



COMPETITION POLICIES TO FOSTER WIDESPREAD PRIVATE SECTOR GROWTH - EXPERIENCES FROM ASEAN

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“COMPETITION POLICIES AS INSTRUMENTS OF SOCIAL AND ECONOMIC DEVELOPMENT -
ASIAN PERSPECTIVES

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Microeconomic Reform is Important

- Around 1900 Australia had the highest level of labour productivity in the world, which reflected a relative abundance of natural resources and a small population. After 1900 Australia's productivity performance deteriorated as governments started to pursue "national development" using high levels of trade protection trade barriers and the developing economic infrastructure through government-owned monopolies.
- Following WW2 industrial development was encouraged through high levels of tariff protection. So by the 1960s Australia was an inward looking, highly regulated economy, with many public sector monopolies. So there was low productivity and growth and poor comparative economic performance.
- From the 1980s and 1990s Australia's economy was transformed by a broad reform agenda, particularly Australia's National Competition Policy, into an open, dynamic, flexible and high productivity economy. Australian economists argued that governments had overestimated their ability to replace the markets. From the early 1980s tariff quotas were phased out and high tariff levels reduced. In the late 1980s wide ranging microeconomic reforms began.

Background – Australia’s Experience

- Overall, there was a recognition that if Australia’s economy was not competitive domestically it could not compete internationally. The NCP Report said that “Australia Competition Policy is sometimes seen as solely comprising competition law but the field of policy interest is much wider.... The Committee has considered competition policy in terms of six specific elements....” They are:
 - ▣ Limiting firm anti-competitive conduct
 - ▣ Reforming regulations that unjustifiably restrict competition – eg deregulating domestic aviation, egg marketing
 - ▣ Reform public monopolies to promote competition e.g. energy utilities
 - ▣ Providing third-party access to essential facilities eg to telecommunications and rail networks
 - ▣ Restraining monopoly pricing
 - ▣ Ensuring “competitive neutrality” between government & private business when they compete e.g. government businesses to make tax-equivalent payments

Is ASEAN Business Culture Different?

- Popular conceptions of Asian business culture stress important differences in the way business is conducted in East Asia compared with that in the West.
- Usually, Western business relationships are described as being underpinned by transparent, 'rules-based' laws.
- On the other hand, East Asian business relationships are often described as being largely oblivious to formal laws, secretive and relationship-based – operating primarily through strong business networks involving family ties and strong links to government
- In other words, some argue that in Asia relationships matter more than institutions – so is competition law enforcement in Asia also based on relationships rather than on law?

Trust More Important than Legal Protection

- In Southeast Asia Chinese businessmen, faced discrimination and racial prejudice and so formed business networks based on extended family clans - not because they trusted other clan members more but rather because they distrusted those outside the group more.
- Clan groups based on language and extended family formed to impose group norms on members in the absence of fairly enforced commercial laws. This ensured adherence to standards or unwritten codes of conduct that helped to protect against opportunistic conduct in business dealings with other clan members.

Family Businesses in Asia - the Result of a Lack of Trust in Institutions?

- Asian reliance (trust) on family and close friends is a necessary consequence of the fact that institutions, including the bureaucracy and legal system, did not protect private property rights or respect individual contracting.
- A lack of trust in government, judges and regulators follows from a belief that they do not behave 'fairly' - by appropriating commercial gains for themselves for example.
- One consequence of a lack of faith in institutions is the fact that business in Asia is dominated by family businesses (more than 70% - see OECD 2003).
- Lack of trust in government also means that relatively more resources will be put into controlling government – so many governments in Southeast Asia are also family run

Families and Politics

- Families dominate politics in many Asian countries. Reflecting hierarchical values (now outdated in the West) Asian societies are run by elites to a greater degree than modern Western countries, although this is changing slowly. Asian countries have more recently moved towards political institutions favourable to economic growth. Japan was the first to transform its political institutions during the Meiji restoration and became the first Asian country to adopt a written constitution with an elected parliament and an independent judiciary – which created the economic institutions for growth. Yet families are still important in Japan.
- As in the West, elites use the coercive power of government to award themselves monopoly rights. This reflects, at least partly, that rulers in Asia (as in Europe) ruled by law to further their own interests (rather than through rule of law under which all were subject to the same rules).
- The introduction of competition law upsets long-established business to business and business to government relationships and makes economic activity more transparent.

Laws Expand Business Opportunities

- Reluctance to do business outside the family or clan group limits the number of potential contracting parties. A sound rule of law system that effectively enforces contracts and protects property rights reduces the risk in dealing with strangers.
- In addition to contract law, competition law can help to protect against unilateral and collective predatory conduct. As a result, competition law leads to a lesser reliance on close-knit family and clan groups - which helps to ensure more transactions and so economic growth.
- Naturally those who have benefitted from family ties to government and each other are reluctant to see the introduction of competition law which signals that government is moving to a more merit based economic system.

Lessons for ASEAN Countries

- Competition policy needs to go well beyond narrow competition law enforcement.
- For improved productivity:
 - monopolies need to be dismantled,
 - competition needs to be introduced into new areas
 - competition law needs to cover state owned enterprises.
- Competition agencies in developing countries usually need to play a larger advocacy role to take on vested interests and government restrictions. This can be challenging.

Lessons for ASEAN Countries

- ASEAN has opted to move mainly towards *coordination* of competition and other important areas such as intellectual property laws.
- The ASEAN Economic Community (AEC) Blueprint states that: “The main objective of the competition policy is to foster a culture of fair competition” but does not say what ‘fair competition’ means (ASEAN Secretariat 2009, p.32).

Lessons for ASEAN Countries

- ASEAN has set fairly modest goals for itself in the area of competition law and policy (ASEAN Secretariat 2009, p.32).
- First, not all ASEAN countries have competition laws but they have all committed to introducing them by 2015.
- Second, ASEAN sought to develop regional guidelines on competition policy by 2010 and did so (ASEAN Secretariat 2010) – based on European competition law
- Third, it seeks to enhance capacity building in the area of competition law.
- Fourth, it seeks to establish a network of national competition law enforcement bodies - the role of the network being to “discuss and coordinate” competition policies.
- There is no commitment to harmonise competition law and policies across countries nor to establish a supranational regulator

More Rules Based?

- The signing at the thirteenth ASEAN Summit in Singapore in 2007 of both the ASEAN Charter and the Declaration of the AEC Blueprint was a significant step toward achieving the goal of a single economic market.
- Of particular importance was the commitment to move away from the ‘**soft-law**’ approach of political commitments dealing with trade and investment liberalisation towards an “**adherence to rules-based systems for effective compliance and implementation of economic commitments**” (ASEAN Secretariat 2009, p.21). It remains to be seen how much progress towards an ASEAN rules-based system occurs in the foreseeable future.

Regional Trade Agreements

- Many RTAs contain competition provisions particularly since the 1990s.
- As Cernat (2005) notes the application of competition law in a regional trade context can have trade creation or trade diversion effects. If members apply competition laws in a non-discriminatory manner across the board, then there will be trade creation, whereas if they are only applied in a discriminatory manner to tackle anticompetitive practices in so far as they affect trade between members this may have a trade diverting effect.
- Cernat finds that though developing and emerging market countries have been eager to sign RTAs with competition policy provisions, “little action has been recorded in the implementation phase of such CRPs [competition related provisions]” and concludes that countries appear to be more eager to sign such agreements rather than implement them (Cernat 2005, p.31).
- Though Cernat does not provide reasons for the lack of implementation, other scholars suggest that there are limits to the effectiveness of competition policy provisions, particularly if competition officials are not involved in negotiations. Competition officials find more informal methods of cooperation to be more effective than formal cooperation rules (Alvarez et. al. 2005).

Progress in Introducing Competition

Laws in ASEAN

- Brunei – currently drafting
- Cambodia – Ministry of Commerce finalising draft law- expected to be submitted to Council of Ministers in mid 2013
- Indonesia – Law No 5/1999
- Lao PDR – 2004 Decree not yet implemented
- Malaysia – Competition Act 2010
- Myanmar – still drafting
- Philippines – adopts a sectoral approach – 1925 Act prohibiting Monopolies and Combinations in Restraint of Trade (from the U.S.)
- Singapore Competition Act 2004
- Thailand Competition Act B.E. 2542 (1999) – no successful prosecutions
- Vietnam - Law on Competition (No 27/2004)

Some Problems

- Some Acts in ASEAN
 - Include inconsistent provisions
 - Have market share presumptions which do not reflect sound economics eg Vietnam
 - Exclude important sectors (e.g. state-owned enterprises)
- Some competition authorities
 - Are within government and so decisions are likely to be influenced by industrial policies etc rather than competition effects-based economics – can create confusion for business
 - Need greater economic expertise to identify the effects of anti-competitive practices in their jurisdiction
 - Need a greater role in competition advocacy

ASEAN Competition Law Convergence?

□ ASEAN Regional Guidelines

“1.2.1. The Regional Guidelines serve as a general framework guide for the AMSs as they endeavour to introduce, implement and develop competition policy in accordance with the specific legal and economic context of each AMS.

1.2.2. The Regional Guidelines endeavour to help in the process of building stronger economic integration in the region, by acting as a common reference guide for future cooperation to enhance the competitive process in the AMSs. It is important to note that the Regional Guidelines serve only as a reference and are not binding on the AMSs.”

- Unlikely that there will be much convergence in the future – cross-border competition law disputes will be handled mostly by informal consultations between competition agencies.
- No prospect of collaboration on wider issues of microeconomic reform as happened in Australia in the 1980s and 1990s

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