the role of the state to protect it.[147] As Wagner argues, harmonisation contributes to policy convergence only insofar as the agreed rules prescribe the implementation of similar policies and states have the ability to respect these rules.[148]

For example, in the mid-1980s, the US was exporting about US$120 million in beef each year to the EU. In 1989, however, the EU banned the import of US beef produced with growth-promoting hormones, dramatically reducing US access to an important international market. US beef exports to Europe fell from 76,000 (1982) to 4,500 tonnes (1990).[149] The US beef industry, desiring restored access to the European market, took the dispute to the new WTO–SPS Framework (Agreement on the Application of Sanitary and Phytosanitary Measures), at which the dispute became the Framework's first test case.[150] The two goals to which the WTO–SPS Framework is devoted, namely the achievement of regulatory harmonisation of trade-related sanitary measures and the

[145] Ibid.

[146] Ibid.

[147] Ibid.

[148] Ibid.

[149] Justin J. Kastner and Rosa K. Pawsey, 'Harmonising Sanitary Measures and Resolving Trade Disputes through the WTO–SPS Framework. Part I: A Case Study of the US–EU Hormone-Treated Beef Dispute' (2002) 13(1) (01) *Food control* 49, 50.

[150] Ibid.

resolution of trade-related disputes, were not realised in the US–EU hormone-treated beef case.[151] The application of two provisions of the WTO–SPS Framework (the reliance on existing international standards and the requirement for risk assessment) failed to bring about harmonisation and dispute resolution.[152] In this case, the EU thus moved from negative harmonisation, where the purpose is to remove all domestic trade barriers, to positive harmonisation, where the aim is to make the legal systems of the member states consistent with the political and social goals of the Community.[153]

The WTO–SPS Framework essentially facilitated a limited resolution to the hormone dispute. The EU was told to modify its regulations to allow for the import of hormone-treated beef, and after the EU did not alter its measures, the US was authorised to retaliate. The US did take advantage of this authority, and has punished specific commodity groups in certain EU states considered especially influential in EU decision making. While tariffs were raised on European products such as Roquefort cheese and Danish ham, the US actually did not achieve its goal, which was access to the European beef market. From the case above, the lack of rules harmonisation led to disadvantage when it comes to inter-trade between nations.

Kastner argues that harmonisation cannot be achieved when collaboration is delayed. The intra-EU regulatory harmonisation momentum that prompted the adoption of the EU hormone ban did not extend across the Atlantic during the US–EU dispute. While the EU may be accused of using delay tactics, the US may in turn be criticised for not pursuing collaboration. It has been suggested that the US, eager to take its case to the WTO and send a message to its trading partners that it would challenge any sanitary measures not based on Codex Alimentarius Commission standards or risk assessment, was hesitant to pursue a labelling solution to the dispute.[154]

In his study, Calderoni argues that there is no best solution or best legislation for legal harmony, and no predetermined benchmark. Harmonisation involves elements that are different but equal in value; no legal system has higher status or consideration. This is a

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[151] David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Harvard University Press, 1995), 38-39.

[152] Ibid.

[153] Ibid, 26.

[154] Kastner and Pawsey, above n 150.

core premise when assessing the level of harmonisation among different legal systems.[155] The nature of harmonisation has a deep influence on its assessment. Calderoni explains that in the process of harmonisation among different legal systems, the initial step is the identification of similarities and differences among those legal systems. Then, possible frictions must be identified.

Finally, level of harmonisation does not imply good legislation, since harmonisation and effectiveness are independent concepts and should not be mixed.[156] The ultimate goal of harmonisation is to remove all frictions among different systems to achieve legal harmony. This implies a process of modifying different competition legislations in order to improve their consistency and eliminate frictions among them.

2.4 Regional Economic Integration

Economic integration theory focuses primarily on market relationships, where economists are generally concerned with the issue of welfare gains and losses. Economic integration deals with how various aspects of the world's economies are integrated. As trade barriers diminish between two countries or among a group of countries, certain changes take place that have a large impact on particular aspects of each country`s economy.[157] This holds on both a global and regional level.[158] Economic integration, according to Pelkmans,[159] is defined as the elimination of economic frontiers between two or more economies, where 'economic frontier' refers to any demarcation over which actual and potential mobility of goods, services, production factors and communication flows are relatively low.

Economic integration is driven by efforts to reduce or eliminate the public role of territorial and economic frontiers as a whole. The most recent theories of trade, particularly New Economic Geography models as introduced by Baldwin,[160] Fujita et

[155] Calderoni, above n 117.

[156] Ibid.

[157] Jacques Pelkmans, *European integration : Methods and Economic Analysis* (Harlow, England ; New York : FT Prentice Hall 3rd ed, 2006).

[158] Ibid,

[159] Ibid.

[160] Richard E. Baldwin et al, *Economic Geography and Public Policy* (Princeton University Press, 2003), 487.

al.[161] and Barkman,[162] explain economic integration as the inverse of transportation costs. Based on these models, integration is assumed to reach from autarky to unrestricted freedom of trade, or fully integration. Krieger-Boden stated that usually there is no distinction made between regional integration and globalisation. Moreover, regional integration typically refers to the freedom of exchanging goods and services only.[163] Economic integration deemed as a process of three core elements: the driving forces of economic integration, the transmission channels through which economic integration affects the economies of the integrating countries, and the effects of economic integration.[164]

Economic integration theory revolves around customs union and optimal currency area theories.[165] Among the scholars working in this field are Viner and Balassa, who have both made foundational contributions to economic integration theory. Viner is noted for his work on the static effects of economic integration.[166] He argues that a common external tariff (CET) will create trade diversion and trade creation effects; the former would result from the replacement of high-cost production with cheaper imports from a member state by the elimination of intra-trade barriers between member economies, while the latter would result from the shifting of lower-cost external (non-member) sources of import to higher-cost internal sources of supply, leading to increased costs for members and reduced production for non-members.[167]

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[161] Masahisa Fujita, Paul R Krugman and Anthony J Venables, *The Spatial Economy: Cities, Regions, and International Trade* (MIT press, 2001); Baldwin et al, above n 160.

[162] Steven Brakman, Harry Garretsen and Charles Van Marrewijk, 'Economic Geography within and Between European Nations: The Role of Market Potential and Density Across Space and Time' (2009) 49(4) *Journal of Regional Science* 777, 777.

[163] Christiane Krieger-Boden and Christiane Krieger-boden, 'Identifying European Economic Integration and Globalization: A Review of Concepts and Measures' (2013) 47(9) (10) *Regional studies* 1425, 1425-1426.

[164] Ibid. Krieger-Boden followed the conception of Balassa's economic integration to narrow down the definition of economic integration. See Bela Balassa, *The Theory of Economic Integration* (Allen and Unwin, 1962).

[165] Benny Teh Cheng Guan, *Regionalism in East Asia: The Dynamics of Formal and Informal Processes of Regionalization* (Doctoral Thesis, Kanazawa University, 2006), 35.

[166] Jacob Viner, *The Customs Union Issue* (Oxford University Press, 2014), 5-6.

[167] Ibid. During the Viner's era, In Viner's day, the establishment of Customs Unions (CU) was generally considered to be welfare increasing and therefore had to be supported. This position was justified with the argument that global free trade would bring a maximum of global welfare, and since a CU was a step in the direction of global free trade, it should bring an increase in welfare after all. Jacob Viner doubted this idea because a CU only meant free trade within its boundaries and a protectionist attitude against the rest of the world. According to Viner, this could lead to trade creation as well as trade diversion.

The basics of the theory of economic integration were introduced by Bella Balassa in the 1960s. Balassa's theory consists of six successive stages in the development of economic freedom. Trade liberalisation entails the removal of physical, fiscal and technical barriers in order for the goods and services to expand freely across national markets.[168] In contrast to Viner's work, Balassa examined the dynamic effects believed to be rooted in economies of scale, technological development, enhanced competition and lower costs of capital. The first systematic, albeit descriptive, examination of the output effects of economic integration was carried out by Balassa's study on the dynamic effects of integration.[169] Balassa created a clear-cut definition of the term 'economic integration'.[170] The dynamic effects of integration are considered long-term, while static effects are short-term. Further, Balassa is credited for introducing an economic integration model with linearly successive levels. Regional economic integration is explained in terms of stages whereby the fulfilment of a lower stage has spillover effects leading to a higher stage, and so on.[171]

In such a model, the starting point would be the establishment of an FTA or preferential trade agreement (PTA),[172] characterised by the elimination of tariff barriers between members. These agreements are limited to a few sectors or can encompass all aspects of international trade. FTAs create limitations on member states. The FTAs may contain provisions in some areas if the signatory countries agree to do so, but there are no harmonisation of regulations, standards or economic policies is required. It has no free movement of capital and labour a necessary part of a free trade agreement. FTA member countries have independent trade arrangement with all countries outside the agreement, including applications of tariff barrier to non-members.[173]

The second stage is a customs union. It possesses the features of the free trade agreement, but introduces a CET.[174] A customs union performs on a free trade area by eliminating internal barriers to trade. The higher level it requires its participants to

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[168] Balassa, above n 164.

[169] Bela Balassa, 'Towards a Theory of Economic Integration' (1961) 14(1) *Kyklos* 1.

[170] Balassa, above n 168.

[171] Guan, above n 165.

[172] Balassa, above n 170.

[173] Rolf Mirus and Nataliya Rylska, 'Economic Integration: Free Trade Areas vs Customs Unions' (2001) *Western Centre for Economic Research* , 3.

[174] Ibid.

converge and harmonise their external trade policy. The policy includes the application of CET and import quotas on products entering the region from non-member countries, as well as establishing anti-dumping and countervail measures as part of their trade policy.[175]

The third level is a common market, which goes a step higher in bringing down non-tariff barriers.[176] In this level, typically requires significant policy harmonisation in a number of areas.[177] Usually, a common market is associated with a broad harmonisation of fiscal and monetary policies due to the increased economic interdependence within the region and the effect that one member country's policies can affected to other member countries.[178] The common market has more strict limitations on member countries regard to their independence on economic policies. The main benefit of establishing a common market is the economic efficiency in the market.[179]

In the fourth level, the characteristics of a common market are combined with the coordination and harmonisation of national economic policies and laws to establish an economic union.[180] The highest and final stage is reached when there is a unification of monetary, fiscal and social policies and an effective supranational authority with supranational laws in place.[181] An economic union is signed by the use of a single currency and an integrated monetary policy. These policies eliminate exchange rate uncertainty and improve the functioning of an economic union by allowing trade to follow economically efficient paths without being unduly affected by exchange rate considerations. The existence of supranational institutions is required to regulate within the union to ensure uniform application of the rules. Like in the EU, these laws would still be managed by member countries.

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[175] Ibid.

[176] Ibid.

[177] For example the free movement of labour necessities agreement on worker requires qualifications and certifications.

[178] Mirus and Rylska, above n 173.

[179] Ibid.

[180] Ibid.

[181] Ibid.

Table 1: Classification of Regional Economic Integration

Economic Integration	Free Trade	Customs Union (CU)	Common Market (CM)	Economic Union	Political Union
Zero tariffs between member countries and reduced non-tariff barriers	√	-	-	-	-
FTA + common external tariff		√	-	-	-
CU + free movement of capital and labour, some policy harmonisation	-	-	√		
CM + common economic policies and institutions, including common currency policy	-	-	-	√	√

In free trade, harmonisation is not necessary required, but some free trade agreements incorporate competition policy cooperation. In contrast, customs unions entail harmonisation of external trade rules and policies due to the abolition of internal border controls. The decision to abolish internal border controls creates the need for harmonisation in light of recognition that policy independence is no longer available.[182] The most difficult aspect of harmonisation is adopting effective policies in light of reduced trade barriers and also desires to prevent such trade barriers in the union.[183] Both factors become important elements in realising harmonisation for economic integration.[184]

2.5 Competition Policy Harmonisation in Regional Economic Integration

2.5.1 Tripartite Relationship between Free Trade, Competition Policy and Economic Integration

This section examines the relationship between economic integration and competition policy, as well as the relationship between competition law and its interface with free trade. The interrelationship between these policies is that it is believed that free trade among nations does not stop only the removal of public barriers to trade, but it also

[182] Leebron, above n 139, 97.

[183] Ibid.

[184] Muna Ndulo, 'Harmonisation of Trade Laws in the African Economic Community' (1993) 42 *International and Comparative Law Quarterly* 101, 103-105.

needs to eliminate a series of obstacles originating in private restraints, such as abuses of dominance, import cartels, and vertical restraints.[185] Legal framework harmonisation has a significant role in market economies.[186] The effects of economic integration are closely related to reductions in differences at the regional level by performing harmonisation and standardisation at the level of law and policy. The core concept of harmonisation is commensurate with the aim of competition policy from the perspective of efficiency: the maximisation of the welfare of individuals,[187] which means consumers in the context of competition law.

Regarding the interrelation between economic integration, harmonisation and competition law, an empirical study by Gerber proved that the harmonisation of competition law systems is important because it may help to resolve two major problems in global economic and legal relations.[188] First, the same anti-competitive conduct may be subject to different standards prescribed by different legal systems. Second, challenges may be presented by the capacity of public officials to deter anti-competitive conduct. Reducing differences among competition law systems means to reduce harms. This also means that the risk of conflicts between the prescriptive and enforcement claims of individual systems is also likely to be minimalized.[189]

Economic integration and competition policies have significant differences in their objectives.[190] Economic integration is based on trade liberalisation,[191] which offers opportunities for firms to reach potential customers beyond borders and the resulting benefit.[192] From the perspective of trade law, the interface between competition law and trade law has often been debated in the past, but has recently arisen in a different

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[185] Damien Geradin, *Competition Law and Regional Economic Integration: An Analysis of the Southern Mediterranean Countries* (World Bank Publications, 2004) 21.

[186] Wagner, above n 144, 542-543.

[187] Giandomenico Majone, 'Policy Harmonization: Limits and Alternatives' (2014) 16(1) (01) *Journal of comparative policy analysis* 4, 12.

[188] David J Gerber, 'Competition Law' (2002) 50 (10/01) *The American Journal of Comparative Law* 263, 264.

[189] Ibid.

[190] Kim Them Do, 'Competition Law and Policy and Economic Development in Developing Countries' (2011) 8(1) *Manchester Journal of International Economic Law* 18, 19-21.

[191] Balassa, above n 169.

[192] Sherman Robinson, 'Trade Liberalisation and Regional Integration: The Search for Large Numbers' (2002) 46(4) (12) *The Australian journal of agricultural and resource economics* 585, 585-604.

context.[193] Acquier and Caves analyse the link between trade and competition policy. Both examine trade-offs between domestic consumer welfare and monopoly profits from abroad.[194] Their studies are based on the view that the best commercial policy is free trade: the free movement of goods ensures that countries and firms specialise in what they can do best, thus enhancing the economic efficiency and welfare of the countries involved in the trade liberalisation process.

On the other hand, competition law has common ground with economic integration, which implies free trade, though motivated by different goals. On this point, competition law allows firms to take advantage of the market and gain benefit.[195] Fine justifications give explanation regarding the development of a common competition policy in regional economic integration.[196] Generally, the main reason competition policy and law is necessary is that customers must be protected from anti-competitive behaviour conducted by firms who possess market power;[197] in other words, the protection of competition rather than competitors.[198] Protection of economic competition makes sense only in those national economies where competition itself may occur, such as market economies;[199] this is not a generally accepted economic system as recognised by Article 1 of the Charter of Economic Rights and Duties of States:[200]

> Every State has the sovereign and inalienable right to choose its economic system as well as it political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever.

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[193] Harvey M Applebaum, 'The Interface of the Trade Laws and the Antitrust Laws' (1997) 6 *George Mason Law Review* 479, 479.

[194] Antoine A. Auquier and Richard Calves, 'Monopolistic Export Industries, Trade Taxes, and Optimal Competition Policy' (1979) 89 *Economic Journal* 559, 559-581.

[195] Do, above n 190.

[196] Lawan Thanadsillapakul, 'The Harmonization of ASEAN: Competition Laws and Policy from an Economic Integration Perspective' in Philippe Gugler and Julien Chaisse (eds), *Competitiveness of the ASEAN Countries Corporate and Regulatory Drivers* (Edward Edgar Publishing, 2010) ; Geradin, above n ; Ondrej Blazo, 'Harmonization of Competition Law in Globalized Economy and European Law' (2010) (December) *Available at SSRN 1720819* .

[197] Do, above n 195.

[198] Bork, above n 31.

[199] Blazo, above n 196, 1.

[200] UNCTAD, *Resolution adopted by the General Assembly 3281 (XXIX): Charter of Economic Rights and Duties of States* (May 24, 2015) United Nations <http://www.un-documents.net/a29r3281.htm> at June 3, 2015.

There are two possible motivations for why competition law might figure on the agenda of a trade agreement. The first is that there are benefits gained from cooperation in this particular area and an international trade agreement allows these to be attained.[201] The second is that common disciplines on competition policy are necessary to achieve the objective of regional trade liberalisation. In the first case, a distinction must be made between situations where national competition policies result in outcomes that are inefficient from a joint welfare perspective and those where they do not.

However, the possible advantage of market liberalisation could not be achieved if anti-competitive practices by firms are prevalent in the market.[202] Firms that possess market power have the ability to sustain prices above competition level. The raising of prices and the reduction of quantity of commodities on the competitive market may have adverse effects on consumer welfare.[203] Once a monopolist exercises market power in the relevant market, consumer welfare is harmed. M&As are deemed as one forms of anti-competitive conduct that lessen the market substantially. M&As promote concentration, which leads to a dominant position in the relevant market.[204] A dominant position is accepted as a result of economic strength enjoyed by an enterprise. It enables firm to prevent competitors to enter the market so that effective competition cannot be performed on the relevant market. Ultimately, the abused of dominant position affects the consumers.[205]

When markets are open, mergers do not occur only between domestic firms; collusion might involve firms from different countries. This implies that different national institutions might be involved in the same cases, thus creating inefficient duplication of work and conflicts of jurisdiction. At the same time, firms might engage in arbitrage activities between different domestic legislations, trying to avoid the jurisdictions of countries that implement stricter competition rules in favour of those that have laxer

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[201] Bernard M Hoekman, 'Free Trade and Deep Integration: Antidumping and Antitrust in Regional Agreements' (World Bank Policy Research Working Paper No. 1950, World Bank, Development Research Group, International Trade, 1998) <http://ssrn.com/abstract=620582>, 5-6.

[202] Do, above n 197, 19.

[203] Ibid.

[204] Eleanor M Fox, 'Mergers in Global Markets: GE/Honeywell and the Future of Merger Control' (2002) 23 *University of Pennsylvania Journal of International Economic Law* 457.

[205] In EU's Merger Regulation, it provides merger and acquisition as follows: A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in substantial part of it shall be declared incompatible with the common market.

rules.[206] Competition policy plays an important role, and, in the form of integration, is considered a vital complement to trade policy.[207] One of the key connections between trade and competition is the role that private barriers play in obstructing imports. Liberalising market access to foreign goods and services lies at the heart of international trade policy.[208] Therefore, by impeding imports, private market access barriers created by firms frustrate competition policy. At the same time, preventing anti-competitive private conduct, including market access barriers, is one of the cornerstones of competition policy. Therefore, there is a natural complementarity between the goals of trade liberalisation and competition policy.[209]

The initial important step in determining regional competition law is to determine the extent to which competition law is beneficial.[210] The advantages of competition policy harmonisation can be extracted from the examination above: better use of resources, avoidance of conflicts with other laws and rulings, and a more predictable and (cost-) efficient outcome, which is beneficial to the business environment.[211] The risks, costs, and inconveniencies for companies of having to operate in a fragmented legal environment with a great diversity of national competition laws are obvious.[212] By using similar substantial or procedural legal systems it would simplify the business transactions. Furthermore, it will be more transparent and predictable while promoting better enforcement for economic activities. However, there is too little agreement among the scholars on what competition law should try to accomplish and how it should be done.[213]

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[206] Massimo Motta and Fabrizio Onida, 'Trade Policy and Competition Policy' (1997) *Giornale degli Economisti e Annali di Economia* 67.

[207] Geradin, above n 196. Merit E Janow, 'Trade and Competition Policy' in *The World Trade Organization: Legal, Economic and Political Analysis* (Springer, 2005) 2076. Brendan Sweeney, 'Globalisation of Competition Law and Policy: Some Aspects of the Interface between Trade and Competition' (2004) 5 *Melbourne Journal of International Law* 375.

[208] Sweeney, above n 48.

[209] Ibid.

[210] Guzman, above n 18.

[211] Demedts, Valerie, 'International Competition Law Enforcement: Different Means, One Goal?' (2012) 8(3) *Competition Law Review* 223, 228.

[212] Ibid.

[213] Ibid.

2.5.2 Earlier Attempts at the Establishment of Competition Law in Economic Integration

Several international organisations on economic integration show the interface between economic integration and competition policy harmonisation. The EU is the most successful example of regional economic integration, and has applied common competition policy since its formation. The basic principles of the competition policy of the European Communities were laid down first in the Treaty of Rome.[214] Agreements distorting competition, abuse of dominant position, rules on public undertakings and exclusive rights of states, as well as state aid rules, were the basic targets of competition policy to ensure fair competition among companies and to avoid distortion on the common market. After the signature of the Treaty of Rome, Council Regulation No. 17 guided the enforcement and the implementation of antitrust rules.[215] Competition rules were first designed to contribute to the achievement of the main objective of the treaty: the creation of a common market.[216] The free movement of capital was also foreseen in the treaty, based on the progressive abolishment of restrictions on the movement of capital and discrimination based on nationality.

Although the Treaty of Rome has been amended several times,[217] the basic objectives and principles of competition law never changed. In fact, the application of competition rules has been added and revised to some economic sectors not previously covered. The Single European Act created a broader opportunity for competition policy through the reform of regulations in the services sector. After the customs union had been achieved, the free movement of goods and services also evolved and fully supported by the Court of Justice. The Court clearly stated that the common market as a legitimate notion against preferential national treatment applied by countries. The reformation initiated by

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[214] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases and Materials* (Oxford University Press, 2014) 36.

[215] Council Regulation, 'No 17 (EEC): First Regulation implementing Articles 85 and 86 of the Treaty (at present Articles 81 and 82)' (1962) *Official Journal* (13).

[216] Jones and Sufrin, above n 214.

[217] Csilla Bartók and Sébastien Miroudot, 'The Interaction amongst Trade, Investment and Competition Policies' (OECD Trade Policy Papers, No. 60, OECD, 2008) <http://dx.doi.org/10.1787/241467172568> Joseph A. McMahon, 'Chasing a Moving Target through a Thick Fog: Questioning the Objectives of the Common Agricultural Policy' in John Anthony Usher, Niamh Nic Shuibhne and Laurence W Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Oxford University Press, 2012) 267, 267.

the Single Market programme opened up public tenders for services such as telecoms, energy and transport that were previously closed to players from non-member states.[218]

During the reformation, a greater emphasis was put on capital liberalisation.[219] The free movement of capital was come along with the new European Community (EC) competition policy rules, including on the assessment of mergers of European community. More than twenty years competition policy by all odds has been consolidated through the increasing number of cases and court judgments. The increased free movements of capital and the ongoing regulatory reforms brought national markets together led to an increasing number of mergers notified to the Commission from 1994 onwards.[220]

The EU has two methods for realising its objectives via its founding treaties. In some areas, the EU carries out common policies with uniform regulations applied directly in each and every member state.[221] In other fields, member states approximate their national legislation towards a common standard. This process is called harmonisation of law, where common standards are embodied in directives. Directives, as a general rule, have no direct applicability, but rather require further national implementation. An example of uniform regulation is the common customs policy, or the Community competition law. The most important directives have been adopted in the framework of the internal market project with a view to maximising the beneficial effects of the free movement provisions of the Treaty. It must also be noted that the Community's competition policy is mainly enforced by the Commission and not by the national administrations of member states, as in the case of customs policy. These features of competition law have a significant influence on the scope and depth of the law harmonisation obligations of associated countries in this field.[222]

Competition policy thus became an exclusive competence of the EU, but this competence covers only activities that may affect trade between member states to

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[218] Bartók and Miroudot, above n 217.

[219] Ibid.

[220] Ibid.

[221] Tihamér Tóth, 'Competition Law in Hungary: Harmonisation towards EU Membership' (1998) 19 *European Competition Law Review* 358, 358.

[222] Ibid.

ensure the function of the common market.[223] The fact that national competition law may be applied besides European law was confirmed by the Court in the *Walt Wilhelm v. Bundeskartellamt* case,[224] in which not only a parallel application was accepted, but it was denied that divergences between national arrangements represented discrimination based on nationality. It was established only that the application of national law should not impede the full and uniform application of European law and that national law must be applied in a non-discriminatory way.

After the reform of European competition law in the years 2003 and 2004, responsibility for the application of European competition law was transferred to national competition authorities. In 2003, Council Regulation No. 1/2003 introduced two arguments that led to uniformity of national competition arrangements and their joint harmonisation with European competition law. The first was an obligation to apply EU competition law in addition to national law if the conditions given by Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) are met.[225] The second was that the national competition law must not lead to the prohibition of such activities that are not prohibited under the Article 101 of the TFEU.[226]

Other FTAs, such as those between Singapore and New Zealand, Singapore and the US, Singapore and Japan, Korea and Chile, and NAFTA, involve cooperation related to competition policy, but not harmonisation.[227] The Australia–New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) is an example of cooperation in competition policy application where member countries examine the scope for taking action to harmonise requirements relating to such matters as, inter alia, restrictive trade practices, and, where appropriate, members also encourage government bodies and other organisations and institutions to work towards the harmonisation of such requirements.[228] AFTA has neither specific competition policy nor harmonisation of

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[223] Blazo, above n 196.

[224] Ibid, 7-9. *Walt Wilhelm v. Bundeskartellamt*, 1969 E.C.R. 1 (1969).

[225] Ibid.

[226] Ibid.

[227] Robert Scollay, 'RTA Developments in the Asia-Pacific Region: State of Play' (Paper presented at the PECC Trade Forum, Phuket, Thailand, 2003).

[228] Bernard M Hoekman, 'Competition Policy and Preferential Trade Agreements' (Stock No. 37131, Economic Development Institute of the World Bank, 1998) 9.

competition policy, but harmonisation did take the form of standards and conformances, technical barriers, and sanitary and phytosanitary measures.

Other examples of economic integration that have enacted competition policy in various economic communities are as follows. The South African Development Community (SADC) bound its member states to implement measures that prohibit unfair business practices and promote competition within the Community.[229] In the West African Economic and Monetary Union (UEMOA), the established treaty agreements directly prohibited restricting competition within the Union, abuse of dominant position on common market and public aids.[230] There is a also Free Trade Agreement between the Governments of Central America and the Government of Chile.[231] The US–Chile Free Trade Agreement was entered into force on January 1, 2004. It aimed eliminates tariffs and opens markets, reduces barriers for trade in services, provides protection for intellectual property, ensures regulatory transparency, guarantees non-discrimination in the trade of digital products, commits the countries to maintain competition laws that prohibit anti-competitive business activities, and requires effective labour and environmental enforcement.[232] The US also has a free trade agreement with the Government of the Dominican Republic (CAFTA-DR),[233] in which are member countries are obliged to ensure that the purpose of the agreement shall not be disrupted

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[229] Mamhare Gladmore, 'Southern African Development Community SADC Regional Competition Policy' in Josef Drexl (ed), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar, 2012) 56, 56.

[230] The Trey on West African Economic and Monetary Union, Article 88, in detail Regulation of the Council of Ministers of the UEMOA No 2/2002/CM/UEMOA.

[231] Agreement on Antitrust Cooperation between The United States Federal Trade Commission and the United States Department of Justice of the one part, and the *Fiscalía Nacional Económica* of Chile (FNE) of the other part. The Agreement was signed on June 6, 2003. The United States Federal Trade Commission and the United States Department of Justice and the Fiscalía Nacional Económica of Chile, *Agreement on Antitrust Cooperation between the United States Federal Trade Commission and the United States Department of Justice of the One Part, and the Fiscalía Nacional Económica of Chile (FNE) of the other Part* (March 31, 2011) <https://www.ftc.gov/system/files/110331us-chile-agree.pdf> at June 4, 2015.

[232] Ibid, Article 1, Section 2.

[233] On August 5, 2004, the United States signed the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) with five Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua) and the Dominican Republic. The CAFTA-DR is the first free trade agreement between the United States and a group of smaller developing economies. This agreement is creating new economic opportunities by eliminating tariffs, opening markets, reducing barriers to services, and promoting transparency. It is facilitating trade and investment among the seven countries and furthering regional integration. See The United States and the Government of the Dominican Republic (CAFTA-DR), *the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR)* (August 5, 2004) <https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file747_3918.pdf>

by anti-competitive business practices, shall aim to common competition rules and shall seek to develop mechanisms that promote and support the development of competition policies. The policy underlying these evolving relationships, therefore, is market integration; integration will occur on relatively parallel tracks among all member states when there is harmonisation of legal rules.[234]

2.6 Conclusion

This chapter has described the relationships between trade liberalisation, harmonisation, and the importance of competition policy for economic integration. Above all, my conclusion in regard to harmonisation of competition policy in economic integration is significant to avoid market failure created by firms who have market power where the firms have the ability to create barriers to trade. Similarly, market power tends to produce monopoly power through M&As, since economic integration means trade openness and liberalisation. The duty of competition policy is to prevent firms or countries' policies from impeding the market and creating a fair level playing field for all market players. Market barriers are not completely private by nature, as governments may take part in them as well.

Competition policy also aims to provide benefits for the consumer by offering the highest quality of goods and services at the lowest prices. Competition policy harmonisation offers benefits to member countries by the following means: it reduces the differences between legal systems that could create non-tariff barriers to trade liberalisation; it reduces conflict between competition law, and efficiency for the common market since similar substantive and procedural law will simplify the business environment for investment. Competition policy attempts to change firms' incentives to ensure that the pursuit of profit will not harm the consumer's welfare. Finally, competition policy harmonisation prevents economic communities from future policy failure, particularly when the policy falls across the jurisdictions between the member states.

It has been shown that the close relationship between trade liberalisation and economic integration has the potential to harm consumers. Hence, to avoid the negative side

[234] Richard O Cunningham and Anthony J LaRocca, 'Harmonization of Competition Policy in a Regional Economic Integration Perspective' (1996) 27 *Law & Policy in International Business* 881.

effects of market liberalisation in an economic community, competition policy and law must play a significant role. The aim of competition policy and law is to create a fair level playing field for firms and to protect the market from anti-competitive behaviours, typically conducted by firms through mergers and export cartels.

Chapter 3

Legal Barriers to Applying Competition Policy and Law in an Economic Community

3.1 Introduction

The previous chapter described the close connection between trade and competition law within economic integration.[1] Harmonisation of law is a framework that cannot be separated from this connection. As competition law is a basic instrument of all transnational economic integration,[2] increased conflicts can arise between cross-border transactions and domestic competition law. These conflicts are leading to a growing consciousness of harmonisation in the ASEAN economic community. Diversities in competition law and policy regimes within an economic community will increase transaction costs in cross-border business.[3] This occurs through competition law provisions and regulations in the respective member states, and a great number of other legal provisions. Imperfect national competition law and policy in a community is one cause of legal uncertainty.[4] Further, this imperfection hinders growth and economic stability within the economic community.[5] Meanwhile, competition policy and law need to be understood as the breakdown of national boundaries between member states of an economic community.[6]

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[1] The interface of trade law and competition law is often one of tension of conflict. There is a growing recognition that an international approach to greater reconciliation of or harmonization of these laws should be considered. See Harvey M Applebaum, 'The Interface of Trade/Competition Law and Policy: An Antitrust Perspective' (1987) *Antitrust Law Journal* 479, 491.

[2] Roger Van den Bergh and Peter D Camesasca, *European Competition Law and Economics: A Comparative Perspective* (Intersentia nv, 2001) 1.

[3] Eleanor M Fox, 'Harmonization of Law and Procedures in a Globalized World: Why, What, and How?' (1991) 60(2) *Antitrust Law Journal* 593, 594.

[4] Helmut Wagner, 'Economic Analysis of Cross-Border Legal Uncertainty: The Example of the European Union' (Discussion Paper No. 371, Fachbereich Wirtschaftswiss., FernUniv., 2004) 5.

[5] Ibid.

[6] Van den Bergh and Camesasca, above n 2, 2.

As the fundamental principles of regional economic integration, competition law and policy bring many benefits for the countries involved.[7] In fact, they improve economic growth and economic welfare, though creating winners and losers.[8] Regional competition policy has the potential to reduce some significant obstacles to competition law enforcement in developing jurisdictions.[9] Further, in a common market, a single competition policy has the potential to further the goal of the integrated market. Robert Lawrence and Robert Litan assert that integrating competition policy is valuable where regional agreement has the wider opportunity to assist regions in achieving deeper economic integration than the international system could achieve.[10]

A further benefit offered by regional competition policy is that most of it eliminates barriers to trade and make sure member countries to enforce their national competition laws to ensure the access of firms.[11] To put it in other words, common standardised rules of competition policy reduce entry barriers to the economic community. It is widely acknowledged that openness in trade is the most effective tool available to small and developing economies to face the limitations of their markets;[12] accessibility to export markets enlarges the scope of the market and encourages the creation of product runs of larger size.[13] It will provide efficient technology choices and the achievement of lower production costs by domestic firms.[14] The implementation of decentralisation increases the risk of uncertainty in the application of procedural competition law. The lack of a harmonised competition policy will create a burden on companies and impose high costs on them and prevent consumers from enjoying increased welfare.[15]

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[7] Michal S Gal, ‘Regional Competition Law Agreements: An Important Step For Antitrust Enforcement’ (2010) 60(2) *The University of Toronto Law Journal* 239, 248.

[8] OECD Global Forum on Competition, 'Challenges/Obstacles Faced By Competition Authorities In Achieving Greater Economic Development Through The Promotion Of Competition' (CCNM/GF/COMP(2003)6, OECD, 12-13 February 2004) 7.

[9] Gal, above n 7.

[10] Robert Z Lawrence and Robert E Litan, *Saving Free Trade: A Pragmatic Approach* (Brookings Inst Press, 1986).

[11] Gal, above n 7.

[12] Ibid.

[13] Ibid.

[14] Ibid, at 249.

[15] Ibid.

This chapter contains five sections. Section 3.2 discusses the issues of applying competition policy in economic integration. Legal barriers to the implementation of competition policy in economic integration are analysed in Section 3.3. Next, Section 3.4 examines harmonisation as a possible framework for diminishing issues and legal barriers in implementing competition policy in a regional economic community. Finally, Section 3.5 presents the ultimate result of the analysis and concludes the chapter. The analyses in this chapter come from a perspective of aiming to achieve efficient competition policy; the economic community should make substantial effort to have a set of standard rules for competition policy. This chapter argues for harmonisation of laws as a possible framework for minimising legal conflict at the interface between community competition law and domestic law.

3.2 Competition Policy in an Economic Community and its Issues

Enforcing competition policy in economic integration has resulted in some convergences of practice across competition law jurisdictions. These convergences include bridging gaps between developing and developed countries.[16] According to a study by the Malaysian Institute of Economic Research in 2008,[17] the convergence of practice from competition policy harmonisation occurred across these areas: 'treatment of mergers and dominant position; growing use of the substantial lessening of competition tests in assessing mergers, abuse of dominance, vertical restraints, and horizontal agreements such as joint venture; approach to non-price vertical restraint, joint ventures and other high technology based on horizontal agreements; the method of investigation; strictly limiting the number of broad/sectoral agencies to be as independent as possible from government'.[18]

However, these convergences on competition policy also gain difficulties in its implementation. A study by Jones in 2000 related to cooperation on competition policy in the Asia–Pacific Economic Cooperation (APEC) region pointed out some problems

[16] Rafaelita M Aldaba, 'Emerging Issues in Promoting Competition Policy in the APEC and ASEAN Countries' (Discussion Paper Series No. 2008-02, Philippine Institute for Development Studies, 2008) 14.

[17] Ibid.

[18] Ibid, at 15.

involved in embracing the enforcement of competition policy.[19] These difficulties include the differences in the treatment of market behaviour, the substantive elements of competition policy and the competition law culture in a related country.

3.2.1 Differences in the Treatment of Market Behaviour

3.2.1.1 Export Cartel Agreements

Differences in the treatment of market behaviour show in several anti-competitive conduct provisions such as export cartels, vertical restraint, resale price maintenance and merger policy.[20] Different treatments of anti-competitive conduct may affect trade relations between countries. Export cartels are deemed as forms of anti-competitive conduct since those arrangements create monopolies in the relevant market.[21] Those forms of conduct are commonly regarded as acceptable and are permitted where domestic cartels are forbidden, because such domestic arrangements have an adverse impact on local consumers, while export cartels can be beneficial.[22] The justification often given is that export cartels will help small and medium-size firms to cope with international trade barriers, reduce the extra costs of exports and refuse the power of international buying cartels.[23]

The reason some countries exempt export cartels from their national competition policies is because these practices facilitate the exercise of market power by their domestic exporting firms.[24] As stated by the Canadian Department of International Affairs and International Trade, export cartels are increasingly coming to be viewed as an instrument of strategic trade policy. The aim of a national government exempting export cartels from policy in its territory is to gain supra-normal profits in international

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[19] Ross Jones, 'Economic Integration and Competition Policy: The Agenda for APEC' in Christos Paraskevopoulos, Theodore Georgakopoulos and Leo Micheles (eds), *The Asymmetric Global Economy: Growth, Investment and Public Policy, APF Press, Toronto, Canada* (AFP Press, 2000) 225.

[20] Ibid.

[21] Andrew R Dick, 'Are Export Cartels Efficiency-Enhancing or Monopoly-Promoting' (UCLA Economics Working Papers No. 601, Department of Economics, University of California, 1990) <http://EconPapers.repec.org/RePEc:cla:uclawp:601>, 3.

[22] Alexis Jacquemin, Tsuruhiko Nambu and Isabelle Dewez, 'A Dynamic Analysis of Export Cartels: The Japanese Case' (1981) *The Economic Journal* 685, 685. Also see Christian Schultz, 'Export Cartels and Domestic Markets' (2002) 2(3) *Journal of Industry, Competition and Trade* 233, 233.

[23] Jacquemin, Nambu and Dewez, above n 22.

[24] Frederic Desmarais, 'Export Cartels in the Americas and the OAS: Is the Harmonization of National Competition Laws the Solution?' (2009) 33 (01/01) *Manitoba Law Journal* 41, 48.

markets.[25] Even the OECD considers that it is the rationale for export cartels to be excluded from domestic competition law because this may facilitate cooperative penetration of foreign markets. This will transfer income from foreign consumers to domestic producers and result in a favourable balance of trade.[26] Scherer highlights a range of possible cartel situations.[27] Domestic producers may join international cartels with producers from other countries. Sometimes these cartels are engaged in market sharing. Such cartels affect international trade relations as well as facilitating monopoly pricing by engaging in output restrictions.[28]

The OECD's Competition Committee conducted a survey of cartel cases among its Members between 1996 and 2000, in an attempt to discover more about the harm caused by cartels.[29] The responding countries described a total of 119 cases, but in many of these, it was impossible to estimate the harm. However, the amount of commerce affected by only 16 large cartel cases reported in the OECD survey exceeded US$55 billion worldwide.[30] The survey showed that the cartel mark-up varied significantly between cases, but in some it was enormous, as much as 50% or more.

Narrowly, the definition of export cartels is 'associations of firms operating in the same country that cooperate with one another in various ways, such as fixing common prices in order to export their goods and/or services to the international market'.[31] The definition for export cartels have not been subject to competition law in exporting countries. For legal reasons, it has not been enforced in those countries.[32] The absence of this provision in exporting countries is beyond the jurisdiction of competition law

[25] Ibid.

[26] Centre for Co-operation with European Economies in Transition, 'Glossary of Industrial Organisation Economics and Competition Law' (Secretary-General of the OECD, 1993), 43-44.

[27] Frederic M Scherer, *Competition Policies For an Integrated World Economy* (Brookings Institution Press, 1994) 43.

[28] Ibid.

[29] Organisation for Economic Co-operation and Development, 'Fighting Hard-Core Cartels: Harm, Effective Sanctions and Leniency Programmes' (DAFFE/COMP(2002)7, OECD, 8 April 2002), 2.

[30] Ibid.

[31] Desmarais, above n 24, 42.

[32] Leon Brittan and Karel Van Miert, 'Towards an International Framework of Competition Rules' (1996) 24 *International business lawyer* 454, 455.

authority over the export cartels.[33] For the importing country, the export cartels have an effect on the market, allowing the jurisdiction to be established.[34]

In an economic community such as APEC, some countries exempt export cartels from their competition policy because of the benefit they receive from doing so.[35] For instance, Taiwan and Japan allow import cartels, though only in certain circumstances. Both countries, as well as South Korea exempted cartels from their laws. The Australian Competition and Consumer Commission (ACCC) can authorise an exemption if it feels that there is a potential benefit that outweighs the potential harm. The annual authorisations for export cartels have declined from a peak of 69 in 1975 to just 4 in 2002. As of 1997, the ACCC reported that it had received approximately 400 export agreement notifications.[36] Export cartels are allowed in Taiwan, while in Japan and the US, this provision could be partially exempted.[37]

The competition policy arrangement between Japan and the US met with difficulty when the two countries had different views on export cartels.[38] The law in Japan authorised legal officers to enforce cartel agreements, while in the US, cartel agreements were legalised under the Webb-Pomrene Export Trade Act of 1918. However, the US courts would not enforce these agreements, so that the cartels were obliged provide the enforcement mechanism themselves.[39] In other cases, countries engaged in economic integration or cooperation may exclude export cartels from their competition law. In 2004, a study by Levenstein and Suslow surveyed 56 countries, of which 17 offered exporters an exemption from national competition laws;[40] the rest provided no exemption from regulation for export cartels, but rather exempted them implicitly. Levenstein and Suslow argued that countries with implicit exemption of

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[33] Ibid.

[34] Ibid.

[35] Jones, above n 19, 226.

[36] Margaret C Levenstein and Valerie Y Suslow, 'The Changing International Status of Export Cartel Exemptions' (2004) 20(3) *American University International Law Review* , 9.

[37] Jones, above n 19.

[38] Mitsuo Matsushita, 'Export Control and Export Cartels in Japan' (1979) 20 *Harvard International Law Journal* 103. Export control laws allowing the formation of export cartels are one of the primary tools available to the Japanese government and to Japanese industry for adjusting exports in an attempt to respond to increased scrutiny of imports by foreign countries.

[39] Schultz, above n 22, 233.

[40] Levenstein and Suslow, above n 36.

export cartels stated that their national laws were silent on restrictive activities that affect foreign markets.[41] Further, Levenstein and Suslow argued that the structure of national competition laws only restrict activity that harms domestic competition. It leaves a vacuum in which export cartels can operate without any obvious institution to restrict their anti-competitive activities. To avoid this, it is necessary to have international cooperation on export cartel agreements.[42]

3.2.1.2 Vertical Restraint Assessments

Vertical restraints refer to a broad range of arrangements between independent firms linked to each other in a buyer-seller relationship.[43] These arrangements are seen as extremely anti-competitive conduct, intended to build entry barriers against competing products and to gain profit-maximising margins.[44] Competition policy on vertical arrangements varies considerably between countries. One of the major difficulties in developing a consistent policy is that economists disagree on the extent of the anti-competitive effects of vertical arrangements.[45]

Until the mid-1980s, economists saw vertical restraints was unlikely to restrict,[46] since there was no conclusive evidence that any particular restraint, such as territorial restrictions, tie-ins, or vertical price restraints, improved or reduced economic efficiency.[47] However, there is now considerable debate among economists as to the anti-competitive impact of vertical arrangements.[48] The literature lacks consistency, with some economists concluding that vertical restrictions have the potential for both pro-competitive and anti-competitive effects.[49] In some cases, particularly in

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[41] Ibid.

[42] Ibid.

[43] United Nations Conference on Trade and Development (UNCTAD), 'Competition Policy and Vertical Restraints' (UNCTAD/ITCD/CLP/Misc.8, UNCTAD, 22 January 1999), 1.

[44] Ibid.

[45] Jones, above n 19.

[46] Ibid.

[47] William S Comanor and Patrick Rey, 'Competition Policy towards Vertical Restraints in Europe and the United States' (1997) 24(1-2) *Empirica* 37, 38.

[48] Richard A Posner, 'Vertical Restraints and Antitrust Policy' (2005) *The University of Chicago Law Review* 229.

[49] Dennis W Carlton and Jeffrey M Perloff, *Modern Industrial Organization* (Pearson/Addison Wesley, 2nd ed, 1994) 522-523.

manufacturing industries, vertical foreclosure is beneficial.[50] Vertical restraints can help intra-brand coordination in several ways.[51] For example, by giving the manufacturer direct control over distributors' actions or giving the manufacturer the right to specify retail services or prices. These restrictions can also be used to restructure incentives. For example, a two-part tariff, combining a fixed fee and a price equal to marginal cost, leads a distributor to gain aggregate profits. These restraints may be helpful when there are spill-over effects among distributors. Granting exclusive territories can help solve the problem of free-riding in retail services.[52]

Several models have been constructed to explain how manufacturers benefit from vertical restraints.[53] The first explanation is that these restraints may facilitate cartel behaviour among either manufacturers or distributors. Where this role can be demonstrated, there is broad agreement that vertical restraints promote anti-competitive results and should be prohibited.[54] An explanation for how manufacturers benefit from vertical restraints has been proposed in recent studies. A Federal Trade Commission study, for instance, noted:

> In each of the Resale Price Maintenance (RPM) studies, the consultants found that vertical restraints were being used to protect the signal of high quality created by the retailers' general method of doing business. By carrying the manufacturers' products, retail stores with high-quality reputations indicate that these products are of high quality, thereby helping the manufacturers establish or maintain their products' reputations.[55]

Conversely, vertical restraints can also affect inter-brand competition.[56] These practices can reduce competition among existing suppliers by sustaining collusive behaviour and also by maintaining downstream cartels. In the long run, these restraints can also reduce market competition to block competitors or build entry barriers. Further, manufacturers

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[50] William S Comanor, 'Vertical Arrangements and Antitrust Analysis' (1987) 62 *New York University Law Review* 1153, 1155.

[51] Comanor and Rey, above n 47.

[52] Ibid, 37-38.

[53] Comanor, above n 50, 1155.

[54] Ibid.

[55] Bureau of Competition and Bureau of Economics, 'Impact Evaluations of Federal Trade Commission Vertical Restraints Cases' (Federal Trade Commission, 1984), 34.

[56] Comanor and Rey, above n 47.

were able to impose restrictive contracts, despite increasing competition.[57] The first reason is because most distributors were connected to a specific manufacturer by considerable investment in brand-specific equipment and by their customers' loyalty to the manufacturer's welding equipment. These linkage networks created high costs to distributors of switching gas suppliers entirely. The result is the distributors cannot refuse the restrictive agreement if the alternative would be a significant loss of customers and compensated only by a small cost reduction for a few of the gasses they sell.[58] Second, the distributors were moderate in seeing the elevated rivalry at the manufacturing level. At the previous low level of price competition in gasses, the prohibitive contracts would have merely formalised a linkage that business realities already generally directed.[59]

To assess vertical restraints, whether or not they harm competition, some countries use a different approach. There is diversity in application of the approach based on whether or not it is assumed that vertical restraints have an economic impact.[60] In particular circumstances, vertical restraints have a positive effect for firms, where vertical agreements lead to increased sales and cut distribution costs. Hence it will give rise to the most efficient result. However, vertical restraints also have an adverse economic impact. Firms may not always gain efficiency from vertical restraints. In fact, they may lead to a reduction in consumer welfare overall.[61]

In 1999, an UNCTAD report regarding competition policy and vertical restraints showed that there is a difference in how vertical restraints are assessed that may bring about a different result.[62] This is illustrated in the cases of the EU and APEC in vertical restraints of assessment. Before 1999, according to Article 81(1) of the EC Treaty, the EU's approach to vertical restraints is evaluated on the basis of 'black', 'white' and 'grey' lists, so-called Block Exemption Regulations, each of them exempting a class of

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[57] Competition and Economics, above n 55, 24. Also see Gerald Brock, 'Vertical Restraints in Industrial Cases' (1989) 19(2) *Journal of Reprints for Antitrust Law and Economics* 385, 386-387.

[58] Competition and Economics, above n 55.

[59] Ibid.

[60] See Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases and Materials* (Oxford University Press, 2014), 777-781.

[61] William S Comanor, 'Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy' (1990) 20 *Journal of Reprints for Antitrust Law and Economics* 205, 216.

[62] United Nations Conference on Trade and Development (UNCTAD), 'The Use of Economic Analysis in Competition Cases' (TD/B/C.I/CLP/4, UNCTAD Secretariat, 28 April 2009), 12.

similar agreements whose pro-competitive benefits are considered to outweigh their anti-competitive effects.[63] The black list provisions contained prohibitions against vertical agreement unless vetted through an onerous individual exemption procedure; the prohibitions on the white list were exempted under a block exemption; and the procedures in the grey list contained the block exempted agreements.[64]

Vertical restrictions not covered by the Block Exemption Regulation are then in principle subject to a full competition analysis. In that case, all four criteria of Article 81(3) must be assessed: (1) the positive efficiency effects must outweigh the anti-competitive ones; (2) customers should have a fair share of the efficiency gains; (3) the vertical restrictions must be indispensable for the attainment of these efficiencies; and (4) competition must not be eliminated; that is, the firms must not be dominant or become dominant as a consequence of the vertical agreement. This shows that competition analysis of vertical restraints under Article 81 is mostly centered on the demonstration of efficiencies and the ascertainment of possible indicators of market power, such as the market position of the supplier and of competitors, and the presence of entry barriers.[65]

In 1997, under the Green Paper on Vertical Restraints, the economic approach to the assessment of vertical restraints changed.[66] The EU Commission's new economic approach to vertical restraints focuses on the evaluation of the effects of vertical restraints on the market, with the aim of enhancing consumer welfare and creating an efficient allocation of resources. Vertical restraints are no longer regarded as *per se* suspicious or *per se* pro-competitive (*per se illegal*).[67] The EC commission changed its analysis tool from *per se illegal* to a *rule of reason* approach. The primary cause of this shift was that too much emphasis was previously put on the analysis of clauses, but not enough to prove the economic impact of the restraint agreements.[68]

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[63] Wolfgang Kerber and Simonetta Vezzoso, 'EU Competition Policy, Vertical Restraints, and Innovation An Analysis from an Evolutionary Perspective' (2005) 28(4) *World Competition* 507, 509.

[64] (UNCTAD), above n 43.

[65] Kerber and Vezzoso, above n 63.

[66] Commission of the European Communities, 'Green Paper on Vertical Restraints in EC Competition Policy' (COM (96) 721 Final, EC, 22 January 1997).

[67] Ibid.

[68] (UNCTAD), above n 43.

According to the UNCTAD report, under the old system, the EU commission was notified of multitudes of vertical restraint agreements, while in recent years, the EU indicates that it has not had many cases of vertical restraint in the region. However, this indication does not necessarily represent fewer vertical restraints. The treatment of vertical relationships between competition authorities is the source of some considerable friction in international trade. Lawrence noted that vertical arrangements have been cited as one of the major reasons why foreign suppliers have had difficulties in gaining access to Japanese markets.[69]

In the US, vertical restraints policies have been sharply varied for more than 30 years. Most of the US policies on vertical restraints are set by judicial decisions, but courts can only rule on cases brought before them.[70] While exclusive dealing and tie-ins are subject to a competition test under US law such that they are illegal if the result is to lessen competition, there are no specific prohibitions or anti-competitive tests with regard to other vertical behaviours, such as third line forcing or territorial restrictions.[71] It was only in 1967 that the Supreme Court ruled that vertical non-price as well as price restraints were all per se illegal. Subsequently, standards became far more lenient; vertical non-price restraints were to be evaluated under the rule of reason.[72]

A study by Jones showed that since APEC members are moving towards their objective of free trade by 2020, the treatment of vertical arrangements by member countries led to a significant issue. To date, APEC countries have no significant competition policy towards vertical relationships. Australia has provisions related to vertical practices, and it is subject to a competition test and/or may be authorised. In Taiwan, a rule of reason analysis is applied to vertical restraints, with emphasis placed on the market share of the firm or transaction involved. In Korea, Japan, Mexico and the US, most vertical relationships are subject to a competition test or a test of reasonableness. In Thailand, prohibitions on vertical restraints are only applied to controlled products, such as consumer products for daily usage. Differences in the treatment of vertical restraints become a significant issue in any economic community that seeks to liberalise its

[69] Ibid.

[70] Comanor and Rey, above n 47, 39.

[71] Ibid.

[72] Ibid.

market. Further, such diversities in arrangement will be extremely difficult where there is no accepted economic theory as to the anti-competitive effects of such conduct.[73]

3.2.1.3 Cross-Border Merger Assessment: Market Power v Dominance

In 2000, UNCTAD launched a report on the flow of cross-border M&As. The report showed that the number of M&As had increased rapidly to a total value of US$1,144 billion worldwide,[74] with growth equal to almost 50% in 1999.[75] The majority of M&As involve two firms within the same country; over 40% of M&As that were completed between 1999 and 2000 involved companies headquartered in two different countries.[76] In 2013, the increasing growth of FDI encouraged the growth of M&As.[77] According to the UNCTAD report, as an implication of the FDI movement, the growth of cross-border M&As rose by 5% in 2013.[78]

M&As have various consequences for performance. In a cross-border merger, the assets and operations of two firms belonging to two different economies are combined to establish a new legal entity.[79] The target company ceases to exist as a separate entity. The transaction can be executed through an exchange of stock or assets. The procedures for executing a merger transaction tend to be relatively straightforward. Cross-border mergers often require the approval of both the acquiring and target firm's shareholders, and the acquiring company assumes all of the target's assets and liabilities.

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[73] Jones, above n 19.

[74] Chunlai Chen and Christopher Findlay, 'A Review of Cross-border Mergers and Acquisitions in APEC' (2003) 17(2) *Asian-Pacific Economic Literature* 14, 1.

[75] United Nations Conference on Trade and Development (UNCTAD), 'World Investment Report 2000 Cross-border Mergers and Acquisitions and Development United Nations' (United Nations, 2000),

[76] Michael A Hitt, Jeffrey S Harrison and R Duane Ireland, *Mergers & Acquisitions: A Guide to Creating Value for Stakeholders* (Oxford University Press, 2001) 1-2. Katsuhiko Shimizu et al, 'Theoretical Foundations of Cross-Border Mergers and Acquisitions: A Review of Current Research and Recommendations for the Future' (2004) 10(3) *Journal of International Management* 307, 307-308.

[77] Global FDI flows rose by 11% in 2013 to an estimated US$1.46 trillion, up from a revised US$1.32 trillion in 2012. FDI inflows increased in all major economic groupings−developed, developing and transition economies. See United Nations Conference on Trade and Development (UNCTAD) Division on Investment and Enterprise, 'UNCTAD Training Manual on Statistics for FDI and the Operations of TNCs' (United Nations, 2009), 99.

[78] United Nations Conference on Trade and Development (UNCTAD), 'Global Investment Trends Monitor No. 15' (UNCTAD/WEB/DIAE/IA/2014/1, United Nations, 28 January 2014), 2.

[79] Chen and Findlay, above n 74, 23.

While in cross-border acquisition, the control of assets and operations is transferred from a local to a foreign company, with the former becoming an affiliate of the latter. Cross-border acquisitions include full (foreign interest of 100%), majority (foreign interest of 50–99%) and minority (foreign interest of 10–49%) acquisitions. Acquisitions involving less than 10% are classified as portfolio investment.[80] The purpose of M&A control is to enable competition authorities to regulate changes in market structure by making decisions as to whether two or more firms may merge, combine, or consolidate their companies into one.[81]

UNCTAD reported that cross-border mergers may result in anti-competitive conduct. It is important to eliminate the anti-competitive effects of cross-border mergers; the adverse effects of cross-border mergers have a considerable impact on economies by changing the structure of the relevant market, thereby increasing exposure to anti-competitive practices.[82] In this regard, the term cross-border merger refers to mergers that involve firms established in more than one jurisdiction or that affect markets in more than one jurisdiction. Thus, cross-border mergers may directly involve local businesses or may involve foreign transnational companies, but in the end, it changed to the market of a third country.[83]

The most significant existing merger regimes are those of the US and EU, since the US merger regime has had an impact on EU industry, and vice versa. From the early 1940s until the late 1970s, US anti-competitive rules via antitrust agencies, along with private parties in private litigation, aggressively enforced US antitrust law against firms outside the US jurisdiction and those whose business activities were intended for the US market.[84] The enormous gap in control between the US and EU regimes brings high impact to other jurisdictions. Bergman et al. argued that both merger controls may also affect the rest of the world.[85] In fact, although global companies need to be concerned

[80] Ibid.

[81] Jones and Sufrin, above n 60, 1129.

[82] United Nations Conference on Trade and Development (UNCTAD), 'Cross-border anticompetitive practices: The Challenges for Developing Countries and Economies in Transition' (TD/B/C.I/CLP/16, United Nations, 19 April 2012) 3.

[83] Ibid, at 13.

[84] John J Parisi, 'Cooperation Among Competition Authorities in Merger Regulation' (2010) 43 *Cornell International Law Journal* 55, 57.

[85] Mats Bergman et al, 'Merger control in the European Union and the United States: Just the Facts' (2010) (March 4) *Available at SSRN 1565026* 62, 1.

about competition rules everywhere, their biggest problems lie with the US and the EU.[86]

There are significant differences in the practical analysis of mergers in both jurisdictions.[87] The US's style of unilateral effects analysis is not carried out in the EU jurisdiction. Indeed, the overall focus of the investigation of the merger analysis is strictly different.[88] Niels and Kate gave more specific points of view on significant differences that exist in the legal and economic standards between different competition law jurisdictions, particularly the US and the EU. Having been brought to light, these differences have generated a great deal of controversy and debate in recent years, most notably in high-profile cases such as Boeing/McDonnell Douglas (1997) and GE/Honeywell (2001).[89] Coppi and Walker clarified the peculiarity of both regimes, finding that the US merger control emphasises unilateral effect, while the EU analyses the impact of the merger based on the collective dominance of firms.[90]

In assessing whether trans-border mergers have adverse effects on competition and consumer welfare,[91] market power and market dominance remain essential elements in merger analysis.[92] However, there was debate among experts regarding the use of substantive tests versus market dominance tests.[93] Substantive analysis focuses on the effects of market power or implicit or explicit cooperative conduct. In this regard, market definition is less significant for the dominance test in the US merger control

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[86] David S Evans, 'The New Trustbusters: Brussels and Washington May Part Ways' (2002) 81(1) *Foreign affairs* 14, 15.

[87] Lorenzo Coppi and Mike Walker, 'Substantial Convergence or Parallel Paths-Similarities and Differences in the Economic Analysis of Horizontal Mergers in the US and EU Competition Law' (2004) 49 *Antitrust Bulletin* 101, 103.

[88] Ibid.

[89] Gunnar Niels and Adriaan Ten Kate, 'Introduction: Antitrust in the US and the EU-Converging or Diverging Paths' (2004) 49 *Antitrust Bulletin* 1, 2.

[90] Coppi and Walker, above n 87, 125.

[91] Generally, economists agreed that mergers are usually pro-competitive such as enhance consumer welfare, because they allow the methods of production to be reorganized and inefficiencies to be removed, thereby creating more efficient firms. Consumers benefit if prices are reduced as costs go down. However, not all mergers are benign, because the structural changes may significantly enhance the market power of the firms in the affected market. Bergman et al, above n 85.

[92] Coppi and Walker, above n 87, 103.

[93] Julie N Clarke, 'Multi-Jurisdictional Merger Review Procedures-A Better Way' (2006) 14(2) *Trade Practices Law Journal*, 5.

regime.[94] This approach has been used by several countries worldwide, including the US,[95] Canada, New Zealand, France, Ireland, South Africa and the United Kingdom.[96]

The US test for whether a merger is unlawful is based on whether it is likely to result in a significant lessening of competition as subjected to Section 7 of the Clayton Act. In 1985, the US Department of Justice proposed modified numerical guidelines for mergers in the banking industry and published revised guidelines in 1992.[97] The merger guidelines were based on a concentration measure called the Herfindahl-Hirschman Index (HHI).[98] The US Federal Reserve used this index as the initial step in analysing the effects of bank mergers on competition. The HHI specifies that if a bank merger would result in numerical guidelines (1) in a post-merger HHI in a market of less than 1,800, or (2) in a change in the HHI of less than 200, it is likely that the market structure would not reach a concentration level, or concentration would not increase enough, such that firms in the market would have the market power to maintain prices above the competitive level for a significant period.[99]

The HHI is one of the measures used in analysing the competitive effects of M&As.[100] HHI is important in relation to market concentration as an indicator of competition; it serves as an efficient screening tool for regulators and as a planning device for bankers. The HHI is calculated by including 100% of the deposits of commercial banks in the market and at least 50% of the deposits of thrift institutions. According to Rhoades, if the post-merger HHI does not exceed the numerical guidelines, it is presumed that the merger would not harm the competition, and no further analyses are needed. If, on the contrary, the post-merger HHI exceeds the numerical guidelines, detailed economic

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[94] Coppi and Walker, above n 87, 104-105. In general, the more narrowly the market is defined the more likely a firm or firms will be found to have market power. See Patrick Massey, 'Market Definition and Market Power in Competition Analysis: Some Practical Issues' (2000) 31(4) *The Economic and Social Review* 309, 310. Furthermore, in the US there is general trend toward a reduced reliance on market definition since the utilization of unilateral effect theories.

[95] Bergman et al, above n 85.

[96] Clarke, above n 93.

[97] Stephen A Rhoades, 'The Herfindahl-Hirschman Index' (1993) 79 *Federal Reserve Bulletin* 188, 188-189.

[98] U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* (April 8, 1997) USDOJ <http://www.justice.gov/atr/public/guidelines/hmg.pdf>, at June 8, 2015.

[99] Rhoades, above n 97, 188.

[100] Ibid.

analyses of competition are applied to find out whether other factors, indicate that the market would be more or less competitive than the result of HHI calculation.[101]

The index calculates the number of firms in the relevant market to figure the concentration by merging the relative size of all companies in the relevant market.[102] It is determined or calculated by squaring the market shares of all corporations in the relevant market and then total the squares. The result gives proportionately greater weight to the larger market shares, as follows:[103]

$$\boldsymbol{HHI} = \sum_{i=1}^{n} (\boldsymbol{MS}_i)^2$$

Generally, the US agencies focused the assessment of market concentration after merger was established.[104] When using the index, the US agencies consider both after merger level of the HHI and the increase concentration resulting from the merger. The increase in the HHI can be indicated by the amount of market share product of the merging firms, particularly when it shows double after the merger.[105] The Agencies classify markets into three types:[106]

a. Unconcentrated markets: HHI below 1500
b. Moderately concentrated markets: HHI between 1500 and 2500
c. Highly concentrated markets: HHI above 2500

The HHI is important measure to assess market concentration because it shows the number and size of market shares owned by firms in the relevant market. The index is

[101] Ibid.

[102] Fred H Hays and Sidne Gail Ward, 'Understanding Market Concentration: Internet-Based Applications from the Banking Industry' (2011) 5 *Journal of Instructional Pedagogies* , 2.

[103] Rhoades, above n 97.

[104] Suppose there are ten firms in a market in which each has a 10% market share, the HHI would therefore be (10)2 + (10)2 +.....+ (10)2 =1,000. By contrast, a market with one firm that has a 50% share and five firms each with 10% share would have an HHI of (50)2 + (10)2 +(10)2 +…..(10)2 =3,000. The HHI ranges from 10,000 (in the case of a pure monopoly) to a number approaching zero (in the case of an atomistic market). See Hays and Ward, above n , 2.

[105] For example, the merger of firms with shares of five percent and ten percent of the market would increase the HHI by 100 (5 × 10 × 2 = 100). See the U.S. Horizontal Merger Guidelines 2010 at U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines 2010* (August 19, 2010) USDOJ <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>, Section 5.3, 19.

[106] Ibid, Section 5.3, 20.

necessary as it reflects the concentration of firms' output.[107] The US Merger Guidelines uses the HHI because it has characteristics of being correlated with the level of industry-wide profits based on the Cournot model of competition.[108] In the Cournot model of competition, there is a strong relationship between market power and level of industry profits to overall concentration as measured by the HHI.[109]

Another consideration regarding why the HHI is used by the US is that for any given number of participants in a market, the HHI will be lowest when market shares are equal and highest when one firm has a large share of the market.[110] Another important property of the HHI is that it reveals the shares of every corporate in the relevant market. In 1969, Morris Adelman stated that any HHI can be interpreted as a numbers equivalent.[111] Therefore, one can easily compute the number of firms with equal market shares to find out the result of the HHI.[112]

Conversely, the second method other than the HHI prohibits mergers when they create or enhance a position of dominance in the relevant market. The EU used this method before the latest merger regulation of 2004.[113] However, some EU member states, including Switzerland, Hungary, Poland and Norway, are still using dominance tests in their domestic laws.[114] In 1990, the EU adopted EU Merger Regulation. This regulation prohibited mergers that 'create or strengthen a dominant position as a result of which effective competition would be significantly impeded'.[115] The Merger Regulation was aimed at permitting effective control of all concentrations from the point of view of

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[107] Stephen A Rhoades, 'Market Share Inequality, the HHI, and other Measures of the Firm-Composition of a Market' (1995) 10(6) *Review of industrial organization* 657, 657.

[108] Jean Tirole, *The Theory of Industrial Organization* (MIT press, 1988), 218. The Cournot model competition assumes that each firm competes by setting its output so as to maximize profits given the output of other firms in the market.

[109] Coppi and Walker, above n 87, 111.

[110] Stephen Calkins, 'The New Merger Guidelines and the Herfindahl-Hirschman Index' (1983) *California Law Review* 402, 405.

[111] Morris A Adelman, 'Comment on the" H" Concentration Measure as a Numbers-Equivalent' (1969) 51(1) *The Review of Economics and Statistics* 99, 99-101.

[112] Calkins, above n 110, 405.

[113] Lars-Hendrik Röller and Miguel De La Mano, 'The Impact of the New Substantive Test in European Merger Control' (2006) 2(1) *European Competition Journal* 9, 9-11.

[114] Clarke, above n 93, 5.

[115] Röller and De La Mano, above n 113, 10.

their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations.[116]

The 1990 Merger Regulation was based on three main propositions: first, the enlargement of the EU, integrated internal market and single currency, and the lowering of international trade barriers would continue to result in massive corporate reorganisations, particularly in the form of concentrations.[117] Second, mergers and other concentrations will not be illegal they are fill the requirements of dynamic competition and are capable of increasing the competitiveness of European market. At the same time it may improving the conditions of growth and raising the standard of living in the Community.[118] Third, that Community law must regulate those concentrations that may significantly harm effective competition or a substantial part of it.[119] In contrast to the objectives of the US merger regime, the focus of EU merger control is aimed at protecting consumer welfare.

It was stated by Competition Commissioner Mario Monty that merger control in the EU is a fundamental means of protecting consumers against the effects of anti-competitive conduct, as stated below:

> The goal of competition policy, in all aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market. … Our merger policy aims at preventing the creation or strengthening of dominant position through mergers or acquisitions. Such a market power produces competitive harm, which manifests either directly through higher post-merger prices or reduced innovation or, indirectly, through the elimination of competitors, leading ultimately to the same negative results in terms of prices or innovation. Let me be clear on this point, we are not against mergers that create more efficient firms. Such mergers tend to benefit consumers, even if competitors might suffer from increased competition. We are, however, against merger that, without creating efficiencies, could raise barriers for competitors and lead, eventually, to reduced consumer welfare.[120]

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[116] Council Regulation, 'No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings (the EC Merger Regulation)' (2004) 24(29.01) *Official Journal of the European Union* , Recital 6.

[117] Council Regulation, 'No 1310/97 of 30 June 1997 Amending Regulation (EEC) No 4064/89 on the Control of Concentrations between Undertakings' (1997) 180(09) *Official Journal of the European Union* 07. This Merger Regulation was changed in 2003 and formally adopted in 2004. Regulation, above n 116, Recital 3.

[118] Regulation, above n 116, Recital 3.

[119] Ibid, Recital 4.

[120] Mario Monti, 'The Future of Competition Policy in the European Union' (2001) *Speech at Merchant Taylors Hall* .

In the European experience, since the creation of the European Economic Community, the wave of European mergers has increased to a particular level. Merger policy was not explicitly dealt with in the Treaty of Rome in 1957. Rather, it has traditionally been guided by a comprehensive interpretation of Articles 85 and 86 of the Treaty. More recently, however, a new regulation was approved as an attempt at creating the basis for an EU-wide merger policy.[121] According to Jacquemin, the existing data reflects that the sum of M&As involving at least one of the top 1,000 EU firms has been steadily developing with positive progress,[122] increasing from 185 in 1984–1985 to 492 in 1988–1989. Among these top 1,000 firms, companies with sales of over 1 billion (based on European currency) were involved in 75% of mergers in 1988–1989, compared to 50% in 1984–1985.[123] The market shares of the merging firms were too large and endangered the welfare of the consumers. The logical reason is the more power the merging firms hold before the merger, the larger the cost reduction has to be in order for the after-merger price to fall.[124]

In the GE-Honeywell merger case, the centre of the conflict between two competition policy systems was that each used a different theory. The US expressed disagreement with the EU's decision, pointing out the different method used to evaluate the impact of the merger, yielding different results.[125] The EU applied the range effect theory and the entrenchment doctrine to assess the merger of GE-Honeywell. Under both theories, the merger could be condemned if it strengthened an already dominant firm through greater efficiencies, or gave an acquired firm access to a broader line of products or greater financial resources, thus making business more difficult for small firms. For that reason, the US eliminated the use of these theories for examining non-horizontal mergers. In addition, these theories are no longer used because empirical evidence could not show that this would harm the competition.[126]

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[121] Regulation, above n 116. Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings has been substantially amended.

[122] Alexis Jacquemin, 'Horizontal Concentration and European Merger Policy' (1990) 34(2) *European Economic Review* 539. Pedro P. Barros, 'Merger Policy in Open Economies' (1994) 38(5) (05) *European Economic Review* 1041, 1047-1048

[123] Barros, above n 122.

[124] Jacquemin, above n 122, 544.

[125] Department of Justice, *Roundtable on Portfolio Effects in Conglomerate Mergers* (2001) Department of Justice <http://www.justice.gov/atr/public/international/9550.htm#N_47_>

[126] Ricky D Rivers, 'General Electric/Honeywell Merger: European Commission Antitrust Decision Strikes a Sour Note' (2002) 9(2) *ILSA Journal of International & Comparative Law* 525, 528.

In the EU itself, the enforcement of the Old Regulation raised important question due to it resulting in different interpretations. Therefore, in its performance a lot of changes were made. One alternative interpretation articulated that market concentration is prohibited whenever it leads to the creation or strengthening of a dominant position, and if the effect of such change in the market structure amounts to a significant impediment to effective competition (SIEC).[127] In this case, dominance is quite necessary but not sufficient to prove the negative impact of the merger in the relevant market. The second alternative interpretation is that mergers that create or strengthen a dominant position will automatically harm competition.[128] The opponents of this analysis argue that dominance is both necessary and sufficient, and constitutes a single condition.[129]

To overcome these multiple interpretations of the substantive test, in 2004, the EU adopted the New Merger Regulation and reformulated the substantive test, or significant impediment to effective competition test (the SIEC test), as follows:

> A concentration which would significantly impede effective competition, in particular by the creation or strengthening of a dominant position, in the common market or in a substantial part of it shall be declared incompatible with the common market.[130]

The 2004 changed merger regulations had similar methodology to those in the US, introducing a multi-firm unilateral effect, along with efficiency defence and the use of a hypothetical monopoly test to define the market.[131] According to the 2004 Regulation, concentration is to be welcomed if it is not damaging to competition, but rather increases the competitiveness of the entire European industry and raises living standards.[132] Market concentration should maintain and develop effective competition. The resulting expansion of technical and economic progress should benefit consumers. The 2004 Regulation states that it is possible that the efficiencies brought about by the concentration counteract its effects on competition, and in particular the potential harm to consumers.[133]

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[127] Röller and De La Mano, above n 113, 9.

[128] Ibid.

[129] Ibid, 11.

[130] Regulation, above n 116, 1-22.

[131] Bergman et al, above n 85, 51.

[132] Regulation, above n 116, 1-22.

[133] Adél Németh and Hans-Martin Niemeier, 'Airline Mergers in Europe–An Overview on the Market Definition of the EU Commission' (2012) 22 *Journal of Air Transport Management* 45, 48.

However, the dominance test standard under the 2004 Regulation is differently worded from the US merger regimes.[134] In contrast to the US legal definition of dominance, the EU defines dominance as a position of economic strength enjoyed by a firm which enables it to prevent its competitors from enter into market so that the effective competition cannot be maintained on the relevant market.[135] By affording its power, a firm also abuse its power to control the price. Dominance in this perspective remains the core principle of Article 2 of the Merger Regulation. The new SIEC test does not require the presence of dominance as the prerequisite to define market power, based on the reason that if dominance is properly understood as significant market power, then there is no reason for market leadership to be necessary for a dominant position.[136]

In dealing with restrictive business practices, some cooperation agreements were established, including the international measures provided for in the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices negotiated under the auspices of UNCTAD. Another international measure is the OECD Recommendation on Merger Review 2005, which stresses the importance of cooperation and coordination in reviewing transnational mergers.[137]

3.2.2 Differences in Competition Law Culture

Differences in national legal cultures may substantially affect regional cooperation on competition policy.[138] Differences in legal culture among member states in a regional trade agreement also enhance the obstacles to the enforcement of competition law.[139]

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[134] Nicholas Levy, 'EU Merger Control: From Birth to Adolescence' (2003) 26(2) *World Competition* 195, 200.

[135] The definition available in the *United Brands v. Commission*, 1978 E.C.R. 207 (1978), 217. Also see Margaret H FitzPatrick, 'United Brands Company v. Commission of the European Communities: Window to Price Discrimination Law in the European Economic Community' (1979) 1 *Northwestern Journal of International Law & Business* 338, 340.

[136] Röller and De La Mano, above n 113, 15.

[137] On 23 March 2005, the OECD Council adopted this Recommendation on merger review. It aims to contribute to greater convergence of merger review procedures, including cooperation among competition authorities, towards internationally recognized best practices. It should thus help to make merger review procedures more effective, while at the same time helping competition authorities and merging parties to avoid unnecessary costs in multinational transactions.

[138] Ki Jong Lee, 'Culture and Competition: National and Regional Levels' (2008) 21 *Loyola Consumer Law Review* 33, 33.

[139] Aldaba, above n 16, 1-10.

Kim Them Do[140] mentioned in a study that different legal cultures may create crucial obstacles to economic integration. The culture and the social conditions of a country affect its enforcement of the law; Cotterel observed this as the relationship of culture to the application of the law.[141] Similarly, Lawrence Friedman argued that culture is another significant element that defines a legal system in one country, after legal substance and legal structure such as procedural law and court decisions.[142] He further added that 'the culture relates to the values and attitudes that link the system together and that determine the place of the legal system in the culture of the society as a whole'.[143] Without understanding the culture of a country, it would be difficult to design a law regime for them to adopt. Ultimately, implementing transnational competition law would not be simple because cultural barriers or issues should be understood in the context of the member states themselves.[144]

In Japan, for instance, there is a cultural barrier to accepting new competition owing to the great success of the prevailing competition culture, which has had an influence on economic stability.[145] Cultural differences have played a role even within the EU economic community, where the strength of the competition culture of member states varies. For example, the UK and Ireland are developing a stronger competition culture, with their drive towards rigorous criminal enforcement against cartels, whereas most other members seem to waver in this regard.[146]

In 2002, the OECD reported penalising hard-core cartels in several countries, and that the process of doing so was influenced by the culture of each country.[147] Of these

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[140] Kim Them Do, 'Competition Law and Policy and Economic Development in Developing Countries' (2011) 8(1) *Manchester Journal of International Economic Law* 18, 19. Also see Kim Them Do, 'The Perspectives of International Cooperation in Competition Law and Policy' (2009) 3 *Zeitschriftt fir Wettbewerbsrecht (ZWeR) Journal of Competition Law* 298, 303.

[141] Roger Cotterrell, 'Law in Culture' (2004) 17(1) (03) *Ratio Juris* 1, 1.

[142] Lawrence M Friedman, 'Legal Culture and Social Development' (1969) 4(1) *Law & Society Review* 29, 34.

[143] Ibid.

[144] Competition, above n 8, 128-152.

[145] Lee, above n 138.

[146] Ibid.

[147] Organisation For Economic Co-Operation And Development (OECD), 'Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes' (OECD, 2002) <http://www.oecd-ilibrary.org/fr/governance/fighting-hard-core-cartels_9789264174993-en;jsessionid=1mm6afuejmsnc.delta>, 100-101.

countries—Australia, Canada, France, Germany, Ireland, Japan, Korea, Mexico, New Zealand, Norway, Slovak, Spain and the US—only nine provided for criminal sanctions, such as imprisonment, for those involved in anti-competitive conduct. The nine countries were Canada, Germany, Ireland, Japan, Korea, Mexico, Norway, the Slovak Republic and the US[148] Canada and the US are also known for meting out gaol punishment to executives who become involved with cartels. Recently, the UK and Ireland also imposed criminal sanctions on executives for cartel activity.[149]

There are reasonable explanations as to why legal implementation could vary according to culture.[150] First, nations with individualistic values have more rigorous anti-cartel policies than those with collective cultures; second, nations with a higher tendency to avoid uncertainty are inclined to have relatively lax anti-cartel policy. Third, countries that show mixed cultural values, such as the US, tend to have more rigorous anti-cartel policy; and fourth, cluster countries such as Canada and the United Kingdom, Ireland, Australia and New Zealand tend to have relatively rigorous anti-cartel policy.[151] Cartels are deemed a direct restraint against competition law; Lee opines that a lax anti-cartel policy indicates a fairly weak competition culture, while a rigorous anti-cartel policy manifests in a stronger competition culture.

There has also been debate regarding the connection between culture and harmonisation of law in the EU.[152] Article 167 of the TFEU articulates the balance between contributing to member states' cultures while respecting national diversity and moving the common European cultural heritage forward.[153] Accordingly, a broad interpretation of culture should be allowed in the context of harmonisation so that cultural diversity covers, inter alia, legal as well as societal diversity.[154] Apart from the relative competencies of the EU and its member states, as provided for in Article 167 Lines 2–3 of TFEU, the importance of cooperation must be highlighted, since it requires the Union

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[148] Ibid.

[149] Paul Gorecki, 'Competition Policy in Ireland: A Good Recession?' (Working Paper No. 427, The Economic and Social Research Institute, 2012) <http://www.tara.tcd.ie/xmlui/handle/2262/63752>, 14.

[150] Lee, above n 138, 39.

[151] Ibid.

[152] Ruth Sefton-Green, 'Multiculturalism, Europhilia and Harmonization: Harmony or Disharmony' (2010) 6 *Utrecht Law Review* 50, 52.

[153] Ibid.

[154] Ibid.

to take cultural aspects into account in its action under the other provisions of the Treaties, particularly in order to respect and promote diversity of its cultures. This implies that when the EU sets out its process of harmonising domestic laws, it must take cultural considerations into account.[155] Fortunately, in the context of EU economic integration, the cultural identities of the member states, including their political and socio-economic environments, are more homogeneous; this cultural make-up is quite different compared with that of ASEAN, which is more heterogeneous.[156]

3.3 Legal Barriers to Implementing Competition Policy

3.3.1 EU: Cross-Border Legal Uncertainty

The trinity of the EU Treaties explicitly defines the single legal system to be applied in that region.[157] At its outset, the EU was created with the Treaty of Maastricht in 1993. It consisted of three communities: the Coal and Steel Community (ECSC),[158] the Atomic Energy Community, and the Economic Community. These communities were based on the Treaty of the European Union, the Treaty establishing the European Economic Community, the Treaty establishing the Atomic Energy Community and the Treaty establishing the European Coal and Steel.[159] It covered specific policy areas of the EU, such as union citizenship, community policies and the Economic and Monetary Union.[160] Although these communities are different in name, they are all based on the EU.[161] The various divisions of community do not demarcate different groups but only different capacities with specific legal instruments and procedures.[162]

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[155] Ibid, 52.

[156] Linda Low, ‘Multilateralism, Regionalism, Bilateral and Crossregional Free Trade Arrangements: All Paved with Good Intentions for ASEAN?’ (2003) 17(1) (03) *Asian Economic Journal* 65.

[157] Armin Von Bogdandy, 'The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System' (1999) 36(5) *Common Market Law Review* 887, 887; Dominik Lasok and Peter A Stone, *Conflict of Laws in the European Community* (Professional books, 1987), 3-17.

[158] The European Coal and Steel Community ceased to exist in 2002, when the ECSC Treaty expired.

[159] Von Bogdandy, above n 157.

[160] Ibid.

[161] Ibid, 887. The term for European Union is provided in the Treaty on European Union Article 1.

[162] Ibid.

In 2007 the Treaty of Lisbon was signed to amend the Maastricht Treaty and Treaty of Rome.[163] Two years later, all the Treaties, together with secondary law, form the single legal system of the EU. The legal regime of the EU Community builds upon these Treaties, forming the European judicial order or legal system. In creating the EU law, the EC does not aim to contrast with the law of its member states. In fact, the EC sought to harmonise the national legal systems as a requirement for the functioning of the common market. This means that the harmonisation of member states' legal systems is the ultimate goal and plays a functional role in the community.[164] Therefore, the primary task of the EU is to find and achieve the optimal degree of regional harmonisation between and among its members.

A study by Freyhold et al analyses the legal, practical and economic effects of judicial barriers in the Single Market.[165] The study finds that several factors have a profound influence on economic stability in the EU. First, civil litigation concerning minor daily disputes of consumers in different member state may takes couple times longer than usual. The cost of the minor disputes could be even higher than a total dispute valued €2,000. Inaccessible justice for consumers happened during the period of stabilisation of the single market and the preparation of the introduction of a single currency.[166] The second study by Freyhold et al, titled The Cost of Legal Obstacles to the Disadvantage of Consumers in the Single Market, examined the situation of consumers in cross-border appellate proceedings and re-evaluating the claims pursued by consumers. This study underlined the cross-border transaction costs of the judicial process among the EU member states: the results of the research indicated that diversity in the legal system led to the high cost of procedures.[167]

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[163] Thomas Christiansen, 'The EU Reform Process: From the European Constitution to the Lisbon Treaty' in Maurizio Carbone (ed), *National Politics and European Integration: From the Constitution to the Lisbon Treaty* (Edward Elgar Publishing, 2010) 16. Also see Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, available online at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12007L/TXT.

[164] Wagner, above n 4, 4.

[165] H von Freyhold et al, 'Cost of Judicial Barriers for Consumers in the Single Market' (A Report for the European Commission (Directorate General XXIV), 1995), 1.

[166] Vial Von Freyhold and Partner Consultants, 'The Cost of Legal Obstacles to the Disadvantage of Consumers in the Single Market' (A Report for the European Commission, von Freyhold, Vial & Partner Consultants, 1998), 1.

[167] Ibid, 2.

Recently, the demand for comprehensive harmonisation of law in the EU has increased, since legal diversity creates transaction costs and lowers trade and economic welfare.[168] According to the EU Commission in its report to the European Parliament on European Contract Law of September 2001,[169] legal diversity enhances the transaction costs of cross-border contracting, and hinders consumers and small businesses from engaging in such transactions. It is assumed that the high costs of cross-border transactions caused by legal uncertainty arise from the diversity in the formal legal system or diversity in judicial administration across the member states of the EU.[170] The desire to strive for harmonisation of competition policy was strengthened in 2008, when the EU published a White Paper on Damages Actions for Breach of the EC Antitrust Rules.[171] Its primary objective was the improvement of legal conditions for consumers who become victim of violations of the EC's competition policy rules.[172]

Competition policy and law have been enforced in the EU effectively since the establishment of the European Economic Community in 1957, since which competition law has played a pivotal role in EU economic integration.[173] It is well known, based on the hard law, that the members of the Union are obliged to follow the TFEU and adopt its national competition policy and law in parallel to it.[174] The interface of harmonisation between the EU's competition law and that of its member states' competition law is provided within Regulation 1/2003 Article 3.[175] Article 3(1) provides

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[168] Wagner, above n 4, 3.

[169] Commission of the European Communities, 'Communication from the Commission to the Council and the European Parliament on European Contract Law' (European Commission, July 11 2001) <http://ec.europa.eu/consumers/archive/cons_int/safe_shop/fair_bus_pract/cont_law/cont_law_02_en.pdf >

[170] Wagner, above n 4.

[171] Ibid.

[172] Helmut Wagner, 'Legal Uncertainty: Is Harmonization of Law the Right Answer?; a Short Overview' (Discussion Paper No. 444, Fernuniv., Fachbereich Wirtschaftswiss., 2009), 1.

[173] Phanomkwan Devahastin Na Ayudhaya, 'ASEAN Harmonization of International Competition Law: What is the Most Efficient Option?' (Paper presented at the Kuala Lumpur International Business, Economic and Law Conference, Kuala Lumpur, Malaysia, April 8-9 2013). Also see David J Gerber, *Law and Competition in Twentieth Century Europe* (Oxford University Press, 1998).

[174] A Douglas Melamed, 'International Cooperation In Competition Law And Policy: What Can Be Achieved At The Bilateral, Regional, And Multilateral Levels' (1999) 2(3) (09) *Journal of International Economic Law* 423.

[175] Regulation 1/2003 Article 3:

1) Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 101(1) of the TFEU which may affect trade between Member States within the meaning of that provision, they shall also apply Article 101 of the TFEU to such agreements,

that where a member state of the EU or national court applies national competition law to conduct that constitutes an agreement, decision or concerted practice within the meaning of Article 101 or abuse prohibited by Article 102 of the TFEU that affects the member states, it shall also apply Articles 101 and 102. In these provisions, the national competition authorities are obliged to apply the national competition law to anti-competitive practices that affect trade between Members also implementing the EU competition law.[176]

Procedure and substance are dependable elements in any effort to harmonise, since one without the other will result in frustration.[177] As provided in EU law, the European Commission and the national competition authorities of the member states are in charge of the supervision and enforcement of European competition law. These competition authorities investigate practices that may affect competition, and if they consider them to be harmful they will prohibit them or grant an exception.[178]

According to the TFEU, to achieve full harmonisation, member states within the region must share similar economic conditions, while sovereignty of the states must be maintained.[179] To maintain a certain degree of sovereignty, the Treaty allows member states to develop domestic competition law and policy. This implies an obligation for every member state to have a high level of competition law enforcement, parallel to the Treaty. The Treaty allows each of the member states to enforce their national

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decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 102 of the TFEU, they shall also apply Article 102 of the TFEU.

2) The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 101(1) of the TFEU, or which fulfil the conditions of Article 101(3) of the TFEU or which are covered by a Regulation for the application of Article 101(3) of the TFEU. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

3) Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 101 and 102 of the TFEU.

[176] According to the Article 189 of the EEC Treaty a regulation shall apply generally. It shall be binding in its entirety and shall be directly applicable in each member states.

[177] Daniel A Crane, 'Substance, Procedure, and Institutions in the International Harmonization of Competition Policy' (2009) 10 *Chicago Journal of International Law* 143, 156.

[178] Jones and Sufrin, above n 60, 922.

[179] Melamed, above n 174.

competition policy and law within their own jurisdiction, but the member must join with EU Commission to cooperate on cases, including sharing the investigation procedure and information.[180] The process of the EU integration was initiated through judicial integration mechanism and hard laws. However, recently, the EU has developed a hybrid approach that offers soft law for improving rule of law promotion to its newer member states, particularly from Central and Eastern European countries.[181]

3.3.2 MERCOSUR: Uncertain Legal Decision Mechanisms

The harmonisation of competition policies has been on the agenda of the Common Market of the Southern Cone (MERCOSUR) project since the signing of the Treaty of Asunción in 1991.[182] Article 1 of the Treaty provided that 'the coordination of macroeconomic and sectoral policies between the States Parties in the areas of foreign trade, agriculture, industry, fiscal and monetary matters, foreign exchange and capital, services, customs, transport and communications and any other areas that may be agreed upon, in order to ensure proper competition between the States Parties'.[183] In this agreement, the Member Parties are agreed to harmonise their trade policy in order to strengthen the integration process.[184]

In 1993, a protocol indicating the guidelines for a single competition policy was signed by the MERCOSUR member countries.[185] Under this framework, Argentina, Brazil, Paraguay and Uruguay entered into an agreement for the Defence of Competition,[186]

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[180] Jones and Sufrin, above n 60.

[181] Gerda Falkner et al, *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge University Press, 2005), 201.

[182] José Tavares De Araujo Jr and Luis Tineo, 'Harmonization of Competition Policies among MERCOSUR Countries' (1998) 24(2) *Brooklyn Journal of International Law* 441, 441.

[183] Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay 1991.

[184] The Treaty of Asunción 1991.

[185] Lúcio Tomé Féteira, 'Competition Rules in MERCOSUR: the Fortaleza Protocol' in Marcílio Toscano Franca Filho, Lucas Lixinski and Maria Belen Olmos Giupponi (eds), *The Law of MERCOSUR* (Hart Publishing, 2010) 291, 291-316. Marco Botta, 'The Role of Competition Policy in the Latin American Regional Integration: A Comparative Analysis of Caricom, Andean Community and Mercosur' (Paper presented at the IX Annual Conference of the Euro-Latin Study Network on Integration and Trade (ELSNIT): Revisiting Regionalism. Appenzel, Switzerland, 2011) 9.

[186] MERCOSUR, *Protocolo De Defensa De La Competencia Del MERCOSUR* MERCOSUR <http://www.mre.gov.py/v1/Adjuntos/mercosur/Acuerdos/1996/espanol/19-protocolodedefensadelacompetenciadelmercosur.pdf>

called the Fortaleza Protocol.[187] The following summarises the main contents of the Fortaleza Protocol:[188]

a) The scope of the agreement covers all acts by individuals and legal persons, private or public, with effects on competition within MERCOSUR and that affect commerce for the Parties.
b) The illegality test covers individual or collusive conduct with the purpose or effect of limiting, restricting or distorting competition or market access, or that merely abuses dominant positions in the relevant market for goods and services.
c) Particular illegal conduct, including price fixing and resale price or conditions maintenance; influence or adoption of uniform commercial conduct; agreements to limit or control research and development or to block investments destined for production or distribution purposes; to assign markets or sources of inputs; to prevent entry of new firms; to agree upon prices and advantages that could affect public biddings; discrimination; tying; exclusive dealing; refusals or exclusive arrangements to broadcast publicity; undue sales below cost; refusals to deal; interrupting, for 'undue' reasons, of manufacturing; destroying inputs, products or manufacturing equipment; abandoning or destroying crops or plantations without just cause and manipulation of markets to impose prices.
d) Standard rules regulate that State parties must adopt within two years common rules to control acts and contracts that could limit or damage free competition or the dominance of the regional market, including concentrations, aimed at preventing anti-competitive effects.
e) Supervisory enforcement is where the protocol supervision is entrusted to the Commerce Commission of MERCOSUR and the Committee for the Defence of Competition.
f) Implementing regulations, the Committee is empowered to issue guidelines that define the relevant market, evidence to be admitted and criteria for analysing such practices.[189]
g) Case enforcement is where the Agency corresponding to the defendant's domicile shall conduct an investigation. Other parties' agencies must cooperate with information, documents and other 'essential' inputs.

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[187] De Araujo Jr and Tineo, above n 182, 442.

[188] Gabriel Castaneda, 'Competition Policy and Economic Integration in NAFTA and MERCOSUR' (1998) 26(11) (12/01) *International Business Lawyer* 496, 500.

[189] Ibid.

h) Supranational procedure: once the investigation is concluded, the domestic investigation agency hands over a report to the Committee, which in turn will adjudicate (*ad referendum* of the MERCOSUR Commission) the case and impose the corresponding sanctions or corrective measures. If the Committee does not reach a decision, then the matter is referred to the MERCOSUR Commission for a ruling. If, again, no ruling is reached, the case goes up to the Common Market Group. After such an instance, State Parties may take the disagreement to MERCOSUR's settlement of disputes mechanisms. Sanctions are referred to the domestic agency for execution.
i) Consent agreements are possible at any time during the procedure, subject to fines *per diem* for non-compliance, as well as disclosure obligations.
j) The Committee may issue sanctions and remedies (*ad referendum* of the MERCOSUR Commission), cease order and, should the law be ignored, a *per diem* penalty. Such orders are executed by the domestic, national agency. Final rulings from the Committee may impose *ad referendum* of the MERCOSUR Commission, fines up to the gross invoices or the assets involved, which will be owned by the original national agency, its level to be assessed according to the corresponding illegal practices.
k) Cooperation, which may involve exchange of information, training and other data exchanges, as well as possible joint investigations.
l) Legislation: parties should work towards the enacting of standard rules and mechanisms, and consider the progress of WTO regulations and public policy definitions.

The Fortaleza Protocol aimed at prevents any illegal conduct between competing firms or individual abuse of dominant position in order to limit competition in the MERCOSUR market.[190] In its implementation, the Fortaleza Protocol faced several challenges to its effectiveness. The first challenge was the lack of competition culture among the member states; some government regulations and corporate leaderships are still not sufficiently aware of competition law culture.[191] The second challenge came from public and private sectors that lack the legal infrastructures to enforce legal

[190] De Araujo Jr and Tineo, above n 182, 454.

[191] Gesner Oliveira, 'Aspects of Competition Policy in MERCOSUR' (2000) (11) *Boletin Latinoamericano de Competencia* 37, 38.

decisions.[192] The third challenge was asymmetries in legal frameworks in the MERCOSUR member states. For example, Paraguay and Uruguay had not yet passed their competition laws; meanwhile, Brazil and Argentina changed their regulations in order to improve their competition laws.[193] Brazil passed its competition law in 1994 and Argentina in 1999.[194]

However, the most important problem facing MERCOSUR's competition policy enforcement is the lack of supranational authority in the community. This has caused serious problems: first, competition law problems related to technical criteria may be decided based on political and diplomatic factors. Second, the decisions of national authorities are replaced by political body of MERCOSUR.[195] However, the member states do realise that the consequences of change the MERCOSUR into a political body it will diminish their domestic jurisdictions. The Fortaleza Protocol does not provide an objective definition for this matter, since it is still under discussion among the member states. The problems above, of course, lead to significant legal uncertainty and competence conflicts within MERCOSUR.[196]

Another step was taken in 2002 continuing the process of the Fortaleza Protocol's development of competition policy harmonisation among the MERCOSUR member states by signing the Agreement for the Regulation on the Application of the Competition Protocol (Regulation).[197] Nevertheless, under the Regulation, some obstacles persisted. Brazil and Paraguay incorporated the Fortaleza Protocol into their competition policy and laws, while Congress in Argentina and Uruguay still suspended the enactment of the law. The enactment of the law in Argentina and Uruguay has encountered problems of political will in both countries in advancing legislative procedures and approving the Fortaleza Protocol.[198] Further, the enforcement of the Fortaleza Protocol and the Regulation may raise conflict, since it depends on the system

[192] Ibid.

[193] Ibid, 40.

[194] Marco Botta, 'The Cooperation between the Competition Authorities of the Developing Countries: Why it does not Work? Case Study on Argentina and Brazil' (2009) 5(2) *Competition Law Review* 153, 153.

[195] Oliveira, above n 191.

[196] Ibid.

[197] Maria Cecília Andrade, 'Competition Law in Mercosur: Recent Developments' (2003) (17) *Boletin Latinoamericano de Competencia* 11, 11.

[198] Ibid, 12.

of negotiations between the member states creating a barrier to the effectiveness of competition law in the community.[199]

3.3.3 CARICOM: Weak National Competition Law Enforcement

The Caribbean Community and Common Market (CARICOM) is one of the oldest regional integration organisations among the developing countries, established by the Treaty of Chaguaramas in 1973.[200] Its primary objective was to promote economic integration through the creation of a common market, to facilitate the free movement of goods, services, capital and people across the region.[201] For CARICOM, a competition law regime was one of the policy instruments designed to advance the creation of market integration in the CARICOM single market and economy.[202] CARICOM has recently formalised a competition system for the member states, existed in the Protocol VIII, which amended the Treaty of Chaguaramas (the Revised Treaty) in 2001.[203] The aims of the CARICOM competition policy are:[204]

a) The promotion and maintenance of competition and enhancement of economic efficiency in production, trade, and commerce;
b) The prohibition of anti-competitive business conduct which prevents, restricts or distorts competition or that constitutes the abuse of a dominant position in the market; and
c) The promotion of consumer welfare and protection of consumer interest.

The Treaty also provides the types of conduct included in anti-competitive activities, as ruled in Article 177 of the Revised Treaty. The rules are as follows:

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[199] Ibid.

[200] Derek O'Brien and Sonia Morano-Foadi, 'The Caribbean Court of Justice and Legal Integration within CARICOM: Some Lessons from the European Community' (2009) 8 *Law and Practice of International Courts and Tribunals* 399, 399.

[201] Ibid.

[202] Allisha Abraham and Taimoon Stewart, 'Competition Issues in Selected Caricom Countries: An Empirical Examination' (Project No. 101650, Sir Arthur Lewis Institution of Social and Economic Studies, 2004) <http://hdl.handle.net/10625/12171> , 13.

[203] CARICOM, 'Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy' (2002) *CARICOM Secretariat, Georgetown, Guyana* .

[204] Caribbean Community (CARICOM) Secretariat, *The Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the Caricom Single Market and Economy Community Including the Caricom Single Market and Economy* (2001) CARICOM Secretariat <http://www.caricom.org/jsp/community/revised_treaty-text.pdf> Chapter VII, Article 169 (2).

a) Anti-competitive agreements between enterprises, decisions by associations of enterprises and concerted practices by enterprises that have as their object or effect the prevention, restriction or distortion of competition within the Community;
b) Actions by which an enterprise abuses its dominant position within the Community; or
c) Any other like conduct by enterprises whose object or effect is to frustrate the benefits expected from the establishment of the CARICOM Single Market and Economy.

The Treaty obliges its member states to enact the rules of competition as provided in Chapter VII. In Article 170(5) of the Revised Treaty, within 24 months of entry into force, the member states should notify the Council for Trade and Economic Development (COTED) of existing legislation, agreements and administrative practices not suitable in relation to Chapter VIII. Further, within 36 months, the COTED shall establish a program of appeal for such regulation and agreements termination and administrative practices.[205] Most importantly, only Trinidad and Tobago has developed a draft competition law to support its extensive liberalisation process, but the law has not yet been fully enacted.[206] Meanwhile, Barbados, Guyana, and Jamaica are already operating their competition laws. The rest of the member states have been slow in the process of implementing legislation due to competition policy and law being seen as second priority, given the severe economic and social problems faced by all member states.[207]

Further, a number of challenges confronted the development of CARICOM's competition policy enforcement. The primary constraint is a lack of skilled personnel to enforce the law using the rule of reason procedure. The CARICOM member states have difficulties developing such expertise due to lack of resources and capacity.[208] Besides, it is also found that CARICOM countries have no substantial provisions prohibiting the

[205] Abraham and Stewart, above n , 23.

[206] Taimoon Stewart, 'Developing and Implementing a Competition Regime: Challenges Faced by Small Open Economies' (2000) (11) *Boletin Latinoamericano de Competencia* 52, 52.

[207] Abraham and Stewart, above n 202. Suriname is in the level of consultation on draft of competition bill. The OECS sub-region is still in the phase of making the draft of competition law, whilst Belize is in the stage of development for implementation.

[208] Taimoon Stewart, 'An Empirical Study on Competition Issues in Selected CARICOM Countries: Towards Policy Formulation' (Sir Arthur Lewis Institute of Social and Economic Studies 2004).

abuse of a dominant market position; this is the primary type of anti-competitive conduct found in most of the member states' economies. While the rule is a difficult provision to enforce, even the Jamaican Fair Trading Commission has had few cases in its ten years of existence.[209] To overcome these problems, CARICOM has developed a model law for competition policy for its member states to use in their national law. However, a meeting is yet to be convened to discuss this model law.

3.3.4 COMESA: Conflict of Competences between the Community and its Members

On 31st October 2000, the Common Market for Eastern and Southern Africa (COMESA) launched an FTA,[210] which has since also formed a customs union in 2008.[211] Since the establishment of the FTA, the absence of tariff and non-tariff barriers among the member states has enhanced the competition process in the COMESA region.[212] However, the lack of adoption of an appropriate competition law and policy by its member states, and the continued protection of vested interests in the CARICOM countries, has tended to have the adverse effect of hindering economic development. The impact has resulted in a lack of innovation, increase in costs of production, slow adjustments and destruction of jobs.[213]

In order to ensure a fair level playing field for economic activities, in December 2004 COMESA adopted a regional competition policy, namely the COMESA Competition

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[209] Ibid.

[210] The Common Market for Eastern and Southern Africa (COMESA) was established in November 1993 in Kampala, Uganda. According to the COMESA (2007), the current members of COMESA are Burundi, Comoros, Congo DR, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. Alemayehu Geda and Haile Kebret, 'Regional Economic Integration in Africa: A Review of Problems and Prospects with a Case Study of COMESA' (2008) 17(3) *Journal of African Economies* 357, 365.

[211] George Lipimile and Elizabeth Gachuiri, 'Allocation of Competencies Between National and Regional Competition Authorities: the Case of COMESA' (2005) *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* 361, 381.

[212] Geda and Kebret, above n 210. Currently, all members, except Angola, Congo, Ethiopia and Swaziland, have achieved a tariff reduction rate of 80–90% on goods originated from member countries. Also see J Musonda, 'Regional Competition Policy for COMESA Countries and Implications for an FTA in 2000' (UNCTAD/ITCD/CLP/Misc.18, UNCTAD, 1999) 108.

[213] George K Lipimile, 'Competition Policy as a Stimulus for Enterprise Development' (UNCTAD/DITC/CLP/2004/1, United Nations Conference on Trade and Development, 2004).

Regulations.[214] The objective of the Regulations is preventing restrictive business practices and other anti-competitive conducts that harm the market efficiency. The Regulations also aimed at improving the welfare of the consumers in the Common Market, and protecting consumers from abuse of market power by firms.[215] The regulations are primarily designed to preserve an unrestrained interaction of competitive forces that will yield enterprise development through efficient levels of investment in discovering new production technologies, new production processes, and new products. The role of competition law and policy was seen to provide strong incentives for achieving enterprise development through: (a) enhancing market access for new investors; (b) protecting the economy from restrictive business practices; and (c) fostering economic efficiency and consumer welfare.[216] The Regulations establish the COMESA Competition Commission, a body responsible for promoting fair competition and enforcing competition law in the region.[217]

The development of the COMESA regional competition policy is derived from the provisions of Article 55 of the Treaty establishing COMESA:

> The Member States agree that any practice, which negates the objective of free and liberalized trade, shall be prohibited. To this end, the Member States agree to prohibit any agreement between undertakings or concerted practice that has as its objective or effect the prevention, restriction or distortion of competition within the Common Market.[218]

The Treaty bestows upon the COMESA member states the obligation to take necessary steps to secure the enactment of the legislation to give effect to the COMESA Treaty. Specifically, the Treaty confers upon the member states the power to enforce the law within its territory to prevent anti-competitive conducts.[219] Therefore, all member states are required to take all appropriate measures to ensure the fulfilment of the obligations

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[214] The COMESA Competition Regulations were adopted by the COMESA Council in December 2004 they were effectively dormant until 14 January 2013, when the COMESA Competition Commission (CCC) issued a notice announcing that it had commenced operations.

[215] Trudi Hartzenberg, 'Competition Policy in Africa' in Christoph Herrmann, Markus Krajewski and Jörg Philipp Terhechte (eds), *European Yearbook of International Economic Law 2013*, European Yearbook of International Economic Law (Springer Berlin Heidelberg, 2013) vol 4, 147, 167-168.

[216] Lipimile, above n 213, 172.

[217] George Lipimile and Elizabeth Gachuiri, 'Allocation of Competencies Between National and Regional Competition Authorities: The Case of COMESA' (No. UNCTAD/DITC/CLP/2005/1, United Nations Conference on Trade and Development (UNCTAD), 2005)211.

[218] COMESA Competition Commission, 'User Guide for Business and Industry on the COMESA Competition Regulations' (COMESA, December 2004), 2.

[219] Ibid.

arising out of the COMESA Competition Regulations, and to abstain from any actions that could jeopardise the attainment of the objectives of the Regulations.[220]

The COMESA Competition Regulations prohibit cross-border anti-competitive practices within the community, and are not merely concerned with conduct within the borders of any one member state.[221] Article 3 of the COMESA Regulations provides the scope of the enforcement, which is in respect of economic activities that has affected the COMESA market, and in particular conduct having an appreciable effect on trade between member states and which restrict competition in the Common Market. It further provides that the COMESA Regulations shall have primary jurisdiction over other regulatory bodies in respect of conduct that falls within its ambit.[222]

However, whereas the intention of Article 3 of the COMESA Regulations is to cover conduct having an effect on trade between member states, conversely, Article 55(1) of the COMESA Treaty proscribes conduct with an effect within the common market. By giving a strict interpretation of both provisions, the Community has obliged the member states to adopt the regional competition law within their national legal systems to combat anti-competitive conduct, hence possibly creating a jurisdictional conflict.[223] The conflict of competences between the Community and the member states becomes the central issue for COMESA.[224] In fact, there is no provision in COMESA for a common competition policy, such that the members are required to cooperate with each other.[225] The clash between community law and the national competition law was caused by misconceptions, legitimate concerns, and controversies that have continued to persist regarding the introduction and enforcement of COMESA competition policy on its member states.[226]

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[220] Ibid.

[221] COMESA Competition Commission, *COMESA Competition Regulations* (November 20, 2012) COMESA <http://www.comesa.int/competition/wp-content/uploads/2014/06/2012_Gazette_Vol_17_Annex_12-COMESA-Competition-Regulations-as-at-December-2004.pdf>, June 5, 2015.

[222] Ibid, Article 3.

[223] Ibid, Article 3.

[224] Lipimile and Gachuiri, above n 211, 364.

[225] Robert Kirk and Matthew Stern, 'The New Southern African Customs Union Agreement' (2005) 28(2) *The World Economy* 169, 178.

[226] Lipimile, above n 213, 174.

This is shown in the COMESA Consultancy Report on the establishment of the Regional Competition Regulation in 2002, which firmly states that the lack of support from the national interest for the enactment of community competition law in domestic jurisdictions clearly affected economic development in COMESA countries:[227]

> The local business communities of most Southern African states do not share the idea that effective competition shall bring about the desired economic development in their respective countries. Results of interviews with businessmen and government officials in different COMESA member states showed that there was the lack of knowledge or understanding of competition law and policy. Many were undecided about whether their governments should divert resources from other scarce priorities to introduce competition law and a competition authority in their country. With some exceptions, such as Kenya, Zambia, and Zimbabwe, citizens were not even convinced that the lack of a regional competition policy constituted an economic problem worthy of their respective government's attention. While countries with national competition legislation were more likely to cite competition law and policy as an important economic tool, those, who lacked the legislation, were less likely to see competition as an important issue. The survey was carried out in the 22 COMESA member states.[228]

While COMESA's process led it to become a union, only six of 19 COMESA members adopted its competition laws, where most of them were introduced in the 1990s.[229] These few member states with national competition laws were quick to realise that domestic competition laws were not sufficient to deal with anti-competitive practices, which were manifested mostly at the regional level. This dilemma in enforcement has been fully acknowledged by all the national competition authorities in the region, namely, Kenya, Zambia and Zimbabwe.[230]

COMESA dealt with conflict in the area of competition, where some members saw that their needs were not adequately taken care of by the regional body. Meanwhile, others claimed exemptions from the application of the Regulations, where those exemptions were granted under the member states' national law.[231] The lack of cooperation between

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[227] Ibid.

[228] Ibid.

[229] Desmond Rudman and Robert Wilson, 'COMESA Competition Law—A New Regional Merger Regime for Eastern and Southern Africa' (2013) 4(4) *Journal of European Competition Law & Practice* 368, 368.

[230] Lipimile and Gachuiri, above n 211, 371.

[231] See Kenya's Competition Law. Section 73 of the Kenyan Competition law states:

community and domestic law in COMESA region upholding the common goals and aspirations under the common market treaty in general and competition regulations in particular.[232] The lack of a single competition policy was implicit in the speech of Ngenda Sipalo, Vice Chairman of the Zambia Competition Commission at the SADC Cooperation Forum, in South Africa in 2001:

> The Commission has handled a number of cross-border cases involving players in the sub-region of Southern Africa and Zimbabwe. The mergers and takeovers were in the Agro-Processing sub-sector, the poultry industry, sugar refining, agrochemicals, beverages and construction and building products industries, among other sectors. International mergers and takeovers have continued to be the greatest challenge of the Zambia Competition Commission due to a lack of information on the competitive behavior of these regional firms and the absence of cooperative arrangement within the region. Positive comity as an instrument of cooperation among competition officials is at a very informal level. The current practice of informal positive comity is not sufficient to effectively regulate the behavior of transnational corporations in the region. There is a need for a regional framework for the regulation of the behavior of regional firms. This framework may take the form of a Regional Cooperation protocol or a forum where matters of anti-competitive conduct and/or cross-border mergers and takeovers that are likely to be anti-competitive would be resolved. The absence of such a mechanism has made it possible for transnational corporations to enter weaker economies of regional states and wiped out competition and abuse their dominance without any action from the competition authorities. The weakness currently is that the jurisdictions of the competition authorities are domestic without any extra-territorial applications.

On 14 January 2013, a new regional competition law regime came into operation across the 19 African countries that constitute COMESA.[233] The new competition regime introduces new supranational merger control, business conduct and consumer protection rules which must now be complied with and which are enforced by the COMESA Competition Commission (CCC) which is based in Lilongwe, Malawi.[234] COMESA follows both monist and dualist member state systems.[235] Under the monist system,

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> Except insofar as exempted from the application of the provisions of this Act by section 5 or any other written law, everybody corporate in which the Government holds one or more shares, whether as sole, majority or minority shareholders, and which is carrying on any trade is a person to whom this Act applies and who may be investigated by the Commissioner…

[232] Lipimile and Gachuiri, above n 211, 365.

[233] As per September 2013, they are only six countries of the COMESA member states that do not currently have domestic competition law regime. These countries are Libya, Eritrea, Djibouti, Uganda, and Democratic Republic of Congo.

[234] Rudman and Wilson, above n 229.

[235] Compare to the EU system which follows the monist and dualist systems but in the same time those systems were limited by direct applicability principle.

national and international legal systems act as one. In a pure monist system, international law does not need to be incorporated into national law, as it is automatically affected. Thus, international law and national law can be directly applied by national courts and enforced by the officers. In contrast, under the dualist system, international law must be first incorporated into national law before the national courts can apply it. In this case, even if the state has signed or ratified a treaty, it cannot be applied until the state has incorporated it into its national law as required by its constitution.[236] Within COMESA, it appears that some of the member states follow dualist systems, such as Swaziland, Zimbabwe and Zambia.[237] This means that the Regulations must be incorporated into national law before they can be applied and enforced by the CCC.[238] Other countries, such as Ethiopia and Kenya, follow the monist system.[239]

The COMESA Treaty provides that the member states must make every effort to achieve and abstain from any measures that are likely to jeopardise the achievement of the aims of the common market or the implementation of the provisions of the Treaty. The implication of this Treaty is if a member state has not taken any necessary step to ensure that the Regulations have the force of law and the necessary legal effect in the member states, that country would be in violation of the COMESA Treaty.[240]

3.3.5 The US: Extraterritorial Jurisdiction Interface

The race between competition law jurisdictions is reflected in the US history of competition policy and law application. In 1890, before the enactment of the Sherman Act, the US faced issues related to the enforcement of national antitrust law in transnational business activity.[241] After the promulgation of the Sherman Act in 1890, the US federalised the common law of restraint of trade, and changed its jurisdiction

[236] Rudman and Wilson, above n 229.

[237] Ibid.

[238] Ibid, at 373.

[239] Ibid.

[240] Ibid.

[241] Eleanor M Fox, 'The Milton Handler Lectures: Antitrust Trade and the 21st Century-Rounding the Circle' (1993) 48 *The Record of the Association of the Bar of the City of New York* , 557-559.

from the state to the federal level.[242] Waller argues that, for this case, the international equivalent of this transformation has yet to occur. Efforts to establish transnational competition law, with the exception of the EU,[243] have ended either in complete failure or dilution into aspirational measures with little content.[244]

The application of US competition law outside its territory raises several questions. How far should the courts of the country go in exercising jurisdiction over conduct abroad? Further, what effects must be felt in that country before exercising extraterritorial jurisdiction doctrine? If these effects continue, what will be the result in the international community? In 1993, the US Supreme Court confronted the extraterritorial application of the statute in the case of *Hartford Fire Insurance Co. v. California*.[245] The case arose from a consolidated antitrust action brought by 19 states and several private plaintiffs against a collection of primary insurance companies, reinsurance companies, insurance underwriters, brokers, and two insurance associations. Some of these defendants were London-based reinsurance companies (the London reinsurers), who were alleged to have conspired with their American co-defendants to restrict the terms and availability of commercial general liability insurance in the US. The London reinsurers argued that their conduct was beyond the jurisdiction of the American courts, so that the principle of international comity prevented the American courts from adjudicating the claim.

The London reinsurance insisted and claimed that the District Court should decline to use such jurisdiction under the principle of international comity.[246] This argument was accepted by the Court of Appeals for consideration that courts should look to that principle in deciding whether to exercise jurisdiction under the Sherman Act.[247] The

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[242] Spencer Waller, 'The Internationalization of Antitrust Enforcement' (1997) 77 *Boston University Law Review* 343, 344.

[243] The EU also recognizes extraterritorial jurisdiction application of national laws only for the states which economically strong because they have the ability to coerce compliance through economic sanctions. See Claus-Dieter Ehlermann, 'The International Dimension of Competition Policy' (1993) 17(4) *Fordham International Law Journal* 833; Daniel Steiner, 'The International Convergence of Competition Laws' (1997) 24 (01/01) *Manitoba Law Journal* 577, 593.

[244] Waller, above n 242.

[245] Kenneth W Dam, 'Extraterritoriality in an Age of Globalization: The Hartford Fire Case' (1993) *The Supreme Court Review* 289, 289.

[246] Robert C Reuland, 'Hartford Fire Insurance Co., Comity, and the Extraterritorial Reach of United States Antitrust Laws' (1994) 29 *Texas International Law Journal* 159, 161-162.

[247] David G Gill, 'Hartford Fire Insurance Co. v. California' (1994) *American Journal of International Law* 109, 110-111.

Court rejected the argument that the conduct of the London reinsurers was beyond the subject matter jurisdiction of the American courts,[248] and that the international comity prevented the US courts from adjudicating the claim.[249] However, the Court failed to address the comity since there was no 'true conflict' in that case.[250]

Justice Souter argues that a bare majority of the Court held that the application of the US antitrust law was proper. Several decisions have been made by the Supreme Court in regard to jurisdictional conflict.[251] In general, the decisions explicitly determined that the District Court should not consider the interests of a foreign state unless there is, in fact, a true conflict between domestic and foreign law. An actual conflict in this case occurs when the law of the foreign state requires a defendant to violate US law, or when compliance with both the legislation of the US and that of the state of the accused is not possible.[252] To overcome such conflicts, the US advocated a system in which there is a possibility of enforcement of national antitrust law as an alternative to international competition law.[253] However, the attempt to substitute international competition law with national competition law resulted in failure, since it depended on the coordination of many political regimes with different laws and attitudes towards competition policy.[254]

Another example case is that of the GE-Honeywell cross-border mergers.[255] There was a conflict between EU and the US when both countries attempted to expand their

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[248] Ibid.

[249] Roger P Alford, 'The Extraterritorial Application of Antitrust Laws: A Postscript on Hartford Fire Insurance Co. v. California' (1993) 34 *Virginia Journal of International Law* 213.

[250] Reuland, above n 246.

[251] Renee Hardt, 'Kodak v. Fuji: A Test Case for the Extraterritorial Application of the Sherman Act' (1997) 15 *Boston University International Law Journal* 309, 323-324. In *Hartford Fire*, nineteen U.S. states and numerous private plaintiffs charged, *inter alia*, certain London reinsurers with conspiracy to coerce primary insurers in the U.S. to offer commercial general liability insurance coverage only if certain changes to the benefit of the reinsurers were made in the insurance forms. The plaintiffs claimed that failure to make these changes would result in a boycott by the reinsurers of those insurance forms and withholding reinsurance coverage from the primary insurers, which violated Section 1 of the Sherman Act.

[252] *Hartford Fire Insurance Co. v. California*, 509 US 764 - Supreme Court 1993, para. 798-799. Also see Reuland, above n 246.

[253] Earl W Kintner, Mark R Joelson and Peter J Vaghi, 'Groping for a Truly International Antitrust Law' (1973) 14 *Virginia Journal of International Law* 75, 86-89.

[254] Waller, above n 242, 345.

[255] Pinar Karacan, 'Differences in Merger Analysis Between the United States and the European Union, Highlighted in the Context of the Boeing/McDonnell Douglas and GE/Honeywell Mergers' (2004) 17 *Transnational Lawyer* 209.

competition laws geographically in the merger of GE-Honeywell.[256] In this case, Kolasky stated, the differences between the EU and the US were too broad.[257] Kolasky was referring to the ideological gap between the competition law authorities of the EU and the US regarding the adverse effects of conglomerate mergers.[258] In May 2001, the US and Canadian competition law authorities approved a merger of General Electric with Honeywell International, valued at $42 billion, after the company agreed to sell military helicopter engine units and let the new company service some of Honeywell's small commercial jet engines.[259] On July 3, 2001 the EU issued a decision and declared that the merger of the two companies created market concentration and was incompatible with the common market and the European Economic Area.[260]

Fundamentally, the principles underlying EU and US antitrust laws are different. In America, it is well settled that antitrust law promotes competition and protects consumers rather than competitors. Mergers are allowed to go forward if the likely effect is that there will be price reduction or increase in the quality of the goods, services and innovation that create welfare for consumers.[261] Under US antitrust law, competitors do not have a cause of action against a merger with reason that it makes the merged firms more efficient, even if they are afraid that they may, as a result of the merger, be forced from the market. On this basis, US and Canada officials concluded that the merger was likely to benefit consumers.[262]

In contrast to US antitrust law, aimed at protecting consumers, EU competition law promotes competition to protect competitors in the market. EU law seeks to prohibit or restrain firms from creating or abusing their dominance in the market at the expense of other competitors in the market.[263] In the EU competition policy system, this allows

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[256] Rivers, above n 126, 534.

[257] William J Kolasky, 'Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels' (2001) 10 *George Mason Law Review* 533, 535-542. The U.S. antitrust authorities view the EU approach to conglomerate mergers as inconsistent with the central tenet of U.S. antitrust policy, that the antitrust laws protect competition, not competitors. By contrast, in its conglomerate merger decisions, the EU prohibits mergers because they will make the merged firm a stronger competitor that may ultimately be able to drive rivals from the market.

[258] Ibid.

[259] Rivers, above n 126, 526.

[260] Ibid. Also see Steiner, above n 243, 593.

[261] Rivers, above n 126, 526.

[262] Ibid.

[263] Ibid, at 527.

competitors to provide information in regards to the impact of the merger on the competitor's ability to compete if the merger is approved by the Commission.[264]

Fox argues that US competition law could trigger other competition laws in a 'race to the bottom' and degrade other countries' laws so as not to disadvantage US business.[265] Fox illustrated this by presenting a scenario from the EU perspective:[266]

> EU abuse of the dominance law is good for society. It maintains the right economic, fairness, and governance values, which are good for Europe and good for the world. However, given the globalization of markets, Europe cannot maintain this system unless the United States adopt it too. Otherwise, European businesses will pay higher costs than the American firms, American firms will out-compete European companies, and investment will gravitate to American shores. Europe might be forced to downgrade its law to the American standard-soulless, short term aggregate efficiency based on assumptions of well-functioning markets. To the extent that Europe stands its ground, the competition, it faces from lower-cost American firms, is unfair competition.

Meanwhile, the EU obliges its member states to adopt into its legal system, being the major bodies of law of the EU, including its competition law. This policy is designed to create common conditions of competition at high standards and to equalise the costs. As explained by the European Commission:

> Another reason for legislating at the Community level has been the need to create and maintain equal conditions for economic operators. Competition could be distorted if undertakings in one part of the Community had to bear much heavier costs than in another and there would be a risk of economic activity migrating to locations where costs were lower. The implementation of high common standards for protection is among the Union's objectives and at the same time helps to ensure this level playing field.

For other countries, such as Canada, the main concern is to ensure that the international competition policy system is not designed to meet only the economic needs of the major powers, global or regional.[267] Accordingly, as befits its traditional trade policy stances,

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[264] Ibid. The EU had two theories of competitive harm. First, it found that the merger would strengthen GE's already dominant position in the market for large jet engines. Second, it found that the merger would enable Honeywell to gain a dominant position in the small engine, avionics, and non-avionics markets in which it competes. See Kolasky, above n 257.

[265] Eleanor M Fox, 'Antitrust and Regulatory Federalism: Races Up, Down, and Sideways' (2000) 75 *New York University Law Review* 1781, 1792.

[266] Ibid.

[267] Allan Fels, 'The Australian System of Competition Law and Its Relationship to International Harmonisation of Competition Laws' in Zhigang Wang et al (eds), *International Harmonization of Competition Laws* (Martinus Nijhoff Publishers, 1995) 355, 355. For Canada effort and enforcement on

Canada seeks multilateral solutions wherever possible and bilateral ones where necessary.[268]The Canadian government has historically taken a restrictive position in applying its competition regime extraterritorially. In fact, Canadian laws have rarely been applied to foreign activities anywhere outside the nation's boundaries, such as in the US.[269] Part of the reason for this is the penal provision under Article 6(2) of the Canadian Criminal Code, which states that 'no person shall be convicted … of an offense committed outside Canada'.

The history of Canadian competition law conflicts began in 1947 in the case of Canadian International Paper.[270] The US proceeded against US and Canadian firms for price fixing and other anti-competitive behaviour.[271] US efforts to obtain evidence from Canada gained public attention and criticism as an intervention in Canada's authority, and were later responded to by the enactment of two pieces of legislation in the Canadian provinces of Ontario and Quebec.[272] Guzman argues that countries having the ability to apply their laws extraterritorially will result in overregulation and inefficiency.[273] He added that:

> If every country applies its laws extraterritorially, each country will have the ability to prevent the transaction … This means that for the transaction to be permitted, being globally efficient is not enough. Hence, it is must improve the welfare of every country. Transactions that increase world welfare but that harm even a single country will be prevented.[274]

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competition policy harmonization see George N. Addy, 'International Harmonization and Enforcement Cooperation: The Canadian Experience' in Zhigang Wang et al (eds), *International Harmonization of Competition Laws* (Martinus Nijhoff Publishers, 1995) 399.

[268] Bruce G Doern and Stephen Wilks (eds), *The Internationalization of Competition Policy*, Comparative competition policy: national institutions in a global market (Oxford University Press, 1996), 309.

[269] Carlos Di Ponio, 'Competition, Cooperation, and Conflict: An Assessment of the Extraterritorial Application and Enforcement of Competition Laws in Canada and the United States' (2005) 13 *Michigan journal of international law* 283, at 288.

[270] *In re Grand Jury Subpoenas Duces Tecum*, 72 F. Supp. 1013 - District Court, SD New York 1947.

[271] Karl M Meessen, 'Antitrust jurisdiction Under Customary International Law' (1984) *American Journal of International Law* 783.

[272] Ibid.

[273] Andrew T Guzman, 'Is International Antitrust Possible' (1998) 73 *New York University law review* 1501, 1510.

[274] Ibid, at 1512-1521.

Extraterritorial regulation in the US[275] has caused grave concern in the EU.[276] EU members declined the extraterritorial jurisdiction application, since it is contrary to international law and US commitments under the WTO rules.[277] Moreover, it violates the doctrine of traditional comity,[278] where one state is supposed to respect the essential interests of another state.[279] EU members argued that the application of extraterritorial jurisdiction may threaten their national interests where implemented.[280]

3.4 Harmonisation of Laws

3.4.1 Effort to Minimise Conflict between Competition Laws

The problems of applying national competition laws in situations where the relevant producers and/or consumers are in other countries have become much greater due to the globalisation of markets.[281] The concept of the globalisation of markets emphasises the connections among national markets that have come about through reductions in barriers to cross-border trade and investments. This leads naturally to consideration of the ways in which domestic markets are connected.[282] The problems of differences in national law and policies in integrated market relations create two types of frictions.[283] On one hand, differences between national law and policies may appear to constitute barriers to transnational business transactions. On the other hand, the differing policies of foreign countries may frustrate individual national interests.

To overcome conflict between the various legal regimes, there are several ways in which this might be mitigated through a process of unification of laws, through uniform

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[275] Sharon E Foster, 'While America Slept: The Harmonization of Competition Laws Based upon the European Union Model' (2001) 15(2) *Emory International Law Review* 467, 488.

[276] Ibid.

[277] Ibid.

[278] Youri Devuyst, 'Transatlantic Competition Relations' in M.A. Pollack and G.C. Shaffer (eds), *Transatlantic governance in the global economy* (Rowman & Littlefield, 2001) 127, 135.

[279] Ibid.

[280] Foster, above n 275.

[281] Peter J Lloyd, 'Multilateral Rules for International Competition Law?' (1998) 21(8) *World Economy* 1129, 1130. G Bruce Doern and Stephen Wilks, *Reconciling Competition Laws and Trade Policies: A New Challenge to International Co-operation*, Comparative competition policy: national institutions in a global market (Clarendon Press, 1996) 269-270.

[282] Lloyd, above n 281, 1130.

[283] Robert Hudec, 'Introduction to Legal Studies' in Jagdish Bhagwati and Robert Hudec (eds), *Fair Trade and Harmonization: Prerequisites for Free Trade?* (MIT Press, 1996) 1-2.

rules that are devised by a supranational authority and adopted by separate states.[284] Alternatively, according to Zamora, differences between legal systems can be mediated by a process of harmonisation.[285] One of the primary functions of harmonisation is to enable transnational trade practices between countries with different systems and jurisdictions, enabling these countries to interact.[286] According to Foster, since the expansion of competition law as the result of global trade law is increasing, so does the potential for conflict.[287] In minimising trade and competition conflicts between nations,[288] it is important to have a common set of rules at the international level in the form of harmonisation.[289]

Another argument advocating this notion is offered by Steiner. He underlines that there is a concern about the aggregate level of system friction arising from different domestic competition policies in an increasingly interdependent global economic order.[290] A converged set of rules may reduce this friction to the minimum level. Steiner gives an example from the mergers area:[291] if companies under different jurisdictions are interested in an international merger, but have different information regarding the legal requirements, the compliance costs for the companies concerned are unnecessarily raised. This may cause an undesirable chilling effect on socially beneficial mergers.[292] Conflict may also arise from diverging conclusions reached by the competition law authorities or courts of different jurisdictions.[293]

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[284] Stephen Zamora, 'NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade' (1995) 12(2) *Arizona Journal of International and Comparative Law* 401, 403.

[285] Ibid. Also see Martin Boodman, 'The Myth of Harmonization of Laws' (1991) 39(4) *The American Journal of Comparative Law* 699.

[286] David W Leebron, 'Lying Down with Procrusters: an Analysis of Harmonization Claims' in Jagdish Bhagwati and Robert Hudec (eds), *Fair Trade and Harmonization: Economic Analysis* (The MIT Press, 1996) vol 1, 41, 52.

[287] Foster, above n 275, 483.

[288] For further discussion regards to the link between trade law and competition law, see Applebaum, above n 1, 409-416.

[289] Foster, above n 275, 483.

[290] Steiner, above n 243, 582.

[291] Ibid.

[292] Ibid; Neil Campbell and Michael J Trebilcock, 'International Merger Review: Problems of Multi-Jurisdictional Conflict' in Erhard Kantzenbach, Hans-Eckart Scharrer and Leonard Waverman (eds), *Competition Policy in an Interdependant World Economy* (Nomos, 1993) 89, 89-126.

[293] Campbell and Trebilcock, above n 292.

Legal harmonisation may reduce these forms of conflict. Setting a common legal system may avoid conflicts of laws and the often severe enforcement of private international law and foreign substantive law. This standard of rule reduces the legal uncertainty associated with international business, generating greater legal predictability and security.[294] Diversity of legal systems among the parties is deemed as the major reason of inefficiency in transnational trade.[295]

3.4.2 Reducing Legal Transaction Costs

There are benefits to be gained from the possibility of harmonisation of competition policy. Rill and Metallo argue that harmonisation aims to reduce transaction costs in international business operations,[296] while another view sees the need for harmonisation to guide emergent markets towards efficiency.[297] Rodick estimates that total transaction costs for advanced countries are about 40% in ad-valorem terms, of which traditional border-type barriers (e.g., tariffs) account only for 5%. The remaining transaction costs may be partly due to different national currencies, but differences in legal systems certainly play a significant role.[298]

Eleanor M. Fox raises a similar argument in regard to competition law harmonisation. She actively favours efforts to harmonise competition policy and law.[299] Regulation differences across countries in standards and conformity increase transaction costs, leading to less trade.[300] The existence of competition policy in an economic community has a number of effects on national competition law enforcement.[301] Such a policy can

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[294] Emanuela Carbonara and Francesco Parisi, 'The Paradox of Legal Harmonization' (2007) 132(3-4) *Public Choice* 367, 369.

[295] Ibid.

[296] James F Rill and Virginia Metallo, 'The Next Step: Convergence of Procedure and Enforcement' (1992) 15 *Fordham Corporate Law Institute* , 31.

[297] Waller, above n 242, 344.

[298] Dani Rodrik, 'Globalization and Growth—Looking In The Wrong Places' (2004) 26(4) *Journal of Policy Modeling* 513, 514.

[299] Eleanor M Fox, 'Toward World Antitrust and Market Access' (1997) *American Journal of International Law* 1.

[300] Dawn D Thilmany and Christopher B Barrett, 'Regulatory Barriers in an Integrating World Food Market' (1997) 19(1) *Review of Agricultural Economics* 91. Harold Demsetz, 'The Cost of Transacting' (1968) *The Quarterly Journal of Economics* 33.

[301] Muhammad Ariff, 'Competition Policy for ASEAN' in H. Soesastro (ed), *Deepening Economic Integration- The ASEAN Economic Community and Beyond* (Economic Research Institute for ASEAN and East Asia, 2007) 135.

be used as an indicator to determine the scope, intensity and quality of enforcement of the national law.[302] At the final stage, the availability of competition policies may also be used as a signal of the priorities of national competition authorities and thus of what kind of cooperation the national authority can expect.[303]

From a similar perspective, Fox proposes some reasons to advocate for harmonisation of law.[304] She emphasises that the harmonisation may address three different problems in reducing transaction costs. The first problem is *externalities*: firms or countries may engage in activities that impose costs on others for which the actor does not have to pay, as occurs in cases of hard-core cartels. If one country's firms have monopoly power in world markets, that country and its firms will have a strong incentive to promote export cartel activity, increasing national wealth at the expense of foreigners.[305]

The second problem harmonisation could address is that of *unnecessary transaction costs*.[306] These transaction costs include the cost of compliance with the law.[307] In cases of mergers, if the same merger is subject to the different laws and procedures among different nations, and if compliance procedures are complicated, transaction costs could be very high. In addition, in the presence of multiple different enforcers, there may be a greater likelihood of error in enjoining pro-competitive transactions, thus increasing the costs of error. Because of the extra costs, some transactions that would have taken place, will not take place.[308] Tarullo also presents a strong argument in regards to the notion of reducing transaction costs. He argues that 'it is certainly conceivable that successive reviews of the same merger by eight or ten different national authorities could delay or even defeat a merger that is substantively unobjectionable.'[309]

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[302] Without competition policy it is impossible to have competition law since competition policy covers the competition law and its enforcement. See Herbert J Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice*, Hornbook Series (West Group, 3rd ed, 2005).

[303] See the cooperation among the NAFTA member states. Kathleen Murtaugh Collins, 'Harmonizing the Antitrust Laws of NAFTA Signatories' (1995) 17 *Loyola of Los Angeles International and Comparative Law Journal* 157

[304] Fox, above n 299, 595.

[305] Ibid.

[306] Ibid.

[307] Huong Ly Luu, 'Regional Harmonization of Competition Law and Policy: An ASEAN Approach' (2012) 2(02) *Asian Journal of International Law* 291, 295.

[308] Fox, above n 299.

[309] Daniel K Tarullo, 'Competition Policy for Global Markers' (1999) 2(3) *Journal of International Economic Law* 445, 449.

The third problem to be resolved is that of *interdependence*.[310] Transactions may be so integrated into international commerce that various national standards no longer make economic and practical sense. Indeed, if any one nation is able to enjoin an entire transnational merger transaction, or requires a given high level of disclosure to trade on a stock exchange, or requires the revelation of trade secrets to continue doing business, the most restrictive national standard will tend to be the international standard, and will have significant transnational effects.[311]

Accordingly, business actors are motivated in favour of a harmonisation process as a way of thinking out and bringing nations towards the best acceptable standard of law.[312] In fact, as pointed out by Sokol,

> [T]he push for cooperation provisions in Preferential Trade Agreements (PTAs) comes from international business, particularly in the areas of merger control and cartel investigation. … International business wants increased agency cooperation to streamline and harmonise procedures and operational matters for mergers.[313]

Thus, in summary, competition authorities want efficient business conduct, while at the same time businesspeople want to minimise the number of agencies they are accountable to.[314]

3.5 Conclusion

This chapter has shown that increased numbers of cross-border economic transactions have enlarged the problem of national competition policy and law within economic communities. The limits of national laws in overcoming trans-border issues and legal barriers among the member states of an economic community have raised several issues in the application of competition law within economic communities. Institutional and

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[310] Fox, above n 299.

[311] Ibid.

[312] D Daniel Sokol, 'Order Without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements' (2008) 83 *Chicago-Kent Law Review* 2007, 276.

[313] Ibid, 276.

[314] Luu, above n 307, 296.

jurisdictional differences constitute serious barriers to globalisation. For that reason, demand for legal harmonisation is very strong.

This chapter has highlighted ways in which harmonisation can help to reduce legal conflicts between member states in a regional economic community. These can be summarised in two key approaches. First, legal systems can unilaterally amend their internal rules and adopt rules that are more frequently observed in other legal systems. Harmonisation of law reduces or potentially eliminates differences between legal systems through the unilateral non-cooperative effort of one system. Second, nations can bilaterally or multilaterally coordinate their efforts by harmonising their legal systems. With harmonisation of law, nations agree on a set of objectives and targets and let each nation amend their internal law to fulfil the chosen objectives.

How can harmonisation of law help increase trans-border trade? A unified legal system avoids the problems of conflict between systems of laws and the often severe application of private international law and foreign substantive law. This reduces the legal uncertainty associated with international business, generating greater legal predictability and security. Moreover, harmonisation minimises the costs of compliance that arise from legal conflict. Unfortunately, to date only the EU has succeeded in achieving harmonisation of law through the supranational authority. Meanwhile, other regional economic communities are still struggling with their efforts to harmonise differences between the member states.

The main reasons why some regional economic communities delay or avoid the process of harmonisation stem from the perception that harmonisation of law is a threat to their national interest. Another obstacle is the problem of legal culture and the effect of the history of a nation on its competition policy and law. The central point regarding this obstacle is that legal differences often stem from different cultures and social preferences. Specific rules are often suited to local traditions and customs, and even if harmonisation enhances foreign trade opportunities, it may impose quite substantial short-run adaptation costs. Accordingly, the chance to harmonise different competition policies and laws among the member states of an economic community cannot be ultimately seen as an uncontroversially positive effort or one that is free of conflict. The increased integration of trade and national laws also creates fault-lines of cultural dissonance.

Chapter 4
Harmonising Competition Policy in Economic Integration: Setting the Indicators

4.1 Introduction

Chapter 3 has examined and analysed the possibility of a competition policy harmonisation framework in a regional economic community. It can be concluded that the need for harmonisation of competition law among different legal systems is due to the notion that legal diversity and uncertainty can cause transaction costs and reduce economic trade and welfare.[1] In turn, diversity could be problematic for efforts to harmonise legal policy in an economic community. Bhagwati argues that diversity could enhance barriers to free trade in an economic community;[2] these types of barriers are categorised as non-tariff barriers.[3] Moreover, diversity will be an obstacle when an economic community applies its law to a national legal system.[4]

In economic integration, legal uncertainty may upset the vertical relations between broader community laws and national legal systems. This uncertainty hinders the uniform application of community law within member states' legal systems, and makes community law ineffective.[5] Legal uncertainty also hinders regional trade and investment integration in an economic community.[6] To avoid such uncertainty, a regional economic community requires harmonisation of policy, and particularly of

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[1] Helmut Wagner, 'Costs of Legal Uncertainty: Is Harmonization of Law a Good Solution?' (Paper presented at the Modern Law for Global Governance. Congress to Celebrate the 40th Annual Session of UNCITRAL, Vienna, 9-12 July 2007) 1.

[2] Jagdish Bhagwati, 'The Demand to Reduce Domestic Diversity among Trading Nations ' in Jagdish Bhagwati and Robert Hudec (eds), *Fair Trade and Harmonization: Prerequisite for Free Trade* (MIT Press, 1996) vol 1, 9, 11.

[3] Helmut Wagner, 'Legal Uncertainty: Is Harmonization of Law the Right Answer?; a Short Overview' (Discussion Paper No. 444, Fernuniv., Fachbereich Wirtschaftswiss., 2009) 1, 1-2. The types of free trade barriers also cover tariff and non-tariff barriers.

[4] Richard Frimpong Oppong, 'Making Regional Economic Community Laws Enforceable in National Legal Systems-Constitutional and Judicial Challenges' in Anton Bösl et al (eds), *Monitoring Regional Integration in Southern Africa* (Yearbook, 2008) vol 8, 149, 149.

[5] Ibid.

[6] Laura Jarnagin, *MERCOSUR Economic Integration: Lessons for ASEAN* (Institute of Southeast Asian Studies, 2009) 56-57.

competition policy. Avoiding legal uncertainty is not the only reason for harmonisation; the main economic benefit of harmonisation is its accompanying reduction in transaction costs, which facilitates market integration, exchange of goods and services, and economic growth.[7]

Policy harmonisation is an old concept in international trade cooperation. In fact, it has a long tradition of political debate in world trade history.[8] In this diffuse picture of the diversity of competition policy, it is difficult to discern an appropriate framework for trade agreements. At its foundation, policy harmonisation is a response to the problems arising from asymmetric regulation among nations.[9] In general, competition policy harmonisation refers to setting a common standard of rules in order to enhance cooperation and enforcement. Despite the frequent use of the concept, specific indicators for the harmonisation of competition policy are still unclear.

A successful case of harmonisation, such as that of the EU, does not mean it is free from criticism when encountering competition policy in an economic community. Some commentators have frequently criticised the economic community approach to harmonisation. In particular, questions are often raised concerning the legitimacy of the economic community institution in adopting legal instruments that affect national law. Further, it is to be believed that harmonisation has potential to harm the original law of the member states. The fear of applying foreign law in domestic legal systems creates a dilemma for national authorities regarding giving away their sovereignty to regional powers. Therefore, lack of political support is one factor that makes harmonisation difficult.[10]

Section 4.2 analyses the legal status and personality of regional economic communities This legal relationship justifies the legal status of an economic community to its

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[7] Nuno Garoupa, 'An Economic Analysis of Legal Harmonization: the Case of Law Enforcement within the European Union' in Thomas Eger and Hans-Bernd Schafer (eds), *Research Handbook on the Economics of European Union Law* (Edward Egar Publishing, 2012) 279, 281.

[8] Kim Them Do, 'Bad Problem Getting Worse: Regional Trade Agreements and the Future of the Multilateral Framework on Competition Policy and Law' (2011) *Available at SSRN 1836444* , 355.

[9] Giandomenico Majone, 'Policy Harmonization: Limits and Alternatives' (2014) 16(1) *Journal of Comparative Policy Analysis: Research and Practice* 4, 4.

[10] OECD Global Forum on Competition, 'Challenges/Obstacles Faced By Competition Authorities In Achieving Greater Economic Development Through The Promotion Of Competition' (CCNM/GF/COMP(2003)6, OECD, 12-13 February 2004)

member states. This section continues on to describe the relationship between a regional economic community and its member states, the status of the relationship, and also the legal consequences of the relationship. Section 4.3 describes how to integrate community law into domestic law. In this section, the author examines the parallel relationship between regional law and national law. This section describes the possibility of applying community laws using direct effect and direct applicability, and the consequences of doing so.

This chapter also conceptualises policy harmonisation based on the above concerns. The resulting conceptualisation offers several criteria that form indicators for harmonisation. These indicators have been drawn from the experiences of several regional economic communities (see Chapter 3). From those experiences and cases, the author identified and classified the following five indicators: (1) supranational law, (2) supranational institutions, (3) competition law culture, (4) level of competition law development, and (5) economic stage of development. Finally, this chapter demonstrates that harmonisation of competition policy within an economically integrated region occurs when these five indicators are present. Without the presence of these indicators in hand, it is very difficult to achieve the main purpose of an economic community: to enhance economic growth in a region.

4.2 Economic Community Status and Personality

4.2.1 The Legal Personality of an Economic Community

International legal personality enables a community to communicate and operate with other international actors.[11] According to the will theory, an international organisation may have legal personality if its founders intend to endow their creation with it. Some international organisations, such as International Criminal Court, asserted their legal personality within their constitutive documents.[12] As stated in Article 4 of the Rome Statute of the International Criminal Court:

[11] P Kenneth Kiplagat, 'An Institutional and Structural Model for Successful Economic Integration in Developing Countries' (1994) 29 *Texas International Law Journal* 39.

[12] Simon Chesterman, 'Does ASEAN Exist: The Association of Southeast Asian Nations as an International Legal Person' (2008) 12 *Singapore Year Book of International Law* 199, 202.

> The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.[13]

Another theory that supports the legal personality of international organisations is the objective theory.[14] The objective theory suggests that legal personality can be deduced, not from the will of the founders, but from the possession of certain attributes by the organisation itself. In this way, the objective theory reaches further than the will theory. With international legal personality, international organisations such as the United Nations (UN) are able to initiate proceedings under international law against a state. Similarly, with international legal personality, the EU is capable of concluding treaties or performing other international legal acts.[15] The objective of the legal personality concept is to create a separation between those actors that are included in a legal system and those that are not.[16] Actors can only perform legal acts if they possess personality as granted or at least recognised and accepted by the particular legal system in which they wish to act.[17] Nevertheless, the statement leads to a common sense: an international organisation must have legal capacity and personality.

International law accepts that legal personality can also be implicitly conferred by an international organisation.[18] The legal argument for this is an advisory opinion concerning the UN issued by the International Court of Justice (ICJ) in 1949.[19] The ICJ, in the case of *Reparation for Injuries*,[20] accepted that international organisations may possess international legal personality.[21] The milestone judgment of the ICJ on

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[13] International Criminal Court, *Rome Statute of the International Criminal Court* (1998) International Criminal Court <http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf> May 20, 2015.

[14] Chesterman, above n 12.

[15] Jan Klabbers, 'Legal Personality: The Concept of Legal Personality' (2005) 11 *Ius Gentium* 35, 36.

[16] Roland Portmann, *Legal personality in International Law* (Cambridge University Press, 2010), 5.

[17] Klabbers, above n 15.

[18] Ibid.

[19] United Nations, *Reparation for Injuries Suffered in the Service of the United Nations: Advisory Opinion of 11 April 1949* United Nations <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&case=4&p3=4>, at 179. In the opinion of the Court, the rights and duties of an international entity such as the international organization depend on its purposes and functions as specified or implied in its constituent documents and developed in practice. Also see Yuen-Li Liang, 'Reparation for Injuries Suffered in the Service of the United Nations' (1949) *American Journal of International Law* 460.

[20] Nations, above n 19.

[21] Ibid.

international legal personality arose in 1948, when Zionist militants killed a UN mediator in Jerusalem.[22] Discussions ensued in the General Assembly on whether the UN had the capacity to bring an international claim against Israel for reparation covering the damage caused to the victim. An advisory opinion on this issue was requested from the ICJ, which considered whether the UN was a legal person under international law.[23] The ICJ found it necessary to approach the case by analysing whether or not the UN had international legal personality, thereby strongly suggesting that without such personality it would have been possible to bring a claim.[24] Indeed, the court questioned:

> … [H]as the Organization such a nature as involves the capacity to bring an international claim? In order to answer this question, the Court must first enquire whether the Charter has given the Organization such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect. In other words, does the Organization possess international personality?[25]

The status of the UN had likewise never been determined; a related provision in the UN Charter stated that the UN has legal capacity.[26] The ICJ stated that:

> The Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is 'a super-State', whatever that expression may mean … Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice. [27]

This approach is amplified in the relevant decision by the European Court of Justice (ECJ) in the European Road Transport Agreement (ERTA).[28] The decision at issue was whether the EC had the power to conclude a treaty with Switzerland on road transportation, or whether the power to conclude such agreements still rested with the

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[22] Quincy Wright, 'The Jural Personality of the United Nations' (1949) *American Journal of International Law* 509, 510.

[23] Leland Matthew Goodrich, Anne Patricia Simons and Edvard Isak Hambro, *Charter of the United Nations: Commentary and Documents. 3d and Rev. ed* (Columbia University Press, 1969) 619.

[24] Klabbers, above n 15.

[25] Nations, above n 19.

[26] Wright, above n 22.

[27] Nations, above n 19 179.

[28] Klabbers, above n 15, 53. *In Re European Road Transport Agreement [ERTA]*, 1971 E.C.R. 263 (1971).

member states.[29] As did the ICJ in *Reparation for Injuries*, so did the ECJ in ERTA;[30] ECJ found that there were no specific provisions in the EC Treaty, creating an external treaty-making power in the field of transport. The Treaty drafters had empowered the EC with internal powers, but had not added any external powers.[31] The ECJ indicated that if the Treaty had granted only external powers, it would not have begun to enquire about personality. In turn, it raises the possibility that personality does not constitute a threshold for acting in a legally recognisable manner.[32]

The EC Treaty contains two articles relevant to the legal capacity of the Community to enter into international agreements.[33] These articles are Article 210 (now Article 218), which gives the Community legal personality, and Article 228 (now Article 300), which provides the procedure for the conclusion of international agreements by the Community. However, the Treaty only provides two articles giving the Community external power to enter into international agreements: Article 113 (now Article 133), concerning trade agreements, and Article 238 (now Article 310), concerning association agreements.[34] Conflict arises when the external power opposes the internal power of the EC. As a result of this divergence regarding the EC's capacity, the Court of Justice accepted that the EC has more power than is literally mentioned in the EC Treaty.

The ECJ accepted that the EC has the power to enter into agreements with third countries. The EC's capacity not limited to that given to it in the EC Treaty, but also comes from outside it.[35] The Court interpreted the phrase in what used to be Article 210 (now Article 281) of the EC Treaty that 'the Community shall have legal personality' to refer to international personality.[36] From both cases above it is heuristically suggested

[29] Ibid.

[30] Ibid.

[31] Ibid.

[32] Ibid.

[33] Peter E Herzog, 'Treaty-Making Power of the European Community Thirty Years (Approximately) After the ERTA Case-and Where Does this Leave the United States' (2003) 30 *Syracuse Journal of International Law and Commerce* 205, 208.

[34] Ibid.

[35] Ibid, at 206-208.

[36] Ibid.

that legal personality precedes action. Therefore, it might be interpreted that without personality, no legal action would be possible.[37]

International law scholars have approached the legal personality of international organisations in four ways.[38] First, the *inductive approach* examines the evidence surrounding the organisation's formation to determine the intent of the founding states.[39] Under this approach, an organisation's legal personality depends on the express or implied will of the founding states, as expressed in the constituent instrument. Second, the *objective approach* does not preoccupy itself with the instruments creating the organisation, but rather applies prescribed international criteria to the organisation and determines whether the organisation has complied with these international requirements.[40] Third, the *formal approach* cautions that it is a mistake to jump to the conclusion that an organisation has a personality, and to deduce specific capacities from the concept of personality. Fourth, the *material approach* holds that certain rights and duties emanate from the very concept of the personality of international organisations, regardless of the instruments creating them.[41]

Chiu, in his research, showed that the treaty-making power of international organisations has been admitted.[42] This conclusion is also advocated by Dupuy in his study on state and international organisation.[43] Different perspectives are provided in Article 6 of the Vienna Convention on the Law of Treaties between States and International Organisations or International Organisations, 1986; it places limitations on the extent to which an international organisation has the power to make treaties.[44] The Article stresses that the limit of an international organisation's capacity to conclude treaties is governed by the rules of that organisation.

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[37] Bryant Smith, 'Legal Personality' (1928) 37(3) *Yale Law Journal* 283, 283.

[38] Kiplagat, above n 11.

[39] Manuel Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations' (1970) 44 *British Yearbook of International Law* 111, 112.

[40] Ibid.

[41] Kiplagat, above n 11, 47.

[42] H. Chiu, *The Capacity of International Organizations to Conclude Treaties, and the Special Legal Aspects of the Treaties So Concluded* (M. Nijhoff, 1966) 46.

[43] René Jean Dupuy, 'The State and International Organization' in René Jean Dupuy (ed), *A Handbook on International Organizations* (Martinus Nijhoff Publishers, 1998) vol 87, 13.

[44] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations Done at Vienna on 21 March 1986.

With regard to the legal personality of an economic community as an international organisation, the perspectives above suggest a clear position: an economic community possesses capacity to conclude treaties where the capacity to conclude treaties is derived from international law. However, this capacity depends on the constitution of the community.[45] It is clear that international organisations have the legal capacity to perform any international act, as states do, unless their constituent instruments impose limitations.[46] If the constitution of the organisation does not provide any regulation the matters with which the organisation can rule, then it has power to apply the regulation. Similarly, if the constitution does not provide certain types of conducts or exhaustively enumerate the acts that the organisation must perform, then it freely to perform any acts.[47]

As mentioned earlier, in order to have legal relations with non-member states or international organisations, the community must be able to enter into diplomatic relations.[48] However, this legal capacity should be distinguished from a legal status of the community. Legal status indicates the status of the community, while legal capacity is the extension of the status. Lasok argued that both elements are significant to the conflict of laws.[49] Ian Brownlie developed a three-part test summarising the majority views on legal personality.[50] In this test, an international organisation must possess the following characteristics:

> (1) a permanent association of states with lawful objects, equipped with organs;
>
> (2) a distinction in terms or legal power and purposes, between the organisation and its members; and
>
> (3) the existence of legal powers exercisable on the international plane and not only within the national systems or one or more countries.[51]

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[45] PR Menon, 'The Legal Personality of International Organizations' (1992) 4 *Sri Lanka Journal of International Law* 79, 86-87.

[46] Finn Seyersted, 'Is the International Personality of Intergovernmental Organizations Valid vis-a-vis Non-Members?' (1964) 4 *Indian Journal of International Law* 233, 255.

[47] Ibid.

[48] Dominik Lasok and Peter A Stone, *Conflict of Laws in the European Community* (Professional books, 1987) 9.

[49] Ibid, at 8.

[50] Ian Brownlie and Kathleen Baker, *Principles of Public International Law* (Clarendon Press Oxford, 1973) 57.

[51] Chesterman, above n 12.

In Southeast Asia, as in the EU, there is no doubt that ASEAN is a product of international law.[52] If analysed based on Brownlie's characteristics, ASEAN is an international organisation, but with limited legal personality. Since the signing of ASEAN Charter in 2008,[53] ASEAN was certainly a permanent association of states with lawful objects, and equipped with at least rudimentary organs. Secondly, in terms or legal powers and purposes, there is no separation between the organisation and its member states. It is mentioned in the Bangkok Declaration that ASEAN countries share some goals. However, in the economic sphere, ASEAN has a competence distinct from that of its member states. An example is found in the signing of the Framework for Enhancing ASEAN Economic Cooperation, which provides a legal basis for trade liberalisation and industrial cooperation.[54]

Whether ASEAN possesses legal powers over its member states is a crucial issue. Some agreements signed by ASEAN were ratified by the member states in their individual capacities.[55] This means that the legal binding of the ASEAN agreement depends on the will of its member states. Regardless of the possibility that ASEAN has marked the Charter in 2008 as legally binding, the scepticism of it continues to be appeared in the future. A media release stated that the points of interest regarding what ASEAN can or cannot do with its legal personality will be examined and stated in a supplementary protocol after the signing of the ASEAN Charter.[56]

4.2.2 The Legal Relationship between an Economic Community and its Member States

The legal relationship between a community and its member states is evidently a complex one, and one at risk of being over-schematised. Dashwood perceives that a community only has those powers that have been conferred on it; this is known as the

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[52] Donald K Emmerson, 'ASEAN as an International Regime' (1987) 41(1) *Journal of International Affairs* 1.

[53] ASEAN, *The ASEAN Charter* (2007) ASEAN <http://www.asean.org/archive/publications/ASEAN-Charter.pdf>

[54] Chesterman, above n 12, 205.

[55] For example: the 2000 Memoranda of Understanding (MoU) with Australia on Haze and a 2002 MoU with China on Agricultural Cooperation.

[56] Chesterman, above n 12.

conferral principle,[57] based on power delegation and division of functions.[58] The power flows from member states to the community that they have created. In this regard, power is attributed, since it cannot be claimed by virtue of the existence of the community alone.[59] The conferral principle underlying the legal relationship between a community and its member states provides that a community shall act within the limits of the competence conferred upon it by the member states in the constitution to attain the objectives set out therein. Competences not conferred upon the community in its constitution remain with its member states.[60]

The common policy of an economic community is the essence of multinational integration, based on common legislation.[61] The core concept of a common policy is its binding force on the member states inherently. The latter must give the community's institutions the legal means to implement common policies and to enforce their decisions on all the parties concerned and on their citizens. In the end, common policies are shaped by legal acts agreed upon by the community's institutions, implemented by the member states and/or the common institutions and controlled by the common institutions. The national laws of the member states are harmonised in a great number of fields in the context of common policies.[62]

4.2.3 The Legal System of an Economic Community

Hart describes the legal system as a unity of primary and secondary rules. The latter consists of the rules of recognition, the rules of adjudication, and the rules of change.[63] The main idea of Hart's legal system lies in the rules of recognition.[64] The function of rules of recognition is to help to identify other rules that are part of the legal system's

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[57] Alan Dashwood, 'The Relationship between the Member States and the European Union/European Community' (2004) 41(2) *Common Market Law Review* 355.

[58] Lasok and Stone, above n 48, 7.

[59] Ibid.

[60] Dashwood, above n 57, 357.

[61] Nicolas Moussis, *Access to European Union: Law, Economics, Policies* (European Study Service, 2006).

[62] Ibid.

[63] Herbert Lionel Adolphus Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 100-117.

[64] David Palmeter, 'The WTO as a Legal System' (2000) 24 *Fordham International Law Journal* 444, 449.

set of norms. It also accepts and uses for the identification of primary rules of obligation.[65] They are also used to determine what rules are valid within a legal system where this will differ from system to system.[66]

John Austin underlines that a legal system must contain a determinate human superior, a sovereign who will issue commands to his subjects.[67] Meanwhile, Hans Kelsen proposes that a legal system exists only if it reaches a certain minimum degree of efficacy.[68] He emphasises that such a system consists of a set of hierarchical norms that relies on a *ground norm* that is the ultimate source of authority.[69] The existence of this authority is not sufficient, but its absence is also dangerous. To exist, the subject of a legal system must adhere to its rules.[70] Occasional infractions of specific rules do not necessarily negate the existence of the entire legal system.[71]

Four elements are necessary to consider for the existence of a legal system.[72] First, rules of conduct must be present. Within a state, the existence of rules and rule-making institutions is an essential component of the legal system or legal order,[73] while a community consists of several institutions that together create a single legal system.[74] Second, there must be entities to which the rules apply: these are the subjects of the legal system. The legal system confers benefits and imposes burdens on the subjects.

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[65] Ibid, at 448.

[66] Ibid.

[67] Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (Oxford : Clarendon Press; New York : Oxford University Press 2nd ed, 1980) 5.

[68] Ibid, 93-95. The efficacy of a system is a function of the efficacy of its laws. The efficacy of norm can be manifested in two ways: (a) by the obedience pf those on whom a duty is imposed by that norm; (b) by the application of the sanction permitted by the norm.

[69] Hans Kelsen, *Pure Theory of Law* (University of California Press, Reprint ed, 1967) 222.

[70] Ibid.

[71] Hans Kelsen, 'The Pure Theory of Law' (1935) 51 *Law Quarterly Review* 517, 520.

[72] Donald M McRae, 'Sovereignty and the International Legal Order' (1971) 10 *Western Ontario Law Review* 56, 67.

[73] Richard Frimpong Oppong, 'Observing the Legal System of the Community: The Relationship Between Community and National Legal Systems Under the African Economic Community Treaty' (2006) 15 *Tulane Journal of International and Comparative Law* 41.

[74] Lesson learned from the African Economic Communities and EU. See ibid, at 51; Karen J Alter, 'The European Union's Legal System and Domestic Policy: Spillover or Backlash?' (2000) 54(03) *International Organization* 489, 489-490; Armin Von Bogdandy, 'The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System' (1999) 36(5) *Common Market Law Review* 887, 887-889.

Third, there must be authority to identify the rules that constitute the legal system. The final element is the obligation to obey the norms of the legal system.[75]

The legal system is deemed one of the important institutions in a society. The legal system is where institutions are understood via both formal and informal mechanisms.[76] Its task is to control human interaction under some structure;[77] in this way, these institutions shape restrictions on individual behaviour so that negotiation and coordination costs are reduced.[78] These institutions are thus 'institutionalised' and defined as the legal system of the country or union.

In recent decades, considerable attention has been paid to the economic community and its institutions. The stability of these institutions brings stability to the economy, and eventually welfare to the community.[79] However, these elements do not comprise what is called a legal system. The obligation to obey the laws of the system depends on cooperation and compromise among the sovereign states of the international organisation.[80] Cooperation is assumed to be an effective way of eliciting compliance with the legal system; this is important in attempting to apply the model of the legal system of international organisations to institutions consisting of sovereign states such as a regional economic community.[81]

4.3 Integrating Community Law into a National Legal System

4.3.1 Parallel Applications of Community Law to National Law: Relationships between Two Independent Legal Systems

[75] McRae, above n 72.

[76] Douglass C North, 'Economic Performance through Time' (1994) 84(3) *The American Economic Review* 359, 360.

[77] Helmut Wagner, 'Economic Analysis of Cross-Border Legal Uncertainty: The Example of the European Union' (Discussion Paper No. 371, Fachbereich Wirtschaftswiss., FernUniv., 2004) 4-5.

[78] North, above n 76, 360-368.

[79] Wagner, above n 5.

[80] Oppong, above n 73.

[81] Ibid, at 50.

The relationship between community law and national legal systems is marked by the international legal principles and federal law of many federations.[82] However, the international legal order has no judicial system, and can only be applied in the national judicial system through precedent.[83] The relationship between community and domestic competition law is clearly expressed in the case of the EU and its member states. The EU implemented common competition policies across its member states, governed by the principle of subsidiarity. This requires the community to take action only if the member states cannot sufficiently achieve the objectives of the proposed action.[84] In European law doctrine, the development of precedent has received less consideration as a major standard of EU law; [85] however, recently, this role of precedent in the EU legal order has been examined. The constitution of the EU legal order established a decentralised system of application that has been functioning for several decades.[86] This development led to a combination of European law and member states' laws. Given the interaction between the Court and national courts through the preliminary reference procedure, this has often resulted in dynamic European case law.[87]

In EU law, the implementation of community law across national laws has been enforced by two types of procedures: legal implementation and final implementation.[88] Legal implementation means the incorporation of EU legislation into domestic law, while final implementation refers to administrative operations at the practical level: for

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[82] Henry G Schermers, 'Other Courts Applying Community Law' in Henry G. Schemers and Denis F. Waelbroeck (eds), *Judicial Protection in the European Communities* (Springer, 1983) 344, 345.

[83] Ibid.

[84] Barry E Hawk and Laraine L Laudati, 'Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: A Comparison' (1996) 20 *Fordham International Law Journal* 18, 18.

[85] Lionel Neville Brown, Francis Geoffrey Jacobs and Tom Kennedy, *The Court of Justice of the European Communities* (Sweet & Maxwell, 2nd ed, 1983) 276-285.

[86] Ibid.

[87] Herman Van Harten, 'The Application of Community Precedent and Acte Clair by the Hoge Raad: A Case Study in the Field of Establishment and Services' in D. Obradovic and N. Lavranos (eds), *Interface between EU Law and National Law* (Europa Law Publishing, 2007) 1. Also see the paper version Herman Van Harten, 'The Application of Community Precedent and Acte Clair by the Hoge Raad: A Case Study in the Field of Establishment and Services' in Daniela Obradovic and Nikos Lavranos (eds), *The Interface betwen EU Law and National Law* (Europa Law Publishing, 2007) 3893; available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113729.

[88] Basically, EU using direct effect to implement the community law to national laws of its member. Under the EU law, direct effect has function as a sword. The term refers to a process whereby international rights or obligations pierce the shield of the national legal order. It allows for the exercise of judicial power to apply international law in the national legal order, where without direct effect it would not be possible. André Nollkaemper, 'The Duality of Direct Effect of International Law' (2014) 25(1) *European Journal of International Law* 105, 112.

example, the application of EU law.[89] The EU Commission has been obliged to monitor the application and legal implementation of community laws in the member states. The Commission has published an annual report on this implementation process for each member state.[90] Regarding the enforcement of EU competition law, the EU has experienced three phases: the decentralisation process, harmonisation and modernisation.[91]

Between 1980 and 2004, [92] the EU applied three types of enforcement for the application of competition policy and law as part of the decentralisation process. The first of these approaches to decentralisation meant that the EU Commission began to consider the need to involve national courts and national authorities.[93] Several factors contributed to this decision: primarily, it was apparent that the EU Commission was unable to meet its responsibilities under the regime due to a lack of resources, financial and political support.[94] In 1993, the Commission issued guidance in the form of a Notice Concerning Cooperation between the Commission and Courts of the Member States with Regards to the Application of Articles 85 and 86 (Notice).[95] The 1993 Notice clarified the role of national courts by providing procedural guidance for the courts to follow in handling the application of EU competition law. It provides specific rules that the domestic courts should consider when deciding cases and the steps they should take.[96]

The second approach to decentralisation was the application of EU competition law by national competition authorities.[97] The member states authorities obliged to apply

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[89] Risto Lampinen and Petri Uusikylä, 'Implementation deficit—why member states do not comply with EU directives?' (1998) 21(3) *Scandinavian Political Studies* 231, 233.

[90] Ibid.

[91] Maher M Dabbah, *International and Comparative Competition Law* (Cambridge University Press, 2010) 177. David J Gerber, 'Two Forms of Modernization in European Competition Law' (2008) 31 *Fordham International Law Journal* , 1235-1236. Gerber discusses two kinds of modernisation in Europe: procedural and substantive modernisation.

[92] Dabbah, above n 91, 177.

[93] Barry J Rodger and Stuart R. Wylie, 'Taking the Community Interest Line: Decentralisation and Subsidiarity in Competition Law Enforcement' (1997) 18(8) *European Competition Law Review* 485, 487.

[94] Dabbah, above n 91.

[95] Regulation Council, 'Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC' (2004) *Official Journal C 101* 54 .

[96] Dabbah, above n 91, 183.

[97] Hawk and Laudati, above n 84, 32.

Articles 101 and 102 of the Treaty completely, to guarantee the enforcement of competition law.[98] For years, the EU member states have had no interest in this type of enforcement. Several reasons may explain this lack of enthusiasm. National authorities have largely showed little interest in enforcing EU competition law in their domestic competition law. Further, some of the member states had very limited resources and experience in enforcing competition law; for example, Italy did not have competition law regime at that time.[99] In 1996, the Commission issued another Notice on Cooperation between Commission and National Competition Authorities in Handling Cases Falling within the Scope of Article 85 and 86 TFEU.[100] The 1996 Notice referred to the principle of subsidiarity—which allocates competence between the EU and national levels—as a justification for increased transfer of competence to national competition authorities.[101]

The third type of decentralisation involves a national competition authority applying the member states competition laws.[102] This approach is more solid contrasted with alternatives where the national authorities apply their competition laws as they react to the values of the subsidiarity principle.[103] The values embodied in the principle reduce the centralisation of power at the EU level and increase the power of member states to protect competition.[104] Moreover, applying domestic competition law by national authorities may avoid the difficulties that might arise when the EU Commission and one or more national competition authorities apply EU competition laws.[105]

The second phase of the EU process of applying its community law to domestic law is that of harmonisation.[106] The stage of integrating EU competition law into member states' national laws through harmonisation characterises the pre-modernisation phase

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[98] European Commission, *Antitrust Overview* (November 21, 2014) European Commission <http://ec.europa.eu/competition/antitrust/overview_en.html> June 8, 2015.

[99] Dabbah, above n 91, 184.

[100] The 1996 Notice is no longer valid and has been replaced by the current Notice: the European Competition Network Notice.

[101] Dabbah, above n 91.

[102] Hawk and Laudati, above n 84, 33.

[103] Rodger and Wylie, above n 93, 487.

[104] Hawk and Laudati, above n 84, 35.

[105] Dabbah, above n 91, at 186.

[106] Ibid, at 187.

of 1962–2004.[107] Harmonisation occurred in two different fields. The first is through substantive law, or textual harmonisation,[108] as provided in Articles 101 and 102 TFEU. The second is procedural and institutional harmonisation.[109] However, significant differences in legal procedure remain between EU competition law and the competition law regimes of some member states. Meanwhile, general patterns of change at the institutional level in national competition law regimes have shown a move towards more judicial characteristics.[110] National competition law regimes are increasingly altered by adopting judicial roles that involve interpretation, application and enforcement of national competition law regulations. Changes in the competition law regimes of member states may be interpreted to mean that there is greater independence from political influence.[111]

In contrast, a study by Lampinen and Uusikylä found that the implementation of EU law in the member states had not been completely effective.[112] Although the member states have made significant efforts to improve implementation, this ineffectiveness remains a serious problem.[113] The Commission has considered unimplemented directives the main obstacle to efficient enforcement of Community Law.[114] Denmark has clearly been the most successful country in implementing EU law. Italy, Greece, Portugal and Belgium are among the countries with less effective implementations of EU law.[115]

Failure in the implementation of community law depends on several factors. Lampinen and Uusikylä argue that two factors contribute to this failure of enforcement. First, there is the willingness to implement, which implies a stable political culture in the member state, high support for the community itself, and the capability to implement. The latest is including the role of interest groups in the states and the overall political system or

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[107] Ibid.

[108] Toshiaki Takigawa, 'Harmonization of Competition Laws after Doha Substantive and Procedural Harmonization' (2002) 36(6) *Journal of World Trade* 1111, 1112-1113.

[109] For procedural harmonization see Konstantinos D Kerameus, 'Procedural Harmonization in Europe' (1995) 43(3) *The American Journal of Comparative Law* 401, 401-416. Dabbah, above n 91.

[110] Dabbah, above n 91.

[111] Ibid, 189.

[112] Lampinen and Uusikylä, above n 89.

[113] Ibid, at 233.

[114] Ibid.

[115] Ibid.

political institution setting in the member states.[116] In this case, therefore, the effectiveness of harmonising community law with member states' national law cannot be separated from the political will of the member states to follow the agreed consensus. It also cannot be separated from the national interest of the member states.

In 1999, to avoid such failure, the EU Commission introduced the White Paper on the Modernisation of the Rules Implementing Article 85 EC.[117] Modernisation efforts appeared as a response to the regulatory inefficiencies and the burdens that competition law enforcement had imposed.[118] The White Paper presented a fundamental rethink by the EU Commission on the EU competition law regime, on the basis that recent competition policies were no longer appropriate for the community of the day.[119] The White Paper offers some revisions that including the reform of the block exemptions, the introduction of new merger control regulation and institutional reforms.[120] The modernisation of EU competition law refers to the Regulation 1/2003 (new Regulation). It is replaced the Regulation 17/62 on the application of Articles 81 and 82 of the EC Treaty were comprised of six notices issued by the EU Commission.[121]

The core components of the EU Commission's modernisation program consisted of abolishing the antiquated notification system, relinquishing the exemption monopoly, pre-empting national law, and introducing the importance of interstate commerce requirements.[122] In the application of the program, EU established a legal system *sui generis* that was completely separated from those of the member states. The EU member states retained the power to maintain their national laws applicable to competition among private firms.[123] The EU established a unique system based on the concurrent jurisdictions of national authorities to facilitate the enforcement of EU

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[116] Ibid.

[117] Dabbah, above n 91. Also see The White Paper on the Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, signed in Brussels, April 28, 1999.

[118] Andre Fiebig, 'Modernization of European Competition Law as a Form of Convergence' (2005) 19 *Temple International & Comparative Law Journal* 63, 64.

[119] Recently, EU consists of 15 member states, with 11 different languages, and over 350 million people.

[120] Fiebig, above n 118, 67-68.

[121] Katie J Cseres, 'The Impact of Regulation 1/2003 in the New Member States' (2010) 6(2) *Competition Law Review* 145.

[122] Fiebig, above n 118.

[123] Ibid, at 75.

competition law.[124] With respect to national competition authorities, the White Paper essentially provides three devices.[125] The first is a simple information requirement: domestic competition law authorities should be obliged to inform the Commission of all cases in which Article 81 (Article 101 TFEU) apply.[126] The EU Commission believes that this information exchange, together with any correspondence that may take place with the national authorities, ensures the consistency of competition policy. It can be preserved to impose solutions to conflicts in the application of the Community law.[127]

In the case of conflict, EU law is superior to national law.[128] This statement qualified as the second device where the Commission would still have the possibility of taking a case out of the jurisdiction of the national competition authorities. The Commission has the right to annul a national decision where this right shows the administrative hierarchy that is unavailable in the EC Treaty and the Community legislation.[129] Further, the Commission's right of evocation read together with the White Paper as resolution of conflicts, as mentioned in the White Paper paragraph 102 (2):

> When a national authority has adopted a positive decision that is either no longer open to appeal or which has been confirmed on appeal, or a court has delivered a positive judgment (for example rejection of a complaint on the ground that a restrictive practice satisfies the tests of Article 85 (3) which is either no longer open to appeal or has been confirmed on appeal, the Commission can always intervene to prohibit the agreement, subject only to the principle of res judicata that applies to the dispute between the parties themselves, which has been decided one and for all by the national court.

The White Paper paragraph 102 (4):

> For as long as a decision of a national authority or a court is still open to appeal, or the decision on appeal is pending, the Commission may at any time adopt a contrary decision. In that case, the principle that confliction decisions must be avoided will apply to the appeal body.

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[124] Frédéric Jenny and Pierre M Horna, 'Modernization of the European System of Competition Law Enforcement: Lessons for other Regional Groupings' (United Nations Conference on Trade and Development, 2005) 281.

[125] Claus Dieter Ehlermann, 'The Modernization of EC Antitrust Policy: a Legal and Cultural Revolution' (2000) 37(3) *Common Market Law Review* 537, 545.

[126] Ibid.

[127] Ibid. See the White Paper on the Modernization of the Rules Implementing Articles 85 and 86, para 105.

[128] Fiebig, above n 118, 76.

[129] Ehlermann, above n 125.

Despite the fact that these two sections above are genuine, they propose a certain interventionism to the national interest and violating the fundamental principle of mutual respect between competition authorities.[130] The basis should be the equality of all members of this relationship. Therefore, there should not be a pyramid in which the Commission is at the top, and the work is divided among the member states.[131] The White Paper suggests the third device to assure that proper functioning of the network between the Commission and the member states through a reinforcement of the role of the Advisory Committee on Restrictive Practices and Dominant Positions. The Committee would become a full-scale forum in which important cases would be discussed irrespective of the competition authority dealing with them.[132] The Commission, on its initiative or at the request of a member state, could also be empowered to ask the Committee for its opinion on cases of application of Community law by national authorities.[133] Where it means that national authorities should inform the EU Commission of any proceeding, they are conducting under national law that might have implications for the EU competition law. As the result of the decentralisation process of EU law, the new system promised an efficient enforcement.

The new Regulation offers competition authorities the possibility to see other national competition authority in dealing with unfair practices, seeing that each of them all working in the same field. Moreover, the system of the new Regulation offers a framework for this cooperation but it is not sufficient.[134] The new regulation is mainly concerned with the vertical relationship between the EU and its member states. It does not much concern the horizontal relationship between national competition authorities. Besides that, the strength of the network depends on the relationship between the national competition authorities because it legitimates the EU as an organisation.[135] Another argument advocated by Kist is that this relationship should, therefore, have both a horizontal and a vertical character. Further, Kist added that recognising the

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[130] Ibid.

[131] Anne Willem Kist, 'Decentralisation of Enforcement of EC Competition Law' (2002) 37(1) *Intereconomics* 36, 37.

[132] The White Paper, above n 127 para 106.

[133] Ibid.

[134] Kist, above n 131, 41.

[135] Ehlermann, above n 125, 47.

member states to continue to be independent competition authorities in the economic community as a critical element.[136]

The core parallel relationship between community law and domestic law is placed in the superior laws. The existence of the superior law will be able to avoid the conflict between two different legal systems of community and domestic laws. In a regional economic community, the existence of a superior law can be a useful tool to resolve competition issues particularly for member states where they do not have trans-border anti-competition provision. It additionally gives a level playing field for fair competition in the community and promotes a soft harmonisation of national laws over time.[137]

When there are a supranational law and supranational body to enforce the law, the relationship between the community and the member states is developed and bound to evolve over time.[138] Strong control of the superior body is useful whenever a member state does not have sufficient resources or lack of understanding of competition law enforcement. The changing system from a priori to ex-post enforcement system will cut the cost of enforcement. Thus, it will bring efficiency and effectiveness.[139] Meanwhile, the cooperation between national competition law authorities on cross-border anti-competitive conducts need a specific framework including procedures for the exchange of information. Jenny and Horna argued that in this matter, the supranational law is not necessary. When a cooperation framework between national competition authorities has established, it will develop through formal and informal cooperation agreement by itself.[140]

From the EU experience, the existence of supranational law and the function of a supranational agency related to the application of community law to national law characterising the Community.[141] The reform of the old Regulation in the end expresses

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[136] Kist, above n 131. Kist argued that independent in the case means that EU member states are independent of each other and that not one big European competition authority with national divisions will be created.

[137] Jenny and Horna, above n 124, 300.

[138] Ibid.

[139] Ibid.

[140] Ibid.

[141] Ibid, at 299.

decentralisation of competition law enforcement in the EC is to avoid multi-jurisdictional conflicts. Further, it will enhance the effectiveness of regional law enforcement, and the last is fostering cooperation among regional and national competition law authorities.[142]

Opposite to the EU competition law application, the enforcement of community law to the domestic law without supranational law and supranational agency brings ineffectiveness in the application of competition law. Empirically, Jenny and Horna explained several reasons for this failure. First, it is very difficult to cooperate or exchange of information among national competition authorities in the absence of supranational organisation. For instance, the enforcement of competition law in MERCOSUR without the existence of supranational law either supranational institution.[143] The enforcement of MERCOSUR competition law harmonisation is largely ineffective due to lack of a supranational agency to enforce the supranational law.[144] Even though, MERCOSUR provide cooperation agreement and exchange information between national competition authorities related to transnational issues but without superior agency the agreements merely a mechanism.[145] The function of the cooperation agreement and exchange information is essential to develop competition policy in an economic community. However, the exchange of information is highly influenced by the level of economic development of each member states.[146] If the degree of development is not equal where one country dominated others, thus the imbalance will make voluntary cooperation among the member states more difficult by exacerbating trade friction.[147]

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[142] Ibid, at 301.

[143] See Chapter 3.

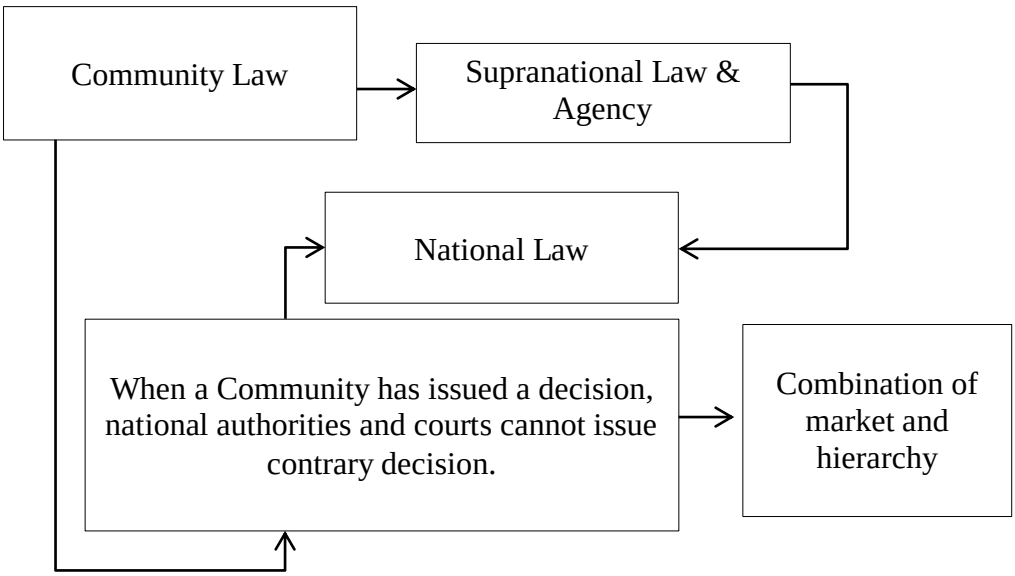
[144] Lúcio Tomé Féteira, 'Competition Rules in MERCOSUR: the Fortaleza Protocol' in Marcílio Toscano Franca Filho, Lucas Lixinski and Maria Belen Olmos Giupponi (eds), *The Law of MERCOSUR* (Hart Publishing, 2010) 291. Also see John AE Vervaele, 'Mercosur and Regional Integration in South America' (2005) 54(02) *International and Comparative Law Quarterly* 387.

[145] Gesner Oliveira, 'Aspects of Competition Policy in MERCOSUR' (2000) (11) *Boletin Latinoamericano de Competencia* 37.

[146] Jenny and Horna, above n 124, 317.

[147] Ibid.

Figure 3: Parallel Enforcement of Community Law in National Law with Supranational Law



Source: Compiled by author.

4.3.2 Direct Applicability Doctrine

Economic communities such as the EU use directives as a means of integrating their competition laws with those of their member states. The utilisation of directives rather than regulations as the essential instrument ensures the sovereignty of the different states.[148] A directive applies only to those member states to which it is directed, not to each member state automatically. Therefore, the directive must be enacted first at the community level, and then be transformed into national law by the parliament within each of the member states.[149] Direct applicability bound the member states, but national authorities have option on how the objective of the EU law is to be implemented in the national legal systems.[150]

The process of incorporating community law into national law is characterised by occasional conflict between the community legal order and national legal orders.[151] This situation appears when a community law confers rights and imposes obligations directly

[148] Richard M Buxbaum and Klaus J Hopt, *Legal Harmonization and the Business Enterprise: Corporate and Capital Market Law Harmonization Policy in Europe and the USA* (De Gruyter, 1988) 232-233.

[149] Ibid.

[150] Klaus-Dieter Borchardt and Office for Official Publications of the European Communities, *The ABC of Community law* (Office for Official Publications of the European Communities, 1994) 65.

[151] Buxbaum and Hopt considered this conflict of laws as indirect method of harmonization.

upon community citizens, while its content conflicts with the national law. Within this apparently simple problem area, there are two fundamental theories underlying the construction of community law within national law: direct applicability and direct effect.[152] Direct applicability is a feature of some economic community rules in the instances where this directive is applied. The member states have no say in how the measure in question penetrates the legal order; it does so in its original form.[153]

Direct applicability allows community law to become part of national legal systems without the need for intervening national measures that aim at transforming the community law into a national one.[154] In reference to the EU Court of Justice definition, the enforcement of community law is independent of any measure of its acceptance into national law.[155] Such a measure should become applicable within a member state after the passage of national enabling laws; it could take the form of a parliamentary resolution, an act of parliament, or an executive act such as cabinet approval.[156] An important problem appears when the enabling laws have different contents to the community law. To avoid such conflict, the ECJ decided, in the case of *Commission v. Italian Republic*,[157] that the adoption of community law into national enabling laws is necessary even for the parts of the directive that are directly applicable to individuals.[158] Through the direct applicability principle, community law may confer rights and impose obligations directly, not only on the community institutions and member states, but additionally on the community's subjects. National law is the primary legal standard to be applied, and the directive of community law will be treated as directly applicable only if there is a conflict between it and the national law.[159]

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[152] Jan A Winter, 'Direct Applicability and Direct Effect Two Distinct and Different Concepts in Community Law' (1972) 9(4) *Common Market Law Review* 425.

[153] Alicia Hinarejos, 'On the Legal Effects of Framework Decisions and Decisions: Directly Applicable, Directly Effective, Self-executing, Supreme?' (2008) 14(5) *European Law Journal* 620, 629.

[154] Winter, above n 152, 428-433.

[155] Oppong, above n 4, 3.

[156] Ibid.

[157] *Commission v. Italian Republic*, E.C.R. 1307, (1978)

[158] Ibid, at 1308.

[159] Buxbaum and Hopt, above n 148, 240.

4.3.3 Direct Effect Doctrine

In some economic communities,[160] harmonisation is based on law translation using direct effect for the application of community law.[161] The notion of direct effect of community law makes it possible for individuals to invoke community law before national courts.[162] Therefore, it allows national courts to use community law as an independent, direct, and autonomous basis for decisions.[163] Further, it turns national courts and persons who litigate before them into private enforcers of community law. Direct effect doctrine is completely different with direct applicability. The basic difference is that direct applicability deals with processes by which community law is applied to national law and becomes part of national legal systems.[164]

The principle of direct effect first appeared in the case of *Van Gend en Loos v Nederlandse Administratie der Belastingen*.[165] The ECJ formed the important principle that the Treaty Establishing the European Economic Community (EU Treaty) was capable of creating legal rights. The enforcement of these rights could be undertaken by both natural and legal persons before the courts of the community's member states. The ECJ adopted criteria for establishing the direct effect of the EU Treaty. First, the provision must be sufficiently clear and precisely stated. Second, it must be unconditional or non-dependent. Third, it must confer a particular right on which the citizen can base his or her claim.[166]

Another example of harmonising community law and domestic law using direct effect appears in the case of *Moolla Group Ltd. v Commissioner*.[167] The case included a contention between a South African statute incorporating a bilateral trade agreement

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[160] African economic communities such as the Economic Community of West African States (ECOWAS) applied the direct effect to their legal system. Enyinna S Nwauche, 'Enforcing ECOWAS Law in West African National Courts' (2011) 55(02) *Journal of African Law* 181, 201.

[161] Oppong, above n 4.

[162] For example NAFTA, see Stephen Zamora, 'NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade' (1995) 12(2) *Arizona Journal of International and Comparative Law* 401, 409.

[163] Oppong, above n 4.

[164] Ibid, at 8.

[165] Ibid.

[166] The concept of direct effect is not found in the EU Treaty but is a creation of the ECJ. Nwauche, above n 160, 185.

[167] Oppong, above n 4.

between South Africa and Malawi. It was held that, in cases of such conflict, the national legislation should prevail. As the court stated:

> If there was to be an apparent conflict between general provisions of the statute and particular provisions of an agreement, difficulties of interpretation might indeed arise. The Act must, of course, prevail in such a case: the agreement once promulgated is by definition part of the Act.[168]

Oppong argues that the court decision suggests that an international instrument loses its independent existence.[169] This lack of independence could be dangerous for the application of the international agreement to the domestic legal system directly.[170] Even so, efforts to harmonise the regional system with national legal systems in African economic communities reached a dead end when communities remained silent on the issue of the enforcement of the community law on domestic law.[171]

4.4 Conceptualising Competition Policy Harmonisation

Policy harmonisation is not a new concept. However, there is a problem in that no harmonisation project has ever reached completion except for that of the EU.[172] This lack of completion is due to the nature of harmonisation, which is designed to incorporate different legal systems under a basic framework. Indeed, harmonisation is globally acknowledged as a tool for avoiding conflict between legal systems; however, this does not mean that harmonisation always brings effectiveness in the standardisation of laws.

From the analysis of the underlying issues in the harmonisation of competition policy in Section 4.3, it can be inferred that harmonisation may occur in the presence of supranational systems, and that supranational law, supranational institutions and legal culture should be considered as the core of integration. Supranational law consists of substantive law and procedural law, and supranational institutions include enforcement

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[168] The decision available online at The Supreme Court of Appeal of South Africa, *Moolla Group Ltd. v Commissioner* (March 16, 2003) The Supreme Court of South Africa <http://www.sars.gov.za/AllDocs/LegalDoclib/Judgments/LAPD-DRJ-SCA-2003-02%20-%20AM%20Moola%20Group%20Ltd%20and%20Others%2026%20March%202003.pdf>, June 8, 2015.

[169] Oppong, above n 4.

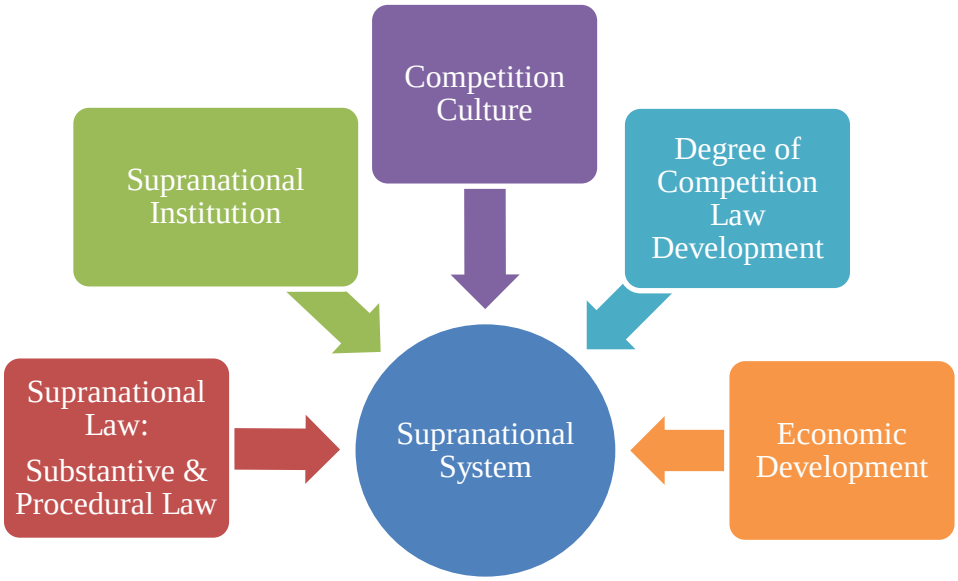
[170] Ibid.

[171] Ibid.

[172] See Chapter 3.

practices and competition authorities. The harmonisation of competition policy should also consider the degree of development of the existing competition law of the member states. The existence of competition law in a nation has a significant role in developing a single competition policy. Economic development also contributes to the process of harmonisation.

Figure 4: Policy Harmonisation Indicators



Source: Compiled by author

4.5 Supranational Law

4.5.1 The Legal Substance of Competition Law

Harmonisation is difficult to accomplish unless nations converge on a commonly accepted standard of rules.[173] In most regional economic agreements, economic integration occurs after member states have adopted competition laws and policies that are similar.[174] The harmonisation of substantive competition law has been part of the general economic changes considered necessary for the formation of regional economic integration. The need for change is demonstrated in the NAFTA experience:[175] NAFTA was established with a competition enforcement cooperation agreement, but without substantive competition law harmonisation.

[173] Eleanor M Fox, 'Harmonization of Law and Procedures in a Globalized World: Why, What, and How?' (1991) 60(2) *Antitrust Law Journal* 593, 596.

[174] Richard O Cunningham and Anthony J LaRocca, 'Harmonization of Competition Policy in a Regional Economic Integration Perspective' (1996) 27 *Law & Policy in International Business* 881.

[175] Ibid.

NAFTA, effective on January 1, 1994, consists of the US, Mexico and Canada.[176] The NAFTA agreement itself confines its competition provisions to the five articles of Chapter 15.[177] Except for the provisions governing the behaviour of state monopolies, the NAFTA agreement does not govern substantive competition rules. It merely obligates the parties to have such rules without specifically mentioning how those rules should be applied. This vagueness is demonstrated in Article 1501(1) of the NAFTA Agreement:

> Each Party shall adopt or maintain measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto recognizing that such measures will enhance the fulfillment of the objectives of this Agreement. To this end, the Parties shall consult from time to time about the effectiveness of measures undertaken by each Party.[178]

The substance of competition rule is can be found in Article 1502(3) of NAFTA. Essentially it provides state-designated monopolies or corporates are supposed to behave as follows:

> Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures that any privately owned monopoly that it designates and any government monopoly that it maintains or designates:
>
> 1. acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative or other governmental authority that the Party has delegated to it in connection with the monopoly good or services, such as the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges;
> 2. except to comply with any terms of its designation that are not inconsistent with subparagraph (c) or (d), acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale;
> 3. provides non-discriminatory treatment to investments of investors, to goods and service providers of another Party in its purchase or sale of the monopoly good or service in the relevant market; and
> 4. does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, its subsidiary or other enterprise with common ownership, in anticompetitive practices in a non-monopolized market in its territory that adversely

[176] Clifford Jones, 'Competition Dimensions of NAFTA and the European Union: Semi-Common Competition Policy, Uncommon Rules, and No Common Institutions"' (2006) 6(18) *Jean Monnet/Robert Schuman Paper Series* , 6-7.

[177] North America Free Trade Agreement NAFTA, *North America Free Trade Agreement* (2014) NAFTA Secretariat <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement> June 8, 2015

[178] Ibid.

> affect an investment of an investor of another Party, including through the discriminatory provision of the monopoly good or service, cross-subsidization or predatory conduct.[179]

Article 1502(3) obliged the NAFTA members not only to have such regulations, but also oblige that the rules are enforced. However, since the content of the rules is not closely specified, there can be different results as to the substantive requirements of the national competition laws.[180] In contrast to the EU, NAFTA provides no standard rules on competition laws.[181] When conflict arises among the member states, they obligate to consult each other and cooperate in the enforcement by assisting the other member states.[182] Article 1501(2) of NAFTA confirms the importance of cooperation between nations to enforce competition policy and law:

> Each Party recognizes the importance of cooperation and coordination among their authorities to further effective competition law enforcement in the free trade area. The Parties shall cooperate on issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area.[183]

In sum, NAFTA leaves a wide gap in interpretation of the substance of the competition policy and law, leading to the ineffectiveness of the NAFTA agreement. As a result, the parties rely heavily on the consultation and cooperation framework; in this context, a lack of willingness to apply cooperation makes it very difficult to achieve such effectiveness. Further, traditionally, Mexico has no competition law enforcement history, though it passed a competition law in 1992. In fact, Mexico's competition policy is substantially protected, and there has been strong state participation in the market.[184] Compared to the other parties, the US and Canada, the enforcement of competition policy in Mexico is underdeveloped.[185]

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[179] Ibid.

[180] Jones, above n 176, 7.

[181] EU has a single set of Treaty rules (Articles 81 and 82 EC) applies uniformly throughout the EU member states.

[182] Jones, above n 176.

[183] Article 1501(2) of NAFTA agreement.

[184] Kathleen Murtaugh Collins, 'Harmonizing the Antitrust Laws of NAFTA Signatories' (1995) 17 *Loyola of Los Angeles International and Comparative Law Journal* 157, 172.

[185] Mexico has changed the policy and the new Federal Competition Commission explained in Annual Report 1993 as follow:

Without supranational law and agency at the regional level, NAFTA is merely a free trade agreement.[186] Imbalances in the development of competition law make the formation of substantive competition law harmonisation even more difficult for the agreement. Therefore, the need to comply with different competition laws in the economic community led the member states to call for the harmonisation of substantive competition laws.

4.5.2 Competition Law Procedure

Legal procedure and substance are interrelated; where there is harmonisation of substantive law without harmonisation of legal procedure, and vice versa, the harmonisation of the system will be fruitless in the long run.[187] According to Crane, harmonising procedural law is less threatening to national jurisdiction, more modifiable, and less of a compromise on ideological principle compared to substantive law harmonisation.[188] Further, harmonisation of procedural law and enforcement practices provides some benefits, such as simplifying merger requirements for firms. It also offers a framework for member states of the economic community to have formal competition law norms.[189]

In cases of cross-border mergers, the role of procedural law harmonisation is significant.[190] The marked increase in the number of jurisdictions that have adopted merger review regimes makes it increasingly likely that multiple competition authorities will review cross-border M&As.[191] In 2000, the International Competition Policy Advisory Committee (ICPAC) issued a Final Report, of which Annex 2-C comprised competition law merger notification systems from worldwide jurisdictions. In 1999,

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> Mexico is undergoing far-reaching changes in its economic strategy. The State's role in the economy has been reformed and distortions that hindered efficient market operations have been eliminated. The revision of the regulatory framework in which economic activity takes place led to the repeal and modification of laws and regulations which limited the initiative and activity of producers and consumers. Ibid.

[186] See the stages of economic integration based on Balassa's theory. Bela Balassa, *The Theory of Economic Integration* (Allen and Unwin, 1962).

[187] Daniel A Crane, 'Substance, Procedure, and Institutions in the International Harmonization of Competition Policy' (2009) 10 *Chicago Journal of International Law* 143, 157.

[188] Ibid.

[189] Ibid

[190] Ibid.

[191] Ibid.

Annex 2-C showed that 67 countries had a form of merger notification system. Of these, only nine countries had voluntary notification systems, and 11 countries had provisions for mandatory notification of M&A transactions that met the post-closing requirement.[192] The remaining 57 countries had provisions for merger mandatory pre-closing notification systems.[193]

The Annex described that the majority of jurisdictions had chosen to implement systems involving mandatory pre-closing merger notification. The widespread preference for such regimes may well reflect the following considerations, as stated in Chapter 3 of the ICPAC's Final Report:

> Advance notice is viewed as useful to competition authorities because it permits them to evaluate and either prohibit or restructure potentially anticompetitive transactions before the transaction is implemented. In this way, competition authorities avoid the widely acknowledged difficulties that accompany attempts to restore competition by unscrambling the eggs after allegedly anticompetitive transactions have been completed. Reliance on premerger notification systems to provide advance notice of proposed transactions is based in large part on the recognition that competition authorities have neither the time nor the resources to monitor all business transactions in an attempt to identify those that pose a threat to competition. Nor do they can detect those midnight mergers that are consummated without public notice. Moreover, it is not practical to place the burden of notification on concerned competitors and customers. Reliance on these entities to provide advance notice may prove imperfect either because these entities may not know about transactions before their consummation or because the transactions costs incurred by these entities in notifying the competition authorities may outweigh any benefits obtained by having the proposed transactions reviewed. For these reasons, many jurisdictions view premerger notification regimes as the most efficient way of systematically obtaining advance notice of potentially anticompetitive transactions.[194]

The implementation of different merger notification systems was expressed in the case of the General Electric-Honeywell merger. The merging companies underwent multiple legal procedures in the EU and US[195] Predictably, the results differed between the two jurisdictions. It is wasteful of resources, particularly human resources, for multiple

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[192] International Competition Policy Advisory Committee, 'Final Report to the Attorney General and Assistant Attorney General for Antitrust ' (Final Report, The United States Department of Justice, 2000) Annex 2-C.

[193] Ibid. In 2010, Indonesia has changed its merger notification from post-closing to pre-closing notification.

[194] Ibid.

[195] Eleanor Morgan and Steven McGuire, 'Transatlantic Divergence: GE–Honeywell and the EU's Merger Policy' (2004) 11(1) *Journal of European Public Policy* 39.

competition law agencies to engage in such investigations.[196] Further, multinational companies are burdened with huge legal costs for conducting multiple investigations and legal procedures.[197]

Relatively, procedural law harmonisation can be achieved in a very short time compared to substantial law harmonisation.[198] The need for procedural law harmonisation is even more important than that for substantive law. The reason for this is simply because most international trade issues invoke multi-jurisdictional enforcement differences. Therefore, procedural law harmonisation is a more pressing need than that of substantive law. However, there is interrelation between the two elements; to develop effective harmonisation law between the community and its member states' different jurisdictions, the tripartite relations between substantive, procedural and institutional harmonisation must all be involved.[199] There is close linkage between those elements involved in the effective running of an economic community. Ultimately, shared similar understandings of procedural norms will make convergence with substantive law easier for the member states.

4.6 Supranational Institutions

To implement substantive and procedural harmonisation needs an effective enforcement practice. The elements of such a practice require some sacrifice of member states' sovereignty to enable enforcement to work properly.[200] The EU provides the best example of enforcement practice, coordination and sacrifice of sovereignty.[201] To promote the common rules of EU competition law, a supranational court was established under the Treaty of Rome: the Courts of the EU.[202] Enforcement practices

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[196] Takigawa, above n , 1121.

[197] Ibid.

[198] Ibid.

[199] Cunningham and LaRocca, above n 174.

[200] Ibid, at 886.

[201] Ibid.

[202] Spencer Weber Waller, 'National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law' (1996) 18 *Cardozo Law Review* 1111, 1121. Since the drafting of the Treaty of Rome in 1957, the expansion of European community led some countries making EU competition law paramount within their own national legal systems. England, Ireland, Denmark, Spain, Portugal, Greece, Finland, Austria, and Sweden, have joined together with France, Germany, Italy, Belgium, Luxembourg, and Holland as member states. Other states such as Norway, Liechtenstein, and Iceland remain outside the membership of the EU. However, those countries

are harmonised through the formation of the European Commission, which is responsible for enforcing European competition law all over the EU.[203]

More recently, under the TFEU, the EU Commission handles the enforcement of competition rules provided in Articles 101 and 102 TFEU.[204] The EU enforcement system is that of an integrated public authority that investigates and has the ability to request that encroachments be conveyed to an end including imposing sanctions.[205] EU Commission decisions are subject to legal review by the Courts of the EU, namely the General Court and the Court of Justice.[206]

The Directorate General for Competition (DG Competition), a branch of the European Commission, is primarily responsible for enforcing Articles 101 and 102 TFEU.[207] The DG Competition is administratively organised under Directorates. Under EU competition law, the DG Competition has the authority to conduct any investigation anywhere in the EU.[208] A private party with a legitimate interest in a particular case may apply to the EU Commission to initiate an investigation. A national competition law authority may also apply, as long as the EU Commission has not already started an investigation with respect to the same case.[209]

As a critical element of harmonisation, enforcement practice is far harder to achieve than the harmonisation of substantive and procedural law.[210] During the 1980s, in a trade agreement between the US and Japan, for the first time competition law enforcement became an important issue.[211] The different perspectives of the two

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adopted equivalent competition law provisions and harmonize their law enforcement mechanism as a condition of their membership with the EU countries in the European Economic Area (EEA).

[203] Cunningham and LaRocca, above n 174, at 894.

[204] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases and Materials* (Oxford University Press, 2014)

[205] Ibid.

[206] European Commission, *Proceedings for the application of Articles 101 and 102 TFEU: Key actors and checks and balances* (September 27) European Commission <http://ec.europa.eu/competition/antitrust/key_actors_en.pdf>

[207] Ibid.

[208] Cunningham and LaRocca, above n 174.

[209] Ibid, at 894.

[210] Harry First, 'Antitrust Enforcement in Japan' (1995) *Antitrust Law Journal* 137, 163.

[211] John O Haley, 'Competition and Trade Policy: Antitrust Enforcement: Do Differences Matter' (1995) 4 *Pacific Rim Law and Policy Journal* 303, 303-304.

countries on competition law made trade cooperation less effective.[212] In the US, antitrust law is defined as legalistic regulation to protect consumers and small businesses,[213] while the central premises of Japanese anti-monopoly law proceed in a different way.[214] Lax competition law enforcement resulted in inadequate sanctions and weak enforcement of Japan's post-war anti-monopoly law.[215] These issues led to a trade barrier against the US's entry to the Japanese market, and became crucial factors contributing to the chronic imbalance for the bilateral agreement.[216] Haley points out that less effective enforcement of competition law in one market would prevent new entrants to that market.[217] Therefore, the harmonisation of enforcement practices within trade agreements is significant and cannot be separated from the other two elements of harmonisation (substantive and procedural law).

4.7 Competition Law Culture

In 1997, the *Economist* reported on the effect of the differences between English, German and French types of legal systems on their economic development.[218] Countries under the English legal system showed stock market values equal to 60% of their Gross National Product (GNP). Meanwhile, countries under the French legal system (civil law) remain much smaller, with a market capitalisation ratio of only 21% of GNP. Under the German legal system, the ratio is close to 50%. These different results in GNP ratio indicate that distinctions made between common law and civil law legal systems are linked to the culture.[219]

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[212] Ibid.

[213] First, above n 210.

[214] Ibid, at 143.

[215] For further Japan's antimonopoly law history see Hiroshi Iyori, 'Comparision of US-Japan Antitrust Law: Looking at the International Harmonization of Competition Law, A' (1995) 4 *Pacific Rim Law and Policy Journal* 59, 63. The legal system diversity between Japan and U.S. made this enforcement even harder. Lack of information related to the application of competition law also crucial factors for the enforcement. U.S. has enormous competition law cases per year, if compare to Japan. Small cases in Japan made other parties could not interpret the application of the Japan's antimonopoly law.

[216] Haley, above n 211.

[217] Ibid.

[218] Wolfgang Pape, 'Socio-Cultural Differences and International Competition Law' (1999) 5(4) *European Law Journal* 438, 443.

[219] Ibid, at 444.

A simple picture of the relationship between law and culture is expressed by Judge Devlin, who famously argues that the law should be used to enforce the norms of a society's culture:

> Society means a community of ideas; without shared ideas on politics, morals, and ethics no society can exist.... If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For a society is not something that is kept together physically it is held by the invisible bonds of common thought... A common morality is part of the bondage. The bondage is part of the price of society, and mankind, which needs society, must pay its price.[220]

Overall, culture has an impact on the way society's actors behave. Okimoto argues that culture plays a central role in political-economic behaviour.[221] There are differences between cultures that are related to any effort to harmonise competition policy and law.[222] For instance, the relationship between culture and law, which has a strong impact on competition behaviour, is recognised in the harmonisation between applications of Japanese and US antitrust law.[223] There was previously a huge gap between Japanese and US antitrust law, including issues such as the dichotomy between case law and the abstract codification, US extraterritorial jurisdiction and Japanese extra-legal measures.[224]

Thus, taking 'culture' in the sense of the behaviour and values within which people and institutions operate, there are two key cultures that are relevant to competition policy harmonisation: business culture and regulatory culture.[225] The core of business culture can be conceptualised as a continuum with the poles marked as 'rivalries' and 'cooperatives'.[226] Regulatory cultures focus on how the market should be structured and run. The pattern for regulatory culture is marked as legalistic and bureaucratic.[227] Another culture that is significant for the effectiveness of the application of competition

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[220] Robert Post, 'Law and Cultural Conflict' (2003) 78 *Chicago-Kent Law Review* 485, 485.

[221] Daniel I Okimoto, *Between MITI and the Market: Japanese Industrial Policy for High Technology* (Stanford University Press, 1989) 237-238.

[222] Pape, above n 218, 438.

[223] Iyori, above n 215.

[224] Pape, above n 218, 438-440.

[225] First, above n 210, 139.

[226] Ibid.

[227] Ibid, at 142-143.

law harmonisation is the culture of political support.[228] 'Competition culture' is defined as political support for the use of competition law in the market as a normal piece of equipment for organising business activities outside the family, government, and single entities or firms.[229] Wise defines this by stating that, in the long run, competition policy must be consistent with publicly accepted goals and values, as shown in the political process.[230]

Similarly to Wise, the International Competition Network underlines that competition culture refers to awareness, among both the public at large and economic actors, of the competition rules.[231] A lack of competition culture means that there is no political support from the state for the competition authority. A lack of support for the competition authority will translate into specific weaknesses where the government does not delegate sufficient resources; these weaknesses may include financial resources, lack of quality personnel, inappropriate training for personnel, and lack of access to information for research and prosecution. The absence of political support may also influence the power of the competition authority to open investigation, such as bringing prosecution to a court.[232]

These kinds of public goals and values are also termed a socio-economic ideology, and determine to a large extent the success or failure of competition law enforcement. A study by Michal S. Gal shows that several developing countries have had competition or antitrust laws for a very long time, but none appears to have been enforced to further the aims generally associated with competition law.[233] The main cause of this issue is clashes between competition law and existing socio-economic and political ideologies

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[228] Michal Gal, 'The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries' in Phillip Brunsick (ed), *Competition, Competitiveness AND Development: Lessons FROM Developing Countries* (UNCTAD, 2004) 20, 26.

[229] Competition, above n 10, 4.

[230] Michael O Wise, 'Independence of Competition Authorities: Theory and Practice' in Van de Gronden and Widdershoven (eds), *Edingingsautoriteiten Als Zelfstanding Bestuursorgaan: Onafhankelijk Toezicht?* (Kluwer, 2002) 71-73.

[231] International Competition Network, 'Advocacy and Competition Policy' (International Competition Network, 2002) iii.

[232] Ibid.

[233] Gal, above n 228, at 22.

that shape public policy.[234] It is the non-market factors underlying public policy that constitutes the main obstacles to applying competition law.[235]

4.8 Degree of Competition Law Development

One of the barriers to the harmonisation of competition policy is the non-existence of a competition law regime. Lessons from previous regional economic community integrations have shown that states' levels of competition law development have a significant role in the process of harmonisation.[236] Different degrees of competition law development create a barrier to harmonisation.[237] Even though NAFTA increased trade volumes, the regulatory asymmetries among member states slowed NAFTA's progression towards economic convergence.[238] The absence of robust competition regulation hinders the goals of the NAFTA agreement and the development of regional competition policy.

The US and Canada's cooperation agreement on competition law enforcement has been effective due the strong domestic enforcement of the competition laws of both countries. The dynamic cooperation between competition law authorities of both nations has meant that this enforcement is able to run well and be effective.[239] In contrast, Mexico has no strong domestic competition law and policy, and its enforcement is less effective than that in the other two member states.[240] Due to this imbalanced development in enforcing competition law, cooperation on the application of competition law is beyond expectation.

A similar asymmetrical situation also occurred in the CARICOM competition policy harmonisation.[241] At the time, Jamaica and Barbados were the only countries that had

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[234] Ibid.

[235] Ibid.

[236] Gesner Oliveira, 'Competition Policy in Brazil and MERCOSUR: Aspects of the Recent Experience' (1998) 24(2) (12/01) *Brooklyn Journal of International Law* 465, 466-467.

[237] See Chapter 3.

[238] Do, above n 8, 364.

[239] Ibid.

[240] Ibid.

[241] See Chapter 3.

competition regimes in place.[242] Since 1993, Jamaica has had a competition law in the form of the Fair Trading Act. In the same year, Jamaica established a competition law authority, the Fair Trading Commission, to enforce the Fair Trading Act. Currently, the Act is being amended to take into consideration, among other factors, the provisions of Chapter VIII of the Revised Treaty.[243] Barbados passed its law in January 2003, and has since established a Fair Trading Commission that brings under one umbrella the supervision of managed businesses, rivalry and customer issues.[244] While St Vincent and the Grenadines enacted a competition law in 1998, no competition law authority has been established to enforce the law.[245] The Organisation of Eastern Caribbean States—a subregional grouping of smaller states within CARICOM—and Trinidad and Tobago both have drafted competition laws, and other member states are currently drafting their laws.[246]

The members of regional trade agreements, especially developing countries and their policy makers, should be concerned about the implications of competition provisions in economic integration in regards to development and access to goods and services.[247] UNCTAD reported that competition law provisions within regional trade communities should match with its member states' competition law.[248]

4.9 Stages of Economic Development

The economic structures of countries are supportive of a functioning competition regime,[249] while economic development contributes to appropriate competition law enforcement.[250] The argument that an effective competition law application also

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[242] Jenny and Horna, above n 124.

[243] Ibid.

[244] Ibid.

[245] Ibid.

[246] Ibid, at 306.

[247] Lakshmi Puri, 'Implementing Competition-Related Provisions in Regional Trade Agreements: Is it Possible to Obtain Development Gains? (Introduction)' (U.N. Doc. UNCTAD/DITC/CLP/2006/4, UNCTAD, 2007) <http://unctad.org/en/Docs/ditcclp20064_en.pdf>

[248] Ibid.

[249] Pape, above n 218, 456.

[250] Simon J Evenett, 'What is the Relationship between Competition Law and Policy and Economic Development?' in Douglas H Brooks and Simon J Evenett (eds), *Competition Policy and Development in Asia* (Palgrave Macmillan, 2005) 1.

depends on the level of economic development of a nation is advocated by several experts.[251] No doubt, there is a conceptual linkage between the implementation of competition law and the factors that are thought to influence economic efficiency.[252]

However, it is too narrow to view harmonisation as being completely about the reduction of transaction costs. Changes in legal regimes also have disadvantages in the context of legal transplant.[253] Some economic experts have proposed similar arguments and results in possible lists of costs from policy harmonisation. Direct costs are imposed on some member states in terms of acquiring information, importing new rules and introducing new practices, and interpreting and applying them.[254] On one hand, harmonisation will reduce the costs of trans-border transactions by firms. On the other hand, harmonisation also imposes a burden on a member state. A country has to change its sets of regulations to become compatible with regional law.[255] In sum, harmonisation on one side reduces transaction costs, but on the other, it is also imposes a cost on member states.

A review of competition policy in MERCOSUR reveals that its process of harmonisation is underdeveloped.[256] Article 32 of the Fortaleza Protocol mandated that the States Parties should apply the Protocol within two years,[257] and that all the national parliaments of the member states should ratify the Protocol so that the Protocol could enter into effect. However, the ratification process was not completed, and currently the Protocol is being reviewed to introduce amendments.[258] Two main reasons seem to explain why the Protocol was not ratified. The first reason is the strong resistance to the provisions of the Protocol that provide for the elimination of anti-dumping duties and the regulation of state aids, as stipulated by the Protocol. This resistance is partly due to trade asymmetries among the MERCOSUR member states and the dominance of the

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[251] In several economic communities the level of economic development influences the exchange of information in the competition policy harmonization and cooperation agreement among the member states. See Chapter 3.

[252] Evenett, above n 250, at 14.

[253] Garoupa, above n 7.

[254] Ibid, 282.

[255] Ibid.

[256] See Chapter 3.

[257] Jenny and Horna, above n 242.

[258] Ibid, at 309.

Brazilian economy. The second reason is the lack of experience in antitrust law enforcement, particularly in the cases of Paraguay and Uruguay.[259]

4.10 The Ultimate Goal of Harmonisation

Regional integration without harmonisation of laws means that economic integration cannot be achieved. Therefore, economic integration needs support from legal framework to foster the integration.[260] A process of harmonisation can mediate differences between legal systems. While competition policy and law are devices for achieving efficiency and non-efficiency objectives,[261] harmonisation in the field of competition policy and law aims to promote economic integration by avoiding wide gaps between countries.[262] The final process of achieving harmonisation should consider the societal preferences regarding competition policy and law of the various member states over the relevant issues affected by the behaviour that would be subject to the harmonisation. In this case, the ultimate goal of harmonisation depends on the basic reason why countries need harmonisation.[263] Differing objectives of competition policy may lead to trade barriers, as experienced by the US and EU.[264] This argument is found in the UNCTAD report's statement that competition policy harmonisation should match with its member states competition law; nevertheless, follow-through is needed.[265]

4.11 Conclusion

Regional economic integration processes in developing countries have suffered from a lack of institutional analysis and excessive emphasis on economic inquiry. Since

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[259] Ibid.

[260] Muna Ndulo, 'Harmonisation of Trade Laws in the African Economic Community' (1993) 42 *International and Comparative Law Quarterly* 101, 107.

[261] Majone, above n 9, 12.

[262] Ibid.

[263] David W Leebron, 'Claims for Harmonization: A Theoretical Framework' (1996) 27 *Canadian Business Law Journal* 63.

[264] Charles W Smitherman III, 'The Future of Global Competition Governance: Lessons from the Transatlantic' (2003) 19(4) *American University International Law Review* 769, 823.

[265] UNCTAD, 'Implementing Competition-Related Provisions in Regional Trade Agreements: Is it Possible to Obtain Development Gains?' (UNCTAD/DITC/CLP/2006/4 (2007) UNCTAD, 2007) <http://www.unctad.org/en/docs/ditcclp20064_en.pdf>

economic integration is deemed as the answer to developing countries' economic plight, the success or failure of integration attempts has depended upon and been gauged by economic outcomes. This chapter has stressed the importance of the relationships between community law and national law in maintaining the objectives of the economic integration, prior to harmonising competition policy and law. The legal personality of an economic community organisation must be considered first, since this will justify a regional institution's legitimation in applying its law on national law.

In conceptualising the harmonisation of competition policy, there is no doubt that the objective of harmonisation is to set common principles governing restrictive business behaviour. Nevertheless, harmonisation of competition policy is not an easy task. In fact, it is globally recognised that competition policy harmonisation is difficult precisely because if it results in the wrong common set of rules or principles, then it will likely create harm rather than a useful tool. For that reason, an economic community should consider the factors and indicators discussed in this chapter when attempting to harmonise regional competition policy for member states. These indicators have been chosen based on the experiences of several economic communities around the world. Finally, this chapter proposed five indicators that can be used to avoid legal uncertainty in regional economic integration. More importantly, these indicators could possibly be used as a framework for competition policy harmonisation, particularly in ASEAN.

Chapter 5
Current Status of the ASEAN Economic Community and its Competition Policy and Law

5.1 Introduction

The core issue addressed in this chapter is competition policy and law development in ASEAN. This chapter also discusses the effort of ASEAN to develop a common competition policy and law as a response to open regionalism. As one of the fastest-growing economic communities that include developing countries, ASEAN is taking a step forward from free trade to economic community by establishing a single market. Since it is still not clear what form the AEC will take, some recommendations are proposed. One recommended form is an FTA-plus arrangement, which includes some elements of a common market, such as free flow of capital and free flow of skilled labour. The second recommended form is a single market, but without an arrangement that aims to create a fully integrated market. This form still has areas where members of ASEAN will reserve deeper integration for the next stage.

Unlike European economic integration, which began as an inward-looking approach to regionalism, ASEAN economic integration has focused itself towards open regionalism, particularly with economic partners from outside ASEAN. Evidence for this is in the recent proliferation of FTAs in the region, particularly with China, Japan and the Republic of Korea, called ASEAN+3.[1] In this very short time, ASEAN is faced with a few choices regarding its development. First, ASEAN should clarify the form its integration will take. The dilemma arises since ASEAN is currently in a state somewhere between a free trade area and a customs union. If the choice is free trade, then ASEAN should stay in AFTA. If the choice is to move higher to a customs union, ASEAN lacks the legal powers to force its member states to perform the ASEAN

[1] Rosabel B Guerrero, 'Regional integration: the ASEAN Vision in 2020' (2008) 32 *IFC Bulletin* 52, 54. Hee-Ryang Ra, 'Intra-Regional Trade of ASEAN+3: Trends and Issues for the Economic Integration of East Asia' (2015) 18(2) *International Area Studies Review* 109, 109-137. According to Hee-Ryang Ra, the development of the ASEAN+3 cooperation has been growing. It is proved by the amount of the regional trade record US$4.8 trillion. This amount is more than 29 fold increase and more than 12% annual growth rate in the past 30 years from 1980 until 2012.

Charter. The same would apply in the process of establishing competition policy and law in the region.

The position of competition policy and law in free trade is a significant one. Without it, the parties involved cannot protect the stability of the relevant market from unfair business conduct. Stability is needed, not only for the benefits of the market, but also to protect consumers from anti-competitive behaviours such as monopoly by cartel agreement among competitors. Competition law exists also to avoid anti-competitive cross-border mergers by small numbers of firms that control the market using their market power. In an era of integrated markets, it is easier for big companies to control markets due to the free movement of capital. In the end, market power tends to lead to price control. ASEAN is on its way to forming a common standard for competition policy and law that suitable for each of its member states. This means that the notion of total harmonisation of competition policy and the law is still far off.

The aim of this chapter is to shed light on the previous failure of free trade in ASEAN, and to discuss the current opportunity for the AEC in the next stage of AFTA. This chapter details recent developments in ASEAN's efforts to establish a single market and movement to form competition policy regimes in its member states. It discusses the role and the benefit of competition policy for the single market in ASEAN. However, it has been identified that only a few AMSs have competition policies and laws within their legal systems. These are Indonesia, Thailand, the Philippines, Singapore, Vietnam and Malaysia. It is also revealed in this chapter that several AMSs have established cooperation on competition law enforcement with other parties beyond the membership. These agreements show a positive step in that those member states have realised the importance of competition policy for trade relationship. The conclusion of this chapter is that ASEAN requires a common standard for competition policy and law that each of its member states are required to follow.

5.2 Developments in ASEAN Trade Liberalisation

5.2.1 ASEAN Free Trade Area: Illuminating the Failure

The idea of economic regionalism did not appear on the ASEAN agenda when it was formed in 1967.[2] The Bangkok Declaration only mentioned that economic progress was required in order to develop ASEAN in a forward direction.[3] Since then, ASEAN has become one of the most incredible regional associations that include developing countries with regard to its economic development. A milestone in ASEAN's attempt to promote economic integration was AFTA.[4] Through AFTA, ASEAN has launched several economic cooperation schemes for implementing trade liberalisation, such as ASEAN+3, ASEAN+6, and ASEAN-EU. [5]

At the 4th Summit in January 1992, ASEAN leaders agreed to establish a free trade area by the year 2008 by signing the Framework Agreement on Enhancing ASEAN Economic Cooperation.[6] Under the Common Effective Preferential Tariff (CEPT) Scheme,[7] existing tariffs on manufactured goods and processed agricultural products would lower to between 0 and 5%, and quantitative restrictions and other non-tariff barriers would be eliminated.[8] ASEAN members have gradually expanded the scope of market liberalisation. At the 5th Summit in 1995, ASEAN leaders agreed on the ASEAN Framework Agreement on Services.[9] In 1998, the Framework Agreement on ASEAN Investment Area was also reached.[10]

Freund and McLaren introduce an alternative way of looking at the effects of Regional Trade Agreements (RTAs). Their focus is on the dynamics of trade reorientation when a

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[2] Suthiphand Chirathivat and Piti Srisangnam, 'The 2030 Architecture of Association of Southeast Asian Nations Free Trade Agreements' (ADBI Working Paper 419, Asian Development Bank Institute (ADBI), 2013) <www.adbi.org/working-paper/2013/04/25/5627.2030.architecture.asean.free.trade.agreements/>, 4.

[3] Bangkok Declaration was signed by 5 ASEAN founding nations: Indonesia, Singapore, Malaysia, Thailand, and the Philippines in 1967.

[4] Hidetaka Yoshimatsu, 'Collective Action Problems and Regional Integration in ASEAN' (2006) 28(1) *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 115, 122.

[5] Mark Beeson, 'ASEAN plus three and the rise of reactionary regionalism' (2003) 25(2) *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 251; Hadi Soesastro, 'Whither ASEAN Plus Three' (Paper presented at the PECC Trade Policy Forum, Seminar on Regional Trading Arrangements, Bangkok, 2001); Michael G Plummer, 'The EU and ASEAN: Real Integration and Lessons in Financial Cooperation' (2002) 25(10) *The World Economy* 1469, 1470.

[6] Yoshimatsu, above n 4.

[7] ASEAN, *Agreement on the Common Effective Preferential Tariff Scheme for the Asean Freetrade Area* ASEAN <http://www.asean.org/communities/asean-economic-community/item/agreement-on-the-common-effective-preferential-tariff-cept-scheme-for-the-asean-free-trade-area-afta>

[8] Yoshimatsu, above n 4.

[9] Ibid.

[10] Ibid.

country joins a regional trade agreement and through the years of its membership.[11] Their study found that AFTA is the most successful among other RTAs and has had a measurable positive impact on its members.[12] Globally, the trade effect of AFTA has been positive since intra-AFTA exports and imports increased over the studied period. AFTA's impact on export flows, however, has been neutral. Through AFTA, ASEAN has passed many necessary measures to remove intra-regional tariff barriers. The World Bank noted in 2008 that Asia is using regional trading agreements to reinforce regionally-oriented markets, and that ASEAN is at the center of these initiatives, where AFTA plays an important role.[13]

[11] Caroline L Freund and John McLaren, 'On the Dynamics of Trade Diversion: Evidence from Four Trade Blocs Discussion Papers Number 637' (Board of Governors of the Federal Reserve System Washington, DC, 1999), 1.

[12] Other RTAs include SAPTA, SADC, ECOWAS, CACM, CAN and MERCOSUR.

[13] Zakariah Rashid et al, 'Regional Market for Goods, Services, and Skilled Labor' in Michael G Plummer and Chia Siow Yue (eds), *Realizing the ASEAN Economic Community* (Institute of Southeast Asian Studies, 2009) 20, 219. Trade as a percentage of GDP has risen impressively due to the strong performance of AFTA.

Table 2: ASEAN Trade Liberalisation and Integration Milestones

Year	ASEAN Trade Liberalisation and Integration
1992	AFTA and CEPT initiated
1994	ASEAN Regional Forum established
1995	Signing of ASEAN Framework Agreement on Services (AFAS)
1997	First ASEAN–People's Republic of China Summit
	First ASEAN+3 Meeting
	Chiang Mai Initiative established
	ASEAN Vision 2020 adopted
1998	Framework Agreement on ASEAN Investment Area
2003	Bali Concord II: ASEAN Community comprises three pillars: the ASEAN Political-Security Community, AEC, and ASEAN Socio-Cultural Community
	ASEAN Minus X was introduced in the Protocol to Amend the ASEAN Framework Agreement on Services
2005	Mutual Recognition Arrangement (MRA): Engineering Services
2006	First ASEAN+6 meeting
	MRA: Architectural Services, Nursing Services; MRA Framework: Surveying Qualifications
2007	ASEAN Charter and AEC Blueprint signed
2008	MRA: Medical Practitioners, Dental Practitioners; MRA Framework: Accountancy Services
2010	All tariffs for products in the CEPT Inclusion Lists of ASEAN-6 eliminated for intra-ASEAN trade
	ASEAN Trade in Goods Agreement (ATIGA) implemented and cancellation of non-tariff measures by Brunei Darussalam, Indonesia, Malaysia, Singapore and Thailand
2013	Target: Elimination of all barriers to trade and allow 70% ASEAN equity ownership in logistic services
2015	Target: AEC
	Target: Elimination of tariffs by Cambodia, Lao, Myanmar and Vietnam
	Target: Elimination of all barriers to trade and allow 70% ownership in all service sectors

Source: Adapted from Suthiphand Chirathivat and Piti Srisangnam, 'The 2030 Architecture of Association of Southeast Asian Nations Free Trade Agreements' (ADBI Working Paper 419, Asian Development Bank Institute (ADBI), 2013).[14]

After the formation of AFTA, some ASEAN member countries, such as Indonesia, Malaysia, the Philippines, Thailand, and Vietnam experienced economic growth.[15] A study by Plummer and Yue shows that economic growth in ASEAN is influenced by

[14] Chirathivat and Srisangnam, above n 2, 5.

[15] International Monetary Fund, *World Economic Outlook Database* (October 2012) IMF <http://www.imf.org/external/pubs/ft/weo/2012/02/weodata/weoselgr.aspx>, 22.

various factors.[16] First, while the economic performance of member countries varies considerably, growth rates have been increasingly correlated since the Asian financial crisis in 1997.[17] Second, rapid structural change in ASEAN has been brought about by ASEAN's outward-oriented development strategy, which views globalisation as an opportunity to be taken. Economic reform in several ASEAN countries has facilitated the movement of production inputs across sectors in such a way as to reduce the costs of economic transition and to allow efficient reallocation of resources.[18] Third, the prospective benefits from international trade have persuaded ASEAN members to make structural adjustments to their economies. Exports, as an indicator of economic growth, have been rising in all member countries as a result of trade openness.[19] Trade openness refers to a lack of barriers to international trade and investment,[20] whether tariff or non-tariff barriers. Trade, as a measure of economic activity, contributes to a country's GDP. Trade openness is correlated with trade growth—that is, fewer barriers tend to increase trade, and trade contributes to a country's economic growth.

In 1992, a more definite goal for trade liberalisation—an FTA in the Southeast Asia region by 2003—was laid down under AFTA.[21] The primary aim of AFTA is to promote the ASEAN region's competitive advantage as a production base using the CEPT scheme.[22] AFTA narrowly focuses on the removal of trade barriers. Fortunately, a further important step has since been taken in the direction of trade liberalisation by eliminating tariff and non-tariff barriers among ASEAN members.[23] This move has served as a catalyst for enhancing efficiency in production and long-term competitiveness.[24] The expansion of intra-regional free trade has also provided ASEAN consumers with a wider choice of better quality products.

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[16] Michael G Plummer and Chia Siow Yue, 'Introduction' in Michael G Plummer and Chia Siow Yue (eds), *Realizing the ASEAN Economic Community: A Comprehensive Assessment* (Institute of Southeast Asian Studies, 2009) 215.

[17] Siow Yue Chia, 'The ASEAN Economic Community: Progress, Challenges, and Prospects' (ADBI Working Paper 440, Asian Development Bank Institute (ADBI), 2013), 93-94.

[18] Ibid.

[19] Rashid et al, above n 13.

[20] Ibid.

[21] Paul Bowles, 'ASEAN, AFTA and the "New Regionalism"' (1997) 70(2) *Pacific Affairs* 219, 220.

[22] CEPT was signed in 1993 in Singapore as an agreement of AFTA.

[23] Hadi Soesastro, 'ASEAN Economic Community: Concept, Cost, and Benefits' in Wei-Yen and Denis Hew (eds), *Roadmap to an ASEAN Economic Community* (Institute of Southeast Asian Studies, 2005) 13.

[24] Bowles, above n 21.

According to Imada and Naya, ASEAN's change in direction has resulted in significant accomplishments in the political arena, but achieved little in terms of economic cooperation, which has been limited. In fact, the idea of open trade was previously discouraged by ASEAN leaders.[25] However, as identified by Bowles and MacLean, there were strong drivers in the formation of AFTA. These included (1) the changes in international political economy during the 1980s; (2) the rise in influence of business interests throughout the ASEAN region and their general predisposition towards regional trade liberalisation; and (3) ASEAN's desire to maintain its position as an important organisation in a region experiencing change and the proliferation of new regional bodies, both proposed and actual.[26]

Since the formation of AFTA, economic growth has been significant in some ASEAN member countries, including Singapore, Indonesia, Thailand, Malaysia and Vietnam, as claimed by ASEAN. The ASEAN Secretariat states that since the implementation of the CEPT scheme in 1993, intra-ASEAN trade has grown from US$44.2 billion in 1993 to US$74.4 billion in 1999.[27] The intra-trade growth reflects an average annual increase of 11.4%.[28] Between 1980 until 2005, intra-ASEAN trade increased by an average annual rate of 8.9% in real terms. In the period 1987–1996, the growth increased significantly at 15.5% per annum on average rate.[29]

After the economic crisis in 1997, the intra-trade has grown at an average rate of 6.8% for the period 1997–2005.[30] In 2001-2002 the economic growth has gone even slower as a consequence of the global economic crisis. The development of AFTA during 1980-1991 (at 4.3%) compare to AFTA in 1992-2002 (at 8.2%) shows that in the second period of AFTA the trade increased twice than the first period. It demonstrated the positive impact of AFTA on intra-ASEAN trade. In fact, between 2003 and 2005, intra-

[25] Pearl Imada and Seiji Naya, *AFTA: The Way Ahead* (Institute of Southeast Asian (ISEAS), 1992), 53.

[26] Paul Bowles and B. MacLean, 'Understanding Trade Bloc Formation: The Case of the ASEAN Free Trade Area' (1996) 3(2) (06) *Review of International Political Economy* 319, 320.

[27] David J Dennis and Zainal Aznam Yusof, *Developing Indicators of ASEAN Integration: A Preliminary Survey for a Roadmap* (Regional Economic Policy Support Facility, 2003), 2.

[28] Ibid.

[29] Helen Cabalu and Cristina Alfonso, 'Does AFTA Create or Divert Trade?' (2007) 7(4) *Global Economy Journal* 5.

[30] Ibid.

ASEAN trade showed impressive trade rates.[31] However, ASEAN member countries have fallen short on implementation. Despite the launching of various programs for market liberalisation, the actual implementation progress did not go smoothly.[32] The agreement to create AFTA was reached within ten months after its initial proposal. Accordingly, the agreement did not include details of implementation, and backsliding moves immediately emerged. At the 3rd AFTA Council in December 1992, each member state revealed the CEPT plan.[33]

A 2012 study by Hussin and Saidin examines the correlation between trade openness and economic growth in ASEAN member countries using economic variables such as FDI, openness and GDP.[34] These variables prove the failure of AFTA in several AMSs, such as Indonesia, Malaysia, Thailand and the Philippines. This failure means that AFTA has had few benefits for its members.[35] FDI[36] was not significant in the case of all four ASEAN countries, while the GDPs of these countries have seen no significant growth.[37]

The ineffectiveness of AFTA is been proven empirically in a 2007 study by Ravenhill.[38] The author asserts that by the end of 2006, 99.8% of the tariff lines of the six original AFTA signatories (ASEAN 6) had been brought within the 0–5% range required by AFTA. The average tariff level was 2.39%, which was down from 12.76% in 1993 during the initial implementation period of AFTA. By 2003, ASEAN 6 had failed to meet its target of zero tariffs for 60% of the lines, with only Brunei, Singapore and Malaysia managing to reach this goal. As for the other three countries, Indonesia

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[31] Ibid.

[32] Yoshimatsu, above n 4.

[33] Ibid, at 122.

[34] Economic growth is the expansion in a nation's economy which can be measured by several indicators, the most often used being GDP. The increase in economic growth leads to the increase in labour demand, which is followed by higher labour incomes. Higher income of labour subsequently implies an increase in GDP, which translates to economic growth. Fauzi Hussin, 'Economic Growth in ASEAN-4 Countries: A Panel Data Analysis' (2012) 4(9) (07) *International journal of economics and finance* , 119.

[35] Ibid, at 119-122.

[36] Author using FDI as one of the indicators of competition policy harmonization and will be discussed in Chapter 5.

[37] Hussin, above n 34.

[38] John Ravenhill, 'Fighting Irrelevance: An Economic Community 'with ASEAN Characteristics'' (2008) 21(4) (08) *Pacific review* 469, 474–475.

achieved 54.6%; Thailand, only 4.3%; and the Philippines, only 3.8%. In 2006, only 65% of the products on the Inclusion List of ASEAN 6 had zero tariffs.[39]

The failure of economic cooperation under AFTA was due to the lack of precision of the obligations to which the members had agreed, the frequent changes to the target dates for the implementation that caused uncertainty for investors, and the failure of member states to honour the commitments they had made.[40] Most ASEAN states could not sufficiently identify their national interest with regional economic integration. Nor were ASEAN firms able to see how their businesses could benefit from the economic integration.[41] Soesastro gives a similar opinion that the implementation of economic integration under AFTA has been dissatisfied,[42] without dismissing the fact that the percentage of intra-ASEAN trade eligible for low or zero tariffs that actually utilises the lower AFTA preferential rates is very low.[43] [44] Declining margins of preference may have caused this, as 'most favoured nation' rates also came down at the same time. Other factors figure in the outcome, such as the lack of private sector awareness, lack of clarity in the application of the Rules of Origin, problems with customs procedures, and the lack of dispute settlement mechanisms.[45] However, the most crucial issue that ASEAN has is the commitment of the member states to the agreement.[46]

Further, there has been little progress in the removal of non-tariff barriers, because there has been no agreement on what this entails.[47] While tariffs have been significantly lowered, most countries within ASEAN are simultaneously raising non-tariff barriers, which may undermine the success of AFTA. It is posited that the removal of non-tariff barriers should be positively correlated with trade. Hence, as non-tariff barriers go

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[39] Ibid.

[40] Ibid, at 476.

[41] Rodolfo Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General* (Institute of Southeast Asian Studies, 2006).

[42] Hadi Soesastro, 'Accelerating Asean Economic Integration: Moving Beyond AFTA' (Paper presented at the The Second ASEAN Leadership Forum, Jakarta, 2005), 2.

[43] Ibid.

[44] Ibid.

[45] Ibid

[46] Ibid

[47] Ibid.

down, trade-facilitating infrastructure improves, which brings about greater regional trade.[48]

5.2.2 AEC 2015: Learning from the Past

While the achievements of AFTA may have been less than satisfactory, several factors serve as *prima facie* evidence to forge on by deepening the integration towards the ASEAN single market through the AEC by 2015. Since the rise of India's and China's economies in international trade, ASEAN is no longer the sole favourite destination for investors.[49] India, which has had a slower and less dramatic emergence than China, has also begun to show promising signs as an investment destination.[50] The weakened ability of ASEAN to attract FDI has brought AMSs together to deepen the integration of the ASEAN economies.[51]

According to the 2003 Declaration of ASEAN Concord II at Bali (Bali Concord II), ASEAN will become the AEC come 2015. In 2015, ASEAN will have fully implemented AFTA and will have accelerated trade liberalisation through trade facilitation. In 2007, at the 13th ASEAN Summit in Singapore, the ASEAN Charter of 2007 was signed by the ASEAN member countries. The charter serves as the legal and institutional framework as well as the constitution for the AEC.[52] The charter refers to economic integration theory that states that benefits accrue if the movement of goods and services across borders is uninhibited by artificial barriers.[53] The AEC adopted the ASEAN Economic Community Blueprint in 2008 (AEC Blueprint), which serves as a

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[48] Ibid.

[49] Denis Hew and Hadi Soesastro, 'Realizing the ASEAN Economic Community by 2020: ISEAS and ASEAN-ISIS Approaches' (2003) 20(3) *ASEAN Economic Bulletin* 292; Soesastro, above n ; Hank Lim and Matthew Walls, 'ASEAN after AFTA: What's next?' (2004) 3 *Dialogue and Cooperation* 91; K. Kesavapany and R. Sen, 'ASEAN's Contribution to the building of an Asian Economic Community' in N. Kumar (ed), *Towards an Asian Economic Community: Vision of a New Asia* (Research and Information System for Developing Countries, New Delhi and Institute of Southeast Asian Studies, Singapore, 2004) ; Adam Schwarz and Roland Villinger, 'Integrating Southeast Asia's economies', *Corporate Finance* 2006.

[50] Siow Yue Chia and Chalongphob Sussangkarn, 'The Economic Rise of China: Challenges and Opportunities for ASEAN' (2006) 1(1) *Asian Economic Policy Review* 102, 103.

[51] Shujiro Urata and Mitsuyo Ando, 'Investment Climate Study on ASEAN Member Countries' (ERIA Research Project Report 2008 No.3, Economic Research Institute for ASEAN and East Asia, 2010), 162-169.

[52] Article 1.5 of ASEAN Charter 2008.

[53] Rashid et al, above n 13, 20-21.

roadmap that ASEAN countries should abide by come 2015.[54] The aims of the AEC Blueprint are to create a single market and production base with free flow of goods, services, investment, capital and skilled labour; the realisation of a highly competitive economic region; the achievement of equitable economic development; and full integration into the global economy. Soesastro states that the AEC as a single market gives opportunities for consumers to get better option in the market. Further, on the other side, it will also open an arena for producers without worries about national boundaries in the ASEAN.[55] The ultimate mission of the AEC is to establish ASEAN as a single market and production base, with greater opportunities for businesses, and make ASEAN plays important role in global trade.[56]

To achieve the aims above, ASEAN should prioritise some sectors for undertaking bold liberalisation. In each of these priority sectors, four initiatives should be pursued.[57] These are: (a) eliminate non-tariff barriers, including increasing the efficiency of customs, harmonise or mutually recognise product and technical regulations, and remove duplication in testing and licensing procedures; (b) enhance tariff reform, including the elimination of internal tariffs as well as closer alignment of each member country's external tariffs; (c) create a level playing field for capital, by eliminating restrictions on cross-border investments within ASEAN and by introducing an ASEAN-wide competition policy, and (d) improve regional collaboration, including the promotion of an easier flow of skilled labour across the region and better mechanisms to provide development and technical assistance to newer members. As advocates of the initiatives above, Petri, Plummer and Zhai have explored the potential impact of AEC.[58] AEC is a highly ambitious effort that will enhance ASEAN's global competitiveness through the free flow of goods, services and skilled labour, the project intending to establish an efficient single market and production base encompassing nearly 600

[54] The member states chose to present these steps in a binding but flexible roadmap, compared to those found in the Charter that shows hesitancy. The result is another economic instrument that makes bold proclamations but leaves ample room for those states uncertain about their future to deviate from the necessary measures. See Lee Leviter, 'The ASEAN Chapter: ASEAN Failure or Member Failure?' (2010) 43 *New York University Journal of International Law & Politics* 159, 203-204.

[55] Hadi Soesastro, 'Implementing the ASEAN Economic Blueprint' in *The ASEAN Community: Unblocking the Roadblocks* (Institute for Southeast Asian Studies, 2008) 30, 47.

[56] Soesastro, above n 42, 47.

[57] McKinsey and Company, 'ASEAN Competitiveness Study: Final Report' (McKinsey Company, 2003).

[58] Peter A. Petri, Michael G Plummer and Fan Zhai, 'ASEAN Economic Community: A General Equilibrium Analysis the ASEAN Economic Community' (2012) 26(2) (06) *Asian Economic Journal* 93.

million people and US$2 trillion in production. In scale and difficulty, the AEC is comparable to European integration.[59]

The reasons behind the decision to create the AEC are various: first, the desire of ASEAN to create a comprehensive post-AFTA agenda; second, the perceived need to deepen economic integration in ASEAN in light of the new international commercial environment, especially the dominance of FTAs; third, the possibility that bilateral FTAs could jeopardise ASEAN integration, since all member states are free to pursue their commercial policy agendas. Further, there has been recognition since the Asian Crisis that cooperation in the real and financial sectors must be developed concomitantly, and that free flows of skilled labour will be a necessary complement to free flows of goods, services and capital.[60]

The decision to move forward from FTAs into an economic community in the ASEAN region is based on the assumption that the economic community will foster ASEAN welfare.[61] It is clearly defined in the AEC Blueprint that the primary goal of the economic integration is to reduce the transaction costs associated with cross-border trade. Further, it aims to make ASEAN an attractive destiny for multinational firms and FDI.[62] Other economic motivations for creating the AEC would include the potential benefits of creating a single market. Indeed, in the EU economic integration, it was estimated that the creation of a single market in Europe would create substantial advantages. These advantages were estimated as high as over 6% of the EU economy at the time.[63] For the ASEAN countries, it is assumed that the gains of harmonising rules, regulations and policies under the AEC would likely be far larger.[64]

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[59] Ibid.

[60] Michael G Plummer, ‘An ASEAN Customs Union?’ (2006) 17(5) (11) *Journal of Asian Economics* 923, 927.

[61] Hiro Lee and Michael G Plummer, 'Assessing the Impact of the ASEAN Economic Community' (Osaka School of International Public Policy, Osaka University, 2011).

[62] Ibid.

[63] Plummer, above n 60.

[64] Ibid.

Table 3: ASEAN Economic Community Status

Single Market and Production Base	2010	Current Status in 2015
Free flow of goods		
Tariff elimination	All tariffs for products in the CEPT inclusion lists of ASEAN-6 eliminated for intra-ASEAN trade Fully ratify tariff reduction schedule for CLMV*	All tariffs for products in the CEPT Inclusion lists and highly sensitive lists are eliminated Sensitive lists of ASEAN 10 eliminated for intra-ASEAN trade with flexibility for some sensitive products by 2018 for CLMV
Non-tariff measures (NTMs) & non-tariff barriers (NTBs)	Verification and cross-verification of NTBs among ASEAN member progressing	Significant progress in eliminating NTMs and NTBs among ASEAN members
Rules of origin	ASEAN Working Group on Rules of Origin concluded	Rules of origin and self-certificate system made more user-friendly and accessible with little transaction cost
Trade facilitation	ASEAN Trade Facilitation Framework and Work Program adopted ASEAN working group on tariff nomenclature and customs procedures concluded	ASEAN single window systems enabled and accessible. Issues such as customs, trade procedures, standards, performance, sanitary and phytosanitary solved
Free flow of services	Elimination of all barriers to trade and 70% ASEAN equity participation allowed in the following priority service sectors: air transport, e-ASEAN, health care, tourism by 2010, and logistics by 2013	All barrier to trade eliminated and 70% ASEAN equity participation allowed in all service sectors
Free flow of skilled labour	MRA: engineering services, architectural services, nursing services, medical practitioners, dental practitioners; MRA framework: surveying qualifications, accountancy services signed ASEAN Agreement on Movement of Natural Persons Remove discrimination in employment	Harmonisation of standards in education and training MRA on vocational training
Free flow of capital	Relax capital control measures on intra-ASEAN portfolio investment	Harmonise capital market standards Facilitate market-driven efforts to establish exchange and debt market linkages

Source: The AEC Blueprint 2008.

*CLMV: Cambodia, Laos, Myanmar and Vietnam.

5.2.3 AEC: Customs Union or Common Market?

Recall Balassa's theory regarding economic integration as a process encompassing measures designed to abolish trade discrimination between the economic units of different national states.[65] There are five types of economic integration that vary in degree (see Chapter 2). Balassa's conception of integration seems inflexible, as it mentions that the process must start with an FTA. There must be complete elimination of discriminatory measures as the economic community pursues a deeper form of integration.[66] The shift from FTAs to customs unions could be a very gradual process; alternatively, often member countries might leave economic integration at the FTA stage.[67] The step-by-step process of the shift is because the move from FTA to customs union requires not merely an economic motive but also a political one.[68] It requires participating countries to agree on a CET for all non-members.[69] No doubt, a fundamental difference between an FTA and a customs union can be seen in terms of pooling or loss of sovereignty on certain trade policies.[70] Unwillingness to give up sovereignty can be seen from the WTO notifications of RTAs. As of 8 January 2015, some 604 notifications of RTAs (counting goods, services and accessions separately) had been notified to the WTO. From the total 604 RTAs, 398 regional agreements were in force. These WTO figures correspond to 446 physical RTAs, of which 259 are currently in force.[71] The amount remaining implies that although many sign up for an FTA, very few are prepared to pool their sovereignty.

Examining the AEC from this perspective, it can be seen that ASEAN has successfully achieved the first stage of economic integration by establishing AFTA. A study by Plummer suggests that the development of ASEAN economic integration under the AEC will bring ASEAN greater gains economically from trade when it becomes a

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[65] Bela Balassa, *The Theory of Economic Integration* (Allen and Unwin, 1962).

[66] Sanchita Basu Das, Rahul Sen and Sadhana Srivastava, 'AEC Vision Post-2015: Is an ASEAN Customs Union Feasible?' (ISEAS Economics Working Paper No.2015-1, Institute of Southeast Asian Studies, 2015)

[67] Ibid, at 3-4.

[68] Balassa, above n 65.

[69] Anne O Krueger, 'Free Trade Agreements versus Customs Unions' (1997) 54(1) (10) *Journal of Development Economics* 169, 177-178.

[70] Das, Sen and Srivastava, above n 66.

[71] WTO, *Regional Trade Agreements* (April 7, 2015) The WTO <https://www.wto.org/english/tratop_e/region_e/region_e.htm#top> June 8, 2015.

customs union.[72] A customs union will be necessary for the formation of the AEC, since it will prevent ASEAN from market segmentation.[73] The ASEAN customs union will allow for a truly integrated market in ASEAN, allowing for greater gains from trade and more FDI than expected from AFTA.[74]

While AFTA is estimated to have had an important economic effect in certain sectors, some scholars argue that the creation of a real integrated market will not eventuate. The main reason for this is that divergent commercial policies among the market participants allow for divergent prices across the board.[75] This divergence has the additional effect of making the region less attractive to FDI. Investors face higher transaction costs in doing business in a segmented market than they do in the case of a single market. In fact, there is a strong theoretical argument that would suggest that a single market would have a far greater effect on attracting FDI from outside the region than would be the case in an FTA.[76]

To achieve status as a customs union, ASEAN faces several problems ahead. The first problem is the way in which ASEAN deals with regional matters.[77] This problem relates to ASEAN's preference for soft arrangements rather than formal agreements. The relationship between ASEAN member states is depends on personal relations among ministers and leaders rather than strong institutions. It is well known that ASEAN rely the cooperation on consensus and common interests rather than legal binding agreements.[78] The second characteristic problem is that ASEAN states a preference for sovereignty. ASEAN uniformly rejects the idea of pooled sovereignty under any regional order. In fact, ASEAN believes that regional institutions should enhance the sovereignty of their member states. This also holds true for its economic integration measures. Although initiatives like the AEC are regional in nature, compliance with and implementation of AEC commitments depends on voluntary national action.[79]

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[72] Plummer, above n 60, 297.

[73] Ibid.

[74] Ibid.

[75] Ibid.

[76] Ibid.

[77] Rodolfo C Severino, *Southeast Asia in Search of an ASEAN Community* (Institute of Southeast Asian Studies, 2008)41.

[78] Ibid.

[79] Das, Sen and Srivastava, above n 66, 21.

Finally, the third problematic element in implementing a customs union is related to ASEAN's principle of non-interference.[80] The non-interference principle is reaffirmed as fundamental in the 2007 ASEAN Charter, particularly for the internal affairs of the member states.[81] Under this principle, it can be predicted that achieving status as a customs union will not suit ASEAN's characteristics. ASEAN never set its main objective to be supranational institution for its member states.[82] Cooperation was pursued as one way to achieve national interest and gain mutual benefit among the member states. Meanwhile, a customs union has supranational characteristics that are unacceptable in ASEAN.[83]

Hew and Soesastro introduced two different scenarios for deepening ASEAN economic integration: AEC as an FTA-plus or AEC as a common market minus.[84] An FTA-plus is one integration level above an FTA where tariffs are harmonised among member countries, but they are allowed to have different tariffs with non-members. For ASEAN, this is more realistic than forming a customs union, due to the gap in economic development between CMLV and ASEAN 6.[85] A customs union takes the FTA further by deepening integration through the adoption of a CET. Such a form of integration will be more difficult particularly among countries that have disparities in tariff structures (as in ASEAN).[86] The formation of a customs union is also highly difficult because the member states must be obliged to yield sovereignty over most of their commercial policies. ASEAN members have not committed to an EU-style transfer of sovereignty;[87] further, strong political commitment and compromise are needed in regard to the implementation of a CET.[88]

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[80] Ibid.

[81] Ibid.

[82] Narongchai Akrasanee and David Stifel, 'The Political Economy of the ASEAN Free Trade Area' in Pearl Imada and Seiji Naya (eds), *AFTA: The Way Ahead* (Institute of Southeast Asian Studies, 1992) 27, 31.

[83] Ibid.

[84] Hew and Soesastro, above n 49, 293-294.

[85] Ibid.

[86] Plummer, above n 60, 933.

[87] Anja Jetschke and Philomena Murray, 'Diffusing Regional Integration: The EU and Southeast Asia' (2012) 35(1) *West European Politics* 174, 186.

[88] Plummer, above n 60.

ASEAN, in cooperation with the Institutes of Strategic and International Studies, has suggested that a common market minus could be more liberalising for the region than an FTA-plus. Hew and Soesastro explain that it would have the additional advantage of including the explicit formulation of some negative list of temporary exclusions that could be brought into the integration project.[89] A study by McKinsey on ASEAN competitiveness suggests that turning ASEAN into a single market would boost its competitiveness.[90] It is true that the final goal for the AEC is inspired by the experiences of the EU integration. However, whether the AEC should aim for a customs union or a common market is debatable.[91]

In contrast, the Institute of Southeast Asian Studies Paper recommends that the AEC should have the following conditions: first, it should have free movement of goods, services, investments, and capital. This would include achieving a zero-tariff FTA and the elimination of all non-tariff barriers. Second, the AEC should have an attractive regional production platform that would be a magnet for FDI.[92] Third, it should have free movement of skilled labour and creative talent and free movement of tourists from all ASEAN countries. Fifth, ASEAN has to harmonise the customs procedures and minimise customs requirements. Finally, to perform the AEC, ASEAN must have a well-developed institutional and legal infrastructure to facilitate the economic integration.[93]

It is explicitly mentioned in the Vientiane Action Plan 2004 that the process of establishing the AEC will require the harmonisation of many areas of policies, particularly microeconomic.[94] Most likely, the AEC will need some subsidiarity approach to harmonisation issues, as is the case in the EU.[95] Subsidiarity refers to an approach to harmonisation in which policies should be adopted at the lowest but most

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[89] Chien-Huei Wu, 'The ASEAN Economic Community Under the ASEAN Charter; Its External Economic Relations and Dispute Settlement Mechanisms' in *European Yearbook of International Economic Law 2010* (Springer, 2010) 331, 335.

[90] Ibid.

[91] Hew and Soesastro, above n 49.

[92] Ibid.

[93] Ibid, at 294.

[94] Ibid.

[95] Plummer, above n 60.

efficient level of aggregation.[96] Under such an approach, those policies would continue to dictate national regulations. However, where policies affect economic interaction with other regional partners or could be potentially detrimental to regional goals, region-wide rules and regulations would dominate.[97]

5.3 Competition Policy in the ASEAN Economic Community

The ultimate objective of the AEC is to achieve economic integration through the formation of a single market and production base. Meanwhile, the role of competition policy is to protect the single market from unfair business practices. Currently, ASEAN has settled the competition policy and law framework for its members to adopt. However, institutions and laws relating to competition policy and law have recently been established in only few ASEAN member countries. Regionally, the ASEAN Experts Group on Competition (AEGC) acts merely as an official ASEAN body for cooperative work on competition policy to serve as a network for competition agencies or relevant bodies to exchange policy experiences and institutional norms on competition policy and law. This section discusses the role of competition policy and law for the AEC. The present policy and its role in a single market do not merely prevent ASEAN market from anti-competitive behaviour; the function of competition policy is broader than that. It fosters the competitive environment in ASEAN, promotes consumer welfare and keeps the ASEAN market conducive for FDI.

5.3.1 Competition Policy as a Response to the ASEAN Single Market

Conceptually, a single market is one in which there is no discrimination according to source in the regional market for the free flow of goods, services, capital and skilled labour, thus removing effects of geographical segmentation.[98] The famous term for the single market is ‘law of one price’. Law of one price implies the equalisation of prices

[96] Ibid.

[97] Ibid.

[98] Peter J. Lloyd, 'What Is a Single Market? An Application to the Case of ASEAN' (2005) 22(3) (December 1) *ASEAN Economic Bulletin* 251, 252.

of similar goods and commodities across the economic community and among its members.[99]

To date, the EU is the only regional trade agreement that has formally created a single market as a goal.[100] The EU single market is deemed as a successful multinational project of economic integration. The objective of EU market is to enable the free cross-border flow of goods and services, labour and capital.[101] Other regional trade agreements have their own styles of economic community; for example, CARICOM defines their community as a 'single market and economy'.[102]

In the context of ASEAN, the term 'single market' is mentioned in the 2003 Declaration of ASEAN in Bali (Concord II). The Bali Concord II states that the ASEAN economic region, in which there is a free flow of goods, services, investment and capital, has seen equitable economic development and reduced poverty and socio-economic disparities. The emphasis on the desirable consequences of the Bali Concord II statement is worth noting in regard to its impact on socio-economy and poverty reduction.[103] The single market is explicitly mentioned in the Declaration as 'single market and production base'. This is reaffirmed in the following statement of the Declaration:

> The ASEAN Economic Community shall establish ASEAN as a single market and production base, turning the diversity that characteristises the region into opportunities for business complementation to make the ASEAN region a more dynamic and stronger segment of the global supply chain.[104]

Meanwhile, the AEC Blueprint re-emphasised the definition of 'production base' more explicitly:

> A single market for goods and services will also facilitate the development of production networks in the region and enhance ASEAN's capacity to serve as a global production center as a part of the global supply chain.[105]

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[99] Cassey Lee and Yoshifumi Fukunaga, 'Competition Policy Challenges of Single Market and Production Base' (Discussion Paper-2013-17, Economic Research Institute for ASEAN and East Asia, 2013), 5.

[100] Lloyd, above n 98, 215.

[101] David Howarth and Tal Sadeh, 'The Ever Incomplete Single Market: Differentiation and the Evolving Frontier of Integration' (2010) 17(7) *Journal of European Public Policy* 922, 922.

[102] Alina Kaczorowska-Ireland, *Competition Law in the CARICOM Single Market and Economy* (Routledge, 2014) 1-2.

[103] James R Ferguson, 'ASEAN Concord II: Policy Prospects for Participant Regional "Development"' (2004) 26(3) *Contemporary Southeast Asia: A Journal of International & Strategic Affairs* 393.

[104] ASEAN, '2003 Declaration of ASEAN Concord II' (ASEAN Secretariat, October 7 2003) 4.

[105] ASEAN Economic Community Blueprint, 'ASEAN Economic Community Blueprint' (ASEAN Secretariat, 2008).

Competition policy plays an important role for single market integration. The primary objective of competition policy and law is to foster economic efficiency and consumer welfare. According to the World Bank and OECD, the goal of competition policy is the maintenance of the free competitive process, or the protection of effective competition.[106] The main focus of competition policy is on the supply side of the market, such as business conduct that is anti-competitive.[107] Competition legislation aims to create and protect economic freedom.[108] The position of competition policy and law in an economic community is significant for protecting the market from anti-competitive conduct that might reduce welfare.[109] Indeed, the presence of competition policy and law in a market is an obligation if a country or region wants to join an open market. In a single market, competition policy relates to beyond-border policies;[110] it addresses business practices that are associated with the sale of goods within a national market. Beyond national borders, competition policy may affect trade and investment, for example, via cross-border mergers. For consumers in a single market, competition policy directly affects their interests and welfare, whether they purchase commodities from their own country or from importers.[111]

Legally, the terms of ASEAN's competition policy are presented in the ASEAN Regional Guidelines of Competition Policy (Regional Guidelines). Competition policy is defined as a governmental policy that promotes or maintains the level of competition in markets and includes governmental measures. The policy directly affected the behaviour of firms and the structure of the relevant markets.[112] The ASEAN Experts Group on Competition (AEGC) acts as an official body comprising representatives from the competition law authorities and agencies responsible for competition policy in AMSs. The main function of the AEGC is to coordinate competition policy for all ASEAN members.[113]

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[106] World Bank and OECD, *A Framework for the Design and Implementation of Competition Law and Policy* (World Bank Publications, 1999) 2.

[107] Lee and Fukunaga, above n 99.

[108] David J Gerber, *Law and Competition in Twentieth Century Europe* (Oxford University Press, 1998) 37.

[109] Bank and OECD, above n 106.

[110] Lee and Fukunaga, above n 99.

[111] Ibid, at 11.

[112] ASEAN, 'ASEAN Regional Guidelines on Competition Policy' (ASEAN Secretariat, August 2010) 3.

[113] Ibid.

Competition policy is significant for the AEC. Trade barriers to new entries may exist in a regional economic community. These obstacles come from the restrictive business practices of dominant domestic firms.[114] Even if the market has been liberalised, large domestic firms can reduce product prices to make the market unattractive for new entrants. Conversely, if the entry is successful, foreign firms could be ejected from the market where domestic enterprises are able to reduce prices.[115] Alternatively, a large foreign firm that enters an ASEAN member state's market may access and dominate the market by predatory pricing or by taking over local companies.[116] In the end, these two forms of anti-competitive conduct abuse the domestic market; the positions of small and medium-sized businesses could be curtailed, and the welfare of consumers adversely affected.[117]

Another significant role of competition policy for a single market is to avoid excess transaction costs incurred by AMS firms engaged in cross-border trade and investment in ASEAN.[118] In order to prevent such transactions, there is a synergistic relationship between trade, investment and competition law.[119] The combined impact of these policies on economic efficiency and income growth can be higher than the sum of their individual effects. The combination can also be understood as a set of complementarities, as reforms in one area would not have their positive impact in the absence of concomitant reforms in the two other policy areas.[120] The imbalance or the lack of one element in this relationship will create compliance costs.

The benefits gained from trade liberalisation in terms of lower prices for domestic consumers can be confiscated by anti-competitive practices that allow firms to exercise

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[114] Lee and Fukunaga, above n 99.

[115] Ibid.

[116] For the predatory pricing see Christopher R Leslie, 'Predatory Pricing and Recoupment' (2013) *Columbia Law Review* 1695. For the risk of take over leads to market control see Michael C Jensen, 'Takeovers: Their Causes and Consequences' (1988) 2(1) *The Journal of Economic Perspectives* 21, 23.

[117] Lee and Fukunaga, above n 99.

[118] Ibid.

[119] Csilla Bartók and Sébastien Miroudot, 'The Interaction amongst Trade, Investment and Competition Policies' (OECD Trade Policy Papers, No. 60, OECD, 2008) <http://dx.doi.org/10.1787/241467172568>, 12.

[120] Ibid.

market power.[121] This also means that opening the market to foreign investors will not benefit consumers if a domestic monopoly is replaced by a foreign monopoly.[122] When domestic markets are competitive, and foreign companies have market access, a higher degree of competition can lead to higher productivity and income.[123] One of the earliest empirical studies in this area, by Blomström, comes to the conclusion that the most significant source of spillover efficiency is to be found in the competitive pressure induced by foreign firms in Mexico.[124] In 2002, Sembenelli and Siotis tried to disentangle the pro-competitive and spillover effects in a study of Spanish firms.[125] They find that in non-research and development intensive sectors, the entry of multinational enterprises dampens the profit margins of local firms in the short term. However, this gives way to efficiency-enhancing effects in the longer term.[126]

In 2003, Chung, Mitchell and Yeung obtained a similar result when assessing the impact of Japanese FDI on the US automotive industry.[127] Increasing competitive pressure in the automotive sector was the main cause of its overall productivity improvement. This occurred during the initial stages of the Japanese presence in the 1980s.[128] More recently, an empirical study by Barrios, Görg and Strobl examined the effect of FDI on the entry of local firms into host economies.[129] They find that the impact of FDI on local development depends on two countervailing forces: first, a competition effect that provokes the exit of domestic firms; and second, positive market externalities related to FDI presence that encourage domestic firms to compete. With a continuous flow of FDI, the evolution of the number of local businesses can be depicted

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[121] Ibid.

[122] Stefanie A Haller, 'The Impact of Multinational Entry on Domestic Market Structure and Investment' (2009) 18(1) *International Review of Economics & Finance* 52, 53-54.

[123] Bartók and Miroudot, above n 119.

[124] Magnus Blomström, 'Foreign Investment and Productive Efficiency: The Case of Mexico' (1986) 35(1) *The Journal of industrial economics* 97, 99.

[125] Alessandro Sembenelli and Georges Siotis, 'Foreign Direct Investment, Competitive Pressure and Spillovers. An Empirical Analysis of Spanish Firm Level Data' (Discussion Paper No. 4903, Centre for Economic Policy Research 2005) 3.

[126] Ibid.

[127] Wilbur Chung, Will Mitchell and Bernard Yeung, 'Foreign Direct Investment and Host Country Productivity: The American Automotive Component Industry in the 1980s' (2003) 34(2) *Journal of International Business Studies* 199, 200.

[128] Ibid.

[129] Salvador Barrios, Holger Görg and Eric Strobl, 'Foreign Direct Investment, Competition and Industrial Development in the Host Country' (2005) 49(7) *European Economic Review* 1761, 1782.

as a U-curve: first, the competition effect dominates. However, in the end this is gradually outweighed by positive externality effects.[130]

Chung, Mitchell and Yeung's study also finds that FDI can be a positive factor for the expansion of domestic firms. Positive externalities are most likely to occur in the amount of capital transferred through FDI and efficiency for local firms. The authors argue that local companies need to adapt to new competitors, since FDI represents an increased competition factor than imports due to the market size limitation factor. In contrast, companies that come from a country with the weak competition policy will face higher compliance costs compared to a domestic firm in a country with strong competition law.[131]

In the case of ASEAN, different sets of competition laws will put an additional burden on both ASEAN and non-ASEAN firms investing in the region.[132] Currently, the development of competition policy and law among the AMSs has made only small progress. Six ASEAN countries have enacted competition law within their legal systems: Indonesia, Thailand, Singapore, Malaysia and Vietnam. The Philippines has no generic competition law, but it regulates anti-competitive behaviour via several fragmented regulations. Two other countries, Cambodia and Myanmar, have adopted competition law in 2015. The remaining countries, Brunei Darussalam and Laos, are still in the process of legal drafting.[133]

Recognition of the important role of competition policy for the AEC is provided in the AEC Blueprint. Specific targets and milestones for the implementation of competition policy are also incorporated in the Blueprint. Along with consumer protection, intellectual property rights, infrastructure development, taxation and e-commerce, competition policy falls under the goal of the establishment of a competitive economic region. In the Blueprint, five points of action on competition policy are proposed. The first action on competition policy is the implementation of competition law in AMSs:[134]

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[130] Ibid.

[131] Bartók and Miroudot, above n 119, at 12.

[132] Lee and Fukunaga, above n 99.

[133] ASEAN Experts Group on Competition (AEGC), *Brunei Darussalam* AEGC <http://www.aseancompetition.org/aegc/aegc-members/brunei-darussalam>.

[134] Blueprint, above n 105.

‘Endeavour to introduce competition policy in all ASEAN Member Countries by 2015.’ The level of this implementation could be measured using either a broad or narrow interpretation of competition policy. In both cases, the standard of implementation is moderate, based on the number of countries that have enacted national competition laws. If a broad interpretation is used, it can be concluded that most, but not all, AMSs have implemented such policies.[135]

The second effort on competition policy relates to the establishment of a competition policy network involving AMSs. The action is stated in the Blueprint as: ‘Establish a network of authorities or agencies responsible for competition policy to serve as a forum for discussing and coordinating competition policies.’ The level of implementation of the above action can be considered high based on the establishment and activities of the AEGC. The AEGC is a formal body comprising representatives from all AMSs nominated by the Senior Economic Official Meeting Leaders from each country. The AEGC was established with a mandate to oversee competition-related matters in ASEAN. Its task includes the achievement of the competition-related goals in the AEC Blueprint. As of June 2012, the AEGC had had nine meetings since its establishment. The significant contributions of the AEGC can be observed from the activities carried out through its five working groups, as follows:

a) Regional guidelines on competition policy;
b) Handbook on competition policy and law in ASEAN for business;
c) Capacity building;
d) Regional core competencies in competition policy and law; and
e) Strategy and tools for regional competition advocacy.

These working groups focus specifically on undertaking activities directly related to the AEC Blueprint: principally, action on capacity building and the Blueprint actions for the development of regional guidelines on competition policy. Both the working groups on regional Guidelines and Handbook have completed these respective documents, with the Handbook scheduled to be updated in 2013. The activities of the working group on capacity building continue to be crucial for AMSs. Between 2008 and 2011, the

[135] Cassey Lee and Yoshifumi Fukunaga, 'ASEAN Regional Cooperation on Competition Policy' (Discussion Paper-2013-03, Economic Research Institute for ASEAN and East Asia April 2013) 86.

working group has organised 14 capacity-building activities involving 700 government officials from AMSs.[136]

[136] Blueprint, above n 105.

Table 4: The ASEAN Competition Policy Timeline

Proposed Actions	Achievement as at 2012	Achievement as at 2014
Endeavour to introduce competition policy in all ASEAN Member Countries by 2015.	Five AMSs have implemented comprehensive national competition laws.	Six AMSs have implemented comprehensive national competition laws (Indonesia, Singapore, Thailand, Philippines, Malaysia and Vietnam). (Two countries have since adopted competition policy and law in 2015: Cambodia and Myanmar. Laos and Brunei Darussalam are still drafting.)
Establish a network of authorities or agencies responsible for competition policy to serve as a forum for discussing and coordinating competition policies.	Full—The AEGC was established in 2007.	Efforts to strengthen the regulatory environment in ASEAN: kick-off workshop on sector studies for the AEGC.
Encourage capacity-building programs/activities for ASEAN member countries in developing national competition policy.	Between 2008 and 2011, AEGC has organised 14 capacity-building activities involving 700 government officials from AMSs.	Introduction of competition policy in at least seven AMSs.
Develop a regional guideline for competition policy by 2010, based on country experiences and international best practices with the view to creating a fair competition environment.	ASEAN Secretariat published the ASEAN Regional Guidelines on Competition Policy in 2010.	Institutional building and enforcement of competition policy and law: Building competition law enforcement capability through investigation skills training.
Proposed Priority Actions		
2008–2009: Carry out a foundation-laying study, review study findings and recommendations, and convene a regional meeting.	The study on best practices in the introduction and implementation of competition policy and the law was completed in June 2008.	Strategy and tools for regional competition advocacy: Developing tools for customised advocacy strategies and collecting case studies.
2010–2015: Draw up a regional work plan on Competition Policy and Law with a special focus: capacity building and the introduction of best practices for introducing competition policy.	AEGC tabled a capacity-building roadmap at the 6th AEGC Meeting in July 2010.	Formulated the draft post-2015 Competition Action Plan.
2010–2015: Explore funding opportunities for the implementation of selected elements of the work plan in line with the strategic schedules of AEC building.	AEGC received funding for capacity building from InWEnt (2009–2020, 2011–2013) and ASEAN-GIZ (2011–2014).	

Source: Adapted from Lee and Fukunaga (2012)[137] and AEC Scorecard (2012).

[137] Lee and Fukunaga, above n 135.

5.4 ASEAN Cooperation on Competition Policy and Law: The Need for a Common Standard

As stated in the AEC Blueprint, competition policy is a crucial aspect of competitiveness. Within the AEC framework, competition policy has been identified as a component of a competitive economic region. There is no precise definition of the term 'competitive economic region' in the Blueprint. Some fields other than competition policy also included under the concept of a competitive economic region: consumer protection, intellectual property rights, infrastructure development, taxation and e-commerce.[138] The AEC Blueprint does not give further explanation in regard to the relationships between those fields and competition policy. However, these areas are likely to provide a situation more conducive to investment becoming more competitive in an ASEAN single market and production base. ASEAN and its member states must understand that proper competition policy and law favour economic efficiency, growth and development, and increase consumer welfare.

It is commonly acknowledged by scholars that competition policy and law assist in the development of market economy and society. They create incentives for market participants to act in a manner consistent with greater efficiency. Competition policy and law also ensure that any efficiency gained from competition is passed through the chain of supply to the benefit of consumers.[139] Several cases in the ASEAN region have proved the importance of the role of competition policy and law. Indonesia, Singapore, Vietnam and Malaysia have experienced the important role of competition policy for the economic development. However, the benefit of a competition policy regime cannot be achieved in Thailand due to a lack of political support and competition culture. Even Thailand has had competition policy and law in Vietnam; the enforcement is underdeveloped. The Philippines is one of few countries in ASEAN without comprehensive competition law. However, competition law provisions are available in numerous legislations and regulations.[140] Meanwhile, Myanmar, Cambodia and Lao

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[138] Blueprint, above n 105.

[139] Tu Thanh Nguyen, 'Competition Law in Vietnam: A Paper or Young Tiger?' (2012) 57(3) *The Antitrust Bulletin* 409, 413.

[140] Rafaelita M Aldaba and Geronimo S Sy, 'Designing a Cooperation Framework for Philippine Competition and Regulatory Agencies' (Discussion Paper Series No.2014-31, Philippine Institute for Development Studies, 2014) 4-5.

PDR currently have no data available on the development of competition law. Cambodia had drafted competition law by 2013, but to date there has been no progress for the draft. Lao PDR had one regulation related to trade practices in 2004, but so far the regulation has never been implemented. Finally, Myanmar has finished drafting competition regulations and has submitted these to the President's office.

Some AMSs have established bilateral cooperation on competition law with other countries that are non-ASEAN. Statistically, cooperation benefits the AMSs and the parties involved. However, at the multilateral level, ASEAN has no common standard for competition law cooperation or agreement. To date, ASEAN has no common competition policy. The 1999 Hanoi Plan of Action made reference to cooperation in order to 'explore the merits of common competition policy' as a possible way towards future harmonisation. The absence of regional competition law in ASEAN reflects the general under-development of competition law among individual ASEAN countries.[141] Unfortunately, the Blueprint does not provide guidance on competition policy harmonisation. ASEAN has taken steps in issuing the Competition Policy Guidelines and Handbook for Competition Policy, but its stand on competition policy harmonisation is still unclear. Member states have no obligation to abide strictly by the Guidelines, since it only serves as a guidebook for member states.

[141] Peter J Lloyd, 'Competition Policy in the Asian-Pacific Region' (2000) 14(2) *Asian-Pacific Economic Literature* 1, 8.

Table 5: Competition Law Regimes in ASEAN Member States

Jurisdictions	Key Legislations	Year	Regulator
Brunei Darussalam	Currently, the law is still being drafted.	-	The following agencies handle regulating market players in their respective sectors, including on general competition matters: Telecommunications, Media and Broadcasting: Authority of Info-Communications Technology Industry Banking, Finance, and Insurance: Monetary Authority of Brunei Darussalam Oil and Gas: Energy Department, Prime Minister's Office
Cambodia	The Cambodian Government has been finalising a draft competition law, which was expected to be submitted to the Council of Ministers of Cambodia prior to the end of 2013. The draft has been passed in 2015 but has not been yet implemented.	-	-
Indonesia	Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition Regulation of the Supreme Court of the Republic of Indonesia No. 3 of 2005 regarding the Procedures for Filing Objections to the Decisions of KPPU*; KPPU Regulation No. 1 of 2006 regarding the Procedures for Case Handling in KPPU; KPPU Regulation No. 2 of 2008 concerning the Authorities of the Commission Secretariat in Case Handling; KPPU Regulation No. 1 of 2010 regarding Case Handling Procedures replaces KPPU Regulation No. 1 of 2006 and No. 2 of 2008 for cases introduced as of 5 April 2010.	1999	KPPU
Lao PDR	The relevant legislation is Decree 15/PMO (4/2/2004) on Trade Competition (the Decree). Currently, the Decree has not been implemented.		According to the Decree, the Trade Competition Commission is chaired to enforce the Decree. The TCC has not yet been established.
Malaysia	The Competition Act 2010	2012	Malaysian Competition Commission
Myanmar	Currently, the draft of the Competition Law has been prepared by the Ministry of Commerce and submitted to President's Office.	-	-
Singapore	The Competition Act (Chapter 50B of Singapore Statutes)	2005	The Competition Commission of Singapore (CCS)
Thailand	The Trade Competition Act B.E. 2542	1999	The Trade Competition Commission
The	The 1987 Constitution;	Various	Department of Justice and several

Philippines	The Act to Prohibit Monopolies and Combinations in Restraint of Trade (Act No. 3247 (1925)); The Revised Penal Code (Act No. 3815), as amended; The New Civil Code (Republic Act No. 386, 1949); Amending the Law Prescribing the Duties and Qualifications of Legal Staff in the Office of the Secretary of Justice (Republic Act No. 4152); Executive Order No. 45, series of 2011, designating the Department of Justice as the Competition Authority; Republic Act 8752: Antidumping Act of Philippine (1999); Republic Act 8293: Intellectual Property Code of the Philippines (1997); Republic Act 165 and 166, regulating Patent Law and Trademark Law. Both describe the appropriate civil actions that can be resorted to and penalties imposable for breaches; Presidential Decree 49 on Copyright Law, penalising copyright infringement.	years	sectoral agencies
Vietnam	Competition Law No. 27/2004/QH11	2004	The Vietnam Competition Authority

Source: Compiled by author from various ASEAN competition law authorities.

*KPPU: Komisi Pengawas Persaingan Usaha

5.4.1 Bilateral Cooperation on Competition Law in ASEAN

On a positive note, some ASEAN member countries do exercise competition policy cooperation with other countries in their trade agreements. From these agreements, in particular, Singapore, Thailand and Malaysia have enjoyed the benefits of free trade, to which cooperation on competition policy is one contributing factor. The most detailed treatment of this relationship can be found in the US–Singapore Free Trade Agreement. In May 2003, Singapore signed an agreement with the US on trade cooperation. Competition law is set out in Chapter 12 of the agreement, entitled Anti-Competitive Business Conduct, Designated Monopolies and Government Enterprises.[142] The chapter contains broad statements of principles on matters relating to competition policy, and states that the parties recognise the importance of cooperation and coordination for the effectiveness of competition law and policy development in the FTA in the future.[143]

[142] United States–Singapore, *United States–Singapore Free Trade Agreement* (April 26, 2012) United States–Singapore <http://www.fta.gov.sg/fta_ussfta.asp?hl=13>, chapter 12, 133.

[143] Ibid.

Another agreement is the Thailand–Australia Free Trade Agreement (TAFTA), which entered into force on 1 January 2005. This was Australia's third free trade agreement.[144] TAFTA was the first free trade agreement for Thailand with a developed country. From the bilateral trade cooperation with Australia, Thailand gained more than doubled since TAFTA entered into force.[145] In Chapter 12 of the agreement, both governments commit to enforcing their competition laws, but with exemptions provided for some areas on public interest grounds and on the condition that these be applied in a transparent way.[146]

Article 1202 of the Thailand–Australia Free Trade Agreement obliges each party to promote competition by addressing anti-competitive practices in its territory and by adopting and enforcing such means or measures as it deems appropriate and effective to counter such practices.[147] In this agreement, Thailand and Australia agreed about achieving effective competition law enforcement outcomes. They also recognise the importance of confidentiality with respect to these arrangements. On Article 1205, the Parties agreed to cooperate, where appropriate, on issues of competition law enforcement, including the exchange of information, notification, consultation, and coordination of enforcement matters that are cross-border in nature.[148]

No different with the agreement above, the Singapore–Australia free trade agreement is commit to address anti-competitive business practices and to consult with each other upon request on matters relating to anti-competitive practices of particular concern.[149] They would ensure that government-owned businesses will be subject to competitive neutrality. After Singapore has passed its competition law, the competition policy provisions will be reviewed to consider extending the agreement.[150] The agreement contains provisions that rule on the anti-competitive horizontal arrangements between

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[144] Australia and the Kingdom of Thailand, *Australia-Thailand Free Trade Agreement* (2012) <http://www.dfat.gov.au/about-us/publications/trade-investment/thailand-australia-free-trade-agreement/Documents/aus-thai_FTA_text.pdf> June 8, 2015.

[145] Ibid.

[146] Ibid.

[147] Ibid, at Chapter 12, Art. 1201.

[148] Ibid, at Chapter 12, Art. 1205

[149] Singapore-ESFTA, *Singapore-European Free Trade Association FTA (ESFTA)* (April 26, 2012) <http://www.fta.gov.sg/fta_esfta.asp?hl=11> March 31, 2015.

[150] Ibid.

competitors, misuse of market power, including predatory pricing by business, anti-competitive vertical arrangements between companies, and anti-competitive M&As.[151]

Competition policy is also provided in the Singapore–European Free Trade Association (EFTA) Free Trade Agreement. Chapter 5, Article 50, regulates the cooperation and exchange of information with the aim of ensuring and facilitating the enforcement of the parties' respective competition laws.[152] Singapore has already reaped benefits from trade with EFTA via their exports. On 18 August 2000, Singapore and New Zealand concluded negotiations on the Agreement between New Zealand and Singapore on a Closer Economic Partnership (ANZSCEP).[153] In ANZSCEP, the parties agreed the importance of competition policy to enhance economic welfare. The agreement strongly suggested the parties to implement the APEC Principles to Enhance Competition and Regulatory Reform in order to protecting the competitive process rather than competitors and ensuring that the design of regulation recognises options that minimise distortions to competition. The parties jointly commit to ensuring that where specific commitments are made relating to market access and national treatment for goods and services; these must not be adversely affected by actions of a monopolist supplier.[154]

The Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership Agreement (JSEPA), or the Singapore–Japan free trade agreement, also contains a provision for competition policy cooperation. Accordingly, the parties would be free to use their own respective countries' competition laws. Without providing details of the said cooperation, the provision states the willingness of the two governments to cooperate in controlling anti-competitive practices. It then stipulates that dispute settlement arrangements in the wider agreement do not apply to the competitive policy cooperation provision of the agreement.[155] Based on JSEPA,

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[151] OG Banda and John Whalley, 'Beyond Goods And Services: Competition Policy, Investment, Mutual Recognition, Movement Of Persons, And Broader Cooperation Provisions Of Recent FTAs involving ASEAN Countries' (NBER Working Paper No. 11232, National Bureau of Economic Research, 2005), 10–12.

[152] Singapore-ESFTA, above n 150.

[153] Singapore-New Zealand, *Singapore and New Zealand Concluded Negotiations on the Agreement between New Zealand and Singapore on a Closer Economic Partnership (ANZSCEP)* (April 26, 2012) <http://www.fta.gov.sg/fta_anzscep.asp?hl=9> March 31, 2015.

[154] Ibid.

[155] Singapore-Japan, *The Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership Agreement (JSEPA)* (April 26, 2012) <http://www.fta.gov.sg/fta_jsepa.asp?hl=7>, March 31, 2015.

Singaporean exporters to Japan enjoy near 100% zero-tariff treatment.[156] The revised JSEPA gives Singapore tariff-free treatment for 8,315 industrial and agricultural products, which constitute approximately 92.1% of Japan's total tariff lines. In the industrial products sector, Japan has granted concessions on 26 petrochemical or plastic products with varying staging periods for tariff reduction. In agricultural commodities, Japan will grant additional concessions for more than 1,340 products.[157]

5.4.2 Regional Cooperation on Competition Policy

Regionally, ASEAN has established several agreements on competition policy cooperation. Regional cooperation on competition policy and the law occurs in a free trade agreement between ASEAN, Australia, and New Zealand (AANZFTA). ASEAN, Australia and New Zealand began FTA negotiations in 2005 that are expected to be completed in two years, with the AANZFTA fully implemented within ten years.[158] Following the agreement, Australia and New Zealand send approximately 10% of their exports to ASEAN with Australia receiving approximately 20% of its imports from ASEAN and New Zealand 14%.[159] In recent years, the growth of the trade has increased impressively. New Zealand exports approximately 22% of its exports to Australia and receives approximately 21% of its imports from Australia. New Zealand is a major agricultural exporter, and approximately 10% of its agricultural exports go to ASEAN. Unfortunately, ASEAN agricultural exports are less than 10% go to New Zealand.[160]

The AANZFTA Agreement effectively creates an FTA of over 600 million people with a combined GDP of US$2.3 trillion. This is expected to have reached US$2.7 trillion, according to the International Monetary Fund (IMF) forecast for 2008.[161] Intra-regional trade between ASEAN, Australia and New Zealand has been growing at an average of

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[156] Ibid.

[157] Ibid.

[158] Robert Scollay and Ray Trewin, 'Australia and New Zealand Bilateral CEPs/FTAs with the ASEAN countries and their Implication on the AANZFTA' (REPSF Project No. 05/003 Regional Economic Policy Support Facility, June 2006) 1.

[159] Sayeeda Bano, 'ASEAN-New Zealand Trade Relations and Trade Potential' (Working Paper in Economics 01/10, University of Waikato, April 2010) 29-30.

[160] Ibid.

[161] ASEAN Secreatariat, *Joint Media Statement on the Signing of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area* (February 27, 2009) ASEAN Secreatariat <http://www.asean.org/news/item/joint-media-statement-on-the-signing-of-the-agreement-establishing-the-asean-australia-new-zealand-free-trade-area-cha-am-thailand-27-february-2009> March 31, 2015.

about 16% per annum since the start of the FTA negotiations in 2005.[162] In 2007, the trade increase in Australian and New Zealand investments in ASEAN reached US$ 1.1 billion.[163]

AANZFTA specifies competition policy and law cooperation in Chapter 14 of the agreement. It mentions that the parties recognise the importance of cooperation in the promotion of competition, economic efficiency, consumer welfare and the curtailment of anti-competitive practices. Chapter 14 does not require parties to develop specific competition-related measures to address anti-competitive practices, or prevent parties from adopting policies in other fields, for example, to promote economic development.[164] However, the parties may engage in cooperation activities consistent with Article 1 (Basic Principles) in the field of competition.[165]

The above agreements showcase competition policy development in ASEAN and give indications that competition policy cooperation benefits the parties involved. With trade liberalisation development in ASEAN, the economy is being dramatically integrated into a single market. To further develop the world economy along this trend of globalisation, cooperation in competition law and policy is needed among AMSs. This is elucidated by the fact that competition issues are included in various forms of bilateral, multilateral and regional agreements. Thus, regional competition policy is something that ASEAN needs to focus on before launching the AEC (defined as the ASEAN single market). Undoubtedly, at the centre of the efforts to create a strong single market is competition policy harmonisation.

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[162] Ibid.

[163] Ibid

[164] ASEAN-Australia New Zealand Free Trade Agreement, *Agreement Establishing the Asean-Australia-New Zealand Free Trade Area* (February 27, 2009) ASEAN-Australia New Zealand Free Trade Agreement (AANZFTA) <http://www.asean.org/images/2013/economic/afta/AANZFTA/Agreement%20Establishing%20the%20AANZFTA.pdf>, March 31, 2015.

[165] Ibid. This is including as follows: (1) exchange of experience regarding the promotion and enforcement of competition law and policy; (2) exchange of publicly available information about competition law and policy; (3) exchange of officials for training purposes; (4) exchange of consultants and experts on competition law and policy; (5) participation of officials as lecturers, consultants, or participants at training courses on competition law and policy; (6) participation of officials in advocacy programmes; (7) other related activities following the introduction of a competition law in a Party; and (8) any other form of technical cooperation as agreed upon by the Parties.

Table 6: AMSs Bilateral Agreements on Competition Policy

Brunei Darussalam	Brunei–Japan Economic Partnership Agreement (BJEPA) Brunei–Chile–Singapore–New Zealand Trans-Pacific Strategic Economic Partnership (P4), signed 3 June 2005 Trans-Pacific Partnership (TPP) Agreement (under negotiation) Brunei–European Union Partnership Cooperation Agreement (under negotiation)
Singapore	Singapore–US, signed 6 May 2003 Singapore–Australia, signed 17 February 2003 Singapore–EFTA, signed 11 April 2002 Singapore–New Zealand (ANZSCEP), signed 18 August 2000 Singapore–Japan (JSEPA), signed 13 January 2002
Malaysia	Malaysia–Japan International Cooperation Agency: Economic Partnership Program–Capacity Building For Competition Law, Japan, 9–16 March 2013 ASEAN–Australia–New Zealand Free Trade Area Economic Cooperation Work Program (AANZFTA ECWP): Competition Regulatory Experts Secondment from the Australian Competition & Consumer Commission (ACCC) to the Malaysia Competition Commission (MyCC), Malaysia, 2 September–20 December 2013 MyCC Attachment Program to the ACCC, Australia, 12 August–1 November 2013
Thailand	Thailand–US, signed 23 Oct 2002 Thailand–Australia, signed 5 July 2003
Cambodia	The Domestic Trade Department, Ministry of Industry and Commerce, operates a bilateral cooperation with GIZ according to the Agreed Minutes on ASEAN-German Cooperation Project Competition Policy and Law in ASEAN, signed 12 June 2012
Vietnam	Vietnam Competition Authority (VCA) and Japan International Cooperation Agency signed a Memorandum on Cooperation in implementing the Project Technical Assistance to strengthen capacity building of law enforcement and consumer protection policy in Vietnam, signed 4 July 2014

Source: Compiled by author from various AMSs' bilateral agreements.

5.5 Developing Competition Policy for AEC

Currently, ASEAN has no general competition policy or law to implement across its member states. In 2010, the AEGC completed the ASEAN Regional Guidelines on Competition Policy, which serve as a non-binding framework for the ASEAN member countries as they endeavour to introduce, implement and develop competition policy according to the specific legal and economic context of each of the member states.[166] In the same year, AEGC issued the Handbook on Competition Policy and Law in ASEAN for Business. The Handbook provides basic notions of substantive and procedural

[166] ASEAN, above n 133.

competition law in AMSs. The aim of the Handbook is merely to provide information for parties engaged in business in the ASEAN region.[167]

In the absence of a common competition policy and law for the ASEAN single market, there is the possibility that a country may apply its competition law to combat anti-competitive conduct beyond its jurisdiction.[168] For instance, the US experience in exercising extraterritorial jurisdiction using the effect doctrine, particularly in the case of export cartels, has had a negative impact on trading relationships with its partners.[169] For developing countries with small open economies that depend on export and foreign trade, the effect doctrine may beneficial.[170] Conversely, however, by reflecting on the US experience, it can be imagined that the use of the effect doctrine may cause tensions and frictions among AMSs, which may pose a challenge for ASEAN economic integration in the future. In this case, the lack of regional competition policy and law seems a pertinent factor in solving the issues of cross-border competition law enforcement.

Competition law enforcement is no longer merely a domestic affair. Some mechanisms, notably the use of extra-territoriality, may create substantial conflicts between the interests and laws of different countries, as in the merger of Boeing–McDonnell Douglas.[171] The case illustrates the possible enforcement conflicts between national competition authorities. Campbell and Rowley argue that as commercial activity becomes increasingly global, competition regimes proliferate. Divergence in competition laws is likely to produce considerable conflict between jurisdictions, compliance burdens for business, and chilling effects on economically beneficial

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[167] ASEAN Secretariat, 'Handbook on Competition Policy and Law in ASEAN for Business 2013' (ASEAN, May 2013).

[168] Brian Peck, 'Extraterritorial Application of Antitrust Laws and the US-EU Dispute over the Boeing and McDonnell Douglas Merger: From Comity to Conflict--An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution' (1998) 35 *San Diego Law Review* 1163.

[169] Najeeb Samie, 'The Doctrine of "Effects" and the Extraterritorial Application of Antitrust Laws' (1982) 14(1) (04/01) *Lawyer of the Americas* 23.

[170] Haniff Ahamat and Nasarudin Abdul Rahman, 'Closer Cooperation and Coordination in Competition Regulation in ASEAN and Their Impact on Trade Liberalization' (2013) 8(2) *Asian Journal of WTO & International Health Law and Policy* 543, 550.

[171] Eleanor M Fox, 'Antitrust Regulation Across National Borders: The United States of Boeing versus the European Union of Airbus' (1998) *The Brookings Review* 30, available online at http://www.brookings.edu/research/articles/1998/12/winter-business-fox.

conduct.[172] To avoid such conflicts, ASEAN needs to set a common competition policy for its member states. In this case, the Regional Guidelines are deemed as the core common standard of competition policy for ASEAN.

However, the lessons learnt from the review of other regional harmonisation regimes is that even a binding set of competition policies will not be effective without a supranational body to enforce them, or at least a competition enforcement system for dispute resolution.[173] Since the rationale for ASEAN's regional competition law is to strengthen and protect the single regional market, it is important to establish an effective competition policy and law. Therefore, to form competition policy harmonisation on a multilateral level, at least four elements identify the directions proposed on competition policies. These elements are: (1) achieving the investment-promoting benefits of harmonised competition policies; (2) actions against anti-competitive practices that restrict market access for imports; (3) replacement of anti-dumping arrangements by competition policies; (4) and restrictions on cross-border cartels.[174]

5.6 Conclusion

This chapter has argued that the failure of AFTA in the past has been due to the lack of a competition policy framework for ASEAN. In line with the aim of establishing the AEC, it is an obligation for the member states to create an extremely competitive region. To establish a competitive market, AMSs must consider that competition law is an expression of competition policy. Competition policy refers to public policies on introducing, increasing and/or maintaining competition in markets, and includes all government measures directly affecting firms' behaviour and industry market structures.

The benefits of competition policy and law have been presented in several cases from ASEAN's member states. From these cases, it can be understood that a properly implemented competition enforcement system favours economic efficiency, growth and development, and in the end will increase consumer welfare. Creating a competition

[172] A Neil Campbell and J William Rowley, 'The Internationalization of Unilateral Conduct Laws—Conflict, Comity, Cooperation and/or Convergence?' (2008) *Antitrust Law Journal* 267, 267.

[173] Huong Ly Luu, 'Regional Harmonization of Competition Law and Policy: An ASEAN Approach' (2012) 2(02) *Asian Journal of International Law* 291, 319.

[174] Aditya Bhattacharjea, 'Trade and Competition Policy' (Working Paper No. 146, Indian Council for Research on International Economic Relations, New Delhi, India, November 2004), 6–7.

enforcement system requires a competition law establishing substantive rules and procedures. Effective competition law enforcement needs back up from competition culture, including for political support.

This chapter has found that some AMSs have adopted competition law among their regulations, and are new to the enforcement of these laws. These member states have realised the importance of competition policy in supporting trade liberalisation in economic integration. It is also admitted that the need for competition policy cannot be separated from the process of trade liberalisation. The function of the former is clear: to protect consumer welfare from the adverse effects of market liberalisation. Further, competition policy is formed to protect competition itself from anti-competitive conduct. A market with a fair level playing field may also attract foreign investment in host countries. The evidence from AFTA experience as cited in this chapter has shown that without competition policy and law in economic integration, expected or predicted economic growth is very difficult to achieve.

Chapter 6
Competition Policy and Law Performance in ASEAN Member States: The Differences and the Gap

6.1 Introduction

This chapter examines the gaps and differences among the various AMSs' competition law regimes. The differences in the competition laws of the member states are varied, and can be divided into three categories: legal substantive, legal enforcement and the degree of development of the competition law. From these categories, the characteristics of AMSs competition law can be recognised. The gaps present difficulty in achieving competition law harmonisation for the ASEAN single market.

Though harmonisation is not a new concept, no harmonisation project has ever reached completion except for that of the EU. This is due to the nature of harmonisation, which seeks to incorporate different legal systems under a fundamental and unifying framework. Although harmonisation serves as a tool that is globally acknowledged to smooth out potential conflicts between legal systems, it does not necessarily follow that harmonisation would be effective in standardising laws. Unlike in the EU, economic regionalism in ASEAN did not begin with the formation of a regional free competition framework. In fact, despite the region's status as one of the economic powerhouses of the world, the arrival of competition law regimes in ASEAN has brought too little too late.[1] To develop competition law harmonisation is far beyond its capability, based on the examples of other economic communities such as ECOWAS or even the EU.

Harmonisation of competition laws in ASEAN is a crucial aspect for AEC 2015. With harmonisation, conflicts between legal systems can be avoided, and also legal differences can be minimised. Luu,[2] Wisuttisak and Binh[3], Thanadsillapakul,[4] Radhie[5]

[1] Haniff Ahamat and Nasarudin Abdul Rahman, 'Closer Cooperation and Coordination in Competition Regulation in ASEAN and Their Impact on Trade Liberalization' (2013) 8(2) *Asian Journal of WTO & International Health Law and Policy* 543, 545.

[2] Huong Ly Luu, 'Regional Harmonization of Competition Law and Policy: An ASEAN Approach' (2012) 2(02) *Asian Journal of International Law* 291, 291–321.

and Pardede[6] agree that competition policy harmonisation will confer advantages to the AEC. However, before further steps are taken to harmonise the competition policies of AMSs, it is important to identify the differences between national competition policies. Examining the competition policies of AMSs shows the directions of national interest. Broadly, the differences between them are enormous, and the gaps are significant. The differences can be observed from the points of view of legal substance, legal enforcement, and the level degree of competition law.

6.2 ASEAN Countries' Policies on Anti-Competitive Conduct

The differences in legal substance of the competition laws of AMSs are grouped into five key aspects: the objective of the law, jurisdictional exemption, horizontal agreements, abuse of dominant position, and mergers. This section focuses on the legal substance of competition laws from AMSs: Indonesia, Malaysia, Thailand, the Philippines and Vietnam. For the Philippines, even though its generic competition law is still in the process of drafting, the rule related to the prohibition of anti-competitive conduct is spread across several regulations.

6.2.1 Objective of the Competition Law

Five AMSs have generic competition laws as part of their legal systems. Each act of competition legislation states an aim. As shown in Table 7 below, these stated aims of competition law are diverse. As a result, the multiple objectives of these five states may come into conflict and cause friction between parties. These objectives are efficiency, consumer welfare, economic development, effectiveness and competitiveness, free and fair trade, and creating a fair level playing field.

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[3] Pornchai Wisuttisak and Nguyen Ba Binh, 'ASEAN Competition Law and Policy: Toward Trade Liberalization and Regional Market Integration' (Paper presented at the The 2nd International Conference on International Relations and Development (ICIRD): Towards an ASEAN Economic Community (AEC): Prospects, Challenges and Paradoxes in Development, Governance and Human Security, Thailand, July 26-27 2012).

[4] Lawan Thanadsillapakul, 'The Harmonization of ASEAN: Competition Laws and Policy from an Economic Integration Perspective' in Philippe Gugler and Julien Chaisse (eds), *Competitiveness of the ASEAN Countries Corporate and Regulatory Drivers* (Edward Edgar Publishing, 2010) .

[5] Tunku Mohammad Radhie, 'Harmonization of Laws: Issues and Prospects in ASEAN Law, Technology and Development' (1986) 1 *ASEAN Law & Social Journal* 50, 50-54.

[6] Soy Martua Pardede, 'Regional Framework for Competition Policy and AEC' (Report No.4, Institute of Southeast Asian Studies, 2009) 30-42.

Examining the diversity of competition law objectives is important, since the direction of the law depends on it. Hence, the first thing that ASEAN must do is to find a common direction for competition law in the ASEAN single market. As shown in Table 7 below, the differences are currently sufficiently wide to cause problems in this regard. Indonesia has more than sufficient objectives, except for in economic development. Interestingly, two opposing objectives are provided in Indonesia's Anti-Monopoly Act of 1999.[7]

Table 7: Objectives of Competition Law

Countries/ Objectives	Indonesia	Philippines	Thailand	Singapore	Vietnam	Malaysia
Economic Efficiency	√	NA	√	√	√	√
Consumer Welfare	√	NA	-	-	√	√
Economic Development	-	NA	√	-	-	√
Effectiveness & Competitiveness	√	NA	-	√	-	-
Free and Fair Trade	√	NA	√	-	-	-
Create a Fair Level Playing Field	√	NA	√	√	√	-

Source: Compiled by author from the competition laws of six AMSs.

Note: Data not available for the Philippines.

The Regional Guidelines on Competition Policy state several key objectives of competition policy. The common aim is to promote and protect the competitive process, while at the same time introducing a level playing field for all market players.[8] The first stated objective of competition law in the Regional Guidelines is economic efficiency. This refers to the effective use and allocation of the economy's resources:[9] disciplining enterprises to produce at the lowest possible cost and pass these cost savings on to consumers will bring enhanced efficiency, both statistic and dynamic. This effort motivates firms to undertake research and development to meet customers' needs.[10]

[7] Law No.5 of 1999 concerning the Monopolistic Practices Prohibition and Unfair Business Competition.

[8] ASEAN, 'ASEAN Regional Guidelines on Competition Policy' (ASEAN Secretariat, August 2010) 3-4.

[9] Ibid.

[10] Ibid.

The second objective is to enhance economic growth and development. Economic growth means increasing the value of goods and services produced by an economy. Meanwhile, economic development refers to a broader definition of an economy's well-being. This development covers employment growth, literacy and mortality rates and other measures of quality of life.[11] The background rationale for this goal is that competition may bring about greater economic growth and development through improvements in economic efficiency. In addition, it will reduce wastage in the production of goods and services, enabling the market to more rapidly reallocate resources, improve productivity and attain a higher level of economic growth.[12]

The third objective is to enhance consumer welfare. According to the Regional Guidelines, competition policy contributes to economic growth to the ultimate benefit of consumers, via a better choice of new products, better quality and lower prices. Competition policy and law are intended to protect consumers from the anti-competitive behaviour of firms using market power to control prices. Firms with market power can unfairly transfer welfare from consumers to themselves (see Chapter 2).[13]

As shown in Table 7 above, all five AMSs agree that efficiency is the main objective of competition law.[14] Four member states also share a common goal of fostering competition through the creation of a level playing field. Nevertheless, disparity appears in other areas, such as economic development and competitiveness. Diversity in the objectives of competition law could lead to conflict between these laws. For instance, if one country aims to improve the competitiveness of their market globally by expanding domestic production and restricting imports, this would go against the region's free trade policy, since regional trade depends on having no trade barriers.[15] As of 2010, on the free flow of goods, duties were eliminated on 99.2% of tariff lines for the ASEAN-6

[11] Ibid.

[12] Ibid.

[13] Kirkwood, John B and Robert H Lande, 'The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency' (2008) 84 *Notre Dame Law Review* 09, 192.

[14] With regards to efficiency, see Chapter 2. Efficiency is the core of competition law in most of countries.

[15] Cassey Lee and Yoshifumi Fukunaga, 'ASEAN Regional Cooperation on Competition Policy' (Discussion Paper-2013-03, Economic Research Institute for ASEAN and East Asia April 2013) 10-11.

member states (not included the CLMV countries).[16] In the remaining member states (Cambodia, Lao PDR, Myanmar and Vietnam), 97.52% of tariff lines were lowered to 0–5%. Measures to reduce technical barriers to trade are also in place, including mutual recognition arrangements (MRAs), the harmonisation of standards and a regulatory regime. About 170 technical standards are now harmonised in ASEAN.[17]

Another significant difference among states is the tension between achieving consumer welfare and efficiency. The two main objectives have a different impact. Many scholars and economists argue that the wisdom of competition policy is efficiency,[18] and that the single objective of competition law is maximising economic efficiency.[19] The background logic to this theory is that the only harm to consumer welfare from higher prices is economic inefficiency.[20] In other words, this theory aims to maximise consumer welfare through efficiency. In this regard, the argument ignores the real consumers whose welfare is extracted and transferred to firms with market power as a result of cost reduction and the higher prices that arise from anti-competitive conduct.[21]

In contrast to the above theory of competition law objectives, the aim of competition law is to enhance consumer welfare, not efficiency.[22] This means that the primary purpose of antitrust laws is to prevent consumers from paying prices that exceed competitive levels.[23] Conflicting objectives between consumer welfare and efficiency arise in the case of M&As. M&As aim at cost reduction, while consumer welfare is motivated by price reduction. A merger of competitors can increase economic efficiency even though it reduces consumer welfare. If the merger is likely to generate cost savings and greater market power, the increase in productive efficiency can outweigh the loss in

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[16] ASEAN, *Thinking Globally, Prospering Regionally: ASEAN Economic Community 2015* (2014) ASEAN Secretariat <http://www.asean.org/images/resources/2014/May/AECKeyMessagesBooklet_FINAL30Apr2014.pdf>

[17] Ibid.

[18] For example is Bork. See Robert H Bork, *The Antitrust Paradox: A Policy at War With Itself* (Basic Book, Inc., 1978).

[19] Richard A Posner, *Antitrust law* (University of Chicago Press, 2009), 2.

[20] Robert H Bork, *The Antitrust Paradox* (Basic Books New York, 1978); Robert H Bork, 'Legislative intent and the policy of the Sherman Act' (1966) *Journal of Law and Economics* 7, 26-31.

[21] John B Kirkwood and Robert H Lande, 'The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency' (2008) 84 *notre dame law review* 0913, 199.

[22] Ibid

[23] Robert H Lande, 'Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust' (1989) *Antitrust Law Journal* 631, 632.

allocative efficiency.[24] In the end, this leads to overall efficiency, even though consumers are harmed because they have to pay higher prices. Even though the legal enforcement is different, it is crucial to have a common objective of competition law for the regional economic community.[25]

6.2.2 Jurisdictional Exemptions

A second disparity in the legal substance of competition laws involves jurisdictional exemption under those laws in five AMSs. A review of different AMSs' competition laws suggests that various jurisdictions have granted a broad range of exemptions and exceptions. Among the ten member states, Indonesia has the largest number of entities that are exempted from competition law. For Thailand, its agricultural agreements are not to be subjected to the enforcement of competition law. On average, government authorities are exempted from all competition laws. These disparities arose from the diverse interests and conditions of each country at the time when competition law was introduced.[26]

There is no data available for Brunei Darussalam, Lao PDR or Myanmar in regards to exemptions from national competition law (on the process of competition law drafting). The Philippines provides exemption under Article 8 of the Cooperative Code. It reads:

> No cooperative or method or act thereof of which complies with this Code shall be deemed a conspiracy or combination in restraint of trade or an illegal monopoly, or an attempt to lessen competition or fix prices arbitrarily in violation of any of the laws of the Philippines.

The Philippines exempts the electricity industry from competition law. This exemption appears in Section 45 of the Electricity Power Industry Reform Act. It provides an exemption for isolated grids that are not connected to the high voltage transmission system regarding the ownership, operation and control limitations of the installed generation capacity. Vietnam focuses its exemptions on the supply of public goods and services, SMEs, and firms that are going to bankrupt.

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[24] Kirkwood and Lande, above n 13, 224. Also see Oliver E Williamson, 'Economies as an Antitrust Defense: The Welfare Tradeoffs' (1968) 58(1) *The American Economic Review* 18, 21-23.

[25] David S Evans, 'Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules' (2009) 10 *Chicago Journal of International Law* 161, 162.

[26] G Sivalingam, 'Competition Policy and Law in ASEAN' (2006) 51(2) *The Singapore Economic Review* 241, 250.

Malaysia exempts collective bargaining activities for employment agreement terms from its national competition law. It also exempts all activities regulated by the Malaysian Multimedia and Communication Commission.[27] Singapore exempts all government activities, such as the supply of piped potable water and wastewater management services, bus and rail services, cargo terminal operations, clearing houses for banks and armed security services.[28] Thailand, under Section 4, excludes the acts of central provincial and local administrations, state enterprises under the law on budgetary procedures, farmer's groups, and all sectors exempted by Ministerial Regulation.[29]

Table 8 shows that common exemptions and exceptions come from sectors that are connected to the public interest. These exemptions include transportation, electricity, agriculture, labour and transportation. A survey of selected countries by the UNCTAD indicates that most competition laws have exempted specific sectors and/or types of economic activity.[30] Developing countries and transition market economies that have recently adopted competition laws tend to have fewer exemptions compared to more industrialised nations.[31] The reason for this is that those developing countries and transition market economies attract FDI. Meanwhile, industrialised countries have more exemptions as attempts at trade barriers. Exemptions in competition law that do not prohibit anti-competitive conduct mainly affect foreign target markets, as long as there are no spill-over effects onto the home market.[32]

Examples are found in cases of export cartels that may harm the importer country,[33] such as the case of garlic import in Indonesia, where KPPU decided that it was violating

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[27] Malaysian Competition Act 2010, Section 8.

[28] Singapore Competition Act 2004, Chapter 50B.

[29] Trade Competition Act B.E. 2542 of 1999.

[30] R Shyam Khemani, 'Application of Competition Law: Exemptions and Exceptions' (UNCTAD/DTC/CLP/Misc.25, United Nations Conference on Trade and Development, 2002) <http://unctad.org/en/Docs/ditcclpmisc25_en.pdf>.

[31] Ibid, 10.

[32] Florian Becker, 'The Case of Export Cartel Exemptions: Between Competition and Protectionism' (2007) 3(1) *Journal of Competition Law and Economics* 97, 97.

[33] According to a definition provided by the OECD, an export cartel is an agreement or arrangement between firms to charge a specified export price and/or to divide export markets (that is markets of the target states). See Centre for Co-operation with European Economies in Transition, *Glossary of Industrial Organisation Economics and Competition Law* (Secretary of Organization for Economic Co-Operation and Development, 1993). United States is one of countries which exempted the export cartel from its domestic anti-trust law, Becker, above n 32.

the Anti-Monopoly Act of 1999 for import cartels.[34] KPPU declared 19 companies—*CV Bintang, CV Karya Pratama, CV Mahkota Baru, CV Mekar Jaya, PT Dakai Impex, PT Dwi Tunggal Buana, PT Global Sarana Perkasa, PT Lika Dayatama, PT Mulya Agung Dirgantara, PT Sumber Alam Jaya Perkasa, PT Sumber Roso Agromakmur, PT Tritunggal Sukses, PT Tunas Sumber Rezeki, CV Agro Nusa Permai, CV Kuda Mas, CV Mulia Agro Lestari, PT Lintas Buana Unggul, PT Prima Nusa Lentera Agung, PT Tunas Utama Sari* Perkasa - as being in breach of Article 19(c) and Article 24.[35]

KPPU also declared the Directorate General of Foreign Trade, Ministry of Trade and Minister of Trade as breaching Article 24 on quota limitation in garlic importation by issuing Ministry of Trade Regulation Number 60/Permentan/OT.140/2013. The Directorate General colluded with business actors in the issuing and extending process of the Import Approval Letter, even though it had no legal standing. This irresponsible action led to an imbalance in garlic supply and price in the domestic market. KPPU imposed fines from IDR 20 billion to IDR 921 billion on the companies and the government official.

The Regional Guidelines recommend that competition policy and law in AMSs should not prevent the member states from pursuing other legitimate policies that may require derogations from competition policy principles. The member states have allowed exemptions or exclusions aimed at specific industries or activities.[36] The member states are not permitted to prohibit agreements or conduct to the extent that such agreements or conduct are made to comply with a legal requirement. Further, the Regional Guidelines allow the member states to apply block exemptions to specific sectors and/or types of economic activities from the application of competition law. Such block exemptions may take the form of general declarations, introduced by regulation or law that a prohibition does not apply to a certain category of agreements. The Guidelines do not place proper limitations on the block exemptions. In Section 3.5.3 it is stated that the AMSs may establish a procedure to consider granting exemptions or exclusions to certain agreements or practices that have significant benefits to economic progress. Prohibition of such agreements is not allowed if it may result in a conflict with international obligations.

[34] Law No.5 of 1999 concerning the Monopolistic Practices Prohibition and Unfair Business Competition.

[35] Article 19 prohibits market control by monopolistic practice. Article 24 prohibits collusion agreement.

[36] ASEAN, above n 8.

In the EU, block exemptions are regulated in several provisions and categories. However, the EU Commission also adopted a number of block exemptions that apply to vertical, horizontal and technology transfer agreements.[37] In the new competition law enforcement system, the EU Commission issued some regulations in regard to block exemptions. The regulations are binding on the EU member states. The block exemptions are part of the EU's modernisation regulations on competition law for its member states, such as efforts to harmonise the competition laws of the EU member states.

Table 8: EU Block Exemptions

Regulation	Categories of Agreements Covered
Commission Regulation 772/2004	Technology transfer agreements
Commission Regulation 330/2010	Vertical agreements
Commission Regulation 461/2010	Vertical agreements and concerted practices in the motor vehicle sector
Commission Regulation 1218/2010	Specialisation agreements
Commission Regulation 1217/2010	Research and development agreements
Commission Regulation 267/2010	Agreements in the insurance sectors
Commission Regulation 906/2009	Liner shipping consortia
Commission Regulation 169/2009	Rail, road, and inland waterway sectors

Source: Adapted from Jones and Sufrin.[38]

[37] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases and Materials* (Oxford University Press, 2014) 263-264.

[38] Ibid.

Table 9: Exemptions under Competition Law

Countries	Indo-nesia	Philip-pines	Thai-land	Singa-pore	Viet-nam	Malay-sia	Cam-bodia	Brunei	Lao PDR
Government Authorities	√	-	√	√	√	√	-	NA	NA
State-Owned Enterprises	√	-	√	√	√	-	-	NA	NA
Public Policy	√	-	√	√	√	-	-	NA	NA
Selected Industries	-	√	√	√	-	-	-	NA	NA
Agricultural Cooperatives	-	-	√	-	-	-	-	NA	NA
Small & Medium Enterprises	√	-	-	-	-	-	√	NA	NA
Research and Development	√	-	-	-	-	-	-	NA	NA
Intellectual Property Rights	√	-	-	√	-	-	-	NA	NA
Selected Agreements	√	-	-	-	-	√	-	NA	NA
Individual Exemption	-	-	-	√	-	√	-	NA	NA
Block Exemption	-	-	-	-	-	√	-	NA	NA

Source: Compiled by author from various competition laws of AMSs.

6.2.3 Prohibition on Anti-Competitive Agreements

The main difference among member states, one that is at the core of the differences in approach to competition law, is the prohibition of anti-competitive agreements. Most of the AMSs prohibit bid rigging as per se illegal, while Indonesia has rather adopted a rule of reason approach to the issue. Where anti-competitive agreements or conduct are ruled as per se illegal, this means that the anti-competitive behaviour does not require any economic analysis. In contrast, prohibitions under the rule of reason oblige an economic analysis to determine the impact of the conduct on consumers or its harm to economic efficiency.[39]

[39] Robert H Bork, 'The Rule of Reason and the Per Se Concept: Price Fixing and Market Division' (1965) *Yale Law Journal* 775, 377-378.

These two opposing methods yield different results in analysing anti-competitive conduct. Under the rule of reason, an action can be classified as pro-competitive or anti-competitive. Thus, certain types of conduct may have the possibility to promote competition, offering beneficial effects for competition and consumer.[40] Conversely, anti-competitive conduct should be summarily condemned under the per se illegal approach without giving the defendant the opportunity to prove that the action is not violating the competition law or harming the consumer.[41] Behaviour characterised as per se unlawful is that which has been found to have a pernicious effect on competition or lacks any redeeming virtue.[42] The Sherman Act defines 'per se illegal' as violations that meet the strict characterisation of Section 1. Violations under a per se illegal rule require no further inquiry into the practice's actual effect on the market or the intentions of those individuals who engaged in the practice.[43]

Indonesia reverses the common pattern among other AMSs of the rule of reason and per se illegal treatment. Indonesia uses the rule of reason to examine some horizontal agreements typically judged under a per se rule in other jurisdictions, such as price fixing, market division and bid rigging.[44] In contrast, it treats much unilateral conduct as per se illegal, including price discrimination, exclusive dealing, tying and abuse of dominant position, where others treat these using the rule of reason.[45]

Another significant difference is in the term of the presence and the size of the market threshold. Malaysia and Thailand do not provide threshold limitations for market share; other member states have specified different market thresholds for assessing anti-competitive agreements in their jurisdictions. The function of the market share threshold is to determine whether conduct is anti-competitive or not using a rule of reason approach (except in Indonesia, where rule of reason only applied to bid rigging) and a per se illegal rule for hard-core restrictions. Each jurisdiction determines a certain

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[40] Thomas A Piraino Jr, 'Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis' (1990) 64 *Southern California Law Review* 685, 685.

[41] Ibid.

[42] Section 1 of the U.S. Sherman Act.

[43] Ibid.

[44] The provisions that contain rule of reason principle determined by the words 'may cause unfair business competition'. The words constitute an economic analysis to prove that the conduct is unlawful.

[45] United Nations Conference on Trade and Development (UNCTAD), 'Voluntary Peer Review on Competition Policy: Indonesia ' (UNCTAD/DITC/CLP/2009/1, United Nations, 2009) 3-4.

market size threshold for deciding whether an agreement is violating the competition law.

Table 10: Prohibitions on Anti-Competitive Agreements

Countries	Provision	Regulation Applied	Market Share Threshold
Brunei Darussalam	NA	NA	NA
Cambodia	The draft was proposed to the Council of Ministers in 2013	-	-
Indonesia	Articles 4–12	Price fixing, market allocation area distribution, boycotting, cartels and trusts are illegal per se. Bid rigging is rule of reason.	Two or more than three firms: 75%
Lao PDR	Decree 15/PMO on Trade Competition, 2004 (the Decree has not been implemented)	NA	NA
Malaysia	Section 4	Price fixing, sharing of market and source supply, limiting/controlling production, distribution of technical/technological development, limiting investment and bid rigging are illegal per se.	-
Myanmar	Competition law still in process of drafting	NA	NA
Philippines	Article XII, Section 19 of the Constitution and Article 186 of the Revised Penal Code	Article XII, Section 19 of the Constitution states that the State shall regulate or prohibit monopolies when the public interest so requires. No combination in restraint of trade or unfair competition shall be allowed. Article 186 of the Revised Penal Code deals with anti-competitive agreements. Combinations in restraint of trade are illegal per se.	NA
Thailand	Section 27 subsections (5)–(10)	Price fixing and restrictions on production, purchase and sale are illegal per se.	One firm: 50% market share and THB 1 trillion. Top three business operators: 75% market share and THB1 trillion. Exception: business operators with market share of less than 10% or with turnover less than THB 1 trillion.

Singapore	Section 34	Price fixing, bid rigging, market sharing or output limitations are illegal per se; rule of reason applies in other cases.	Group: 20% Individual: 25%
Vietnam	Chapter II Section I (Article 8, 9, 10)	Price fixing; market allocation; restrictions on production, purchase and sale; restrictions on technical and technological development; restrictions on investments; tied sale/contracts; market exclusion; bid rigging are all illegal per se.	Group: 30%

Source: Compiled by author from various AMSs' competition laws.

6.2.4 Prohibition on Abuse of Dominant Position

The ASEAN Regional Guidelines defines dominant position as a situation of market power where an undertaking, either individually or together with others, is in a position to unilaterally affect the competition in the relevant market. Abuse of dominance occurs where the dominant firm(s), either individually or together with other firms, exploits its dominant position in the relevant market or excludes competitors and harms the competition process. It is important to consider the actual or the potential impact of the conduct on competition, instead of treating certain conducts by dominant firms as automatically abusive.[46] The size of the market share threshold is used as an indicator whether or not a firm possesses market power.[47]

For six of the AMSs, none of their domestic competition laws provide a definition of 'dominant position' or 'abusive dominant position'. From Table 4 below, the differences between their laws in this domain concern the size of the market share threshold. The Philippines and Malaysia prohibit abuse of dominance, but those regulations do not have a market size threshold to define conduct that abuses market power over the relevant market. Lao PDR and Brunei are still in the process of drafting their national competition laws. Indonesia, Thailand, Singapore and Vietnam define dominant position thresholds, but with different limitations. Indonesia divides the dominant position threshold between single firm cases (50%) and cases with more than two or three firms (75%). Thailand limits the market threshold at more than 50%, or

[46] ASEAN, above n 10.

[47] Michal S Gal, 'Size Does Matter: The Effects of Market Size on Optimal Competition Policy' (2000) 74 *Southern California Law Review* 1437, 1462.

1 trillion Thai Baht, without further specification on number of firms. Singapore defines the dominant position threshold in the relevant market with more than 60% (the market share is only a guideline for competition law authority).[48] Vietnam provides a more rigid threshold: single firms that have a market share of 30% or more on the relevant market, two companies that control 50% or more, three firms that control 65% or more; or four firms that control 75% or more.

Table 11: Provisions on Abuse of Dominant Position

Countries	Provision	Conduct	Dominant Position Threshold
Brunei Darussalam	In the process of drafting	NA	NA
Cambodia	Draft proposed to the Council of Ministers in 2013	NA	NA
Indonesia	Article 25	Imposes terms of trade with the intention of preventing consumers from purchasing competitive products; restricts the market and the development of technology; and hampers potential competitors from entering the relevant market.	One firm or a group of business actors controls more than 50% More than two or three firms or a group of business actors control more than 75%
Lao PDR	Decree 15/PMO on Trade Competition, 2004 (the Decree has not been implemented)	NA	NA
Malaysia	Sections 4(1) and (2)	Horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in the relevant market. Horizontal agreement between firms that has the object to: Directly or indirectly impose unfair purchase or selling price; limit or control production, market outlets, market access, technical development and investment to the detriment of consumers; predatory behaviour towards competitors; building up a supply of scarce inputs or products required by competitors, where there is no reasonable commercial need to do so in order to meet its need.	NA
Philippines	Article XII, Section 19 of the Constitution	According to Article XII, Section 19 of the Constitution, it is for the Government to prohibit specific monopolies, based on the public interest. Article 186(2) of the	NA

[48] Section 3 of the Section 47 Prohibition of Singapore Competition Act.

		Revised Penal Code, as amended, prohibits monopolisation without exceptions. The Supreme Court also has made it clear that monopolies are not per se prohibited by the Constitution but may be permitted to exist to aid the government in carrying on an enterprise or to aid in the performance of various services and functions in the interest of the public, and it also specified that a determination must first be made as to whether public interest requires a monopoly.	
Thailand	Section 27	This section prohibits a business operator from conspiring, colluding or collaborating with another business operator in order to create monopolistic power, or reduce competition. In the case where it is reasonably necessary in the business and has no serious harm to the economy, the business operators shall submit an application for permission to the Commission. The Commission has already approved forms, rules and procedures to apply for permission for any kind of anti-competitive agreement.	50% or equivalent with 1 trillion Thailand Baht
Singapore	Section 34	Predatory behaviour towards competitors; limiting production, markets, or technical development to potential consumers; applying different conditions to equivalent transactions with other trading partners; making a contract that restricts other parties by supplementary obligation that has nothing to do with the subject of the contract.	60%
Vietnam	Article 8 (Abuse of market dominance or monopoly position)	Price predation; limiting production, markets or technical development to potential consumers; applying different commercial terms in equivalent transactions; preventing market entry.	Single firm: 30% Two firms: 50% Three firms: 65% Four firms: 75%

Source: Compiled by author from various AMSs' competition laws.

The key similarity in the regulations above is that all the member states use rule of reason to prove that conduct is anti-competitive and violates competition law. The differing market size thresholds are not a concern in an economic community. In fact, the main issue to be dealt with is the trade barrier created by a dominant firm using its market power. In general, the first step in analysing whether given conduct constitutes an abuse of dominance is to establish whether the firm possesses market power.[49] The

[49] David Fruitman, 'Abuse of Dominance in CLV Countries' (CUTS Centre for Competition, Investment & Economic Regulation, 2006) 10.

market power is indicated by the size of the market share threshold; the higher the market share of a firm, the more concentrated the market.

In traditional economic theory, first proposed by the Harvard school, a more concentrated market implies that prices will move away from competitive prices towards a monopoly price level. In an oligopoly setting, the Cournot model provides a sound theoretical illustration of the general assumption that a more concentrated market leads to higher prices.[50] Another view of the impact of market concentration on market performance comes from the Chicago school. The Chicago school believes that there is a causal link between efficiency and market structure in the way that increasingly efficient firms lead to a more concentrated market, which is better for consumers.[51] Therefore, being dominant is not automatically anti-competitive;[52] it may simply result from a firm being the most efficient competitor in a market. In that case, prudent steps must be taken to avoid punishing firms merely for possessing high market shares or even dominant market positions.[53]

Economic communities such as the EU or US prohibit the abuse of a dominant position in conjunction with exclusionary practices such as vertical restraints and predatory pricing.[54] In fact, the regulations are divided into three broad categories of abusive behaviour: foreclosure behaviour, whereby the dominant incumbent prevents the entry into the market of new competitors; predatory conduct, whereby a dominant company attempts to force its competitors to exit the market; and exclusionary conduct, whereby a dominant firm abuses its market power to discriminate against its suppliers or buyers, thus gaining an unfair advantage in order to extract abnormal rents (tying and bundling treatment of competitors, for instance).[55] One of the most fragile industries with respect to competition policy regarding the abuse of dominant position is the airline industry.

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[50] Commonly referred to as the *SCP* paradigm, there is a causal link between a given market *structure* (*S*), the *conduct* of the firms in the market (*C*) and finally the market *performance* (*P*), often measured by prices. Stefan Hellmer and Linda Wårell, 'On the Evaluation of Market Power and Market Dominance—The Nordic Electricity Market' (2009) 37(8) *Energy Policy* 3235, 3238.

[51] Ibid.

[52] John Temple Lang, 'Some Aspects of Abuse of Dominant Positions in European Community Antitrust Law' (1979) 3 *Fordham International Law Forum* 1, 6-7.

[53] Fruitman, above n 49.

[54] Sanoussi Bilal and Marcelo Olarreaga, 'Regionalism, Competition Policy and Abuse of Dominant Position' (1998) 32(3) *Journal of World Trade* 153, 6.

[55] Ibid.

Predatory pricing has been a significant issue for airlines, especially where small entrants have been challenging large incumbents. There have been many cases or allegations of predation in the US, Europe, Canada and Australia involving airlines.[56] In the AEC's case, predation is likely to be an issue where incumbent airlines are being challenged by small new entrants.[57]

Nevertheless, the focus of difference is not on the market share threshold but more on the substantive legislation on abuse of dominant position that may create entry barriers within the common market. Single competition law objectives are significant for the enforcement of the rule. It is important to consider the goals and objectives of the competition law in question when determining what conduct should be defined as abusive. For example, if an objective of the law is efficiency, then welfare-reducing actions might be considered abusive. If an objective is promoting fair trade, then taking advantage of a better bargaining position may be regarded as abusive.[58] Internal trade liberalisation within the regional community provides opportunities to create economies of scale and the restructuring of the domestic market that drives inefficient firms to exit the market.[59] In the end, it leads to a more concentrated market structure that is consistent with efficiency and welfare gains. Thus, a cautious interpretation of the legislation on the abuse of dominant position is needed.

6.2.5 Prohibition on Anti-Competitive Mergers in ASEAN

A comparison of merger controls in ASEAN reveals that the merger control regimes below are substantially similar. The key difference among the member states concerns merger notification. As of 2015, five of the ten AMSs have implemented generic competition laws. Only three countries have operative merger control regimes, which are Indonesia, Singapore and Vietnam.[60] Malaysia is the only ASEAN country with a generic competition law that does not include merger control.

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[56] Peter Forsyth, *Competition versus Predation in Aviation Markets: A Survey of Experience in North America, Europe and Australia* (Ashgate, 2005) 3.

[57] Peter Forsyth, John King and Cherry Lyn Rodolfo, 'Open Skies in ASEAN' (2006) 12(3) *Journal of Air Transport Management* 143, 151.

[58] Fruitman, above n 49.

[59] Bilal and Olarreaga, above n 54, 16-17.

[60] Daren Shiau and Elsa Chen, 'ASEAN Developments in Merger Control' (2014) 5(3) *Journal of European Competition Law & Practice* 149, 149.

In Indonesia's merger regime, notification should be given by the firm before and after the merger or acquisition. This is provided under the KPPU Regulation No. 10 Year 2010 regarding merger notification form, consolidation of business entities, and company acquisition.[61] Pre-notification is a formal notice that must be submitted by business entities to the Commission. If the merger or acquisition exceeds the sum of the values specified under Government Regulation Number 57 Year 2010 concerning the Merger or Consolidation of Business,[62] this may result in monopolistic practices and unfair business competition.

Singapore, similarly to Indonesia, also requires notification to be given before and after a merger or acquisition. This is provided in Section 34 of Competition Act (Chapter 50B).[63] Section 54 of the Act (the Section 54 Prohibition) came into force in 2007, and prohibits mergers (including autonomous full-function joint ventures made on a lasting basis) that have resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore for goods and services.[64] There is no further explanation as to how substantial lessening of competition is determined.[65] Under the Singapore merger control regime, a merger notification to the Competition Commission of Singapore (CCS) is voluntary, but advisable if the merger may potentially result in a substantial lessening of competition in any relevant market or market segment.[66] In the absence of a filing, parties face antitrust risk, as there is no limitation period on the timeframe after which the CCS may cease to have the power to investigate a transaction.[67]

Thailand's regulation of merger control includes a mandatory merger control filing regime, but with no fixed filing deadlines or guidelines for notification. Unfortunately, Thailand obliges firms to give the notification, but does not provide sanctions for firms who do not submit the notification. Section 26 of the Trade Competition Act 1999

[61] KPPU Regulation No. 10 Year 2010 regarding Merger Notification Form, Consolidation of Business Entities, and Company Acquisition.

[62] Government Regulation Number 57 Year 2010 concerning the Merger or Consolidation of Business.

[63] Singapore Competition Act 2004 (Chapter 50B).

[64] Shiau and Chen, above n 60, 151.

[65] Sivalingam, above n 26, 262.

[66] Shiau and Chen, above n 60.

[67] Ibid.

(TCA) prohibits firms from operating any merger that might give rise to a monopoly or unfair competition.[68] Section 26 mentions that firms are obliged to submit notification to the Office of Thai Trade Competition Commission once the thresholds have been met. However, these thresholds are not specified, so that the Section 26 of the TCA is not enforceable. Vietnam provides merger control under Article 18 of the Law on Competition No. 27/2004/QH11.[69] It prohibits M&As that result in a combined market share of 50%, unless expressly exempted by government legislation.[70] The merger control regime entails mandatory pre-merger notification to the Vietnam Competition Authority (VCA) if the post-merger or post-acquisition combined market share is between 30% and 50%.[71]

The legal implications of merger control regulation for the AEC are crucial. Domestic competition law without merger control will create higher risk of creating oligopoly market structures.[72] Further, a nation with merger control allows for the regulation of M&As between domestic firms; currently, most ASEAN countries only regulate M&As involving foreign investors.[73] Regulation of M&As involving domestic investors are immune to such provisions.[74] The failure to implement merger control in domestic competition law has allowed domestic companies to establish oligopolies in specific sectors at the expense of consumer welfare in countries such as Thailand.[75] Therefore, the primary function of merger control is as a pre-emptive regulatory tool in the market.[76] The introduction of merger control has the advantage of allowing AMSs to take pre-emptive action against any transaction that is likely to have an adverse impact on domestic competition.[77]

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[68] Thailand Trade Competition Act 1999, Section 26.

[69] The Law on Competition No. 27/2004/QH11, Article 18.

[70] Ibid.

[71] Shiau and Chen, above n 60.

[72] Ibid.

[73] Through limitations on foreign equity or ownership and divestment requirements.

[74] Shiau and Chen, above n 60, 6.

[75] Lawan Thanadsillapakul, 'The Harmonization of ASEAN Laws and Policy and Economic Integration' (2004) 3(1) *Uniform Law Review* 479, 754.

[76] Jennifer Orr, Henry Ergas and Jason Soon, 'Best Practices in the Introduction and Implementation of Competition Policy and Law in East Asia Summit Countries' (REPSF II Project No. 07/008, ASEAN Secretariat and Australian Government, June 2008) 3-4.

[77] Shiau and Chen, above n 60.

Most importantly, merger control in ASEAN will address the gap of the regulatory void created by the abolishment of protective trade barriers. Protection trade barriers relating to goods and services have been gradually removed, while the removal of trade barriers remains an ongoing process within the development of the ASEAN Investment Area (AIA).[78] The establishment of the AIA is a policy option by ASEAN to achieve economic integration within the region and more liberalised investment among the member states.[79] The AIA would encourage the inflow of FDI due to the economies of scale generated by the enlargement of the ASEAN market through the regional single market and intra-ASEAN investment liberalisation.[80] These developments in market liberalisation necessitate the introduction of merger control to forestall the emergence of cartels, oligopolies or concentrations that could have an adverse impact on ASEAN economies.[81] Under the agenda of an ASEAN single market, a common form of merger control may remove physical trade barriers. The outcome of this removal will be cost reduction and stiffening competition in that region.

In fact, different merger controls within an economic community can create cross-border frictions as a result of the extraterritorial enforcement implications of competition law arising from the decisions made by competition authorities.[82] Kojima states that even where there is no difference in substantive law, cross-border mergers can easily have varying effects on different national markets; thus, competition authorities could arrive at divergent decisions.[83] Nevertheless, ASEAN needs to harmonise the merger controls among its member states to avoid such burdens that may lead to entry barriers.

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[78] The AIA was created in response to the crisis with the aim of attracting foreign direct investment flows from both outside and within ASEAN. ASEAN is achieving these via the implementation of the ASEAN Comprehensive Investment Agreement (ACIA). The ACIA is one of the economic instruments for realizing regional economic integration. The aims are to create a liberal, facilitative, transparent and competitive investment environment in ASEAN.

[79] Prema-Chandra Athukorala and Jayant Menon, 'AFTA and the Investment-Trade Nexus in ASEAN' (1997) 20(2) *The World Economy* 159, 165.

[80] Ibid.

[81] Thanadsillapakul, above n 4, 768.

[82] Kojima Takaaki, 'International Conflicts over the Extraterritorial Application of Competition Law in a Borderless Economy' (2001) *Weatherhead Center for International Affairs, im Internet unter: http://www. wcfia. harvard. edu/fellows/papers01-02/kojima. pdf,(05.08. 2004)* , 20.

[83] Ibid.

Table 12: Mergers Provisions in ASEAN Member States

Jurisdiction	Merger Control	Threshold	Type of Merger Control		Remedies
			Voluntary	Suspensory	
Brunei Darussalam	NA	NA	NA	NA	NA
Cambodia	NA		NA	NA	NA
Indonesia	Article 28–29	Consolidated assets > Rp 2.5 trillion Consolidated turnover > Rp 5 trillion	Pre-merger notification	Post-merger notification	Administrative sanction: revoke merger Criminal: Min. Rp 25 billion, max. Rp 100 billion or a max. of 6 months of imprisonment
Lao PDR	NA	NA	NA	NA	NA
Malaysia	Section 4	NA	NA	NA	NA
Myanmar	NA	NA	NA	NA	NA
Philippines	Not clear	NA	NA	NA	NA
Singapore	Section 34	Market share of 40% or more; or market share of 20%–40% and post-merger CR3 at 70% or more	Voluntary self-assessment for pre- & post-merger	-	Structural: sale or divestiture Behavioural: commitment to a specified conduct
Thailand	Section 26	NA	-	Compulsory	No sanctions due to absence of notification thresholds
Vietnam	Article 8	Market share of 30–50%	-	Compulsory pre-merger notification	Financial penalty: 1–3% of turnover

Source: Compiled by author from various AMSs' competition laws and ASEAN Expert Groups on Competition website.

6.3 Competition Law Enforcement

The foremost challenge to regional economic integration is how to enforce community laws in the context of the member states' national laws.[84] The absence of common standards in procedural law creates a disjunction between the community and its

[84] Richard Frimpong Oppong, 'Making Regional Economic Community Laws Enforceable in National Legal Systems-Constitutional and Judicial Challenges' in Anton Bösl et al (eds), *Monitoring Regional Integration in Southern Africa* (Yearbook, 2008) vol 8, 149, 1.

domestic legal systems.[85] This also creates higher risks of extraterritorial conflict between national legal systems in the community.[86] The likelihood of extraterritorial application of such national laws increases when a country's enforcement agency has broad powers to prosecute foreign anti-competitive behaviour, while the host country refuses to abide by the rules.[87]

In ASEAN, the procedures of enforcing competition law among member states are varied.[88] The first countries to enact competition law, such as Indonesia and Thailand, have had experience with enforcement since 1999. So far, Thailand has made little progress in enforcing the law.[89] There is currently no comprehensive and consistent database on competition law enforcement in AMSs. Further, currently only six member states have records with regards to their national competition law enforcement, while those of the rest of the members are not clear or are unavailable.[90] In setting up competition law enforcement, the AMSs have made different decisions as to whether anti-competitive conduct amounts to a civil, administrative or criminal wrongdoing. These differences will affect the types of investigative and enforcement powers applicable if it comes to cross jurisdictions.

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[85] Mariolina Eliantonio, 'The Future of National Procedural Law in Europe: Harmonisation vs. Judgemade Standards in the Field of Administrative Justice' (2009) 13(3) *Electronic Journal of Comparative Law* 1, 2-3.

[86] Claus-Dieter Ehlermann, 'The International Dimension of Competition Policy' (1993) 17(4) *Fordham International Law Journal* 833, 833.

[87] Stephen Kines, 'Confidentiality, Conflicts and Comity: Problems and Solutions in the New Era of International Co-operation for the Purposes of Enhancing Competition Law Enforcement' (1996) 43(01) (05) *Netherlands International Law Review* 19. Derek G Barella, 'Checking the Trigger-Happy Congress: The Extraterritorial Extension of Federal Employment Laws Requires Prudence' (1993) 69 *Indiana Law Journal* 889, 890.

[88] Lee and Fukunaga, above n 15.

[89] Mark Williams, 'Competition Law in Thailand: Seeds of Success or Fated to Fail?' (2004) 27(3) *World Competition* 459.

[90] Lee and Fukunaga, above n 15, 16.

Table 13: AMSs Competition Law Enforcement Diversities

Jurisdiction	Type of Infringement Liability			Investigative Powers	Sanctions	Leniency Program	Settlement Provisions
	Civil	Administrative	Criminal				
Brunei	NA	NA	NA	NA	NA	NA	NA
Cambodia	NA	NA	NA	NA	NA	NA	NA
Indonesia	NA	√	√	Power to conduct investigation and hearing on allegations of anti-monopolistic conduct. KPPU has power to summon and request documents; it has no power of raid or seizure.	Administrative financial penalty. Criminal sanction is provided under Article 48, but can be imposed only by Court at appeal proceeding.	No	No
Laos	NA	NA	NA	NA	NA	NA	NA
Malaysia	√	√	NA	Power of search and seizure; power to require information.	No criminal sanction. Under Section 40, penalty imposed not exceeding 10% of the worldwide turnover of an enterprise over the period during which an infringement occurred. Under Section 143 of CA* 2010, a person who contravenes any prohibitions under the CA 2010 shall be liable to a fine not exceeding RM 500,000 and/or imprisonment of not more than 5 years.	Yes	No settlement provision. However, Section 43 of the CA 2010 accepts voluntary undertaking.

Myanmar	NA	NA	NA	NA	NA	NA	NA
Philippines	√	NA	√	The DOJ-OFC has the power to request information and to seek additional documents from the complainant. Subject to the issuance of search warrants by the court, the DOJ-OFC may enter premises and inspect any relevant document and/or record and secure certified true copies of any necessary document.	Criminal liability applied based on Article 186 of the Revised Penal Code as amended. The sanction is prison correctional for minimum period and/or a fine ranging from 200 to 6000 PHP.	No	The Section 2, Rule 116 of the Rules of Court provides for plea bargaining in criminal cases. For civil cases, compromise arrangements are allowed in accordance with Title XIV of the New Civil Code.
Singapore	√	-	-	The Competition Commission has power to require documents or information, enter and search premises.	Directions may require: Modifying or terminating the agreement, or ceasing the conduct; financial penalty up to 10% of turnover in Singapore for each year of infringement for a max. 3 years. Criminal sanctions applied if the person fails to cooperate with the Competition Commission of Singapore; person may be prosecuted in Court and subject to max. fine of $10,000 or max. imprisonment 12 months.	√	No
Thailand	√	-	√	According to Section 19 of	Under Chapter VII of TCA	No	√

				TCA, the competition law authority has power to require persons to give statements, to enter premises, and arrest with and without a warrant in certain cases.	(Section 48–56), criminal sanctions apply to infringement of the substantive provisions of Sections 25–29 of the TCA; failure to comply with a TCC order under Section 30 or 31; disclosure of information concerning anti-competitive conducts; and failure to comply with summons issued by a competent official under Sections 13(3), 19(1) or 44(3).		
Vietnam	-	√	-	VCA has power to require documents or information, and power to enter and search premises, seize persons and documents	Fines up to 10% of the previous fiscal year total turnover of the parties involved in case of competition restrictive acts (under Section 117(1)). Sanctions according to the relevant administrative law provisions in case of unfair competition and other acts violating the TCA.	No	No

Source: Compiled by author from various AMSs' competition laws.

*CA 2010: Competition Act 2010

To overcome conflict in the field of law enforcement, the OECD has published a series of recommendations with regards to cooperation among member countries, with two goals in mind: (1) effectiveness of law enforcement and (2) avoiding jurisdictional

conflicts. On this point, the concept of *comity* refers to the voluntary policy of a country to give full consideration to another country's vital interests while deciding on the enforcement of its competition law.[91] According to the OECD recommendations, there are two kinds of comity. The first is negative comity, which describes a country's consideration of how it may prevent its law enforcement from harming another country's main interests. Conversely, positive comity refers to a country's consideration of another country's request for the former to open or expand a law enforcement proceeding in order to remedy conduct that is substantially and adversely affecting the latter country's interest.[92]

The US and other countries that have signed bilateral agreements, such as Australia, Canada and Germany, have reached mutual understanding to avoid conflict in competition law enforcement by following OECD recommendations.[93] The landmark case in this area is the US and EU agreement of 1991, which demonstrates positive as well as negative comity for the first time in a bilateral agreement.[94] Both countries agreed to promote cooperation and coordination in the field of competition law. The agreement also contained cooperation on lessen the possibility or impact of differences between the parties in the enforcement of their competition laws.[95]

In 1998, this agreement was renewed with a more detailed provision for positive comity, stipulating deferral of enforcement proceedings by the requesting side under certain conditions. Although enforcement cooperation was thus strengthened, the European Commission has explained that terminating the jurisdictional 'imbalance' was one of the main reasons for which EU insisted on including positive comity provisions in the supplement agreement.[96] The EU Commission argued that it was very clear that the US failed to apply the principle of positive comity when considering anti-competitive behaviour that takes place within the EU, rather than seeking the

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[91] Kines, above n 87, 23.

[92] OECD Recommendation Concerning Cooperation between Member Countries on Anticompetitive Practices Affecting International Trade, 1995. Organization for Economic Co-operation and Development, 'Report of the OECD Committee On Competition Law And Policy' (DAFFE/CLP(99)19, OECD, 1999 <www.oecd.org/dataoecd/40/3/2752161.pdf>, 9-11.

[93] OECD Competition Law Enforcement 1984, Annex IV.

[94] European Commission, *The 1991 EU/US Competition Cooperation Agreement* (April 16, 2012) European Commission <http://ec.europa.eu/competition/international/bilateral/usa.html>

[95] Ibid.

[96] Takaaki, above n 82.

application of the US competition law.[97] Through positive comity, the EU Commission urged, the Commission has power to control the enforcement procedures addressing anti-competitive behaviour.

In 1999, Japan and the U.S signed an agreement on competition law enforcement. Conflict arose from the imbalanced power positions held by the two countries with regards to state jurisdiction under international law. The Japan–US agreement,[98] however, was the best test case as to how effectively a bilateral agreement could work in avoiding or mitigating potential bilateral frictions.[99] The agreement explicitly states that enforcement activities that may affect the vital interests of the other party should be respected and that each party should give full consideration to the interests of the other party throughout all stages of the enforcement. As an example of negative comity, the agreement also accommodates the impact of anti-competitive conduct on the parties' interests and the need for this to be considered by each party.[100] The agreement specifies that if the competition authority of a party believes that anti-competitive activities of the other country are affecting the interests of the former party, it may request the competition authority of the other party to initiate the appropriate enforcement. The requested competition authority shall carefully consider whether to initiate enforcement activities.[101] These provisions fall under positive comity.[102]

Finally, to minimise conflicts in the enforcement of competition law, the OECD gives a recommendation based on two categories: the national level and international level. At the national level, the government of each country should ensure that competition policy considerations are taken into account in the formulation and implementation, including laws dealing with unfair trade practices.

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[97] Ibid.

[98] The Government of the United States of America and the Government of Japan, *Agreement between the Government of the United States of America and the Government of Japan Concerning Cooperation on Anticompetitive Activities* (1998) <http://www.justice.gov/atr/public/international/docs/3740.htm>

[99] Takaaki, above n 82, 26.

[100] Ibid.

[101] Ibid.

[102] Ibid.

At the international level, the OECD provides for several situations.[103] First, where a member nation sees that the execution of a trade measure by another member nation would or might fundamentally influence the application of the former's competition laws or policies, the government of the initially mentioned member nation may convey its concerns to the government of the other member nation. Second, where a member nation proposes to actualise a trade measure that may prompt the application of competition laws in or by another member nation, the initially specified member nation may advise the other member nation.[104] Third, member nations ought to respond as positively as they could be expected under the circumstances to demands they may get for consultation in connection with such measures and their implications for their competition laws or policies, without preference to each government's full freedom of action. Fourth, where the governments of the member nations concerned agree, the consultation could be a matter for report and discussion of the Committee of Experts on Restrictive Business Practices in close cooperation with the Trade Committee.[105]

6.4 Degree of Development Competition Law

6.4.1 Indonesia

Prior to the enactment of Law No. 5 of 1999 concerning the Monopolistic Practices Prohibition and Unfair Business Competition, Indonesia has virtually no comprehensive legal framework that serves as guidelines for business competition policies.[106] Before 1999, economic policy in Indonesia was planned and dominated by state enterprises. A competition law regime was never developed, since it is against the Constitution and Indonesia's culture. After the financial crisis in 1997, the IMF pushed Indonesia to enact a competition law bill at the requirement of IMF funding aid.[107] Finally, in 1999, Indonesia passed the bill of Monopolistic Practices Prohibition and Unfair Business

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[103] Organization for Economic Co-operation and Development, 'Recommendation of the Council for Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies' (C(86)65/FINAL, OECD, 23 October 1986 1986) <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=190&InstrumentPID=186&Lang=en&Book=>

[104] Ibid.

[105] Ibid.

[106] Syamsul Maarif, 'Competition Law and Policy in Indonesia' (2001) *Report Paper Jakarta: the ASEAN Competition Law Project* 10-11.

[107] Syamsul Maarif, 'Competition Law in Indonesia: Experience to be Taken for the Development of Competition Law in China' (2004) 3 *Washington University Global Studies Law Review* 333.

Competition (Anti-Monopoly Law). In 2000, the Act became effective and the Supervisory Commission for Business Competition or Komisi Pengawas Persaingan Usaha (KPPU) was formed as the competition law agent.[108]

The Anti-Monopoly Act is divided into three prohibitions: prohibited agreements, prohibited activities and prohibitions on dominant position. The main objectives of the Act are spelled out in Chapter II, Article 3, and aim to improve consumer welfare while at the same time creating effectiveness and efficiency in business activities.[109] These goals are confusing and result in different interpretations. Some scholars agree that these aims of achieving an efficient market and also improving consumer welfare are difficult to achieve at the same time.[110] Other interpretations of the aims state that they represent high expectations of a new law in a context of minimal human resources and a lack of competition culture.[111] It was assumed that competition law had no future in Indonesia since it was contrary to an Indonesian culture that is based on togetherness.[112]

Nevertheless, some cases handled by KPPU have proved the important role of competition policy and law in Indonesia. For example, before the enactment of the Anti-Monopoly Law, Indonesia's telecommunications market was controlled by three major telecommunication operators: Telkomsel (owned by Telkom Indonesia, a state-owned enterprise, or SOE), XL, and Indosat. Due to the sector's robust development, new enterprises began to enter the market.[113] The market for short message services (SMS) raised competition concerns. During the period of 1999–2004, SMSs could only be sent among users of the same operator, with no interconnection between operator networks available. The standard fixed rate for SMSs was IDR350 per message. In 2004–2007, new competing operators entered the Indonesian telecommunications market and introduced different rates for SMS within the same network and to another network (on-net SMS). This competition promoted lower SMS rates as well. In 2007, three new

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[108] Ibid.

[109] Commission for the Supervision of Business Competition (KPPU), *The Monopolistic Practices Prohibition and Unfair Business Competition* (March 5, 1999) Cabinet Secretariat of the Republic of Indonesia <http://eng.kppu.go.id/wp-content/uploads/2010/03/law_5_year_1999_.pdf>

[110] Maarif, above n 107.

[111] Cenuk Sayekti, 'Hukum Persaingan Usaha dan Pembangunan Ekonomi di Indonesia (Competition Law and Economic Development in Indonesia)' (2007) 14(4) *Jurnal Fakultas Hukum* , 610-623.

[112] Ibid.

[113] Decision on Case No. 26/KPPU-L/2007 concerning SMS Cartel.

entrants—Three, Smart and Axis—introduced free net SMS and very low promotional rates (IDR100) for off-net SMS.[114]

In 2007, the KPPU found that the interconnection agreements some of the operators had entered into on retail off-net SMS tariffs constituted price-fixing agreements and price cartels for the period 2004–2008.[115] According to the agreement, the tariffs for off-net SMS should not be lower than IDR 250 per message and of sales value set by the network provider. The KPPU condemned six operators for entering into a cartel and estimated that the cartel had caused damaged to consumers amounting to IDR 2.8 trillion.[116] As a result of the KPPU investigation, off-net SMS rates decreased significantly, down to IDR 100–150 per message. In 2010, the KPPU established a study by questionnaire with 300 respondents and compensating variable methodology in econometrics. It was demonstrated that the KPPU decision increased consumer welfare for the period 2007–2009 at an estimated rate of IDR 1.96 trillion, or similar to 0.0009% of the Indonesian real GDP in 2009.[117]

Table 14: SMS Tariff Cartel Price

SMS Cartel Price	IDR250
Competitive SMS Price	IDR114
Consumer Loss	IDR136

Source: Decision on Case No. 26/KPPU-L/2007 concerning SMS Cartel.

Recently, the Indonesian telecommunications market has been progressing quite rapidly.[118] This has been inspired by the transition phase from fixed to mobile telephones. According to the Institute for Economic and Social Research, or *Lembaga Penelitian Ekonomi dan Masyarakat*, the consumer welfare gains from the KPPU

[114] Decision on Case No. 26/KPPU-L/2007 concerning SMS Cartel.

[115] Chanuka Wattegama, Juni Soehardjo and Nilusha Kapugama, 'Telecom Regulatory and Policy Environment in Indonesia Results and Analysis of the 2008 TRE Survey' (2008) *Available at SSRN 1554762* , 22.

[116] Decision on Case No. 26/KPPU-L/2007 concerning SMS Cartel.

[117] Ibid.

[118] Institute for Economic and Social Research, 'Estimating the Impact of Competition in Text Message Service to Consumer Welfare' (Final Report, Faculty of Economic University of Indonesia, 2011) 14.

decision were significant.[119] In total, the welfare gain achieved from the KPPU verdict was approximately IDR 1.6 trillion from 2007 to 2009 (0.00074% of total real GDP in 2009). This means that the KPPU made an average of around IDR 800 billion per year. The increase in total consumer welfare proves that anti-monopoly law and the KPPU play a significant role in increasing the field of competition and creating higher welfare gains for consumers as a whole.

Another case that significantly increased consumer welfare in Indonesia is the airline sector. The Indonesian airline sector provides an example of successful industrial reform from oligopoly to market competition. Before 1999, entry to the airline sector market was restricted, and the market was highly regulated. There were only six airline enterprises operating from the early of 1990s until 1999. Those companies consistently controlled the market share during that time. Previously, tariff setting had been entrusted to the Indonesian Government, but was then entrusted to the Indonesian National Air Carrier Association (INACA), which set maximum and minimum prices. By the end of 1999, the KPPU had persuaded the Government to withdraw INACA's authority to set tariffs and modify the price gap regulation, triggering a majority regulatory reform in the sector.[120]

The sector subsequently became more open to new entry: 19 airlines are currently operating in the market (as of 2013). Flight tariffs decreased by up to 50% on all flight routes. The number and variety of flight routes continue to increase, including those routes previously subsidised by the Government.[121] The policy reform of the airline sector increased numbers of passengers by up to 300%. The percentage covers the airlines that subsidized by Indonesian Government. Reversing the industry's negative average growth in the period 1997–2001 (negative 4%), the reform produced a significant economic growth in the period of 2002–2006, with total growth of 34%. The passengers' load factor increased from 63% to 77%, changing the perception of flying from an expensive to a popular means of transportation. Increased competition in the

[119] Ibid.

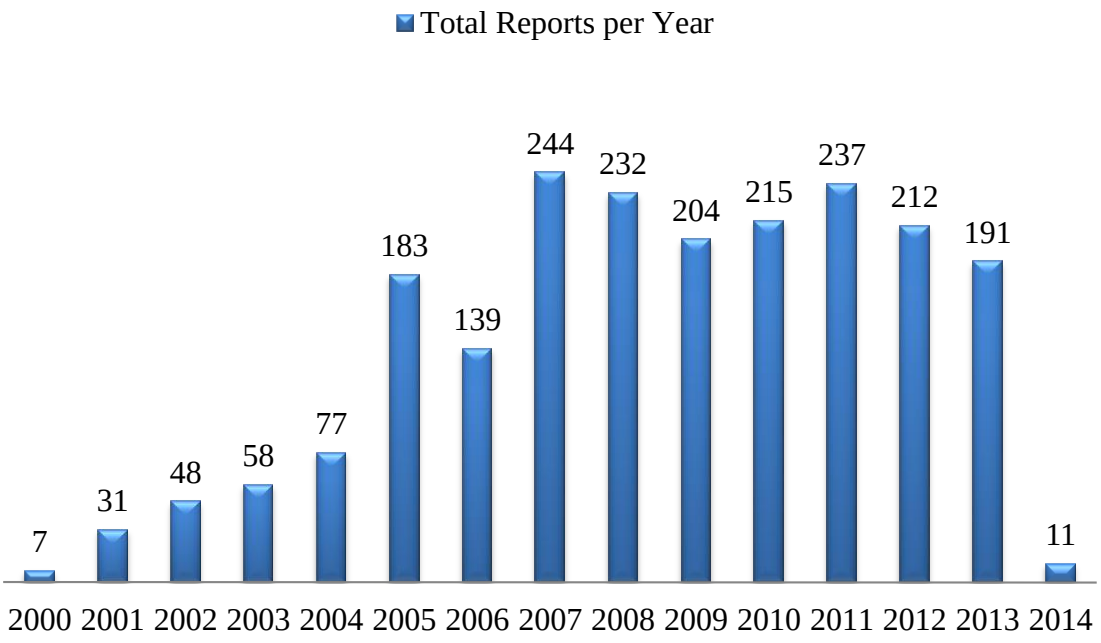
[120] ASEAN, 'Guidelines on Developing Core Competencies in Competition Policyt and Law for ASEAN' (ASEAN, December 2012) 10-11.

[121] Ibid.

airline sector also produced an indirect positive effect on cargo transport, which saw a rise in growth rate from 10% to 13%.[122]

The development of Indonesia's competition policy and law regime shows significant improvement. From 2000 until 2013, 2078 reports were received by the KPPU. From all reports, 242 decisions were issued with regard to competition law violations, of which 69% were bid rigging conducted by local governments. The 2078 reports also included merger notification submissions. In the domain of merger and acquisition, the development within ten years shows a statistically promising trend. The recent regulations on merger and acquisition notifications reveal increasing numbers of merger notifications. In 2010, there were four merger notifications; in 2011, that number increased significantly up to 48 notifications. This continued to increase in 2012, with 31 notifications, and in 2013, with 71 notifications. The composition of industries that have submitted merger notifications is varied: 18.3% of notifications were submitted by manufacturing industries; 15.5% by the mining industry, followed by 14.1% from the energy industry. M&As in both industries are increasing due to the regulation required only one firm able to do so.

Figure 5: Total Reports Investigated by KPPU, 2000–2014



Source: KPPU Annual Report 2013.

[122] Ibid.

Table 15: Total Infringements Decided by KPPU

Year	Total Cases per Year
2000	2
2001	4
2002	4
2003	7
2004	7
2005	18
2006	12
2007	27
2008	48
2009	32
2010	36
2011	13
2012	9
2013	12
2014	11
Total	242

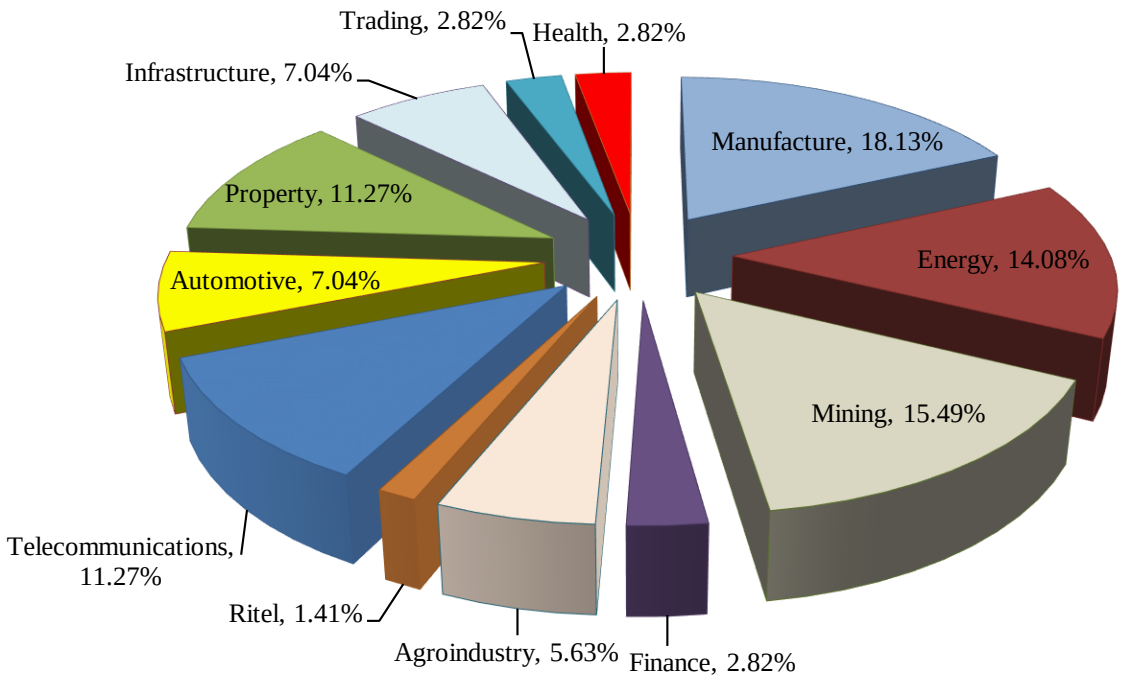
Source: Compiled by author from KPPU Decisions 2000–2014.

Table 16: Merger Notification in Indonesia

Year	Merger Notifications Submission	Approved by KPPU
2010	4	3
2011	48	43
2012	31	31
2013	71	40

Source: Compiled by author from KPPU Annual Report 2013 and KPPU Merger Notification List available at the KPPU website.

Figure 6: Composition of Mergers in Indonesia



Source: KPPU Annual Report 2013.

6.4.2 The Philippines

Currently, there is no specific competition law in the Philippines. However, it has established a competition authority to begin implementing competition-related laws using a sectoral approach.[123] There are also a few special laws related to competition legislation. On December 1, 1925, the Philippines Legislature passed Act No. 3247, entitled An Act to Prohibit Monopolies and Combination in Restraint of Trade (the Law).[124] The Law became the first competition legislation in the Philippines during that time. After the enactment of the Law, several other regulations on competition were passed by the parliament.[125]

Despite these existing regulations on competition, the real growth of the manufacturing sector has been slow. Further, no major increase in the manufacturing industry has been perceived. A systematic movement of resources towards the manufacturing sector has

[123] Rafaelita M Aldaba and Geronimo S Sy, 'Designing a Cooperation Framework for Philippine Competition and Regulatory Agencies' (Discussion Paper Series No.2014-31, Philippine Institute for Development Studies, 2014) 3-4.

[124] Ibid.

[125] Ibid.

been observed to figure in the key issue of low growth. It is not surprising that obstacles to competition continue to exist and prevent the manufacturing sector from maximising the gains from market liberalisation.[126] In fact, the manufacturing industry is highly concentrated and protected from regulation. The industry is also protected, not only by tariff barriers, but by structural barriers as well. These barriers create horizontal price fixing among competitors, which, combined with long-term investment incentives, contribute to oligopolistic structures in the market.[127]

The result in the telecommunications sector has been no different from that of the manufacturing industry. For decades, the government of the Philippines restricted entry into telecommunications service provision on the presumption that it was a natural monopoly.[128] Only one enterprise dominated the industry providing most of the telephone services to the country. The telecommunications market structure was monopolised by the Philippines Long Distance Co. (PLDT) and protected by the regulations.[129] Empirically, during the Marcos era, the PLDT was a dominant carrier, and held government-protected monopolies in all the main aspects of telecommunications.[130] The Philippines' telecommunications industry languished for a long time in the absence of competition policy and law.[131] Until 1989, the industry could only account for 506,000 available phone lines for a population of more than 60 million.[132] This imbalance between supply and demand raised the social costs of telephone lines. To increase the growth of the telecommunications sector, reforms were undertaken so that the sector would provide better service for consumers. In 1989, several telecommunications markets were opened up and two new telecommunications firms entered the relevant market. Four years later, three more firms were authorised to operate in the cellular service industry.[133]

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[126] Rafaelita Mercado Aldaba, 'The State of Competition in the Philippine Manufacturing Industry' (PASCN Discussion Paper No. 2000-13, Philippine APEC Study Center Network, 2000) 2.

[127] Ibid.

[128] Ramonette B Serafica, 'Was PLDT a Natural Monopoly? An Economic Analysis of Pre-reform Philippine Telecoms' (1998) 22(4-5) *Telecommunications Policy* 359, 369.

[129] Erwin Alampay, 'ICT Sector Performance Review for Philippines' (2011) *Available at SSRN 2006072* , 9.

[130] Serafica, above n 128, 360-368.

[131] APEC, 'The Impact of Liberalisation: Communicating with APEC Communities, the Telecommunications Industry in the Philippines' (APEC Report No.98-CT-01.4, APEC, November 1998) 7.

[132] Ibid.

[133] Ibid.

The Philippines government initiated reforms to make the market more competitive and attractive to foreign investors. Since then, the telecommunications industry has also opened for international services. Recently, because of competition, significant reductions have been observed in the prices offered, for example, in SMS, mobile voice calls and broadband services. It is evident that competition has benefited consumers.[134] While continuing to benefit consumers, competition also offers better opportunities for firms to expand their markets and introduce new technologies and services.[135] An empirical study by Alampay shows that in the period 2005–2011, the trend of cellular phone service prices decreased.[136] In 2012, the price of a mobile phone was even lower than the first quarter in 2011.[137]

In 2011, the government issued Executive Order Number 45, designating the Department of Justice as a competition law authority. This agent mandates investigating all cases violating competition law; the tasks of the authority also include enforcing the law, prosecuting violators and supervising the law as well. Several attempts were made to legislate a new generic competition law from 1998 to 2011, but none of the bills were passed.[138] The existing competition laws and regulations are fragmented and are implemented by different agencies. The lack of a central competition authority that coordinates and monitors the sectoral bodies creates diffusion of information, particularly when those sectoral institutions issue conflicting rules and policies. The conflict can be observed in the cement industry.[139] While the Tariff Commission forbids the cement industry to impose anti-dumping duties, the Department of Trade and Industry grants safeguard measures on the cement industry.[140] Further, the conflict between regulations issued by different competition agencies occurred at the height of the cement industry cartel issue.

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[134] Arthur S Cayanan and Ivy DC Suan, 'Pricing in Regulated Industries: The Telecommunications Sector' (2014) 21 *Philippine Management Review* 56.

[135] APEC, above n 131.

[136] Alampay, above n 129.

[137] Cayanan and Suan, above n 134.

[138] Aldaba and Sy, above n 123, 5.

[139] Rafaelita M Aldaba, 'The Impact of Market Reforms on Competition, Structure and Performance of the Philippine Economy' (Philippine Institute for Development Studies, 2005) 47.

[140] Ibid.

The cartel industry in the Philippines is very strong, and able to divert government attention away from the cartel issue by filing anti-dumping cases against imports.[141] The Tariff Commission's effort to find sufficient evidence that the industry suffered serious injury from imports failed. Some consumer groups threatened to file a criminal case against the industry that they accused of engaging in cartel activities, but this never eventuated. The House Committee on Trade and Industry and the Department of Trade and Industry undertook further investigation, but no results were achieved.[142] Numerous competition laws in the Philippines have been ineffective in addressing unfair business practices. The main problem in this regard is due to the lack of law enforcement. The implementation of competition laws is very difficult, as may be observed via the absence of cases litigated in court.[143]

Table 17: Sectoral Competition Authorities in Philippines

Agency	Function
Department of Trade and Industry Bureau of Trade Regulation and Consumer Protection Bureau of Food and Drugs Bureau of Product Standards	Consumer welfare protection
Intellectual Property Office	Intellectual property rights protection
Securities and Exchange Commission	Stock and non-stock corporations
Brangko Sentral ng Pilipinas	Banks and financial institution
Insurance Commission	Insurance companies
Housing and Land Use Regulatory Board	Land use and real estate development
National Food Authority	Foodstuffs, rice, corn, wheat and other grains
Sugar Regulatory Administration	Sugar industry
National Telecommunications Commission	Telecommunications companies
Land Transportation Franchising and Regulatory Board	Common carriers for land
Civil Aeronautics Board	Company engaged in air commerce
Maritime Industry Authority	Shipping industry
Philippines Port Authority	Port operators
Department of Energy Energy Regulatory Board National Power Corporation	Power generation companies and oil companies
Local Water Utilities Administration	Water firms outside Metro Manila

Source: Adapted from Aldaba and Sy.[144]

[141] Rafaelita M Aldaba, 'Emerging Issues in Promoting Competition Policy in the APEC and ASEAN Countries' (Discussion Paper Series No. 2008-02, Philippine Institute for Development Studies, 2008) 9.

[142] Ibid.

[143] Aldaba and Sy, above n 123, 4.

[144] Ibid.

Table 18: The Status of Competition Law Bills in the Philippines

The Bill	Status in the House of Representatives and in the Senate
House Bill No. 388 (An Act Penalising Anti-Competitive Agreements, Abuse of Dominant Position, and Anti-Competitive Mergers, Establishing the Philippine Fair Competition Commission and Appropriating Funds Therefor, and for Other Purposes)	Pending with the Committee on Trade and Industry (23 July 2013)
House Bill No. 453 (An Act Penalising Anti-Competitive Agreements, Abuse of Dominant Position, and Anti-Competitive Mergers, Establishing the Philippine Fair Competition Commission and Appropriating Funds Therefor, and for Other Purposes)	Pending with the Committee on Trade and Industry (23 July 2013)
House Bill No. 1133 (An Act Penalising Anti-Competitive Conduct, Abuse of Dominant Position, and Anti-Competitive Mergers, Establishing the Philippine Fair Competition Commission and Appropriating Funds Therefor, and for Other Purposes)	Pending with the Committee on Trade and Industry (29 July 2013)
House Bill No. 2672 (An Act Penalising Unfair Trade and Anti-Competitive Practices in Restraint of Trade, Unfair Competition, Abuse of Dominant Power, Strengthening the Powers of Regulatory Authorities and Appropriating Funds Therefor, and for Other Purposes)	Pending with the Committee on Trade and Industry (9 April 2013)
Senate Bill No. 1027 (An Act Promoting Competition to Protect Consumer Welfare, Advance Domestic and International Trade and Sustained Economic Development by, Among Others, Regulating Monopolies, Anti-Competitive Agreement, Abuse of Dominant Power, and Anti-competitive Mergers, Establishing the Philippine Fair Competition Commission and Appropriating Funds Therefor and for Other Purposes)	Read on first reading and referred to the Committee(s) on Trade and Commerce; Economic Affairs and Finance (14 August 2013)
Senate Bill No. 1453 (An Act Penalising Anti-Competitive Agreements, Abuse of Dominant Position, and Anti-Competitive Mergers, Establishing the Philippine Fair Competition Commission)	Read on first reading and referred to the Committee(s) on Trade, Commerce and Entrepreneurship; Economic Affairs; and Finance (9 September 2013)

Source: The Philippines Tariff Commission.[145]

6.4.3 Thailand

Thailand has had a generic competition law since 1979, known as the Price Control and Anti-Monopoly Act.[146] At its implementation, the primary objective of the law was to protect consumers from collusive practices among businesses that led to excessive

[145] The Philippines Tariff Commission, *Competition Policy And Law (CPL)* (2013) Rerpublic of the Philippines Tariff Commission <http://www.tariffcommission.gov.ph/previous-website/competition%20policy&law.html>.

[146] Deunden Nikomborirak, 'The Political Economy of Competition Law: The Case of Thailand' (2005) 26 *Northwestern Journal of International Law & Business* 597, 598.

pricing.[147] However, the provision concerning anti-competitive practices was incomplete, as it did not cover mergers and many important vertical restrictive practices.[148] In 1999, Thailand passed a national competition law. In contrast to Indonesia, Singapore and Vietnam, Thailand passed its competition law voluntarily after the monetary crisis in 1997.[149] Therefore, the process of competition law formation has received minimal technical assistance from international organisations such as the World Bank or UNCTAD.[150]

The reason Thailand adopted a competition law in 1999 was because the Price Control and Anti-Monopoly Act of 1979 had been repealed, and that law had both the price control provisions and anti-monopoly provisions. Thailand considers that it needs to improve its anti-monopoly provisions and separate those provisions from price control provisions. The main purpose of the Competition Law of 1999 is to prevent monopoly and restraint of business conduct, leading to the promotion of free competition. The Competition Law is also intended to prevent unfair business practices in Thailand.[151]

Unfortunately, years after its enactment, the Thai Competition Act 1999 has not been employed as a remedy to fight against anti-competitive business conduct.[152] The Thai Competition Commission has not enforced the Act and has proved reluctant to bring the anti-competitive practices to court.[153] For instance, in the energy sector, SOEs monopolised the relevant market.[154] In early 1990s, the Thai government began to liberalise the energy sector market by establishing a National Energy Policy Office (NEPO),[155] subsequently replaced by the Energy Policy and Planning Office (EPPO).[156]

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[147] Ibid.

[148] Ibid.

[149] It was not part of the IMF conditions, as in Indonesia, or part of a bilateral free trade commitment, as in Singapore, or a WTO accession commitment, as in Vietnam. See ibid, at 599.

[150] Ibid.

[151] UNCTAD, 'Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries: Thailand, Lao, Kenya, Zambia, Zimbabwe' (UNCTAD/DITC/CLP/2005/2, United Nations, 2005) 1.

[152] Pornchai Wisuttisak, 'Liberalization of the Thai Energy Sector: A Consideration of Competition Law and Sectoral Regulation' (2012) 5(1) *The Journal of World Energy Law & Business* 185

[153] Ibid.

[154] Ibid.

[155] Chuenchom Sangarasri Greacen and Chris Greacen, 'Thailand's Electricity Reforms: Privatization of Benefits and Socialization of Costs and Risks' (2004) 77(3) *Pacific Affairs* 517, 522.

The main task of NEPO was to facilitate the process of liberalisation of the Thai energy sector.[157] NEPO furthered the liberalisation plan by making recommendations to the government to establish an independent energy regulator and to implement structural reform for the creation of market competition in the sector, in both electricity and gas.[158]

Regulation of the Thai energy sector is primarily based on the Energy Act 2007. The Act sets rules for the energy sector and establishes the Energy Regulatory Commission (ERC) as the independent sectoral regulator for the Thai energy sector. Nevertheless, the substantive provisions of the Energy Act 2007 failed to generate market reform to be more competitive.[159] A lack of coordination between the Thailand Competition Commission and the ERC is claimed to be the reason for ineffective competition law in the energy sector. This has contributed to the lack of awareness of the need to move the Thai energy sector towards market competition.[160]

Enforcement of the Competition Act of 1999 relies on its enforcement institutions.[161] Thus, the ineffective way in which anti-competitive conduct has been addressed is due primarily to institutional problems with the Competition Commission.[162] The major institutional issues of the Competition Commission are reflected in the lack of institutional independence, shortage of resources to support institutional capacity and a lack of communication and coordination with other sectoral regulators.[163] The political factors surrounding SOEs have also influenced the effectiveness of competition law,[164] where the SOEs have resisted the liberalisation of the energy sector.[165]

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[156] Pei Yee Woo, 'Independent Power Producers in Thailand' (Working Paper No. 51, Stanford University, August 2005) 5.

[157] Wisuttisak, above n 153, at 61.

[158] Woo, above n 156, 5.

[159] Wisuttisak, above n 153, 68-70.

[160] Ibid.

[161] Nikomborirak, above n 147.

[162] Ibid, at 611.

[163] Wisuttisak, above n 153.

[164] Richard Geddes, 'Case Studies of Anticompetitive of SOE Behavior' in J. Gregory Sidak, Richard Geddes and David E.M. Sappington (eds), *Competing with the Government: Anti-Competitive Behavior and Public Enterprises* (Hoover Press, 2004) 27, 35-37.

[165] Wisuttisak, above n 153.

A study by Mark William reveals the lack of enforcement of competition law in Thailand through several cases.[166] One of these cases consists of an allegation of abuse of dominant position in the cable television market. In early 2000, the Competition Commission received complaints from consumer groups that a newly merged television company, the United Broadcasting Corporation (UBC), charged an excessive monthly subscription fee.[167] The company argued that it was not a monopoly and was in direct competition with other local cable operators and many other substitutes, in the form of products such as video rental services, movie theatres, satellite dishes and free television channels. The investigation continued, and a subcommittee confirmed that the cable operator was a monopoly in the Bangkok region, where other cable operators were absent, but was not able to establish whether the fee charged was excessive. The subcommittee found that UBC's failure to offer a lower-priced package with fewer channels constituted a breach of the concession contract.[168] It also found that UBC, after the merger, was a monopolist in the national cable television market. UBC was protected from new entrances or new competitors by setting high physical, financial and regulatory barriers to entry.[169]

According to the subcommittee, UBC was found to have infringed on Section 25(3), reducing or restricting services without justifiable reason. However, the subcommittee viewed Section 25 as inapplicable to UBC. Even after the merger, UBC was still two separate legal entities and did not dominate the relevant market.[170] These findings were presented to the Competition Commission, which also agreed that UBC had infringed on Section 25(3). Together with the Commission, the subcommittee agreed that the cable operator was a monopoly. Unfortunately, they decided that the case was not in their jurisdiction because cable television was part of a regulated industry.[171] The Commission transferred the case to the Mass Communication Organisation of Thailand (MCOT), which regulates the cable television industry. They argued that the case should be handled by a particular regulatory body rather than by the general competition

[166] Williams, above n 89, 459-494.

[167] UNCTAD, above n 151, 22.

[168] Ibid.

[169] Ibid.

[170] Ibid, at 23.

[171] Nikomborirak, above n 147, 603.

authority.[172] The MCOT confirmed that the tariff was still normal, because the company was almost bankrupt and facing an operating loss.[173] The price charged to customers was deemed not excessive and thus the claims of monopoly pricing were dismissed. As a result, customers have been forced to pay increasingly higher monthly subscription fees as the operator continues to add new and very expensive channels.[174]

In the case above, a series of price increases took place with no interference from the competition body. The MCOT never took the initiative to review the provider's cost figures or to examine whether the content offered in each package was commensurate with the fee charged. The case above explicitly illustrates the lack of competition law enforcement in Thailand. This lack of enforcement was also reported by Clifford Chance in their guide to competition law in Asia Pacific. According to Clifford Chance, since the Thailand Competition Act came into force in 1999 and as at June 2013, only 93 cases have been brought to the Commission. However, no case so far has reached trial, nor has any criminal prosecution occurred through the Commission.[175]

6.4.4 Singapore

The first milestone of Singapore's competition law comes with the enactment of the Competition Act in 2004.[176] The Competition Act 2004 changes the direction of Singapore's policy in regards to the AEC 2015. Within a space of less than three years, the policy and legislative foundations of the new law were established.[177] Before the enactment of the Competition Act 2004, there were no general provisions related to the prohibition of anti-competitive conduct within the Singapore legal system.[178] In 2005, the Competition Commission of Singapore was formed to enforce the competition law.

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[172] Ibid.

[173] Ibid

[174] Ibid.

[175] Clifford Chance, 'A Guide to Antitrust and Competition Law in Asia Pacific' (Clifford Chance, 2014) 102.

[176] Burton Ong, 'The Origins, Objectives and Structure of Competition Law in Singapore' (2006) 29(2) *World Competition* 269, 269.

[177] Ibid

[178] Ibid.

In 2010, the CCS issued an Infringement Decision against SISTIC for abusing its dominant position in the relevant market. SISTIC was established in 1991 under the Singapore Sports Council as a ticket service provider company in Singapore.[179] SISTIC dominate the relevant market and acted as a middleman between event promoters and the ticket buyers. It provided a platform to buy and sell tickets for events. Between 2006 and 2009, SISTIC entered into exclusive agreements with 17 event promoters and two venue operators to sell tickets through SISTIC. As a result event promoters who wished to hold their events at key venues such as the Esplanade and Singapore Indoor Stadium had no choice but to sell their tickets through SISTIC. So the ticket buyers who wish to attend those events have no choice but to buy tickets through SISTIC.[180]

SISTIC owns 90% of market share which means that SISTIC dominate the relevant market. The CCS found that SISTIC has abused its dominant position in the market in requiring these key venues to use its service exclusively because there are a limited number of venues in Singapore that can host large-scale events. SISTIC also required some event promoters to engage it as the sole ticketing service provider for all their events. These exclusive agreements were harmful to competition in that they restricted the choices of venue operators, event promoters and ticket buyers. In fact, symptoms of adverse effects were observed in the market: for example, an increase in SISTIC's booking fee for ticket buyers in 2008.[181]

In October 2007, a complaint was submitted to the CCS that the restrictions under the Exclusive Agreements were harmful to competition.[182] They restricted event promoters' choice of ticketing service providers, which violated Section 47 (artificially perpetuate SISTIC's dominant position), and afforded SISTIC the ability to charge ticket buyers higher prices. In January 2008, the CCS decided that based on the Section 47 prohibition of the Act SISTIC has harmed the competition law.[183] The CCS issued a decision imposed financial penalties on SISTIC and ordered that SISTIC to change the

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[179] Competition Commission of Singapore, *Abuse of Dominant Position by SISTIC.com Pte Ltd* (November 27, 2014) Competition Commission of Singapore <https://www.ccs.gov.sg/public-register-and-consultation/public-consultation-items/abuse-of-dominant-position-by-sisticcom-pte-ltd>

[180] Ibid.

[181] ASEAN, above n 120.

[182] Singapore, above n 180.

[183] Ibid.

exclusive agreements to remove clauses requiring its partners to use its services exclusively.[184]

As a result of the CCS' decision, increased competition in the ticketing industry has been observed. The industry has also seen a new entrant. Existing ticketing service providers are now able to be the ticketers for events held at key venues. With the opening up of the ticketing service market, other ticketing service providers have also introduced new and innovative services, including leveraging on new distribution channels, thereby differentiating themselves from SISTIC. The CCS's intervention in the market was an important first step towards restoring and allowing greater competition to thrive in this market.[185]

Since the CCS was formed, 850 complaints have been submitted to date. Between March 2013 and April 2014, the CCS completed 49 cases, up from 38 in the previous year. The competitive level playing field has been changed since the enactment of competition law in 2004. One of the changes in the competition environment is to the aviation market. In recent years, alliances for cooperation and integration between airlines have become dominant in Singapore. The present task of the CCS is to ensure that competition in Singapore is not distorted as a result of joint venture agreements conducted by airline companies.[186]

Between 2010 and the end of March 2014, the CCS received a total of ten decision notifications for joint venture agreements and alliances in the aviation industry. To date, the CCS has reviewed and issued decisions for nine of the ten notifications. On 6 August 2012, Qantas Airways Limited and its subsidiary, Jetstar Airways, sought a decision from the CCS on its Jetstar Pan-Asia Strategy. The strategy sees Qantas establishing joint venture agreements with local airline partners to operate low-cost carriers under the Jetstar brand. Under the strategy, Jetstar Asia, Jetstar Pacific and Jetstar Japan will coordinate networks, scheduling, pricing, customer service and resourcing decisions. After reviewing the submission, the CCS found that the proposed conduct would raise competition concerns and increase the level of competitiveness

[184] Ibid.

[185] ASEAN, above n 120.

[186] Competition Commission of Singapore, 'On Top of Our Game: Competition Commission of Singapore Annual Report' (Competititon Commission of Singapore, March 2014) 19-21.

through increased capacity and reduced price from existing airlines on the relevant market. In the end, the CCS was satisfied with the proposed strategy and issued a decision to the parties on September 23, 2013.[187]

In addition to the notifications mentioned above, on January 16 2014, Singapore Airlines and Air New Zealand Limited agreed to form a strategic alliance to provide international scheduled air passenger services, with a focus on Singapore–New Zealand origin and destination city pairs. The agreement includes a proposal to coordinate revenue and cost sharing, pricing, capacity and scheduling for the designated routes. The CCS reviewed the submission and discovered that the alliance could pose some competition concerns. However, it would also directly effect efficiency, for instance, by an increase in capacity in the relevant market. The cooperation also would strengthen Singapore's position as an aviation hub. On that basis, the CCS issued a clearance decision on April 17, 2014.[188]

Table 19: Competition Commission of Singapore Completed Cases

Status per 31 March 2014		Complaints	Preliminary Enquiries/Investigations	Notifications for Guidance or Decision	Merger Notifications	Confidential Advice	Leniency	Appeals	Competition Advisories	Market Studies	Total Workload
Active Cases		52	13	2	3	0	9	1	4	2	34
Completed Cases	2013/2014	97	20	8	0	2	2	2	12	3	49
	2012/2013	84	14	3	7	1	1	2	8	2	38
	2004	850	103	24	36	4	9	7	45	14	242

Source: Competition Commission of Singapore, Annual Report 2013/2014.

6.4.5 Vietnam

A competition law was introduced and passed in the National Assembly of Vietnam in December 2004, and it became effective on 1 July, 2005. The Vietnam Competition

[187] Ibid, at 21.

[188] Ibid.

Law models the UNCTAD and the World Bank competition law frameworks, and is also influenced by other countries' experiences.[189] It prohibits five types of anti-competitive conduct: competition restriction agreements, abuse of dominant or monopoly position, concentration of market power that substantially restricts competition, acts of unhealthy competition and anti-competitive behaviours.[190] The overall goal of the Vietnam Competition Law (VCL) is to promote a competitive business environment and socio-economic development in Vietnam.[191] The Vietnamese Competition Council (VCC) is the competent authority for enforcing the VCA on the basis of the investigations and recommendations of the Vietnamese Competition Administration Department (VCAD).[192]

In 2013, it was reported that the VCA had launched 12 initial enquiries in regards to acts of competition restriction, but that no cases had been initiated by the investigation. Compared to the previous year, the cases handled by VCA fell sharply due to the obstacle of the legal basis of its competence to sanction anti-competitive conduct. Although the 2002 Ordinance on Handling Administrative Violations (amended in 2008) confirms that the VCA Director General (the Head of Competition Authority) has competence to impose fines up to VND 70,000,000, but it does not specify the competence of the Director General to handle anti-competitive conduct. In fact, in the Annual Report of 2013, the VCA issued 20 decisions on a total of 24 cases, earning for the state budget total fine and administration fees of VND 650,000,000. Currently, to avoid such an obstacle, the VCA has submitted a draft to replace the current regulation on handling violations of competition law.[193]

Before Vietnam passed its Competition Law, the competition level playing field in Vietnam was frail.[194] Vietnam has been described as centrally planned, where the state

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[189] Alice Pham, 'The Development of Competition Law in Vietnam in the Face of Economic Reforms and Global Integration' (2005) 26 *Northwestern Journal of International Law & Business* 547, 551.

[190] Ibid.

[191] Ibid.

[192] Vietnam Competition Authority, '2013 Annual Report Vietnam Competition Authority' (Vietnam Competition Authority, 2013) 14.

[193] Ibid, at 14-15.

[194] ASEAN, above n 120.

commands the market.[195] For instance, in the Vietnam mobile telecommunications market, SOEs control the market. Before the enactment of the Vietnam Competition Law, the Vietnam Posts and Telecommunications Corporation (VNPT) held a 97% market share.[196] It was the only network and fixed-line telephone operator in Vietnam. Consumers found it very difficult to subscribe to a mobile by submitting their permanent resident card to the provider. The calling charges were also too high (3,000 VND, or 0.15 US$ per minute).[197]

In 2003, competition law was introduced when Viettel (a SOE) acquired a mobile license. Viettel's entry increased competition and produced immediate market growth to the benefit of consumers. To enter into the mobile market, Viettel had to attract new consumers by setting lower charges (2,600 VND or about 0.13 US$ per minute) and offering more attractive services. Consumers appreciated and supported this increased competition. Viettel Mobile's success triggered other players' entry, intensifying competition in the mobile market. Currently, the market consists of eight operators, including VNPT, Viettel, EVN Telecom, SPT, Vietnam Mobile, Beeline, and Indochina Mobile.[198] Increased competition has spurred new promotion strategies. Consumers can register to both post-paid and pre-paid services, and deposits are no longer needed. The average revenue per user is constantly decreasing, tariffs are decreasing and tariff mechanisms are increasing.[199]

Officially, the first case handled by the VCC was the case of *Tan Hiep Phat Ltd (THP) v. Vietnam Brewery Ltd. (VBL)*.[200] It was issued in the later part of 2003 and ultimately brought in the form of an official complaint to the VCA at the beginning of 2007. VBL is a joint venture between the Vietnamese company, which owns a 40% stake, and Asia Pacific Breweries Ltd., which owns the remaining 60% stake.[201] VBL supplies premium beer brands such as Heineken and Tiger in Vietnam. VBL has agreements with many

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[195] Tu Thanh Nguyen, 'Competition Law in Vietnam: A Paper or Young Tiger?' (2012) 57(3) *The Antitrust Bulletin* 409, 410.

[196] Ibid.

[197] Ong, above n 176, at 270.

[198] ASEAN, above n 120, 9.

[199] Ibid.

[200] Nguyen, above n 195.

[201] Asia Pacific Breweries Ltd is a joint venture company in Singapore between the Fraser and Neave Group and Heineken International.

restaurants, bars, pubs, and hotels for exclusive rights to sell, exhibit, introduce and market VBL's beer products in exchange for compensating their owners.[202]

As a new competitor, THP launched a product named Laser and introduced it to a restaurant, which agreed to sell it. In 2004, the restaurant was sued by VBL on the basis that the restaurant had signed an exclusive agreement with VBL not to sell competitors' products. Surprisingly, the Court required the restaurant to stop selling Laser. The decision was also upheld by the Supreme Court. In July 2005, THP complained about the anti-competitive practices conducted by VBL that were preventing THP from entering the market. Because the competition law authority has not been established at that time, THP could not bring this complaint against VBL. In January 2007, after the VCAD and VCC were formed, and governmental decrees providing detailed guidance on the implementation of the VCL were issued, THP officially brought a complaint to the VCAD.[203] The VCA made its decision to investigate the case in October 2007. The VCA then closed the investigation and referred the case to VCC for a final decision.

In September 2008, 15 insurance companies attended a conference held by the Vietnam Insurance Association and signed an agreement. This agreement expressed their consent to cooperate in the fields of cargo insurance, vessel insurance, vehicle insurance and terms on insurance premium rates for physical damage to cars.[204] Subsequently, four non-life insurance companies considered and signed the same agreement, bringing the total number of firms to 19. The agreement raised insurance premium rates for physical damage to vehicles to a minimum of 1.56% of the insured value per year. On 28 November 2008, VCAD initiated a preliminary investigation and then an official investigation in regards to the agreement above. On 10 April 2010, after the completion of the investigation, VCAD found that the agreement was a price-fixing agreement.[205]

The 19 insurance firms participating in price-fixing accounted for a 99.79% market share in the relevant market, where there were 25 insurance companies in the market.

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[202] Nguyen, above n 195.

[203] Ibid, 435. See also *VBL v. Cay Dua Restaurant*, Judgement No. 51/KTPT of the People's Supreme Court, October 5, 2004.

[204] ASEAN Competition Policy and Law, *Insurance Companies Agreed to Restrain Competition* (September 23, 2013) ASEAN <http://www.aseancompetition.org/resources/cases_rulings/2013-09/insurance-companies-agreed-restrain-competition>

[205] Ibid.

The VCAD concluded that the 19 insurance companies' conduct fell into the category of anti-competitive agreements under Article 8(1) of the VLC. It also prohibited under Article 9(2) for the combination of the market share of those 19 companies to exceed a threshold of 30% in the relevant market. Based on these findings, the VLC, through the Competition Case Handling Council, decided that those 19 companies had violated the VCL. Consequently, the 19 companies were ordered to terminate the agreement and pay a fine amount of VND 1.7 billion (US$89,000). This amount is equivalent to 0.025% of their total revenues in 2007.[206] In the short term, the effect of price fixing cannot be detected. However, in the long term, price agreement among competitors tends to restrict competition and decrease economic efficiency.[207] It implies conspiracy and collusion among competitors to control the market so that they can maintain prices.[208] When prices are artificially maintained or inflated by firms, it can affect the whole supply chain, and result in higher prices for all sorts of goods and services. Consequently, consumer welfare turns into consumer loss.[209]

At the end of 2012, the VCA collected information and some documents that provided evidence of multi-level marketing violations by the Synergy Limited Company.[210] Investigation results indicated that Synergy provided false information about the nature of their product and utilities in the leaflet, the Starkit set and on the company's website to entice people to join the multi-level sales network. The implicated products, such as Mistica, Pro Argi-9 Plus and Chorophyll Plus, were advertised with many overstatements such as: 'Mistica prevents aging and damage of the immune cells', 'Chlorophyll Plus stimulates enzyme and leucocytes cells, strengthens the body's immune response, helps the body to eliminate toxins, improves anaemia, increases the number of red blood cells, balances the body pH, etc.'[211]

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[206] Vietnam Competition Authority, *Press Release on Investigation of Agreement Case of 19 Insurance Companies* (August 6, 2010) Ministry of Industry and Trade <http://www.qlct.gov.vn/NewsDetail.aspx?CateID=336&ID=1131>

[207] Frank H Easterbrook, 'Maximum price fixing' (1981) *The University of Chicago Law Review* 886. Louis Kaplow, *Competition Policy and Price Fixing* (Princeton University Press, 2013) 33.

[208] Kaplow, above n 207.

[209] George A Hay and Daniel Kelley, 'An Empirical Survey of Price Fixing Conspiracies' (1974) 17 *Journal of Law & Economics* 13

[210] Authority, above n 206, 15.

[211] Ibid.

Synergy admitted that the advertisement contents of the implicated products had not been registered at the competent agencies, and the contents of the Starkit set were inconsistent with the Product Standard Dossiers.[212] Throughout the investigation process, the defendant could not show any document proving the truthfulness of the advertised contents of the implicated products. Therefore, the result of the official investigation showed that Synergy performed the act of providing false information on the nature of their product and utilities for the purpose of inciting people to join the network, which is against Clause 4 of Article 48 of the Act on illicit multi-level marketing. On 11 June 2013, the VCA Director General issued Decision No 66/QD-QLCT sanctioning Sygnergy Limited Company with a total monetary fine of VND 80,000,000 and investigation fees.[213]

In 2013, the Vietnam Competition Authority recorded that four merger notifications in crucial sectors such as food manufacturing and trading; production, trading and transmission of electricity; and import, export and distribution of steel. Despite the absence of reports on merger and acquisition notification in previous years, the notifications for 2013 at least show awareness on the part of investors in regards to economic concentration in the relevant markets. This development in Vietnam competition law is a good signal with regard to building a competition environment and culture.

Table 20: Competition Restriction Cases in Vietnam, 2006–2013

	2006	2007	2008	2009	2010	2011	2012	2013	Total
Initial Investigation	5	3	4	8	10	10	12	12	64
Investigation	0	1	2	0	1	2	4	0	10
Decision	0	0	0	1	2	0	0	1	4

Source: Vietnam Competition Authority, Annual Report 2011, 12.

[212] Ibid.

[213] Ibid.

Table 21: Statistics on Unfair Competition Cases in Vietnam, 2009–2013

Types of anti-competitive acts	2009	2010	2011	2012	2013
Advertising for unfair competition purpose	5	20	33	37	2
Sales promotion for unfair competition purpose	2	2	-	-	-
Discrediting other enterprises	4	1	2	-	-
Misleading indications	-	1	-	-	-
Illegal multi-level sales	3	4	1	3	1
Disturbing business activities of other enterprises	-	-	-	1	-
Total Cases	14	28	36	41	3

Source: Vietnam Competition Authority, Annual Report 2011.

Table 22: Merger Notification Lists 2013 in Vietnam

Date	Sector	Companies	Decision
January 2013	Production and trading of confectionery, food and beverages	1. Kinh Do Joint Stock Company 2. Vinabico Joint Stock Company	VCA notified that the merger did not violate competition.
July 2013	1. Commercial production and trading of electricity. 2. Investment and trading of small and medium electricity works.	1. Hydropower Can Don Joint Stock Company 2. Hydropower Na Loi Joint Stock Company 3. Hydropower Ry Ninh Il Joint Stock Company	VCA allowed the companies to merge since it did not fall into the prohibited cases.
July 2013	1. Construction of road, substation, water supply and drainage system. 2. Production and trading of electricity, trading electricity and materials.	1. Song Da 11 Joint Stock Company 2. Song Da-Tha Long Joint Stock Company 3. Song Da 11 Investment and Construction Joint Stock Company	The companies were allowed to merge: according to VCA's evaluation, the combined market share of those companies was smaller than the compulsory threshold.
December 2013	Import-export and distribution of steel, iron, ferrous metals, alloy and steel equipment in toilets.	1. Nippon Steel Commercial Limited Liability Company 2. Sumikin Bussan Viet Nam Limited Liability Company	VCA stated that the combined market share did not exceed the compulsory threshold. The companies were allowed to merge.

Source: Vietnam Competition Authority, Annual Report 2011.

6.4.6 Malaysia

Malaysia enacted its first competition law in 2012, called the Competition Act 2010 (CA 2010).[214] It came into force on 1 January 2012, after a grace period of around 18 months.[215] The CA 2010 is one of the most significant pieces of commercial legislation ever passed by the Parliament of Malaysia.[216] Malaysia took more than 20 years to pass general competition law.[217] During that period various models of competition laws were examined, culminating in the final form of the CA 2010, which is largely modelled after the EU competition law, with similarities to the US Antitrust Law, the UK Competition Act 1998 and the Singapore Competition Act 2004.[218] The primary objective of Malaysia's CA 2010 is to promote economic development by promoting and protecting the process of competition.[219] The key aspect of this Act is its promotion of consumers' welfare by prohibiting anti-competitive conduct. The CA 2010 consists of two main prohibitions: prohibition on anti-competitive agreements and prohibition on abuse of dominance. Examples of the Act's application are discussed in the following.

On 4 March 2012, Mr. Lee Peng Fo, President of the Cameron Highlands Floriculturist Association (CHFA) issued a statement published in the online portal of the *Star* that the CHFA would increase the prices of flowers by 10% effective from 16 March 2012.[220] Mr. Fo mentioned that all of its 150 members had agreed to increase their prices.[221] Based on that statement, the Malaysian Competition Commission (MyCC) started an investigation into the matter. The results from the investigation indicated that the CHFA members had engaged in price-fixing agreement, either directly or indirectly. The CHFA members set the price of their floricultural products by entering into a

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[214] Malaysia Competition Act 2010.

[215] Vince Eng Teong See, 'Competition Act 2010: The Issues and Challenges' (Article not Assigned to an Issue) *European Journal of Law and Economics* 1, 2.

[216] Ibid.

[217] Ibid.

[218] Tze Vern and Wilson Tay, 'Competition Law in Malaysia: Renaissance and the Road Ahead' (2013) 2 *Malaysian Journal Articles* 1, 4.

[219] Julian Nowag, 'An Introduction into competition law: The substantive provisions of the Malaysian competition act in light of its European origins' (2012) 4 *Malayan Law Journal* , 6.

[220] Malaysian Competition Commission, *MyCC's Decision against the Cameron Highlands Floriculturist Association* (December 6, 2012) ASEAN <http://mycc.gov.my/wp-content/uploads/2014/05/MyCC%E2%80%99s-Decision-Against-the-Cameron-Highlands-Floriculturist-Association.pdf>.

[221] Ibid.

horizontal agreement. This had the object or effect of significantly preventing, restricting or distorting competition in the floriculture market.[222] Based on the finding, MyCC directed CHFA to cease the infringing act of price fixing. MyCC directed the CHFA to provide an undertaking that its members should not engaged in any anti-competitive conducts in the relevant market. MyCC also instructed the CHFA to issue a statement in the newspapers on this sanction against price fixing.[223]

The most recent case involving the Act in Malaysia consisted of an infringement of Section 4(2)(a) of the Competition Act 2010 by 15 members of the Sibu Confectionery and Bakery Association.[224] In November 2013, the MyCC initiated an investigation under Section 14(1) of the Competition Act 2010 into a suspected infringement of Section 4(2)(a) of the Competition Act by 40 companies that were members of the Sibu Confectionery Bakery Association. Subsequently, 24 companies were found to be involved.[225] Pursuant to Section 40 of the Competition Act 2010, the MyCC found that 15 of the companies had infringed Section 4(2)(a) of the Act. These enterprises were Huong Hiong (Sibu) Confectionary, Wong Kieng Seng, New Chuo An Bakery, Chung's Bakery, Sweetie Bakery, Seng Kee Bakery, To Eat Bakery Sdn. Bhd., Nam Mee Bakery, Lian Yu Bakery Cake Store, ABC Cake House, Farley Bakery, Wonderful Bakery, Kung Fung Food Industries as well as Yong Lin Yin. Those companies were found entering into a horizontal agreement that had as its objective to fix, directly or indirectly, the selling price of confectionery and bakery product in the Sibu, Sarawak area.[226]

Based on that fact, the MyCC decided that the 14 companies are imposed by financial penalties while one company is not being imposed by the financial penalty.[227] Although found to have infringed section 4(2)(a) of the Act, the MyCC did not impose any financial penalty on Yong Kong Chuo, which generated an insignificant amount of total turnover during the infringement period. The MyCC imposed a total financial penalty of

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[222] Ibid.

[223] Ibid.

[224] Malaysian Competition Commission, *MyCC's Decision Against Fifteen Members of the Sibu Confectionery and Bakery Association* (February 12, 2015) Malaysian Competition Commission <http://mycc.gov.my/wp-content/uploads/2014/07/Final-Decision-SCBA.pdf>.

[225] Ibid.

[226] Ibid.

[227] Ibid.

RM247,730 on the infringing enterprises.[228] In determining the level of financial penalty, the MyCC took into account the seriousness of the infringement, the duration of the infringement, relevant turnover of the enterprises for period of infringement, aggravating factors and mitigating factors.[229]

Significantly, the Competition Act does not regulate anti-competitive M&As. It does not contain substantive provisions regulating this area due to input from agencies such as the Securities Commission and the Central Bank. The lack of M&A regulations is in line with Malaysia's national policy of encouraging M&As among its business actors. The aim of this policy is to strengthen the domestic economy and to advance global corporate competitiveness. To solve this lack of regulation, a strict statement was made by the Malaysian Minister of Trade. He confirms that although the Competition Act does not restrict M&As, the government will regulate what takes place after the merger or acquisition. This is to ensure that if a monopoly power arises, that power is not abused by the company concerned.[230] As an option, the MyCC agency may refer to Section 4(1) of the Competition Act if a merger infringes the market and restricts competition. The section prohibits horizontal or vertical agreements that have the effect of significantly preventing, restricting or distorting competition. Under Section 4(1), the MyCC or an affected party are still able to challenge the anti-competitive M&As.[231]

6.5 Conclusion

From the previous chapters and this chapter, it can be concluded that competition law is a significant part of the foundation of an economic community, particularly one aiming at a single market. If an effective single competition policy system is built for ASEAN, a single market is not impossible. Undoubtedly, this will be very difficult to establish. With the significant diversity existing in the AMSs' competition laws, the process of harmonisation will take a long time. The main focus of this chapter has been to provide an examination of the existing competition law regimes of some of the AMSs.

[228] Ibid.

[229] Ibid.

[230] Dewan Rakyat Hansard, 20 April 2010, at 129.

[231] Vern and Tay, above n 218, 7.

The chapter has also presented the differences and gaps between these regimes. It is imperative that ASEAN leaders consider these differences and gaps if ASEAN is to move to harmonisation among national competition laws and also with regional competition law. Thus far, ASEAN does not have a regional competition policy and law. Of course, this lack of regional regulation related to competition policy and law will be a disadvantage for ASEAN. The clear reason for this is that competition policy and law functions as a tool to protect the market from anti-competitive behaviours. Another function of competition policy and law is to ensure that consumers will be protected from predatory firms. Trade openness creates the possibility for big enterprises to enter the market by using their power to gain supra-maximum benefits from consumers by setting prices higher.

The examination above has shown the wide differences among the AMSs, has covered the substantive, procedural and enforcement elements of these differences, and suggested competition law authorities' duties and obligations. The wide gap between the member states needs to be overcome so that ASEAN may effectively hinder conflicts that create non-tariff barriers to the establishment of the ASEAN single market. Hence, this gap in competition policy and law should be minimised. For that reason, harmonisation of competition policy in ASEAN is urgently needed. The next chapter will examine the possibilities for harmonisation and what legal measures can be taken by ASEAN.

Chapter 7
The ASEAN Economic Community and the Project of Competition Policy Harmonisation

7.1 Introduction

The introduction of competition policy within ASEAN is currently underway. Efforts towards this endeavour have continuously improved, and although faced with the prospect of uncertain results, ASEAN has taken experimental steps to forge regulatory cooperation.[1] Because ASEAN has committed to achieving an economic community by 2015, its members must craft and modernise their national competition policies and laws to enhance market integration and avoid anti-competitive conduct.

The kind of regionalism created by developing countries that focuses on creating a single market has rarely succeeded in its goal of free trade. This is shown in the cases of the Latin American Free Trade Area[2] and the African economic communities.[3] The failures of these attempts can be attributed in large part to the abandonment of the project of formulating and enforcing competition policy that encourages anti-competitive business activities in these regions.[4] This absence of competition policy has not only led to weak economic integration, but has also impeded the development of the market as a result of unfair business practices.[5] Since ASEAN countries have diverse competition regimes, they need to harmonise these regimes before moving forward towards a single market economic community.

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[1] Kim Them Do, 'Competition Law and Policy and Economic Development in Developing Countries' (2011) 8(1) *Manchester Journal of International Economic Law* 18, 23.

[2] Michael G Plummer and Reid W Click, 'The ASEAN Economic Community and the European Experience' in Kōichi Hamada, Beate Reszat and Ulrich Volz (eds), *Towards Monetary and Financial Integration in East Asia* (Edward Elgar Publishing Limited, 2009) 13.

[3] Muna Ndulo, 'Harmonisation of Trade Laws in the African Economic Community' (1993) 42 *International and Comparative Law Quarterly* 101, 104.

[4] Lawan Thanadsillapakul, 'The Harmonization of ASEAN: Competition Laws and Policy from an Economic Integration Perspective' in Philippe Gugler and Julien Chaisse (eds), *Competitiveness of the ASEAN Countries Corporate and Regulatory Drivers* (Edward Edgar Publishing, 2010) 133.

[5] Ibid.

Compared with the EU, where member states have adopted EU law and adjusted their national laws, ASEAN's case will be quite different. The objective of economic integration in the ASEAN region provides the most evident rationale for harmonising laws as a whole,[6] especially those with regard to competition policies. If basic obstacles to the AEC can be found in national competition laws, or if these obstacles arise from the simple disparities in competition law regimes, then there is a *prima facie* case for harmonisation.[7] Differences in the regulatory frameworks of AMSs will have a significant effect on the single market. The harmonisation of laws is widely considered an effective measure to achieve economic integration, and its necessity is observed in the successful case of the EU.[8] In the process of building a community of member states, harmonisation towards a single economic community standard will facilitate a more integrated community.[9] Arguably, a region-wide system of competition policies confers advantages. However, crafting a uniform regulatory framework requires more than uniformity of statements in governing statutes.

This chapter presents a proposal for the future harmonisation of competition policy in the AEC, examining a possible form that harmonisation could take in ASEAN. In this regard, ASEAN has two options for harmonisation: a bilateral or a regional approach. This chapter argues that ASEAN may achieve competition policy and law harmonisation by establishing bilateral cooperation between its member states. The bilateral approach is favoured because it does not require the creation of new substantive laws or enforcement systems. Rather, it enables the member states to retain their own competition laws while also retaining the ability to develop and strengthen them. This chapter concludes that, whatever future form ASEAN may take, without a competition culture that reflects political support, it will be very difficult to achieve harmonisation. In addition, the existence of economic development gaps makes this task even more difficult for ASEAN.

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[6] Arthur Rosett, 'Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law' (1992) 40 *American Journal of Comparative Law* 683, 684.

[7] Carsten Gerner-Beuerle, 'United in Diversity: Maximum Versus Minimum Harmonization in EU Securities Regulation' (2012) 7(3) (July 1, 2012) *Capital Markets Law Journal* 317, 333.

[8] Barry E Hawk, 'Antitrust in the EEC--The First Decade' (1972) 41 *Fordham Law Review* 229. Also see Alissa A Meade, 'Modeling a European Competition Authority' (1996) 46 *Duke Law Journal* 153.

[9] Eleanor M Fox, 'Harmonization of Law and Procedures in a Globalized World: Why, What, and How?' (1991) 60(2) *Antitrust Law Journal* 593, 595.

7.2 Setting a Framework for Competition Policy Harmonisation

7.2.1 A Possible Form of Harmonisation for ASEAN

The harmonisation of laws is an essential ingredient in regional integration, without which meaningful economic integration cannot be achieved. Economic integration requires a legal framework to foster and support it.[10] Differences between legal systems can be mediated by a process of harmonisation, while competition policy and law serve as tools for ensuring efficiency and non-efficiency goals (e.g., consumer welfare).[11] Ultimately, harmonisation in the field of competition policy and law aims to promote economic integration by avoiding disparities between countries. The final phase of harmonisation should consider societal preferences towards competition policy and law in the various member states over the relevant issues affected by the behaviour that would be subject to harmonisation. Here, the ultimate goal of harmonisation depends on the fundamental reasons why countries need harmonisation.[12] In turn, harmonisation ought to be understood as a comprehensive concerted effort that encompasses the political and legal will of all states to establish competition policy in a specific economic community.[13] Regional harmonisation must encompass, principally, the legislation that defines the terms of competition policy, the interpretation of the concepts therein, and the procedure for determining the status of harmonisation.[14] Regional trade agreements play a significant role in the enactment of competition legislation.[15]

Harmonisation in regional trade can be pursued to a variety of degrees.[16] Nakagawa divides the process into two categories: those cases in which no difference in economic regulation between countries is permitted, to cases in which considerable differences are

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[10] Ndulo, above n 3, 107.

[11] Giandomenico Majone, 'Policy Harmonization: Limits and Alternatives' (2014) 16(1) *Journal of Comparative Policy Analysis: Research and Practice* 4, 12.

[12] David W Leebron, 'Claims for Harmonization: A Theoretical Framework' (1996) 27 *Canadian Business Law Journal* 63.

[13] Jose H Fischel De Andrade, 'Regional Policy Approaches and Harmonization: A Latin American Perspective' (1998) 10(3) *International Journal of Refugee Law* 389, 395.

[14] Ibid.

[15] Franz Kronthaler and Johannes Stephan, 'Factors Accounting for the Enactment of a Competition Law-an Empirical Analysis' (2007) 52 *Antitrust Bulletin* 137, 149.

[16] Junji Nakagawa, *International Harmonization of Economic Regulation* (Jonathan Bloch and Tara Cannon trans, Oxford University Press, 2011), 3.

allowed. Countries often pursue legal harmonisation through international cooperative efforts. The creation of mutual recognition of common legal principles can be achieved through international treaties.[17] Harmonisation may also be achieved by international agreement between states or by mandate of a regional supranational institution.[18] Nakagawa describes three possible methods of harmonisation. First, harmonisation can be achieved through the fulfilment of obligations under legally binding agreements that are instituted in the international organisations (hard law). Second, it can be achieved by the establishment of non-binding recommendations or guidelines encouraging countries to adopt harmonisation measures voluntarily (soft law).[19] The third method requires the pursuit of harmonisation by countries on their own initiative, based on mutual consultations or policy coordination.[20]

Hard law measures here may pertain to those with the status of binding legal instruments, whether procedural or substantive, or both.[21] In contrast, harmonisation based on soft law refers to cooperative mechanisms that: 1) are voluntarily adopted by member states; 2) do not require legal change on the part of any participant; 3) are not dependent on shared substantive rules; and 4) have more modest goals, such as increased understanding of each system and avoidance of conflict between member states. Soft laws insufficient to fulfil the formal requirements for duly enacted legislation, but morally it binds people behaviour.[22] As stated by Sir Joseph Gold,[23] ‘there are almost as many definitions of soft law as there are writers about it’. In his view, soft law expresses a preference and states do not necessarily to perform it.[24] In international law, hard or firm law states the culpability of a state for a breach for which

[17] Ibid.

[18] George A Zaphiriou, 'Unification and Harmonization of Law Relating to Global and Regional Trading' (1993) 14 *Northern Illinois University Law Review* 407, 407.

[19] Soft law consists of rules issued by lawmaking bodies that do not comply with procedural formalities necessary to give the rules legal status yet nonetheless influence the behaviour of other lawmaking bodies and of the public. Jacob Gersen and Eric Posner, 'Soft Law: Lessons from Congressional Practice ' (2008) 61(3) *Stanford Law Review* 573, 573.

[20] Nakagawa, above n 16.

[21] Diane P Wood, 'Soft Harmonization Among Competition Laws: Track Record and Prospects' (2003) 48(2) (Summer2003) *Antitrust Bulletin* 305, 310.

[22] Gersen and Posner, above n 19.

[23] Joseph Gold, 'Strengthening the Soft International Law of Exchange Arrangements' (1983) 77 *American Journal of International Law* 443, 443-444.

[24] Ibid.

it is responsible, whatever form of sanction or penalty that responsibility may involve.[25] The success of soft law and various forms of voluntary arrangement in ASEAN shows the distinctive pathway of the rule of law in the region, but also reflects a global trend.[26] Soft law harmonisation is also reflected in the ASEAN Competition Policy Guidelines, where the member states are committed to introducing nation-wide competition policy by 2015.[27] The Competition Guidelines take the form of a framework aimed at assisting AMSs in developing their competition policy.

Through the AEGC, ASEAN has exerted some efforts towards harmonisation among competition policies.[28] For example, the AEGC is focused on strengthening competition-related policy capabilities and best practices among AMSs. In addition, it also functions to develop the ASEAN Regional Guidelines on Competition Policy and to compile a Handbook on Competition Policy and Law in ASEAN for Business. However, the Handbook on Competition Policy and Law in ASEAN for Business 2013 is not intended to be a comprehensive guide to applicable laws, but purely serves as a documentation tool for member states.[29]

In addition, ASEAN also has published guidelines for developing core competencies in competition policy. The aim of the Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN (the Developing Core Competencies) is to provide the AMSs with outlines on what defines and constitutes competition policy and law. It describes the process of how to develop a competition law enforcement system.[30] The Developing Core Competencies is not different from the earlier guidelines: it serves only as non-binding guidance for the AMS. The Developing Core Competencies suggests that, in adopting competition policy and law, the AMSs should first understand

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[25] Cynthia Crawford Lichtenstein, 'Hard Law v. Soft Law: Unneccesary Dichotomy' (Paper presented at the International Lawyer (ABA), 2001), 1433.

[26] From the time of its establishment in 1967 under the Bangkok Declaration, the Association of Southeast Asian Nations (ASEAN) has relied more on diplomacy rather than law.

[27] See ASEAN, 'ASEAN Regional Guidelines on Competition Policy' (ASEAN Secretariat, August 2010).

[28] ASEAN Competition, *About the ASEAN Experts Group on Competition (AEGC)* (2013) ASEAN <http://www.aseancompetition.org/aegc/about-asean-experts-group-competition-aegc> at May 15, 2015.

[29] ASEAN Secretariat, 'Handbook on Competition Policy and Law in ASEAN for Business 2013' (ASEAN, May 2013).

[30] ASEAN, 'Guidelines on Developing Core Competencies in Competition Policyt and Law for ASEAN' (ASEAN, December 2012) 5.

competition law and its goals, with regard to foreign experience, international benchmarks and best practice.

When used in this sense, soft law can be contrasted with hard law,[31] which is binding. Treaties are by definition always hard law, because they are always binding. In the category of soft law, the legal form is decisive: if the form is that of a treaty, it cannot be soft law.[32] If the form is that of a non-binding agreement, such as the Blueprint, the ASEAN Roadmap[33] or the Competition Guidelines, it will not be a treaty for precisely that reason, but rather, in effect, a soft agreement. The result is another economic instrument that makes bold proclamations but leaves significant room for states that are uncertain about their future to deviate from the necessary steps.[34]

Referring to the previous analysis regarding the failure of AFTA, which is based on soft law or non-legally binding rules, some members were unwilling to complete the schedule that was defined in the agreements.[35] AFTA is not the only free trade agreement in the world that has failed in its implementation; other economic communities in developing countries have had similar experiences. Particularly for the implementation of competition policy harmonisation, the AEC is also run only through cooperation without obligation.

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[31] Rationalist scholars find that hard law has more advantages than soft law because hard law instruments allow states to form credible commitments to international agreements. Hard law make state commitments more credible because they increase the cost of reneging, whether on account of legal sanctions or on account of the costs to a state's reputation where it is found to have fallen short on its legal commitments. Hard-law instruments are more credible because they can have direct legal effects in national jurisdictions, or they can require domestic legal enactment. Where treaty obligations are implemented through domestic legislation, they create new tools that mobilize domestic actors, increasing the audience costs of a violation and thus making their commitments more credible. Hard law instruments allow states to monitor and enforce their commitments better, including through the use of dispute-settlement bodies such as courts. See Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54(03) *International Organization* 421, 428. Also see Christine M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38(04) *International and Comparative Law Quarterly* 850.

[32] Alan E Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48(04) *International and Comparative Law Quarterly* 901, 901–902.

[33] ASEAN, *Roadmap for an ASEAN Community 2009-2015* (2009) ASEAN <http://www.asean.org/resources/publications/asean-publications/item/roadmap-for-an-asean-community-2009-2015> at May 15, 2015.

[34] Lee Leviter, 'The ASEAN Chapter: ASEAN Failure or Member Failure?' (2010) 43 *New York University Journal of International Law & Politics* 159, 204.

[35] Hadi Soesastro, 'Implementing the ASEAN Economic Blueprint' in *The ASEAN Community: Unblocking the Roadblocks* (Institute for Southeast Asian Studies, 2008) 30. Also see Hadi Soesastro, 'Accelerating Asean Economic Integration: Moving Beyond AFTA' (Paper presented at the The Second ASEAN Leadership Forum, Jakarta, 2005).

7.2.2 Hybrid Approach to Harmonisation

It is not an easy task for ASEAN member countries to develop and implement competition rules at the regional level. In particular, it is necessary to bear in mind the region's diversity on many fronts. Further, ASEAN works on a consensus-based model, and is not a supranational organisation.[36] Several possible models for creating a common regional competition law have been proposed by experts.[37] However, no consensus has been arrived at so far on the preferred single-model approach to achieving a comprehensive multilateral competition regime.

Given these factors, this chapter proposes a framework for competition policy harmonisation in ASEAN using a hybrid approach based on both hard and soft law. This hybrid approach is based on Abbott and Snidal's conceptualisation of hard and soft law, which is rooted in the predominant strand of rationalism, the so-called rational functionalism.[38] This approach assumes that international institutions and legal arrangements are established to advance mutual interests and solve problems collectively.[39] The idea of the hybrid mechanism for harmonising competition policy in ASEAN also addresses the nature of ASEAN itself as an international organisation.[40] The hard law side of the hybrid approach is based on the substantive and procedural aspects of competition law regulations of primary law—the Competition Act—while

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[36] International Monetary Fund (IMF), 'Asia and Pacific, Shifting Risks, New Foundations for Growth' (IMF, 2012) <http://www.imf.org/external/pubs/ft/reo/2013/apd/eng/areo0413.pdf> at May 15, 2015.

[37] Huong Ly Luu, 'Regional Harmonization of Competition Law and Policy: An ASEAN Approach' (2012) 2(02) *Asian Journal of International Law* 291, Thanadsillapakul, above n 4, Pornchai Wisuttisak and Nguyen Ba Binh, 'ASEAN Competition Law and Policy: Toward Trade Liberalization and Regional Market Integration' (Paper presented at the The 2nd International Conference on International Relations and Development (ICIRD): Towards an ASEAN Economic Community (AEC): Prospects, Challenges and Paradoxes in Development, Governance and Human Security, Thailand, July 26-27 2012), G Sivalingam, 'Competition Policy and Law in ASEAN' (2006) 51(2) *The Singapore Economic Review* 241, Phanomkwan Devahastin Na Ayudhaya, 'ASEAN Harmonization of International Competition Law: What is the Most Efficient Option?' (Paper presented at the Kuala Lumpur International Business, Economic and Law Conference, Kuala Lumpur, Malaysia, April 8-9 2013), Tunku Mohammad Radhie, 'Harmonization of Laws: Issues and Prospects in ASEAN Law, Technology and Development' (1986) 1 *ASEAN Law & Social Journal* 50.

[38] Abbott and Snidal, above n 31, 4231-422.

[39] Duncan Snidal, 'Rational Choice and International Relations' in W. Carlsnaes, T. Risse and B. Simmons (eds), *Handbook of International Relations* (Sage Publications, 2002) vol 73, 74.

[40] Simon Chesterman, 'Does ASEAN Exist: The Association of Southeast Asian Nations as an International Legal Person' (2008) 12 *Singapore Year Book of International Law* 199, 200.

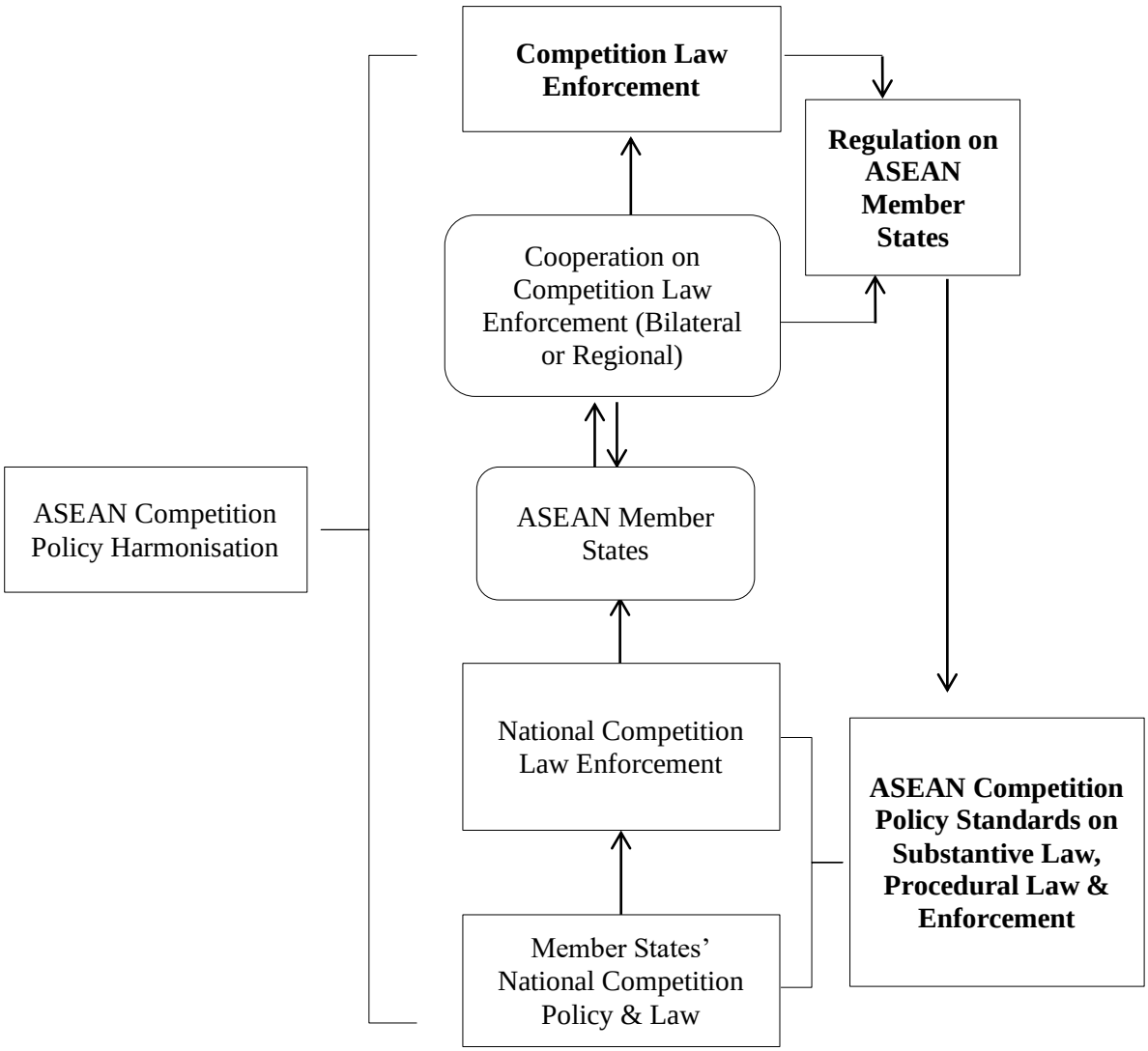
more detailed implementation guidelines are encapsulated in soft law, in the form of guidelines and other non-binding instruments.

Given the diversity across AMSs, ASEAN may achieve competition policy harmonisation without convergence of the existing national competition laws of the member states. Nevertheless, regional standards for competition policy and law are required in the form of supranational competition law for the member states. This mechanism of regional competition law serves to ensure the stability of the market without merging national competition laws. The only problem remaining is how to apply the regional competition law to the member states when conflict appears with national laws. To avoid such conflict and hinder the application of the extraterritorial jurisdiction, an enforcement system and supranational body to supervise the implementation are also needed.

The focus of the harmonisation framework is threefold: harmonisation of substantive competition law, procedural law, and the field of competition law enforcement. ASEAN will not be able to merge and resolve the diversity of competition laws among the member states all at once due to the magnitude of the differences. As a first option, therefore, ASEAN first must come up with a standard for legal substance. Traditionally, in regional economic communities, competition law and the competition authorities have dealt with issues that fall under three broad headings: (1) monopoly or abuse of dominance; (2) cartels; and (3) regulation of combinations, such as mergers, acquisitions and takeovers. It can be argued that competition advocacy should be given equal weight in all of these three traditional areas.[41] Second, ASEAN may focus its harmonisation efforts on competition law procedure. Finally, a competition law body is necessary to enforce the competition law standard. This part is crucial since the effectiveness of competition law depends on its enforcement.

[41] Pradeep S Mehta, 'Competition Policy in Developing Countries: An Asia-Pacific Perspective' (2002) 3 *Bulletin on Asia-Pacific Perspectives* 79, 84.

Figure 7: Proposal for Future Competition Policy Harmonisation



Source: Compiled by the author.

7.3 Creating a Competition Policy Standard for ASEAN

7.3.1 Substantive Law: Setting the Appropriate Issues

Without a common understanding of the substantive provisions of competition law, it is difficult to see how AMSs will be able to interpret some of the specific commitments on the prevention of anti-competitive conduct. Without reference to common standards, it is difficult to enforce competition law extra-jurisdictionally. Embarking on a project of competition policy and law harmonisation must begin by setting the appropriate legal substance of competition law.

The harmonisation of principles has not always been a general element of regional agreements. This is demonstrated by the cooperation on competition policy agreement between NAFTA member states. Before joining NAFTA, Mexico did not have generic competition law until 1992. In December 1992, Mexico passed the Competition Act and initiated its competition policy regime. In several aspects, Mexico's competition law has commonalities with US antitrust law. For instance, Mexican competition law prohibits absolute monopolistic practices such as price fixing and agreements to restrict output, divide markets, or engage in bid rigging.[42] Harmonisation of substantive law is also illustrated between Eastern Europe and the EU. Substantially, the competition law of Eastern European countries and the EU is the same; for example, regarding conduct that affects trade between those countries and the EU.[43]

The decision to harmonise substantive law must be accompanied by the notion that market integration and competition law harmonisation will occur on parallel tracks. These are not easy tasks for ASEAN, where substantive laws are fragmented. There are three major aspects of competition law substance that ASEAN may consider in support of regional market integration: export cartels, cross-border M&As and abuse of dominant position. These three forms of anti-competitive conduct are significant for attracting foreign investment in ASEAN. Moreover, these three anti-competitive conduct provisions are based on the similarities that exist among the member states' competition laws (see Chapter 6).

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[42] Richard O Cunningham and Anthony J LaRocca, 'Harmonization of Competition Policy in a Regional Economic Integration Perspective' (1996) 27 *Law & Policy in International Business* 881, 882.

[43] Ibid.

7.3.1.1 Export Cartels

A growing body of evidence indicates that export cartels are a recurring feature of regional markets for goods and services. Even so, export cartels are not necessarily competition- or welfare-reducing; they are just as likely to enhance competition and welfare. In the end, however, they will create monopoly structures. Currently, no country has a strong incentive to ban export cartels unilaterally. The reason for this is because most of the adverse effects generated by the cartel are experienced abroad, not domestically.

The ways in which trade liberalisation promotes export cartels has been examined by Becker, [44] Sweeney[45] and Evenett et al.[46] In economic integration, foreign firms have more chances to infringe on domestic markets, and it is also easier for domestic producers to retaliate in the opposite direction.[47] For ASEAN's case, all member states are strongly suggested to implement equal treatment of domestic and export cartels and domestic and foreign consumers.[48] A study by Desmarais finds that problems caused by export cartels may be solved with harmonisation.[49] Equal treatment on export cartels has several advantages for an economic community. As argued by Desmarais, harmonisation of export cartel provisions militates the adoption and implementation of the domestic law of the economic community member states.[50] Harmonisation will mean that member states have no difficulties finding information in regards to the activities of the export cartel. It will also make it easier for states to make decisions as to whether preserving or prohibiting an export cartel will affect their domestic markets.[51]

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[44] Florian Becker, 'The Case of Export Cartel Exemptions: Between Competition and Protectionism' (2007) 3(1) *Journal of Competition Law and Economics* 97.

[45] Brendan Sweeney, 'Export Cartels: Is There a Need for Global Rules?' (2007) 10(1) *Journal of International Economic Law* 87.

[46] Simon J Evenett, Margaret C Levenstein and Valerie Y Suslow, 'International Cartel Enforcement: Lessons from the 1990s' (2001) 24(9) *The World Economy* 1221.

[47] Kjell Erik Lommerud and Lars Sørgard, 'Trade Liberalization and Cartel Stability' (2001) 9(2) *Review of International Economics* 343, 344.

[48] Michael Trebilcock and Robert Howse, 'Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics' (1998) 6(1) (1998/07/01) *European Journal of Law and Economics* 5, 12.

[49] Frederic Desmarais, 'Export Cartels in the Americas and the OAS: Is the Harmonization of National Competition Laws the Solution?' (2009) 33 (01/01) *Manitoba Law Journal* 41.

[50] Ibid, 43.

[51] Ibid, 44.

Harmonising substantive competition law is necessary to regulate export cartels, particularly state-sanctioned export cartels.[52] The majority of industrialised countries authorise their export associations and provide some degree of protections for their firms.[53] The aim of such protection is to help small firms to have the capability to compete in international markets, where cooperation and collusion are more widespread.[54]

7.3.1.2 Cross-Border Mergers

M&As have been the most debated examples on the topic of anti-competitive cross-border conduct.[55] The rapid growth of cross-border M&As is a signal indicating growing competition in a country or region.[56] Growth means an entry to domestic markets. There is extensive literature on cross-border M&As as potential modes of entry into foreign markets or FDI.[57] Firms engage in cross-border M&A activity for several reasons: to strengthen their own market position, expand their businesses, seek useful resources such as complementary intangible assets, or realise efficiency gains by restructuring their businesses on a global basis.[58] M&As enable firms to realise new market opportunities quickly and establish an immediate critical mass in a particular market. M&As can also serve to eliminate actual or potential competitors who, at the international level, are becoming more important as barriers to trade and investment fall.[59]

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[52] Cunningham and LaRocca, above n 42, 884.

[53] Becker, above n 44.

[54] Cunningham and LaRocca, above n 42, 884.

[55] Peter John Lloyd and Kerrin M Vautier, *Promoting Competition in Global Markets: A Multi-National Approach* (Edward Elgar Publishing, 1999) 87, 25.

[56] Peter John Lloyd, 'Globalisation and Competition Policies' (1998) 134(2) *Weltwirtschaftliches Archiv* 161, 169.

[57] Katsuhiko Shimizu et al, 'Theoretical Foundations of Cross-Border Mergers and Acquisitions: A Review of Current Research and Recommendations for the Future' (2004) 10(3) *Journal of International Management* 307, 308. Also see Anne-Wil Harzing, 'Acquisitions versus Greenfield Investments: International Strategy and Management of Entry Modes' (2002) 23(3) *Strategic management journal* 211; Otto Andersen, 'Internationalization and Market Entry Mode: A Review of Theories and Conceptual Frameworks' (1997) *MIR: Management International Review* 27.

[58] UNCTAD (United Nations Conference on Trade and Development), 'World Investment Report 1998: Trends and Determinants' (United Nations, 1998) <http://unctad.org/en/Docs/wir1998_en.pdf> May 15, 2015.

[59] Nam-Hoon Kang and Sara Johansson, 'Cross-Border Mergers and Acquisitions: Their Role in Industrial Globalisation' (Technology and Industry Working Papers 2000/01, OECD, 2000) 31.

The anti-competitive merger is not a typical anti-competitive business practice. Merger control deals with aspects of market structure, such as the number of competing firms engaged in selling a given product or service; it does not deal with the anti-competitive behaviour of firms in the relevant market. M&As become illegal whereever they harm competition through the use of cartel agreements that contribute to the creation of a monopoly.[60] On the one hand, such a merger would probably be unlawful, since cartel agreements lead to anti-competitive mergers. However, efficiency may also result from mergers among firms. For that reason, some countries do not provide merger controls in their competition law regimes. The EU did not introduce a merger control system during the first years of its establishment, but rather dealt with anti-competitive mergers using anti-competitive agreements and abuse of dominant position.[61] On September 1990, the Merger Regulation was introduced into EU competition law as a legal framework for the systematic review of mergers, acquisitions, and other forms of concentration.[62] The reason some countries lack a preliminary merger control system is because they are very costly and labour-intensive. Further, merger control systems involve technical economic analysis of the future of the market.

The most important case in merger control harmonisation is that of a merger between two firms located in two different countries. A merger notification proposal must be submitted and approved by the competition authorities of both countries. If, based on its assessment, the competition authority discovers that the merger will decrease welfare in country A and raise welfare in country B, the final result is clear. Consequently, uncoordinated decisions by national competition law authorities can result in non-approval of mergers.[63] Appropriate consideration should be given to any introduction of a merger control regime together with the establishment of competition law.

7.3.1.3 Abuse of Dominant Position

[60] ASEAN, above n 30, 21.

[61] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases and Materials* (Oxford University Press, 2014) 1128.

[62] Nicholas Levy, 'EU Merger Control: From Birth to Adolescence' (2003) 26(2) *World Competition* 195.

[63] Lloyd and Vautier, above n 55, 27.

The concept of abuse of dominant position refers to anti-competitive conduct engaged in by dominant firms to maintain or increase their position in the relevant market.[64] In most regimes, firms with large amounts of market power have special conditions imposed on their conduct by an undertaking that enables it to prevent competition from being maintained on the relevant market.[65] The threshold at which these conditions apply could be a substantial degree of market power or a dominant position.[66] Some competition law regimes use the concept of joint dominance, judging the power of several players together. The provisions may cover all trading practices or they may be restricted to certain classes of goods, certain locations of trades or certain classes of the owner. Exemptions for government trading, international operations such as aviation and shipping, agricultural marketing and labour practices are relatively common. A major issue is whether a competition regime has a particular essential facilities access path and how this is designed. These and other provisions may be enforced by a special industry regulator in key utility industries.[67]

For example, Article 82 of the European Community Treaty prohibits any abuse of dominant position within the EU Common Market insofar as it may affect trade between EU member states.[68] The regulation of abuse of dominant position in the EU is completely different from that in US antitrust law. The two jurisdictions have different perspectives on vertical restraints on trade, even though their provisions related to abuse of dominant position are similar.[69] Section 2 of the Sherman Act and Article 82 of the European Community Treaty are similar in their prohibitions on abuse of dominance. The difference occurs in the interpretation of the regulation: Section 2 of the Sherman Act provides a market definition different from that in Article 82 of the EU Treaty.[70]

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[64] John Temple Lang, 'Some Aspects of Abuse of Dominant Positions in European Community Antitrust Law' (1979) 3 *Fordham International Law Forum* 1.

[65] Bruce Carolan, 'Perils of Harmonization: Refusal to Supply Spare Parts, Article 82 of the European Community Treaty, and Abuse of a Dominant Position, The' (2002) 107 *Dickinson Law Review* 733, 739.

[66] Alan Bollard and Kerrin M Vautier, 'The Convergence of Competition Law within APEC and the CER Agreement' in Rong-I Wu and Yub-Peng Chu (eds), *Business Markets and Government in the Asia Pacific: Competition Policy Convergence and Pluralism* (Routledge, 1998) 120, 126.

[67] Ibid, 126.

[68] Carolan, above n 65, 739.

[69] Susan Beth Farmer, 'Competition without Borders: Antitrust Law and the Challenge of Globalization' (2002) 107 *Dickinson Law Review* 725, 727.

[70] Carolan, above n 65.

Differences in interpretation of the concept of abuse of dominance can be determinative in particular cases and create entirely different rules of legality and illegality.

7.3.2 Procedural Requirements

The significance of harmonisation of competition law procedures has been demonstrated in several cases of regional economic integration.[71] Harmonisation occurs particularly in the area of pre-approval and post-notification of M&As.[72] The need for merger control review increases along with the growth of the global market and cross-border business.[73] Harmonisation of cross-border notification requirements aims to avoid conflict, as demonstrated by the Boeing-McDonnell Douglas merger.[74] The merger review focuses on a different method, whereby the EU merger control focuses on the creation of monopoly and abuse of dominant position, while the US merger review appears more concerned with cartel facilitation.[75]

Regarding merger notification, there are numerous differences ASEAN among member states, including the character of merger notification, whether mandatory or voluntary. These differences may result in various methods of competition law enforcement.[76] Overall, of six AMSs, only four have merger control regimes that mandate the submission of notifications to the competition authority. Only Indonesia has ruled that firms are to submit voluntary pre-notification and mandatory post-notification for a merger. Creating a parallel track for merger notifications among member states by establishing direct enforcement cooperation is one possible track to harmonising procedural law in an economic community,[77] particularly for the AEC.

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[71] Cunningham and LaRocca, above n 42, 885.

[72] James F Rill and Virginia R Metallo, 'Convergence of Premerger Notification and Review: A Case Study' (1993) 28 *Wake Forest Law Review* 35,

[73] Donald Baker, 'Antitrust Merger Review in an Era of Escalating Cross-Border Transactions and Effects' (2000) 18 *Wisconsin International Law Journal* 577, 577.

[74] Eric J Stock, 'Explaining the Differing US and EU Positions on the Boeing/McDonnell-Douglas Merger: Avoiding Another Near-Miss' (1999) 20 *University of Pennsylvania Journal of International Economic Law* 825, 830-831.

[75] Ibid.

[76] See Chapter 6.

[77] Cunningham and LaRocca, above n 42, 885.

The option of harmonising competition procedures by creating a single merger control entity is too difficult. Single merger control is feasible, especially where the member states have common competition law regimes that emphasise enforcement based on private litigation. Even though primary enforcement is handled by the government agencies, coordination of procedural rules will be easier for the agencies to pursue competition law violations that are directed to the state. Most AMSs, such as Thailand, emphasise procedural law based on administrative or a combination of administrative and criminal systems. To change the procedural law will take time and will be costly for the member states.

7.3.3 Competition Law Enforcement

The core of a competition law system is its enforcement system. The critical element of competition law harmonisation exists in the regional coordination among the competition law authorities.[78] Mattoo and Subramanian argue that most of the trade disputes in the area of competition policy have been related to enforcement issues.[79] They advocate a multilateral approach to the national enforcement of existing competition laws. The key advance would be for countries to provide greater possibilities for enforcement by private parties affected by weak enforcement.[80] Enforcement coordination can be very tricky to achieve and supervise, as demonstrated by the Structural Impediments Initiative (SII).[81] The idea of SII is devoted to reduce differences in bilateral trade agreements between the US and Japan.[82] The main role of SII is to find the differences that blocked the bilateral trade, including different competition law. In its report, the SII is heavily emphasised that both countries necessary to change domestic policy and institution, and business customs. The latest may modify the Japanese business culture, including the way of Japan doing its

[78] Ibid.

[79] Aaditya Mattoo and Arvind Subramanian, 'Multilateral Rules on Competition Policy--A Possible Way Forward' (1997) 31(5) *Journal of World Trade* 95.

[80] Ibid.

[81] Harry First, 'Antitrust Enforcement in Japan' (1995) *Antitrust Law Journal* 137, 163-173. Structural Impediment Initiative (SII) is a series of bilateral trade negotiation between the US and Japan in June 1989. The negotiation was established as a result of imbalance trade between both countries. The imbalance trade is come from different competition law enforcement of both countries.

[82] Mitsuo Matsushita, 'The Structural Impediments Initiative: An Example of Bilateral Trade Negotiation' (1990) 12 *Michigan Journal of International Law* 436, 439.

business such as exclusionary business practices and Kereitsu.[83] The SII also aimed at mitigating both countries and reduced the tension in the competition law enforcement.[84] In the end, Japan has agreed to reform its competition law. In this case, the SII plays its role to fill the gap because of the lack of political will from Japan to enforce competition law.[85]

7.4 Potential Methods of Harmonisation for ASEAN

7.4.1 Bilateral Approach

To support the effective application of a competition law standard, it should be ratified by the member states as part of their competition policy and law enforcement. There are two approaches to achieving this ratification. The first is by applying bilateral agreement. Bilateral agreement is one possible way to improve the effective enforcement of competition law in the regional market. The bilateral process occurs when two countries agree to coordinate their approaches to competition, implying that the regimes of both will change. Here they could adopt a common but brand new regime, they could adopt the regime of a third party, or they could agree to submit to a higher authority.[86] The US government puts the competition law enforcement cooperation in every bilateral trade agreement with other country.[87] To avoid the application of extraterritorial jurisdiction, the US established several bilateral agreements on competition law enforcement, including a bilateral agreement with Australia,[88] a cooperation agreement with Canada,[89] and the US bilateral agreement with Germany.[90] The EU also has engaged actively in cooperation with the competition authorities of many countries outside the EU. With some, this cooperation is based on

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[83] Ibid, at 446.

[84] Abbott B Lipsky Jr, 'Current Developments in Japanese Competition Law: Antimonopoly Act Enforcement Guidelines Resulting from the Structural Impediments Initiative' (1991) 60 *Antitrust Law Journal* 279, 280-281.

[85] Mitsuo Matsushita, above n 82.

[86] Bollard and Vautier, above n 66, 128.

[87] Lloyd and Vautier, above n 55, 33.

[88] Stephen D Ramsey, 'The United States-Australian Antitrust Cooperation Agreement: A Step in the Right Direction' (1983) 24 *Virginia Journal of International Law* 127.

[89] Gary E Dyal, 'Canada-United States Memorandum of Understanding Regarding Application of National Antitrust Law: New Guidelines for Resolution of Multinational Antitrust Enforcement Disputes' (1984) 6 *Northwestern Journal of International Law & Business* 1065

[90] B. Zanettin, *Cooperation Between Antitrust Agencies at the International Level* (Hart, 2002) 61-62.

bilateral agreements dedicated entirely to competition. In other cases, the competition provisions are included as part of wider general agreements such as Free Trade Agreements, Partnership and Cooperation Agreements and Association Agreements.

Cooperation agreements on competition policy are simply enabling agreements: they only permit foreign competition law and authorities to cooperate when they willing to do so. An example of an actual cooperation agreement on competition law enforcement is that of the 1991 US–EC agreement in the case Boeing-McDonnell Douglas merger. The competition authorities from both sides regularly consulted on the development of the case. The two authorities shared with each other their analyses of the various markets and what factors were relevant under their respective competition laws.[91] The EU requested that the US take on board vital European interests before making any official decision. In the next stage, the US requested that the EU consider relevant US defence interests. An excellent step was achieved when the EU acknowledged the US's interests by declining to take any action with respect to defence markets. In turn, the US acknowledged the EU's concerns by announcing that the exclusive agreements conducted by Boeing with airlines were against competition law. The result of this cooperation was that the EU and US reached different enforcement decisions from analysing the same relevant market for large commercial aircraft.[92] The EU concluded that the merger would increase Boeing's dominance in the relevant market, while the US analysis told the opposite. Political pressure from the White House culminated in tension between the two authorities.[93] Ultimately, a compromise was reached between Boeing and the EU authorities where the European Commission approved the merger.[94]

The bilateral approach is a possibility for ASEAN, since it has no need otherwise to create any new institutions or change its substantive law. Further, this approach preserves the advantages of localised political and legal structures while attempting to minimise the inefficiency of multiple legal systems. A bilateral agreement would keep

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[91] Lloyd and Vautier, above n 55, at 42.

[92] Pinar Karacan, 'Differences in Merger Analysis Between the United States and the European Union, Highlighted in the Context of the Boeing/McDonnell Douglas and GE/Honeywell Mergers' (2004) 17 *Transnational Lawyer* 209; Amy Ann Karpel, 'The European Commission's Decision on the Boeing-McDonnell Douglas Merger and the Need for Greater US-EU Cooperation in the Merger Field' (1997) 47 *American University Law Review* 1029.

[93] Lloyd and Vautier, above n 55, 42.

[94] Karpel, above n 92.

member states' competition law intact. Hence, it would avoid friction caused by promoting one set of competition laws as the fundamental, universal competition law.[95] This approach could also prevent conflict among the AMSs' diverse legal systems. Some AMSs have developed competition laws based on the administrative system, while others are based on the criminal justice system. Keeping competition law at the national level will ensure national accountability and legitimacy. For ASEAN, behavioural norms are more powerful than the formal and legal rules that occupy the central position.[96] Decision making in ASEAN is based on *musyawarah-mufakat* (consultation and consensus) principles rather than an established supranational structure. This accord with the nature of ASEAN, which was established based on political integration, where permanent products of decision making are not ASEAN's agenda.[97]

Bilateral agreements have the most realistic chance of providing a solution for competition law concerns. Nevertheless, it certainly must be recognised that bilateral agreements have inherent limitations.[98] Bilateral agreements leave cooperation limited for member states. Further, the present form of bilateral agreements cannot adequately address competition law concerns in international markets.[99] Therefore, the agreements need to be widespread, and to reflect the binding commitment among the parties and more meaningful agreement to address the different interests between parties. Another significant element that ASEAN must consider is the meaningful exchange of confidential information. If the exchange of confidential information is banned, this could become a significant obstacle to the effectiveness of the cooperation. Access to confidential information for foreign competition law authorities would enhance efforts to combat cross-border anti-competitive conduct, particularly that of anti-competitive cartels. Without such ability to exchange information, cooperation would become impossible for competition law authorities, which rely upon the consent of the parties involved.[100]

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[95] Lloyd and Vautier, above n 55, 44.

[96] Lay Hong Tan, 'Will ASEAN Economic Integration Progress Beyond a Free Trade Area?' (2004) 53(4) *International and Comparative Law Quarterly* 935, 948.

[97] Eero Palmujoki, *Regionalism and Globalism in Southeast Asia* (Palgrave Macmillan, 2002) 8-36.

[98] Lloyd and Vautier, above n 55, 51.

[99] Ibid.

[100] Ibid, at 53.

7.4.2 Regional Approach

Another option for achieving harmonisation in ASEAN is via a regional approach that is proposed specifically to develop the law in a binding agreement.[101] Many countries have applied this approach and have implemented comprehensive competition policies, but without appropriate instruments for applying domestic competition rules to anti-competitive practices with an international dimension, or for obtaining relevant information outside their jurisdictions.[102] The regional approach will allow AMSs to avoid two types of policy failures.[103] First, national competition laws do not normally extend to conduct that affects the national market, but which is undertaken in other jurisdictions. Second, national competition laws fail to consider injury or costs imposed by the conduct of firms within their jurisdiction on the residents of other countries.[104] Typically, countries take more lenient actions on their own citizens, which may harm other countries. Therefore, some countries afford exemptions to export cartels in their competition law.

However, applying the regional approach to the ASEAN case, member states would have to give up their sovereignty to a supranational institution. In the EU experience, the EU developed a broad set of competition policies for the market for all goods and services, encompassing both public and private actions. The legal foundation of this approach to competition policy is the common market. The EU brought about the introduction of national competition laws in all its full and associate members, and there has been a substantial convergence of these competition laws and their enforcement. At the EU level, competition law has been strengthened, and it has devised procedures with the national-level competition authorities. The aim of this step was to avoid duplication, allowing for the exchange of information among the member states and the European Commission.[105] The EU has a centralised competition authority with an extremely

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[101] Peter Lloyd and Kerrin Vautier, 'Regional Approaches to Cross-Border Competition Policies' in S. Lahiri and V.D.V.P.E.S. Lahiri (eds), *Regionalism and Globalization: Theory and Practice* (Taylor & Francis, 2002) 287.

[102] Lloyd and Vautier, above n 55, 20.

[103] Peter J Lloyd, 'Multilateral Rules for International Competition Law?' (1998) 21(8) *World Economy* 1129, 1132.

[104] Ibid, at 1133.

[105] Ibid.

skilled competition directorate and a well-developed judicial framework. Although some AMSs do have overarching competition acts of legislation, this is lacking when considering the ASEAN region as a whole.[106]

7.4.3 An Anti-Monopoly Institution for the AEC

Currently, there is no official ASEAN body to serve as a supranational competition law authority. The ASEAN Experts Group on Competition (AEGC) acts as an official ASEAN network for exchanging policy experiences and institutional norms on competition policy and law.[107] To act as a competition law body, ASEAN will require an acting institution whenever there is regional enforcement of competition law through bilateral or regional agreements among member states. A regional body may be suited to ASEAN's open regionalism infrastructure and its unique regional characteristics, and to the concerted actions to implement ASEAN competition policy and law. Despite three decades of close cooperation, ASEAN still lacks a supranational decision-making or law-making institution for legislating community law, or for the enforcement of any ASEAN protocol or dispute mechanism.[108] The absence of a supranational institution within ASEAN to enforce mutually agreed decisions among the member states is one of the factors that has slowed progress in the implementation of AFTA in the past.[109]

Whether and how to form a supranational institution for the AEC depends on what kind of economic integration ASEAN aims to achieve. Therefore, determining the shape of this economic integration is significant.[110] To date, it is unclear on what stage of economic integration ASEAN is. Using Bela Balassa's stages of integration to evaluate ASEAN's level of economic integration would not be appropriate;[111] this is because ASEAN differs from the EU in important respects. The AEC does not have political

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[106] Lino Briguglio, 'Competition Law and Policy in the European Union: Some Lessons for Southeast Asia' (2013) 50(2) *Philippine Review of Economics* 37, 7.

[107] CIMB ASEAN Research Institute, 'The ASEAN Economic Community: the Status of Implementation, Challenges and Bottlenecks' (CIMB ASEAN Research Institute (CARI), June 2013) 10.

[108] Tan, above n 96, 949.

[109] José L Tongzon, 'Role of AFTA in an ASEAN Economic Community' in Denis Hew (ed), *Roadmap to an ASEAN Economic Community* (Institute of Southeast Asian Studies, 2005) 266.

[110] Denis Hew and Hadi Soesastro, 'Realizing the ASEAN Economic Community by 2020: ISEAS and ASEAN-ISIS Approaches' (2003) 20(3) *ASEAN Economic Bulletin* 292, 293-295.

[111] For the level stages of economic integration, see Bela Balassa, *The Theory of Economic Integration* (Allen and Unwin, 1962).

support from its leaders to advance beyond free trade to a customs union.[112] ASEAN may achieve a customs union only if the CET rates are no different from the preferential rates. Clearly, this is will be very difficult to achieve, since Singapore has a duty-free market policy. For example, Singapore handles more than 80% of Indonesia's cargo trade;[113] setting a common tariff for all member states would ruin Singapore's policy.[114]

Two main factors illustrate the difficulty of the task of developing community law in ASEAN. First, AMSs' political history shows that tension has sometimes existed between some member states. Historically, some conflicts were resolved through diplomatic devices rather than hard legal mechanisms. The resultant sensitivity to political tension among member states effectively prevents the development or establishment of supranational law in ASEAN. Second, the broad diversity in AMSs' legal systems has influenced the neutrality of the member countries in forming the common law. Positions on community law are also influenced by the national constitutions and judicial philosophy of each member state.[115] ASEAN countries embody a wide range of legal systems, including civil law, common law, sharia law or a combination of systems. In harmonising competition policy in ASEAN, it must be remembered that the norms of the legal system, particularly with regard to competition law, are largely congruent among the AMSs.

Considering the simple case of two countries or two legal families, country A and country B, that initially have different legal systems, this chapter describes the disparity between these legal systems as a legal gap. This disparity between legal systems imposes costs on the countries' ability to foster private transnational transactions.[116] Ideally, working within the same legal system will increase the frequency and profitability of commercial transactions. Similarity in legal systems reduces the uncertainty stemming from not knowing the legal rules governing competition policy or

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[112] Tan, above n 96, 946.

[113] Syafi'i, 'Tendency of World Container Transportation and It's Impact on Indonesian Container Network and Port Development ' (Paper presented at the Simposium XI FSTPT, Universitas Diponegoro, October, 29-30 2008) <http://syafii.staff.uns.ac.id/files/2010/02/tendency-of-world-container-transportation.pdf>, June 8, 2015

[114] Tan, above n 96.

[115] Richard Frimpong Oppong, 'Making Regional Economic Community Laws Enforceable in National Legal Systems-Constitutional and Judicial Challenges' in Anton Bösl et al (eds), *Monitoring Regional Integration in Southern Africa* (Yearbook, 2008) vol 8, 149

[116] See Fox, above n 9, regarding whether the benefits of harmonization will reduce transactional cost between countries.

competition law.[117] The problem begins whenever the diversity in legal systems within one region is too broad. As experienced by the United Kingdom, which refused to adopt EU law within its legal system, case law is not compatible with civil law.[118] Based on these reasons, ASEAN will not be able to form common law or common institutions for the AEC unless the member states voluntarily surrender their sovereignty to ASEAN and create a customs union.

7.5 Challenges for Competition Policy Harmonisation: Beyond Legal Indicators

7.5.1 ASEAN Competition Culture

Different cultures and legal systems perceive the law in various and inconsistent ways. Therefore, for harmonisation to be effective, ASEAN must take this into account, regardless of the definition of harmonisation or its purposes. Harmonisation merely describes a state when the language used across the various governing legal rules is similar, but the underlying legal cultures may remain quite different from one another. Harmonisation is also dependent on the degree of economic integration that the world trading system can tolerate. Although not the aim in itself, harmonisation serves as an instrument for moving towards the goal of an effective AEC. Harmonisation will be difficult to achieve until AMSs have already converged around one commonly accepted regulatory framework.

Fortunately, the leaders of ASEAN envision a common identity for Southeast Asia by 2020—an economic community characterised by trade openness that respects the member states' cultural heritage and yet one that is bound by a common regional identity. ASEAN has also explicitly stated that the economic community vision cannot set aside the member states national identities. All citizens shall enjoy equitable access and opportunities for human development without taking account of gender, race, religion, language, or social and cultural background.[119] Therefore, at least in this

[117] Richard Frimpong Oppong, 'Observing the Legal System of the Community: The Relationship Between Community and National Legal Systems Under the African Economic Community Treaty' (2006) 15 *Tulane Journal of International and Comparative Law* 41, 44.

[118] Przemyslaw Biskup, 'Conflicts Between Community and National Laws: An Analysis of the British Approach' (SEI Working Paper No. 66, Sussex European Institute, 2003), 20-24.

[119] ASEAN Secretariat, *ASEAN Vision 2020* (1997) ASEAN Secretariat <http://www.asean.org/news/item/asean-vision-2020> June 8, 2015.

aspect, ASEAN has built the foundation for respecting the legal cultures of its member states when embarking on policy harmonisation.

In ASEAN, conflict between the competition law regime and individual legal cultures can be observed in the case of Indonesia. It took a decade for the competition authority in Indonesia, the KPPU, to gain the trust of Indonesian customers in persuading them that competition law brings benefits for their welfare.[120] Conflict arose from the controlled economic system adopted by Indonesia for more than 30 years under the Soeharto regime.[121] Under President Soeharto's rule, the economic system protected industrial sectors, even large industries.[122] The most explicit example of anti-competitive conduct is bid rigging; of all cases of anti-competitive conduct in Indonesia, 70% stemmed from bid rigging by the state government. These cases are also highly related to corruption perpetrated by the state. Unfortunately, of these cases, since they involved public officials, the final penalties were only administrative, through the nullification of an agreement entered into by the government and a businessman or firm.[123]

Similarly, until 2004, the Malaysian government refused to liberalise its automobile industry under AFTA. The Malaysian government argued that the industry was a key import substitution project designed to generate a Malay capitalist class.[124] During that time, Malaysia exempted its national car industry, Proton, from the free trade zone and gave it protection.[125]

Some indicators have suggested that the AEC would fail due to the absence of political will from its member states to support competition law enforcement. All these indications suggest that the AEC will be not completed by its deadline in 2020. The

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[120] Cenuk Sayekti, 'Hukum Persaingan Usaha dan Pembangunan Ekonomi di Indonesia (Competition Law and Economic Development in Indonesia)' (2007) 14(4) *Jurnal Fakultas Hukum* , 610-624.

[121] Mari Pangestu et al, 'The Evolution of Competition Policy in Indonesia' (2002) 21(2) *Review of industrial organization* 205.

[122] Eleanor M Fox, 'Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia' (2000) 41 *Harvard International Law Journal* 579.

[123] From 2000–2012, more than 1,700 cases were handled by the Indonesian competition law authority KPPU. For the period 2000–2005, out of 32 cases, 18 were bid-rigging cases.

[124] Lee Jones, 'Explaining the Failure of the ASEAN Economic Community: The Primacy of Domestic Political Economy' (2015) (March 26) *The Pacific Review* 1, 12.

[125] Richard Stubbs, 'Signing on to Liberalization: AFTA and the Politics of Regional Economic Cooperation' (2000) 13(2) *The Pacific Review* 297, 307.

CIMB ASEAN Research Institute finds sufficient evidence that actual implementation is lagging significantly behind the timelines. This is noting a fundamental mismatch between political ambitions, capacity and capability and political will of several member states.[126] Likewise, the Economic Research Institute for ASEAN and East Asia (ERIA) finds that while trade tariffs have fallen, and ASEAN economies are open to FDI, the AEC is still far from its planned track. The non-tariff barriers to trade and investment remain significant, and not one of the regional agreements is fully implemented in the domestic area.[127] Clearly, the lack of political will of the member states explains the failure of ASEAN as an economic community.

7.5.2 Diversity of Economic Development Stages

Research underway at the World Bank, Asian Development Bank and UNCTAD shows that cross-country differences in living standards and growth rates are significantly related to differences between countries in institutional capacity, protection of property rights and fair and efficient markets. Competition policy contributes to all three of these forces in favour of economic development.[128] The OECD states:

> There are strong links between competition policy and numerous basic pillars of economic development. There is persuasive evidence from all over the world confirming that rising levels of competition have been unambiguously associated with increased economic growth, productivity, investment and increased average living standards.[129]

The diversity within ASEAN takes its form on many levels or fronts: geographical size, historical and legal origins (common law and civil law) and pace of economic development. For example, Singapore has the highest GDP per capita, at US$49,271,

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[126] Institute, above n 107, 8.

[127] Economic Research Institute for ASEAN and East Asia (ERIA), 'Mid-Term Review of the Implementation of AEC Blueprint: Executive Summary' (ERIA, October 2012) <http://www.eria.org/Mid-Term%20Review%20of%20the%20Implementation%20of%20AEC%20Blue%20Print-Executive%20Summary.pdf>.

[128] Johannah Branson, Trinh Le and Megan Willcox, *Competition Policy in ASEAN: Case Studies* (Australia-Japan Research Centre, 2008). The interface between economic development and competition policy will be discussed further in Chapter 6. Economic development acts as one of indicators for harmonizing competition policy in the ASEAN Economic Community.

[129] OECD, 'Implementing Competition Policy in Developing Countries' in *Promoting Pro-Poor Growth Policy Guidance for Donors* (OECD Publishing, 2006) 22, 39. Also see Andreas Mitschke, *The Influence of National Competition Policy on the International Competitiveness of Nations: A Contribution to the Debate on International Competition Rules* (Springer Science & Business Media, 2008) 183.

compared with Cambodia, at US$852.[130] These disparities in many aspects form a continuing challenge and provide reason for scepticism about the prospects of ASEAN achieving regional integration by 2015.[131]

As discovered by Henrekson, the growth effect of economic integration has a positive impact on EC/EU and EFTA membership, and there are no significant differences between EC/EU and EFTA.[132] These findings are, however, not completely robust with respect to changes in the set of control variables and measurement errors. Henrekson suggests that regional integration may affect not only resource allocation, but also long-run growth rates.[133] An empirical study by Dion finds a link between trade and productivity and knowledge spillovers in a multi-country model. The interdependence that connects countries in an international network promotes exchanges of goods, services, people and capital, and thus also ideas, knowledge, innovation and technology. Thus, economic integration encourages new ideas and their diffusion. [134]

7.5.2.1 ASEAN Economic Development: Mind the Gap

In the current literatures, economic development refers to a consistent rise in real per capita income accompanied by structural transformation, poverty alleviation and improved distribution of income.[135] Tongzon sees economic development not merely as economic growth; the scope of economic development extends to other important aspects of development, such as high life expectancy, a better-educated workforce, quality of housing and healthcare and lower incidence of poverty.[136]

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[130] World Economic Forum, 'The Global Competitiveness Report ' (World Economic Forum, 2012-2013).

[131] May Fong Cheong, *Competition Policy and Law and ASEAN's Economic Integration Agenda* Centre for Law, Market and Regulation, Faculty of Law, University of New South Wales <http://clmr.unsw.edu.au/article/risk/competition-policy-and-law-and-aseans-economic-integration-agenda> at June 20, 2014.

[132] Magnus Henrekson, Johan Torstensson and Rasha Torstensson, 'Growth Effects of European Integration' (1997) 41(8) (08) *European Economic Review* 1537, 1538.

[133] Ibid.

[134] David-Pascal Dion, 'Regional Integration and Economic Development: An Empirical Approach' (SFB/TR 15 Discussion Paper 20, University of Mannheim, 2004) <http://www.econstor.eu/handle/10419/94049>.

[135] Jose L Tongzon, *The Economies of Southeast Asia: the Growth and Development of ASEAN Economies* (Edward Elgar Publishing, 1998) 13.

[136] Ibid.

Development gaps arise where there is inequality in levels of development between countries, regions or districts within a country.[137] Todaro asserts that the meaning and objectives of development should include the provision of basic needs.[138] This concept of 'basic needs' refers to reducing inequality, raising living standards through appropriate economic growth, and expanding freedom of choice in the market and beyond.[139] Conversely, Amartya Sen sees development as a process of expanding the real freedoms that people enjoy.[140] In the 1990s, the UN Development Programme introduced the Human Development Index (HDI), which is now being used as an indicator for socio-economic development. The HDI is a simple average of three indexes, measuring longevity (measured by life expectancy at birth), education and living standards. The definition of a development gap is still debated with regard to what would be the best and most appropriate indicators to explain the gap.[141] Majority studies use GDP per capita and growth to assess development gaps.[142] However, the limitations of GDP per capita in measuring people's well-being have provoked intense debates on its use as a measure of development.[143]

ASEAN signed the ASEAN Concord II in 2003, ratified the ASEAN Charter and adopted the AEC Blueprint. These steps are initial movements towards the creation of an integrated market in the region. Since then, ASEAN has taken several other steps to speed up and strengthen the community-building project. Such steps include adopting a blueprint for a socio-cultural community and a political-security community. ASEAN has endorsed the ASEAN Trade in Goods Agreement (ATIGA) and ASEAN Comprehensive Investment Agreement (ACIA) to an end of strengthening the community. Member states have also adopted the Master Plan of ASEAN Connectivity

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[137] Rokiah Alavi and Aisha Al-Amin Ramadan, 'Narrowing Development Gaps in ASEAN' (2008) 29(1) *Journal of Economic Cooperation* 29, 31.

[138] P Michael Todaro, *Economic Development*, The Addison-Wesley Series in Economics (Addison Wesley, 8th ed, 2003).

[139] Ibid.

[140] Amartya Sen, 'Development As Freedom (1999)' in J. Timmons Roberts, Amy Bellone Hite and Nitsan Chorev (eds), *The Globalization and Development Reader: Perspectives on Development and Global Change* (John Wiley & Sons, 2014) 525.

[141] Alavi and Ramadan, above n 137.

[142] Ibid.

[143] Ibid.

(MPAC), signed the Bali Concord III and recently launched the Regional Comprehensive Economic Partnership negotiations during the 21st ASEAN Summit.[144]

Despite these various steps, there remain some actions that need to be accelerated. Currently, ASEAN faces a formidable economic challenge in narrowing the development gap between its less developed and newer member states—Cambodia, Laos, Myanmar and Vietnam (CLMV). Having recognised the economic development gap between its member countries, ASEAN adopted the MPAC in 2010. The ASEAN 6 economies are highly diverse economically and socially compared to the CLMV countries.[145] The developmental differences among ASEAN's member states are reflected in terms of GDP per capita, human development indicators such as incidence of poverty, life expectancy, literacy, public expenditure on health and education, and infrastructure.[146] The Vientiane Action Programme of November 2004 notes:

> The development gap is often manifested by disparity in per capita GDP (income). It can also manifested by disparities in other dimensions of human development, such as life expectancy and the literacy rate. The gap can also be measured by disparity in poverty incidence.[147]

The 'income gap' refers to differences in income measures by average GDP per capita and poverty level.[148] In economic terms, the gap is evident in the different levels of human resources and institutional capacity.[149] In terms of per capita GDP, empirically, there is significant income disparity among the member states of ASEAN. For instance, in 2004, Singapore had a first world per capita income level (US$49,936), which is 48 times higher than Myanmar's per capita income level (US$849).[150] Table 23 shows the GDP per capita of the ASEAN-6 (the initial member states) from 1970 to 1995. From the table, it can be observed that in 1970, the GDP per capita of Brunei Darussalam was 43 times higher than that of Indonesia. By 1995, Singapore took over Brunei Darussalam's prior position as the richest country in the region. The Philippines fell into

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[144] Sanchita Basu Das, 'Enhancing Regional and Subregional Cooperationa and Connectivity in ASEAN' (ISEAS Working Paper No.3, ISEAS, 2013), 1.

[145] Ibid, at 5.

[146] Ibid.

[147] ASEAN, 'Vientiane Action Programme (VAP) 2004-2010, ' (ASEAN Secretariat, November, 29 2004) <http://www.aseansec.org/VAP-10th%20ASEAN%20Summit.pdf>

[148] Alavi and Ramadan, above n 137, 32.

[149] Ibid.

[150] Ibid.

the same category as Indonesia as a lower middle-income country. In 1995 and 2003, Singapore's GDP was 25 and 21 times higher than Indonesia respectively. If the CMLV countries are taken into account, the gap is wider. The gap between the ASEAN 6 and CMLV countries is apparent in Table 23. The gap remains wide even though the process of integration has been taken for more than a decade.

The economic development gap is also reflected in the data on poverty in ASEAN's member countries.[151] Rural poverty is very high, particularly within the CMLV countries.[152] In 2010, the population of the poor in Cambodia was approximately 4.09 million people from a total population of 13.96 million. Laos had 2.04 million poor from a total population of 5.66 million. Meanwhile, Vietnam had 11.10 million poor from a total population of 83.10 million (no data available for Myanmar).[153] Such economic disparity will become a threat to regional stability. Such inequality may turn economic conflicts into social ones.[154] Meanwhile, the economic development gap also creates economic structural gaps among ASEAN countries. Singapore in the only country in that region with a highly service-driven economy. In contrast, Indonesia, Thailand and the Philippines are categorised as newly industrialised economies, while the CMLV countries are in the beginning stages of industrialisation.[155]

Table 23: ASEAN 6 per Capita GDP 2006–2013 (million US$ current prices)

Countries /Years	Brunei Darussalam	Malaysia	Indonesia	Singapore	Thailand	Philippines
2012	41126.61284	10421.56152	3551.423737	53608.23143	5887.330499	2587.617
2011	41059.98504	10050.34757	3469.753726	52447.31992	5511.664033	2358.118
2010	30882.33099	8754.24282	2946.656061	45933.00403	5101.905224	2136.43
2009	27212.63121	7277.981292	2272.041528	38306.29255	4224.399684	1832.41
2008	37095.04525	8453.909946	2178.197726	39251.54233	4384.269072	1927.996
2007	32108.19248	7218.276067	1871.288406	37670.4692	3966.304659	1680.941
2006	30612.7029	6179.650342	1601.031146	31643.7737	3354.926806	1399.153
1995	16047.05166	4630.890001	1139.000713	24998.91177	2865.147435	1180.066

[151] Guanghua Wan and Iva Sebastian, 'Poverty in Asia and the Pacific: An update' (ADB Economies Working Paper Series No.267, Asian Development Bank, August 2011), 6-10.

[152] Ibid.

[153] Ibid.

[154] Truong Giang Bui and Trí Thành Võ, 'Approach to Development Gaps in ASEAN: A Vietnamese Perspective' (2007) 24(1) *ASEAN Economic Bulletin* 164, 167.

[155] Ibid.

1970	1564.824525	342.5649831	85.50565758	925.471836	199.9523537	207.0893

Source: Compiled by author from National Accounts Database of the Statistics Division of the UN Secretariat.

Table 24: Per Capita GDP of ASEAN Members (US$ Millions Current Prices)

Countries	Per capita GDP (USD)					
	1996	2001	2004*	2009	2011	2013*
Singapore	24,784	20,659	25,207	38,577.3	52,865.3	55,182.5
Brunei	17,096	12,245	13,879	28,454.0	42,431.5	39,678.7
Malaysia	4,766	3,696	4,625	7,215.6	9,962.1	10,420.5
Thailand	3,035	1,831	2,537	3,946.6	5,116.0	5,678.7
Indonesia	1,155	691	1,193	2,359.2	3,498.2	3,459.8
Philippines	1,184	914	1,042	1,828.6	2,339.2	2,706.9
Vietnam	337	416	554	1,232.4	1,543.0	1,908.6
Laos	393	330	423	913.0	1,262.4	1,547.7
Cambodia	312	270	358	735.1	881.7	1,036.7
Myanmar	109	151	166	538.3	853.2	887.8
ASEAN	1,490	1,154	NA	2,610.1	3,619.1	3,831.8
ASEAN-6	NA	NA	NA	3,265.5	4,537.6	4,740.3
CLMV	NA	NA	NA	930.0	1,229.4	1,455.7

Source: ASEAN Secretariat (2005); ASEAN Surveillance Coordinating Unit Database (2014).
*ASEAN Secretariat's most updated macroeconomic indicators.

Another gap included in the present concept of economic development disparity is the institutional gap.[156] While the EU established its economic and political system based on democratic societies and free market economies, the situation is different with ASEAN. Ulrich Volz shows that ASEAN members encompass the full scale of political and economic systems, ranging from free democracies to authoritarian regimes and free market economies to centrally planned command economies.[157] There are various versions of a market economy in ASEAN. Singapore is the most visible country in ASEAN, with an economy that is highly outward-looking and free market-driven. Indonesia, Malaysia, and Thailand have long adopted market economy principles and

[156] Ulrich Volz, 'Economic Cooperation in ASEAN and the Rise of China' (Yale University, 2006) <http://eprints.soas.ac.uk/id/eprint/17175>.

[157] Ibid.

created highly export-oriented economies.[158] Meanwhile, the CLMV countries are all transitional economies. Those countries have been undergoing a transition from centrally planned to market-oriented and agricultural economies for decades. Now, they are on their way to becoming industrialised.[159] Such a transition has made the CLMV economies a mixture between the import substitution and export-oriented models of development.[160]

The gap in level of economic freedom is an extremely broad one. Figure 8 shows data the 2015 Economic Freedom Index for the ASEAN countries. It displays the scores and score classifications reached by ASEAN countries. According to the ranking, Cambodia and Malaysia largely have freedom in their market.[161] Thailand, the Philippines and Brunei are classified as moderately free, while Indonesia, Vietnam and Laos are classified as mostly unfree. Finally, Myanmar is classified as repressed.[162] Singapore is placed as the freest market in the region. Broadly stated, the index does show diversity in economic rights among ASEAN members. Such diversity in terms of economic development can explain why the AMSs will need a long time to engage in economic cooperation that goes beyond discussions of politics and security.[163]

The lack of symmetry in macroeconomic policy is also reflected in the capital markets of the ASEAN 6.[164] The ASEAN 6 countries are more finance-based, while those of the CLMV are more dependent on the field of the banking system.[165] Financial differences are deepening in level, and the development of financial markets could lead to further asymmetric effects in terms of intra-regional financial market integration. Therefore, monetary and exchange rate policies are difficult to coordinate.[166] Since the majority of the ASEAN members are pursuing export-led growth models, the possibility of

[158] Ibid.

[159] Bui and Võ, above n 154.

[160] Volz, above n 156.

[161] According to the Heritage Foundation the political and civil rights

[162] See Table 5.

[163] Volz, above n 156, 4.

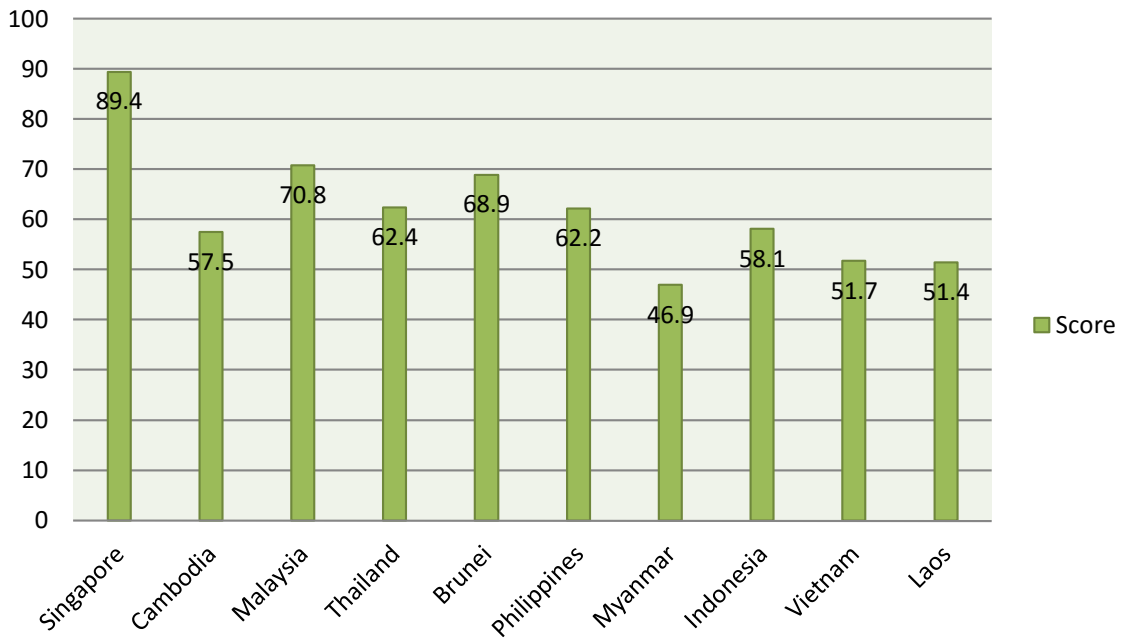
[164] Bui and Võ, above n 154,

[165] Ibid.

[166] Ibid.

competitive exchange rate devaluations could be quite high. This risk is damaging to the implementation of the AEC.[167]

Figure 8: Index of Economic Freedom in ASEAN Countries, 2015[168]



Source: Terry Miller and Anthony B Kim, *Index of Economic Freedom*, Published by the Heritage Foundation & Dow Jones (2015).

Note: Classification: 80–100: free, 70–79.9: mostly free, 60–69.9: moderately free, 50–59.9 mostly unfree, and 0–49.9: repressed.

In sum, a model comparing ASEAN's wealthiest, middle and least wealthy countries has been devised.[169] The nine ASEAN states are divided into three groups: wealthiest (Singapore, Brunei, Malaysia); middle (Thailand, Indonesia, the Philippines); and CLV (no data is available for Myanmar).[170] The situation described above regarding the development gap indicates extreme inequality, which prevents ASEAN from deepening its economic integration into a single market by 2020. It also restricts ASEAN's efforts, making them slow and ineffective. If ASEAN does nothing to overcome these gaps, it will be dangerous to the economic integration process. The reason for this is that

[167] Michael G Plummer, 'ASEAN–EU Economic Relationship: Integration and Lessons for the ASEAN Economic Community' (2006) 17(3) *Journal of Asian economics* 427.

[168] Terry Miller and Anthony B Kim, 'Index of Economic Freedom ' (The Heritage Foundation and Dow Jones & Company, Inc., 2015).

[169] Matthew J. Bock, 'Income Inequality in ASEAN: Perceptions on Regional Stability from Indonesia and the Philippines' (ASEAN-Canada Working Paper Series No. 1, RSIS Centre for Non-Traditional Security (NTS) Studies, 2014), 4.

[170] Ibid.

imbalances in economic development make policy decision-making processes harder due to asymmetric bargaining positions. The situation also generates asymmetric macroeconomic cooperation because of different levels of exchange rate policy and incompatible financial markets.[171]

The AEC Blueprint 2008 mentions that the AEC represents the realisation of the ultimate goal of economic integration as espoused in the Vision 2020.[172] This goal is based on the common interest of the ASEAN member countries to deepen and broaden economic integration through existing and new initiatives with clear timelines.[173] Therefore, in establishing the AEC, ASEAN should act in accordance with the principles of an open, outward-looking, inclusive, market-driven economy, consistent with multilateral rules as well as adherence to rules-based systems. The aim of the market-driven system is effective compliance and implementation of economic commitments.[174]

Nevertheless, to engage in a single market, it will be unavoidable for the AMSs to change their market structures (except Singapore). To achieve one of the long-standing objectives of the AEC in attracting FDI,[175] the ASEAN countries will need to free their markets. However, wide differences among the ASEAN countries in economic openness only slow consensus building and the pace of economic liberalisation in the process of building the single market. Further, in the case of competition policy enforcement, these imbalances will make the exchange of information between member states difficult.

7.5.2.2 Narrowing the Gaps between the Member States

When ASEAN was formed, its founding nations—Indonesia, Malaysia, the Philippines, Singapore and Thailand—had sought to bring Burma (now Myanmar) and Cambodia

[171] Bui and Võ, above n 154, 7.

[172] ASEAN Economic Community Blueprint, 'ASEAN Economic Community Blueprint' (ASEAN Secretariat, 2008)

[173] Ibid.

[174] Ibid.

[175] See the AEC Blueprint. A free and open investment regime is a key to enhancing ASEAN's competitiveness in attracting foreign direct investment (FDI) as well as intra-ASEAN investment. Sustained inflows of new investments and reinvestments will promote and ensure dynamic development of ASEAN economies.

into the new trade region. However, those countries, for their own reasons, opted to stay out.[176] ASEAN's founding nations were at similar levels of economic development at that time, with the exception of Singapore, which is excluded since it had a different economic structure as a free trade-driven market.[177] The evolution of the economic policies of the four founding countries proceeded in a similar sequence, albeit over somewhat different timelines.[178] At that time, the four countries adhered to their policies of import substitution and trade protectionism. There was an aim to promote industrialisation through state direction and intervention.[179] In 1975, while Vietnam made good progress in its political situation, and Laos and Cambodia had new ruling regimes, Myanmar persisted in self-imposed isolation. Shifts also took place in Indonesia, the Philippines and Thailand. Those countries changed the direction of their economic policies from import-oriented to export-oriented, and made themselves more open and welcoming to foreign investment.[180] In the late 1990s, the CMLV countries became members of ASEAN. Since then, economic development has become part of ASEAN's vocabulary, and concerns about it are part of the national agendas.[181]

To narrow the development gap (NDG), ASEAN established a framework for addressing the various forms of disparity among and within the member states.[182] Under NDG, ASEAN has continued to work in close coordination with other subregional cooperation frameworks in the region. AMSs appraise these cooperation frameworks as equal partners in the development of regional production and distribution in the ASEAN single market. The NDG also provides a platform to mainstream social development issues in developing and implementing projects.[183] In 2000, the ASEAN Leaders at their Summit launched the Initiative for ASEAN Integration (IAI) to narrow the development divide. The programme also aimed to enhance ASEAN's competitiveness in the region to provide a framework for regional cooperation through which the more developed ASEAN members could help those member countries that most needed it. The ASEAN

[176] Rodolfo Severino, 'The ASEAN Developmental Divide and the Initiative for ASEAN Integration' (2007) 24(1) *ASEAN Economic Bulletin* 35.

[177] Ibid

[178] Ibid.

[179] Ibid.

[180] Ibid.

[181] Ibid.

[182] Ibid.

[183] Ibid.

Leaders has stressed that the deepening of ASEAN integration cannot be separated from technical and development cooperation to address the economic gap between the ASEAN member states and CLMV countries through the road map for the integration of ASEAN.[184] In 2001, the ASEAN Foreign Ministers adopted the Ha Noi Declaration on Narrowing the Development Gap for Closer ASEAN Integration.[185] The Declaration follows up on the ASEAN Leaders Summit, providing direction to and sharpening the focus of collective efforts in ASEAN to narrow the economic development gap inside ASEAN.[186]

The IAI and NDG are two of ASEAN's frameworks that aim to address these development issues. The IAI and the NDG recognise the value of addressing subregional issues to support ASEAN-wide goals.[187] The objective is to enable all member states to move forward in a unified manner and to let the benefits of ASEAN integration be enjoyed by all members. In this regard, the Vientiane Action Programme 2004–2010 highlighted the strategic importance of narrowing the development gap in realising the ASEAN Community. In the end, the IAI was strengthened to address the needs of CLMV and subregional areas.[188] The IAI Work Plan is divided into two periods: IAI Work Plan I (2002–2008), and IAI Work Plan II (2009–2015). The main context of the IAI Work Plan for Narrowing the Development Gap within ASEAN is that of assisting CMLV countries to be prepared and helping to reduce the development gaps. Also, the Work Plan accelerates greater regional economic integration, advances equitable economic development and helps the CLMV countries from poverty.

The Work Plan I for the period 2002–2008 has accomplished the implementation of a total of 134 projects and programs, attracting a total investment of approximately US$191 million from ASEAN-6, and approximately US$20 million from dialogue partners (of which there are 12), development agencies and other partners. Development agencies have provided funding assistance to 84 projects totalling US$18.4 million,

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[184] ASEAN Secretariat, 'Status Update of the IAI Work Plan I (2002-2008)' (ASEAN, 2009) <http://www.asean.org/images/2012/Economic/IAI/IAI%20Work%20Plan%20I.pdf> June 8, 2015.

[185] ASEAN, *Ha Noi Declaration On Narrowing Development Gap For Closer ASEAN Integration Hanoi* (2013) ASEAN <http://www.asean.org/news/item/ha-noi-declaration-on-narrowing-the-development-gap-2001> June 8, 2015.

[186] Ibid.

[187] Secretariat, above n 184.

[188] Ibid.

¥87,516,000 and €179,948.[189] This does not include other IAI-related substantive support given to the CLMV, nor other projects implemented in the CLMV sub-region.[190]

The IAI Work Plan II (2009–2015) supports the three ASEAN Community Blueprints. Along with four general enabling actions, the IAI Work Plan II is comprised of 182 Actions that are directed towards helping CLMV in undertaking commitments towards attaining an ASEAN Community by 2015.[191] Of these 182 Actions prescribed by the IAI Work Plan II, 19 are studies, 78 require policy and implementation support, and 85 are training programs, apprenticeships or other capacity-building initiatives.[192] Currently, the IAI covers the following priority areas: infrastructure, human resource development, information and communication technologies (ICT), capacity-building for regional economic integration, energy, investment climate, tourism, poverty reduction and improvement in the quality of life.[193]

[189] These 12 dialogue partners are: Japan, Republic of Korea, India, European Union, Denmark, New Zealand, United Nations Development Programme, World Bank, Hanns Seidel Foundation, Australia, ASEAN Bankers Association, and ASEAN University.

[190] ASEAN Secretariat, 'Initiative for ASEAN Integration (IAI) Strategic Framework and IAI Work Plan 2 (2009-2015) ' (ASEAN, 2009) <http://inter.oop.cmu.ac.th/ASEAN/initiativeforaseanintegration_IAI.pdf>.

[191] Ibid.

[192] ASEAN Secretariat, *Initiatives* (2013) ASEAN Secretariat <http://www.asean.org/communities/asean-economic-community/category/initiatives>

[193] H E Rodolfo C Severino, 'Mid Term Review of the IAI Work Plan I (2005)' (ASEAN, November 2005) <http://www.asean.org/images/2012/Economic/IAI/Documents/IAI%20Work%20Plan%20I%20MTR%20Report.pdf>.

Table 25: Equitable Economic Development of ASEAN Work Plan I & II

Issue	2010	2015
Equitable Economic Development		
Initiative for ASEAN Integration (Work Plan I)	Program areas: infrastructure, human resource development, ICT, regional integration, tourism, poverty and quality of life, and general coverage projects.	As of 4 October 2012, all projects under the IAI Work Plan I have been completed.
Initiative for ASEAN Integration (Work Plan II)	Infrastructure, human resource development, ICT, capacity building for regional economic integration, energy, investment climate, tourism, poverty reduction, and improvement in quality of life.	ASEAN-10 as an equal partner in development of regional production and distribution networks. Subregional arrangements such as the Greater Mekong Sub-Region (GMS), Indonesia–Malaysia–Thailand Growth Triangle (IMT-GT), and Brunei Darussalam–Indonesia–Malaysia–Philippines East ASEAN Growth Area (BIMP-EAGA) as focal points for ASEAN economic development.

Source: ASEAN IAI Work Plan I (2000–2008) and ASEAN IAI Work Plan II (2009–2015).

A recent empirical study by Alavi and Ramadan reveals that ASEAN countries have failed in their efforts to narrow the development gap.[194] Their research finds that the main reason ASEAN has failed to narrow its economy disparities is lack of political will. ASEAN members cannot ensure the implementation of action plans that have been drawn by the ASEAN Secretariat.[195] This failure to close the development gap between member states is worrying. Alavi and Ramadan add that another major reason for the failure is the diversity in political ideologies among members.[196] ASEAN's economic integration cannot succeed without first narrowing the development gap by reducing poverty.

7.5.3 Empowering the ASEAN Charter in relation to the Member States

There is no reference in the ASEAN Charter that gives power to ASEAN as an international organisation to impose sanctions on its member states. This is due to two factors. The first is ASEAN's power to institutionalise the ASEAN Charter. The fundamental principles of ASEAN, since its first establishment in 1967, have never

[194] Alavi and Ramadan, above n 137, 54.

[195] Ibid.

[196] Ibid, at 56.

mentioned that ASEAN was formed to be a supranational community with full power to regulate its member states.[197] This is stated by the former Secretary-General of ASEAN: ASEAN 'is not and was not meant to be a supranational entity acting independently of its members. It has no regional parliament or council of ministers with law-making powers, no power of enforcement, no judicial system.'[198] ASEAN was intended to be a kind of social community, rather than a legal one.[199] ASEAN has no power to regulate or bind its member states to agreements. In the past, only about 30% of ASEAN's agreements have been implemented.[200]

Over time, this has changed, with the adoption of various agreements including the signing of the ASEAN Charter in 2007. The Charter was a signal that the paradigm had shifted.[201] The ASEAN Charter has the potential to transform ASEAN into a stronger, more united and effective organisation. It will make ASEAN a more rules-based organisation and strengthen it as an institution.[202] It is expected that this Charter will legalise ASEAN's power to rule its member states.[203] As stated by Tomi Koh and others, the ASEAN Charter is a living document: it will grow a culture of taking of the member states obligations seriously. Above all, without political will, the ASEAN Charter will remain a piece of documentation, no different from the constitutions of many countries.[204]

Another factor is the principle of non-interference. ASEAN's adherence to the norm of non-interference is characteristic of an institutional culture of regional security management that aims to avoid confrontation. Non-interference is well known as the

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[197] Chesterman, above n 40, 200.

[198] Rodolfo C Severino, 'Asia Policy Lecture: What ASEAN is and What it Stands for' (1998) *ASEAN Face the Future (Jakarta: ASEAN Secretariat, 2001)*

[199] Paul J. Davidson, *ASEAN: The Evolving Legal Framework for Economic Cooperation* (Times Academic Press, 2002) 29.

[200] Tommy Koh et al, 'Charter Makes ASEAN Stronger, More United and Effective', *The Straits Times* (Singapore), August 7 2007, 40.

[201] Simon Chesterman, *From Community to Compliance? The Evolution of Monitoring Obligations in ASEAN* (Cambridge University Press, 2015) 12.

[202] Koh et al, above n 200.

[203] Katja Freistein, ''A Living Document': Promises of the ASEAN Charter' (2013) 26(4) *The Pacific Review* 407, 408.

[204] Koh et al, above n 200, at 40.

'ASEAN way':[205] this culture of relying on networking, consultation, mutual accommodation and consensus will not be done away with entirely. It will, however, be supplemented by a new culture of adherence to rules.[206] The principle of non-interference is premised upon the prioritisation of the preservation of ASEAN's unity, which is seen as essential for further integration to become a meaningful driving force in shaping of the region's evolving security architecture.[207] This principle affirms that each state's domestic affairs are its own concern and no one else's. The principle is reaffirmed in all the Association's major agreements, including the founding Bangkok Declaration of 1967.[208]

Recalling the enforcement of EU competition policy, it has been enforced effectively since the establishment of the European Economic Community in 1957.[209] It is well known based on hard law that members of the Union are obliged to follow the TFEU so that each member of EU shall adopt its national competition policy and law in parallel with the TFEU policy.[210] The interface between EU competition law and member states' competition law is provided for under Regulation 1/2003 Article 3. Article 3(1) declares that where a member state of the EU or a national court applies national competition law to a certain conduct that constitutes an agreement, decision, or concerted practice within the meaning of Article 101 or abuse thereof prohibited by Article 102 of the TFEU affecting member states, the member state shall also apply Articles 101 and 102. Under these provisions, national competition authorities are obliged to apply national competition law to anti-competitive practices that affect trade between members. This, in effect, also means implementing the EU competition law.[211]

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[205] Robin Ramcharan, 'ASEAN and Non-Interference: A Principle Maintained' (2000) 22(1) *Contemporary Southeast Asia* 60, 60-61.

[206] Koh et al, above n 200.

[207] Alex J Bellamy and Catherine Drummond, 'The Responsibility to Protect in Southeast Asia: Between Non-Interference and Sovereignty as Responsibility' (2011) 24(2) *The Pacific Review* 179, 184.

[208] Ibid.

[209] Ayudhaya, above n 37. Also see David J Gerber, *Law and Competition in Twentieth Century Europe* (Oxford University Press, 1998).

[210] A Douglas Melamed, 'International Cooperation In Competition Law And Policy: What Can Be Achieved At The Bilateral, Regional, And Multilateral Levels' (1999) 2(3) (09) *Journal of International Economic Law* 423.

[211] According to Article 189 of the EEC Treaty, a regulation shall apply generally. It shall be binding in its entirety and shall be directly applicable in each member state.

Procedure and substance are both crucial elements in harmonisation, since one without the other will only result in frustrated efforts.[212] As provided in EU law, the European Commissions and the national competition authorities of member states are in charge of the supervision and enforcement of European competition law. These competition authorities investigate practices that may affect competition, and if they consider such to be harmful they will prohibit these practices or grant an exception. The decision on whether to grant an exception is taken by the competition authorities.[213]

The TFEU regulates that to achieve full harmonisation, a member state obliged to cooperate with other members within the region and share similar economic conditions while the sovereignty of the states must be maintained.[214] To maintain a certain degree of sovereignty, the member states have freedom to develop domestic competition law and policy.[215] Every member state is obligated to have strong competition law enforcement that parallels with the Treaty. Even though each member state allowed enforcing its national competition policy and law within its jurisdiction, but the member must cooperate with the EU Commission in certain cases, including sharing investigations and information.[216] The integration of the EU was fuelled initially through judicial integration and hard rules. However, in recent days, the EU has developed a hybrid approach that offers varied techniques on improving rule of law promotion in its newer member states from Central and Eastern Europe.[217]

From the time of its establishment in 1967 under the Bangkok Declaration, ASEAN was built based on diplomacy rather than the rule of law.[218] ASEAN treaties and agreements are managed by consultation and consensus, whereas non-binding to the member states.[219] The ASEAN Charter is the only ASEAN treaty that is legally binding on its

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[212] Daniel A Crane, 'Substance, Procedure, and Institutions in the International Harmonization of Competition Policy' (2009) 10 *Chicago Journal of International Law* 143, 156.

[213] Jones and Sufrin, above n 61, 922.

[214] Melamed, above n 174.

[215] Ayudhaya, above n 37, 3.

[216] Jones and Sufrin, above n 61.

[217] Gerda Falkner, *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge University Press, 2005), 201.

[218] ASEAN, 'Report of the Eminent Persons Group on the ASEAN Charter' (ASEAN, December 2006), para 43.

[219] Michael Ewing-Chow and Tan Hsien-Li, 'The role of the rule of law in ASEAN integration' (1028-3625, European University Institute, Robert Schuman Centre for Advanced Studies Global Governance Programme, 2013), 1.

member states. The AEC Roadmap can be described as an expression of intention and understanding among member states to achieve the goal of an economic community. There is no obligation to do this, and there are no sanctions if member states abandon the goal. However, the lack of rule of law in ASEAN does not mean that it has no legal personality.[220] By signing the ASEAN Charter in 2008, ASEAN took on a legal personality as an inter-governmental assembly.[221] The supranational function of ASEAN is relatively different from that of the EU; as noted earlier, EU is considered a supranational organisation where the sovereignty of member states is unaffected, except in legal areas ruled by hard law. In the ASEAN community, all agreements are to be conducted and decided through consensus, not by majority voting among member states.

7.6 Conclusion

This chapter has proposed a future framework for ASEAN competition policy harmonisation using a hybrid approach between hard law and soft law. The hard law approach is based on the national competition laws of each ASEAN member state, while the soft law deals with the cooperation among them. ASEAN may choose the option of which field it wants to harmonise. Using the Cunningham and LaRocca approach to the harmonisation of laws, ASEAN could embark on competition law harmonisation in three fields: substantive law, procedural law and enforcement mechanisms.

To establish cooperation, there are two methods AMSs might undertake. First, AMSs could agree on a bilateral approach to competition law enforcement cooperation. Bilateral cooperation has a greater chance of achieving harmonisation of competition law without creating new substantive law or a new institution. The benefit of the bilateral approach not limited to enabling the member states to exchange information between competition law authorities. It also allows and enables the member states to develop their own competition laws, particularly in countries that have only recently devised competition laws. Further, the flexibility of the bilateral approach is consistent with the 'ASEAN way' of building economic community.

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[220] Chesterman, above n 40.

[221] ASEAN, *The ASEAN Charter* (2007) ASEAN <http://www.asean.org/archive/publications/ASEAN-Charter.pdf>, Art. 3.

Second, AMSs may achieve harmonisation using a regional approach. In this case, AMSs must harmonise regional law with domestic competition law. This approach may prevent ASEAN from possible policy failures. Regional harmonisation of competition law implies a legal level that goes beyond the introduction of national competition laws. It also involves all aspects of these laws across national jurisdictions, such as the scope and the methods of analysis, as well as enforcement. The remaining issue for a regional approach is that the member states would have to surrender their national interest to that of the economic community. This is the biggest problem for ASEAN in light of the national interest and political will of the ASEAN leaders.

In fact, domestic interests and political support are the most influential elements for the development of regional competition law enforcement. Other significant elements that affect the achievement of competition law harmonisation are competition culture and economic development gaps among member states. To create and establish effective competition law enforcement, these barriers must be considered by the ASEAN leaders. At the level of cooperation, one should bear in mind that without common understanding and parallel development tracks, the harmonisation of competition laws cannot be achieved by AMSs.

Chapter 8
Conclusion

8.1 Introduction

The central aim of this research has been to examine the importance of competition policy harmonisation for regional economic integration. Specifically, the core of this research has been to propose a framework for the future competition policy harmonisation of the AEC through a bilateral approach between member states. This thesis has proposed a possible approach through which ASEAN might develop regional competition policy. It has also criticised the absence of a regional competition law standard. ASEAN needs to harmonise the competition laws of its member states to avoid non-tariff barriers and legal conflict between member states. However, the ASEAN Blueprint does not make proper provisions on competition policy for adoption by its member states. This mechanism is urgently needed by ASEAN to support its aim of a single market.

Departing from the above background, this study has addressed two main issues: first, the importance of competition policy harmonisation for the AEC as a fundamental principle in maintaining the effective running of its market and at the same time protecting consumers from anti-competitive conduct; and second, a possible approach that ASEAN may take to develop competition policy harmonisation without abandoning member states' sovereignty. The obstacles to competition policy harmonisation in ASEAN are characterised by the exercise of sovereignty by the member states. Hence, ASEAN should adopt an approach that facilitates resolution of this problem without undermining member states' sovereignty.

This research has examined the issues mentioned above and analysed them in seven chapters. Chapters 2 and 3 discussed the theoretical framework of law harmonisation. Those chapters considered the main approaches to avoiding legal conflict within a regional economic community, particularly in relation to competition policy and law. Chapters 4 and 5 examined the importance of harmonisation of law for setting indicators for the AEC. Chapter 6 discussed the AEC and the urgent need for

competition policy harmonisation in the region. Chapter 7 contained an examination of the probability of achieving harmonisation of law by examining each of the indicators.

This research has found that competition policy harmonisation is urgently needed by ASEAN to support the single market and to protect consumers from anti-competitive practices. The AEC is exposed to the possibility of conflict between jurisdictions on the enforcement of competition law involving foreign companies that operate in host countries. This brings the discussion to the possible resolution of several problems, including the implementation of extraterritorial power. This study has found that the application of extraterritorial power may enhance the risk of legal conflict among the member states of ASEAN. It is also found that this issue poses several challenges to the development of ASEAN market liberalisation.

Current progress in competition law of AMSs is slow. Only five of ten member states have enacted competition laws, while the rest are still in the process of drafting. The lack of competition law in some member states may endanger the free integrated market that ASEAN is attempting to form. The performance of the five member states with regard to competition law implementation shows very broad gaps and differences. These member states are also in the initial stage of developing a competition culture in their country. Competition culture is attracting little attention from these member states; political interest does not fully support the enforcement of competition law. In fact, some cases show that the government tries to exempt SOEs from competition law and monopolise the domestic market. Another issue that ASEAN may face is the notion of surrendering state sovereignty if ASEAN builds a harmonisation framework for competition policy. This concept of surrendering state sovereignty has a strong impact on the characterisation of regional competition regulation for the ASEAN single market.[1] It is far from ASEAN's agenda to cause states to give up their national sovereignty to a supranational institution that is supposed to oversee the enforcement of competition law in their jurisdictions. Nevertheless, to apply this framework, ASEAN requires an approach that does not undermine the national interests of the member states.

[1] Haniff Ahamat and Nasarudin Abdul Rahman, 'Closer Cooperation and Coordination in Competition Regulation in ASEAN and Their Impact on Trade Liberalization' (2013) 8(2) *Asian Journal of WTO & International Health Law and Policy* 543, 545.

This chapter provides an examination the relationships between the discussion chapters and summarises the findings of those chapters. It also assesses the limitations of the research, offers suggestions for future research, and finally, proposes recommendations for ASEAN in harmonising competition policy and law.

In 2007, the member states mutually agreed to the Declaration on the AEC Blueprint, setting out a robust timeframe for all ASEAN members to jointly complete the integration of an AEC by 2015. The Blueprint asks the member countries to develop competition law and policy to advance business competition and enhance the liberalisation and integration of the ASEAN economy. This was followed by the adoption of the ASEAN Competition Policy Guidelines, which advance the use of competition law and policy to develop a competitive ASEAN economic liberalisation and integration.

There are comprehensive competition laws and competition authorities in Indonesia, Singapore, Thailand and Vietnam. Malaysia's competition law and competition authority commenced operating in 2012. Brunei Darussalam, Cambodia, Lao PDR and Myanmar are currently drafting competition laws. The Philippines established a competition authority to begin implementing competition-related laws using a sectoral approach. Taking lessons from the EU experience in establishing a common market in their region, the establishment of economic integration requires a certain degree of harmonisation in the competition policies of ASEAN nations. Competition policy is also the core instrument of free trade; it has an important role to play in the process of ASEAN liberalisation. Therefore, finding an approach to setting up a competition policy for the regional single market is an urgent task.

8.2 Relations between Chapters and Summary of the Research

Chapter 2 of this thesis analysed the legal foundations for harmonisation of competition law in economic integration. This chapter presented a definition of competition policy based on rationalist approach perspective. The scope of competition policy covers competition law, all government initiatives designed to increase competition in trade, FDI, and other policies aimed at promoting competition to reduce restriction in an integrated market. Additionally, this chapter examined the definition of harmonisation from a semantic perspective to understand the form and central role of harmonisation.

Various definitions have been presented by many scholars, and there is little consensus on a precise definition of harmonisation. The term 'harmonisation' means to make or form a pleasing or consistent whole. It is frequently used to mean a process by which everything is made the same, a kind of rush to the bottom to further encourage the globalisation of advanced capitalism.[2] Leebron underlines this as a response to globalisation and fair trade in which unfair differences in law are eliminated.[3] Chapter 2 concluded that the relationship between competition policy and harmonisation of law may support economic integration by reducing costs of transactions and of the legal burden, avoiding the legal gaps among the parties. There are at least two problems that competition policy harmonisation can solve in regional economic integration: (1) the fact that the same anti-competitive regulations may be subject to different standards by various legal systems; and (2) the capacity of competition law authority to deter anti-competitive practices.

Chapter 3 examined barriers to competition policy and law enforcement in several regional economic communities, including ECOWAS, the Andean Economic Community and the EU. From those cases, it was found that barriers come not only from legal but also from non-legal obstacles. These obstacles are: (1) differing treatments of market behaviour; (2) varying legal cultures; (3) legal uncertainty; (4) differing legal mechanisms; (5) weak competition law enforcement; (6) conflicts of competence among member states; and (7) extraterritorial jurisdiction interfaces. This chapter highlighted two main reasons why harmonisation may remove these obstacles. First, a legal system can unilaterally amend its internal rules and adopt rules that are more frequently observed in another legal system. Harmonisation reduces or eliminates differences between policies through a cooperative effort using one system. Second, the economic community's member states can bilaterally or regionally coordinate their efforts by harmonising different competition laws. Also, harmonisation brings a sign that member states have agreed on a set of objectives and targets, and let each member amend their domestic competition laws to fulfil the common goals.

[2] Laura Spitz, 'The Gift of Enron: An Opportunity to Talk about Capitalism, Equality, Globalization, and the Promise of a North-American Charter of Fundamental Rights' (2005) 66(2) *Ohio State Law Journal* 315, 27.

[3] David W Leebron, 'Claims for Harmonization: A Theoretical Framework' (1996) 27 *Canadian Business Law Journal* 63, 64.

This is in line with the success that the EU achieved by harmonising the community competition laws of its member states. The EU gained excellent economic development by diminishing non-tariff barriers through policy harmonisation. It cannot be denied that competition policy harmonisation has been one of the fundamental pillars driving trade liberalisation in the EU market. Harmonisation took place not only among the member states: the EU cooperates with other countries outside the region in the field of competition law enforcement. The aim is to avoid misdirection in the enforcement of competition law, as in, for example, competition law enforcement cooperation between the EU and US. Cooperation agreements are helpful with it comes to cases with different standards of the mechanism. In the case of the merger between Boeing and McDonnel Douglas, this cooperation was crucial in solving conflict when the two countries arrived at different results in examining anti-competitive mergers across the border.

Chapter 4 provided a brief examination of the legal personality and legal status of an international organisation applying its law over its member states. This examination is important in finding a legal foundation for the notion that ASEAN as an international organisation has the power to impose an obligation on its member states to obey the agreement they have signed together. The relationship between community law and national legal systems is marked by the international legal principles and federal laws of many federations. The relationship between the community and domestic competition law is clearly expressed in the case of the EU and its member states. The EU implemented a common competition policy across its member states, governed by the principle of subsidiarity. This requires the Community to take action only if the member states cannot sufficiently achieve the objectives of the proposed action.[4] By analysing the underlying issues in the harmonisation of competition policy, it can be concluded that harmonisation may occur if a supranational system exists, whereas supranational law, supranational institutions and legal culture should be considered as the core of integration.

In Chapter 4, the author proposed key indicators as an analysis tool for examining the probability of competition policy harmonisation in ASEAN. Those indicators are:

[4] Barry E Hawk and Laraine L Laudati, 'Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: A Comparison' (1996) 20 *Fordham International Law Journal* 18, 18.

supranational law that makes provisions for substantive law, procedural law and law enforcement; a supranational body that allows the supranational institution to enforce the regulations on ASEAN's member states; and a strong supranational legal system to support the supranational law and supranational body. These indicators were used to determine the possibility of competition policy harmonisation in ASEAN's case and in what form this may develop. This chapter also considered other factors as indicators, such as competition culture, economic development, and the level of competition law development of each of the member states.

Chapter 5 discussed ASEAN's stage of economic integration in ASEAN prior to the AEC. It was found in this chapter that trade liberalisation in ASEAN through AFTA has not achieved what was expected by the AMSs. It was found that AFTA failed to remove all tariff and non-tariff barriers.

Chapter 5 also found that there is confusion among ASEAN leaders regarding the community's desired level of economic integration. It is not clear whether ASEAN wants to retain the free trade format or move forward to the next level: a customs union. Since it is still not clear what form the AEC will take, some scholars propose recommendations. One recommended form is an FTA-plus arrangement, which includes some elements of a common market, such as free flow of capital and skilled labour. The second recommended form is a single market but without arrangement that aims to create a fully integrated market. This form still has areas where members of ASEAN will reserve deeper integration for the next stage.

The level of economic integration is significant in creating competition policy for a regional single market. Confusion arises because ASEAN's status is something in between an FTA and a customs union. If ASEAN continues as an FTA, then competition policy harmonisation is not necessary. However, if ASEAN deepens its economic integration to take the form of a customs union, competition policy harmonisation will be required. ASEAN must make this decision urgently, and clarify the form its integration will take. ASEAN lacks sufficient legal powers to force its member states to conform to ASEAN regulations. The same would apply in the case of establishing competition policy and law in the region.

The aim of Chapter 5 was to unveil the previous failures of ASEAN's free trade arrangement and the possibility of achieving an AEC as the next stage of AFTA. Some commentators argue that AFTA is only beneficial to intra-ASEAN trade; however, only small progress has been made for inter-ASEAN trade. This chapter described recent developments in ASEAN efforts to establish a single market and its movement to form competition policy regimes in its member states. It discussed the role and benefit of competition policy for the single market in the ASEAN region, and presented the current status of competition policy development among the AMSs. It was found that some AMSs have passed competition laws, including the Philippines. Even though the Philippines has no generic competition law, it has several provisions regulating anti-competitive conduct.

Chapter 6 continued the discussion on the development of competition policy among AMSs. It examined the gaps and differences among the member states. By examining the competition policies of various AMSs, showed their directions of national interest. This chapter found that the differences between policies are too wide and the gaps too broad. The range of differences and gaps was shown across the substantive, procedural and enforcement dimensions of law. The similarities between competition laws are too small; even where member states regulate the same prohibitions, the standards they use to prove the infringement are different. While some forms of anti-competitive conduct are assessed using a per se illegal approach, others fall under a rule of reason approach. Differing applications of these standards will result in different enforcement outcomes.

The first countries to enact competition laws, being Indonesia and Thailand, have had experience with their enforcement since 1999. So far, Thailand has made little progress in enforcing its laws. Currently, there is no comprehensive and consistent database with regard to competition law enforcement in AMSs. Further, currently only six member states have records with regard to their national competition law enforcement, while those of the rest of the members are not clear or are unavailable. It is undoubtedly very difficult to establish competition policy harmonisation. With the significant diversity that exists among AMSs' competition laws, the process of harmonisation will take very long time. So far, ASEAN does not have a regional competition policy and law. Of course, this lack of regional regulation related to competition will be a disadvantage for ASEAN. It is clear that the function of competition policy and law is as a tool for keeping the market from anti-competitive behaviour. In addition, it ensures that

consumers will be protected from predatory firms. Trade openness creates possibilities for big enterprises to enter the market using its power to gain supra-maximum benefits from consumers by setting the price higher.

Finally, in Chapter 7, the indicators were examined in the context of a discussion on the project of competition policy harmonisation for the AEC. This chapter provided a future proposal for the harmonisation of competition policy for the AEC. It examined a possible form that harmonisation for ASEAN could take. In this regard, ASEAN has two options for creating competition policy harmonisation: bilateral and regional approaches. Chapter 7 argued that ASEAN may achieve competition policy and law harmonisation by establishing bilateral cooperation between its member states. The bilateral approach is favoured because it does not require new substantive law or a new enforcement system; it further enables the member states to have their competition law while retaining the ability to develop and strengthen it. This chapter concluded that, whatever future form ASEAN may take, without competition culture that reflects political support, it will be very difficult to achieve harmonisation of the region.

8.3 Limitations and Suggestions for Future Research

This study has answered its aim of identifying a possible mechanism for competition policy harmonisation in the AEC. However, this study has unavoidable limitations. Competition policy is not the only way to solve the problems in the regional economic community, particularly those relating to barriers to trade for foreign firms. The problem of trade barriers not limited to tariffs, since there are other ways to discriminate against foreign firms.[5]

Based on the findings of this study, the benefit of competition policy harmonisation would come from the adoption of better substantive principles of competition law and enforcement mechanisms for ASEAN countries. Competition policy harmonisation will alleviate the burden of economic transactions across jurisdictions caused by heterogeneous national competition law. A deeper problem is that various merger

[5] John Ravenhill, 'Fighting Irrelevance: An Economic Community'with ASEAN Characteristics" (Working Paper 2007/3 Department of International Relations, RSPAS, College of Asia and the Pacific, The Australian National University, 2007) 12.

notifications may delay merger transactions.[6] This research has argued that the benefit of legal harmonisation is to reduce transaction costs and avoid conflict between jurisdictions in the ASEAN regional economic community utilising a bilateral approach. However, there is still unpredictability regarding the effects of cross-border legal enforcement in AMSs. Therefore, further qualitative research should be conducted into whether competition policy harmonisation could address the effects of legal uncertainty and promote sufficient legal coherence for AMSs.

8.4 Recommendations Based on the Study

This study offers the following recommendations. AMSs have been reluctant to cede sovereignty to an overarching regional organisation. The ASEAN perception towards regional integration has been geared by the real shape of market integration, rather than formal economic integration understood as a regional trade agreement. This perception is somewhat opposite to the idea of the common market in the EU.[7] The AEC simply has no legal instruments with which to establish a single market. Therefore, it is more realistic for ASEAN to establish national competition policy and law as a fundamental element of free trade, rather than focusing on the single market.

There are two reasons why ASEAN must establish and develop a regional competition law enforcement mechanism and strengthen national competition law of its member states. First, ASEAN consists of member state countries with economic disparities and a lack of economic cohesion among them. These disparities include economic development in terms of size. The income gap between the member states makes the gap even wider.[8] Comparing this to the EU, the gap among the EU member states is 7:1.[9] This situation is aggravated by the fact that the majority of AMSs are less developed countries. According to the ASEAN Annual Report 2013–2014, 81.7% of the

[6] Daniel A Crane, 'Substance, Procedure, and Institutions in the International Harmonization of Competition Policy' (2009) 10 *Chicago Journal of International Law* 143, 146-147.

[7] Stefano Inama and Edmund W Sim, *The Foundation of the ASEAN Economic Community* (Cambridge University Press, 2015) 3.

[8] International Monetary Fund, *World Economic Outlook Database* (October 2012) IMF <http://www.imf.org/external/pubs/ft/weo/2012/02/weodata/weoselgr.aspx>.

[9] Inama and Sim, above n 7.

229 AEC-prioritised key deliverables targeted for 2013 have been implemented.[10] As for competitiveness in the economic region (Pillar II), the targets have achieved 77% and the remains are not implemented.[11] The annual report fails to provide a breakdown of the non-implemented targets in Pillar II. The AEC Scorecard Key Deliverables January 2008–December 2013 reported that competition policy is fully implemented in only four states. However, this report also fails to provide information on which key areas have been fully implemented in the competition policy.[12]

Second, ASEAN has no great desire to be part of a regional integration market, as occurred in AFTA. AMSs are too much concerned with their national political interests. If ASEAN wanted to focus on developing competition policy harmonisation, at present, only Indonesia, Malaysia, Singapore, Thailand and Vietnam have economy-wide competition authorities. Bilateral cooperation, rather than a regional approach, is significant in this case. The need for a regional competition law is followed by that for a regional competition authority to enforce competition law across jurisdictions. In fact, ASEAN lacks sufficient legal equipment to do so. The lack of a main institution that plays a role in developing competition law and policy in ASEAN will result in ineffective development of competition law and policy in ASEAN. The AEGC is only a consultative forum, and does not have a role as a main institution enforcing competition rules and investigating the anti-competitive restriction and conducts across ASEAN.

8.5 Conclusion

Finally, it is hoped that this research will provide improved understanding of the possibility of competition policy harmonisation for the AEC for scholars and ASEAN policy makers. It also provides comparative lessons for ASEAN in how to establish regional competition policy and enforce it across its member states.

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[10] Jayant Menon and Anna Casandra Melendez, 'Realizing ASEAN Economic Community: Progress and Remaining Challenges' (ADB Economics Working Paper Series No. 432, Asian Development Bank, May 2015) 2-3.

[11] Melanie Milo, 'Linkage between Greater Mekong Subregion Economic Cooperation and ASEAN Economic Community' (Paper presented at the Mekong Forum 2013: Towards More Inclusive and Equitable Growth in the Greater Mekong Subregion, Khon Kaen, July 11-12 2013) <http://www.mekongforum.com>.

[12] Ibid.

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