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Transplanting EU competition law in ASEAN: Towards a context informed method of investigation

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Abstract

When reading the competition law statutes of countries such as Singapore, Malaysia, Brunei Darussalam or, to a lesser extent, the Philippines, it quickly becomes clear to anyone who has studied EU competition law in any detail that these statutes have been inspired by or, indeed, partly been copied verbatim from EU competition law. Yet, do these transplants actually work the same way in the receiving countries? Is that even possible at all? And how are we to understand any deliberate changes which have been made to the transplants?

The article aims to develop a method for investigating EU competition law transplants in non-EU countries, focusing especially on ASEAN, based on inter-disciplinary insight into the social, cultural, political, and economic contexts in the receiving countries. For this, the article engages with the theoretical underpinnings of legal transplants and comparative law. It has become increasingly well-recognised in critical comparative legal research that it is essential to go beyond the legal perspective, but this is still rare in competition law comparison. A sound method taking into consideration legal and non-legal contexts will help us to understand more fully the role of competition law in those non-EU countries that have opted to transplant the EU model.

The Case For Investigating Competition Law Transplants In Context

When reading the competition law statutes of certain ASEAN countries – namely Singapore, Malaysia, Brunei Darussalam and, to a slightly lesser extent, the Philippines – it quickly becomes clear to anyone who has studied EU competition law in any detail, that these statutes have been inspired by or, indeed, partly been copied verbatim from EU competition law. Yet, do these transplants actually work the same way in the receiving countries? Is that even possible at all? And how are we to understand the deliberate changes which have been made to the transplants?

The aim of this article is to develop a method for a deeper study of EU competition law transplants in ASEAN countries. It is meant to facilitate critical investigation into how a legal transplant of EU competition law is received in a country with a completely different legal system, history, and culture. If one wants to understand competition law in these systems more thoroughly, ‘there needs to be room to identify and explore national legal and non-legal factors’¹ influencing the reception of

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¹Jule Mulder, ‘New Challenges for European Comparative Law: The Judicial Reception of EU Non-Discrimination Law and a turn to a Multi-layered Culturally-informed Comparative Law Method for a better Understanding of the EU Harmonization’ (2017) 18 German Law Journal 721, 725.

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such transplants. The idea hereby is not to place EU law and the law in the receiving regime side by side, as the sense of this seems limited. After all, it is clear from the outset that these are completely different legal and social systems in entirely different circumstances, not least as the EU is a supra-national entity rather than a nation-state. As such, there is a particular relationship between the law of the EU and that of its Member States that is not strictly hierarchical, which makes it quite different from state law. Competition law also has decades of history in the EU but has been implemented much more recently in the receiving regimes, which may have historically had entirely different business cultures or governance systems that were at odds with competition law.

Instead, it is suggested here that the EU's competition rules should be perceived as a starting point or blueprint which may not work the same way in other, especially non-Western, systems. They may have become a legal irritant,² they may have been largely ignored or they may have been fruitfully adapted and formed, for example, a particular Singaporean or Malaysian competition law model. One way or another, a legal system always leaves its own mark on the transplant³ and the method developed here aims to uncover the new competition regimes in ASEAN that resulted from the initial transplant in their own right by considering the legal and non-legal contexts. To achieve this, a five-step approach is suggested which starts by questioning the underlying premises of EU competition law, rather than considering it as granted, universal or neutral, and then investigates a variety of internal and external factors which are likely to have informed and shaped the law in the receiving country.

The method developed here can be utilised for both a comprehensive transplant study of a single competition law regime based on an EU transplant (eg, Singapore) or as a tool to comparing two or more such competition regimes (eg, Singapore and Malaysia) which may have some commonalities (eg, historically or geographically), but may also exist in partly different cultural, economic, religious, and political contexts. While particularly intended for studying the regimes in the four ASEAN Member States which have transplanted EU competition law, it could also be employed to study such transplants elsewhere. Beyond that, it is hoped that the discussion in this article can spark future methodological debate more generally, especially in the area of comparative competition law where it is currently still limited. Comparative works on competition law in Southeast Asia, in particular, are sparse and much of the existing writing provides solely descriptive accounts aimed at practitioners. As such, it is high time for more methodological debate.

The article is structured as follows. First, it will briefly illuminate the state of play in comparative competition law and identify the gaps that the method developed in this article aims to contribute to fill. This is followed by a discussion of the notion of legal transplants. The section thereafter engages with the debate on approaches in comparative law. As the literature on comparative law is vast, these can naturally not be discussed in full. Instead, some points of the wider debate are picked up to inform the development of a new method for deeper investigation of EU competition law transplants. The method itself is then introduced which is followed by a conclusion.

Gaps in comparative competition law

Comparative competition law thus far has been limited in width and depth. Much legal scholarship has focused on comparing the US competition law regime with others, especially with the EU regime,⁴ and has often taken a US-centric approach where it is assumed that 'the US has the

²On the term legal irritant see Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61 *The Modern Law Review* 11, especially 12.

³Jaakko Husa, *A New Introduction to Comparative Law* (Hart 2015) 184.

⁴On the prevalence of EU-US comparisons, see Damian Geradin, 'Competition law', in Jan M Smits (ed), *Elgar Encyclopaedia of Comparative Law* (2nd edn, Edward Elgar 2012) 208; David J Gerber, 'Comparative Competition Law', in Mathias Reimann & Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford

right answers to basic antitrust questions'.⁵ In particular, the reliance on economics in the US approach is often uncritically assumed to be the only legitimate basis for competition law analysis and other systems are pressured to follow suit without much consideration for the suitability thereof in the local context.⁶ Research on (comparative) competition law in other parts of the world is still limited,⁷ especially as regards Southeast Asia,⁸ and the majority of publications available simply provide descriptive accounts of the regimes aimed at practitioners.⁹ Only few works attempt more analytical investigations.¹⁰

Relatedly, beyond these limitations in width, the lack of depth in comparative competition law has also been criticised, mirroring certain criticisms in comparative law in general¹¹ that will be further discussed in the following two sections. In particular, it has been asserted that scholarship 'seldom provides more than superficial and sometimes distorted presentations of competition law experience'.¹² It often remains descriptive and overly focused on positive law, has partly been accused of following particular agendas (eg, practitioners may adopt a view in their writings which they hope will attract clients),¹³ and tends to see the Western experience as universal.¹⁴

Outside the sphere of legal scholarship, comparative work on competition law has mainly been conducted by law and economics scholars. These analyse law with economic tools as to its efficiency, which is considered an objective 'universally acknowledged' standard. Economists create models which are meant to explain or predict law's development (positive economic analysis) or, more controversially, to rank legal solutions (normative economic analysis).¹⁵ A special focus of law and economics scholarship has been whether the common or civil law is more conducive to

University Press 2019) 1174; Nuno Garoupa & Tom Ginsburg, 'Economic analysis and comparative law', in Mauro Bussani & Ugo Mattei (eds), *The Cambridge Companion to Comparative Law* (Cambridge University Press 2012) 63.

⁵Gerber, 'Comparative Competition Law' (n 4) 1173.

⁶See on the US-centricism of comparative competition law, critically, Gerber (n 4) 1169, 1173–1180 with further references. On convergence pressure on other regimes, specifically Asian regimes, see David J Gerber, 'Asia and global competition law convergence', in Michael W Dowdle, John Gillespie & Imelda Maher (eds), *Asian Capitalism and the Regulation of Competition* (Cambridge University Press 2013). On the partial convergence of the EU regime around US antitrust rules, see Geradin (n 4) 209 et seq; and on the increasing foothold of economics in EU competition law, see also Anna Gerbrandy, 'Rethinking Competition Law within the European Economic Constitution' (2019) 57 *JCMS: Journal of Common Market Studies* 127, 130.

⁷Gerber, 'Comparative Competition Law' (n 4) 1184 et seq.

⁸Beyond competition law, it has been noted that Southeast Asia generally receives little attention in comparative law. See eg, Mindy Chen-Wishart, 'Legal transplant and undue influence: Lost in the translation or a working misunderstanding' (2013) 62 *International and Comparative Law Quarterly* 1, 27 with further references.

⁹See eg, ASEAN, *Handbook on Competition Policy and Law in ASEAN for Business 2017* (ASEAN 2018); Katrina Groshinski & Caitlin Davies (eds), *Competition Law in Asia Pacific: a Practical Guide* (Kluwer 2015).

¹⁰Two of the exemptions are: Burton Ong (ed), *The Regionalisation of Competition Law and Policy within the ASEAN Economic Community* (Cambridge University Press 2018); Ploykaew Porananond, *Competition Law in the ASEAN Countries* (Kluwer Law 2018). Even fewer works have engaged with how context may influence an EU competition law transplant. One exemption being Ong who considered how the small and open economy of Singapore led to changes to the transplanted EU model: Burton Ong, 'Exporting Article 82 EC to Singapore: Prospects and Challenges' (2006) 2 *The Competition Law Review* 99; Burton Ong, 'The Origins, Objectives and Structure of Competition Law in Singapore' (2006) 29 *World Competition* 269.

¹¹David J Gerber, 'Method, Community and Comparative Law: An Encounter with Complexity Science' (2011) 16 *Roger Williams University Law Review* 110, 120.

¹²Gerber, 'Comparative Competition Law' (n 4) 1191.

¹³Gerber, 'Comparative Competition Law' (n 4) 1171; similarly, on comparative law generally see Robert Leckey, 'Review of Comparative Law' (2017) 26 *Social & Legal Studies* 3, 7, 16.

¹⁴Gerber, 'Comparative Competition Law' (n 4); Gerber, 'Asia and global competition law convergence' (n 6); Michael W Dowdle, 'The regulatory geography of market competition in Asia (and beyond): a preliminary mapping', in Michael W Dowdle, John Gillespie & Imelda Maher (eds), *Asian Capitalism and the Regulation of Competition* (Cambridge University Press 2013) 11–35.

¹⁵Florian Faust, 'Comparative Law and Economic Analysis of Law', in Mathias Reimann & Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019) 827 et seq; Husa (n 3) 163.

economic growth. Particularly influential in this regard were the legal origins theory, which allegedly proved the superiority of common law,¹⁶ and the World Bank's 'Doing Business Reports', which, relying, inter alia, strongly on the former, normatively ranks countries and makes suggestions for reform.¹⁷ In the field of competition law comparison, the potential superiority of the common law system has also been investigated in at least two studies, both considering a large number of countries, which, however, came to opposing results due to different coding.¹⁸

There have been several criticisms against these kinds of studies, some of which overlap with those expressed towards the legal scholarship. Concerns have been raised that, despite several (possibly inevitable) shortcomings of law and economics models (eg, the focus on formal law and particular functions attributed to it,¹⁹ the disregard of non-efficiency related policy concerns and values,²⁰ and the generalisation and assumption of rationality of human behaviour²¹), studies, such as the Doing Business Reports, claim the ability to (accurately) rank the absolute quality of a legal system.²² Another strand of criticism relates to the crude characterisation of legal traditions. Not only are legal traditions simplistically dichotomised into just common and civil law, they are also not necessarily very accurately described or considered in their various emanations (eg, civil law is largely equalised with French law) and seen as static with perpetual differences.²³ In addition, homeward bias in the form of question bias has been asserted due to the reliance on economic analysis, which is of largely US American origin and designed with US law in mind, and as such results in better performance of the US (and other common law systems).²⁴ Furthermore, it has been stressed that the assumption that there is but one 'best' law, which should be promoted, itself distorts the historical context of colonialism and disregards the relevance of local conditions and the cultural contingency of laws.²⁵

Considering the current gaps in and shortcomings of both the legal and the law and economics literature, there is a profound need for a new method which facilitates a 'deeper understanding of the phenomenon of competition law in its varying forms and contexts'.²⁶ The method introduced in this article is meant to contribute to filling this gap in that it aims to be hermeneutic²⁷ and as such to go beyond describing differences between a transplant and the law in the country of origin, but instead to study, understand, and attempt to explain these in context. However, rather than simply relying on efficiency explanations as in the law and economics scholarship, this method is designed to facilitate deeper and broader investigations by considering history, the political system, legal traditions (beyond simply common and civil law), the economic system, and the developments surrounding the implementation of the transplant. As the method focuses on the transplant and its

¹⁶Garoupa & Ginsburg (n 4) 67; Husa (n 3) 164; Ralf Michaels, 'Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law' (2009) 57 *American Journal of Comparative Law* 765, 768 et seq.

¹⁷Michaels (n 16) 771 seq.

¹⁸Cassey Lee, 'Legal traditions and competition policy' (2005) 45 *The Quarterly Review of Economics and Finance* 236 (Lee, a Southeast Asian scholar, did not find a correlation between legal tradition and performance); Armando E Rodriguez, 'Does Legal Tradition Affect Competition Policy Performance?' (2007) 21 *The International Trade Journal* 417 (Rodriguez, an American scholar, found that common law did lead to better competition law enforcement).

¹⁹Michaels (n 16) 775–779.

²⁰Faust (n 15) 831, 846; Garoupa & Ginsburg (n 4) 72; Michaels (n 16) 784.

²¹Faust (n 15) 829 et seq, 838 et seq.

²²Michaels (n 16) 785. Further on specific criticisms against the legal origins theory and the Doing Business Reports, see *ibid* 769 et seq, 772 et seq.

²³Michaels (n 16) 780 et seq; Garoupa and Ginsburg (n 4) 67 et seq.

²⁴Michaels (n 16) 783 et seq. Similarly, in David Nelken, 'Legal culture', in Jan M Smits (ed), *Elgar Encyclopaedia of Comparative Law* (2nd ed, Edward Elgar 2012) 487 et seq.

²⁵Michaels (n 16) 787–791; Garoupa & Ginsburg (n 4) 69.

²⁶Gerber (n 4) 1192.

²⁷Husa (n 3) 99 (on the hermeneutic character of comparative law).

context in the receiving country, it by definition will not involve investigation of the US or the EU itself; thereby moving away from the Western-centric (especially US-centric) focus.

The methods set out in this article was developed specifically with the aim of utilising it to study transplants in those ASEAN Member States (AMSs) which chose to base their competition law on an EU transplant, but it can also provide more general lessons. The method introduces an approach requiring the comparatist to engage with the local legal and non-legal contexts when investigating competition law transplants. This would be equally useful where EU competition law has been transplanted in other, especially other non-Western countries. It may even provide some inspiration for or encourage discussion of methods in other areas of, especially economic, law, where deeper investigations may equally still be sparse. Such investigations are desirable as they are not only academically insightful, but also practically relevant for practitioners such as companies, authorities, and policy makers who, with ongoing globalisation, will increasingly require insights beyond positive law.²⁸

Legal transplants

It would be impossible, or at least superficial, to discuss a methodology of investigating legal transplants of EU competition law to other legal systems without engaging with the notion of legal transplants. Legal transplants have been discussed foremost, and in a rather adversarial fashion, by Alan Watson and Pierre Legrand. In Watson's view, law is not reflective of society or a specific need.²⁹ As such, positive law can be borrowed from other systems and has indeed been borrowed from other systems throughout history (eg, for prestige or practicality reasons).³⁰ Legrand, on the other hand, contends that a legal transplant would involve not only adopting the rule as such, but also the entire contextual legal and non-legal framework in which it exists with all its cultural, political, sociological, historical, and economic factors because only that would give the legal transplant its meaning. Since that is impossible, a 'legal transplant'³¹ is impossible and all that can ever happen is a displacement of meaningless words.³²

It is worth discussing this controversy further, as both sides seem to have a point; legal borrowing undoubtedly takes place,³³ but context, of course, also does matter. Yet, what are we then to make of this debate? Part of Legrand's assertion, namely that a transplant would end up being merely a displacement of meaningless words, seems somewhat disproven in certain contexts. At times, case law from the home jurisdiction of the positive law is transplanted alongside the text by turning it into additional articles in the positive law or into guidelines by the authorities. Case law from the jurisdiction of origin may also continue to serve as persuasive guidance for courts. This is, for example, the case in Singapore's competition law where not only the legal provisions of the Treaties³⁴ and the

²⁸Gerber (n 4) 1191 et seq.

²⁹Alan Watson, 'From Legal Transplants to Legal Formants' (1995) 43 *The American Journal of Comparative Law* 469.

³⁰Alan Watson, 'Legal Change: Sources of Law and Legal Culture' (1983) 131 *University of Pennsylvania Law Review* 1121; Alan Watson, 'Legal Transplants and European Private Law' (2000) 4(4) *Electronic Journal of Comparative Law* <<http://www.ejcl.org/ejcl/44/44-2.html>> accessed 26 October 2021.

³¹Part of Legrand's critique seems to be on a semantic level against the use of the term 'transplant' for legal borrowing. The term would indicate an ease that does not reflect reality, since transplanting law is not straightforward. Therefore, other terms have been suggested in literature to capture the difficulty in the process such as 'legal transfer', 'legal translation' or 'legal irritant': see Husa (n 3) 184. For ease of reading, we will simply stay with the phrase 'legal transplant' to describe legal borrowing.

³²Pierre Legrand, 'The impossibility of legal transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111, 114 et seq, 120.

³³It has been argued that transplants have even increased: Husa (n 3) 108.

³⁴Treaty on European Union and Treaty on the Functioning of the European Union.

Merger Regulation³⁵ have informed the Competition Act and the accompanying guidelines, but also the case law of the Court of Justice which, in addition, continues to be regarded as persuasive in the application of the Competition Act.³⁶ More generally, in common law jurisdictions, there continues to be an interchange between courts³⁷ and even new case law from elsewhere can influence the decisions taken.³⁸ The jurisdiction of origin may thus partly contribute more than just words, but also, to an extent, the interpretation of the words.

However, Legrand's main argument is that, ignoring context, pretending that laws could easily be transplanted and encouraging such transplants in the assumption that they would work the same way in the receiving country is not only ignorant, as law is related to context, but also an inherently capitalist endeavour,³⁹ as it would place the requirements of global businesses over local culture and underline Western hegemonialism.⁴⁰ The first part of this critique (ie, that law is entirely related to its historical, cultural, and societal context) goes to the core of Watson's argument that law is not reflecting society. Yet, as Watson indicated more clearly in later work,⁴¹ his point was not that the transplant might not be changed by the recipient country, but that it is not a product of that society and instead, historically, had often been borrowed from elsewhere. So it would appear that both sides are actually in agreement that at the point of implementation the transplant is alien and detached from the host society.⁴² There may be several reasons why law is, nevertheless, being transplanted; prestige reasons, historical (often colonial) connections⁴³ or to achieve reform either due to external influences (eg, law reform projects like the previously mentioned Doing Business Reports) or because the recipient country itself consciously decided to achieve change in an area.⁴⁴ Once law has been transplanted, it can be presumed that this, at least as a starting point, creates some similarity between the law in the country of origin and the recipient country.⁴⁵

³⁵Council Regulation 139/2004/EC on the control of concentrations between undertakings (the EC Merger Regulation) OJ [2004] L 24/1.

³⁶CCCS 400/001/09 Guideline on Fees para 34, for example, state that case law by the EU courts is considered persuasive guidance.

³⁷Dialogue between courts may always happen whether in common law or other legal traditions, but common law jurisdictions are more prone to it, more likely to engage with it and make these dialogues more explicit/public, because of the nature of the legal culture and binding precedent. Having said that, there are some common law jurisdictions which take a much more critical stance towards consideration of foreign law/case law such as the US. See in that regard, eg, Mathias Siems, 'The End of Comparative Law' (2007) 2 *Journal of Comparative Law* 133, 133 et seq.

³⁸See, for example, Ng and Jacobson's study of court cases in three Asian countries: Kwai Hang Ng & Brynna Jacobson, 'How Global is the Common Law? A Comparative Study of Asian Common Law Systems – Hong Kong, Malaysia, and Singapore' (2017) 12 *Asian Journal of Comparative Law* 209.

³⁹Legrand (n 32) 121 et seq.

⁴⁰Ralf Michaels, "'One size can fit all' – some heretical thoughts on the mass production of legal transplants', in Günter Frankenberg, *Order from Transfer: Comparative Constitutional Design and Legal Culture* (Edward Elgar 2013) 57, 75, 77.

⁴¹Watson, 'Legal Transplants and European Private Law' (n 30).

⁴²In his extended version of Frankenberg's IKEA theory, Michaels suggest that the disagreement may partly arise because the process of transplantation is not broken down sufficiently: Michaels, 'One size can fit all' (n 40) 59 et seq. He proposes seeing it as a five-stage process in which a law turns from its original context into a decontextualised, formalised, and commodified propositional statement, though still with a certain pedigree of being from country A. In the third stage it enters a global reservoir of laws, an international market of rules. When country B then first adopts the law, it initially still does so as a mere propositional statement and only in the fifth stage the law contextualises in country B. The dispute between Watson and Legrand would result because Watson focuses on stages 2 to 4, while Legrand only looks at 1 and 5: Michaels, 'One size can fit all' (n 37) 66 et seq. Seeing the whole five-stage process would help us understand transplants better, shows how both sides of the debate are useful to explain parts of the process and acknowledges an additional global level where decontextualised norms are made available.

⁴³Mulder (n 1) 731; Watson, 'Legal Change: Sources of Law and Legal Culture' (n 30) 1146 et seq; Husa (n 3) 169; Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' (1991) 39 *The American Journal of Comparative Law* 343, 398 (henceforth 'Legal Formants (Installment II)'); Nelken (n 24) 487.

⁴⁴Kien Tran, Nam Ho Pham & Quynh-Anh Lu Nguyen, 'Negotiating Legal Reform through Reception of Law: The Missing Role of Mixed Legal Transplants' (2019) 14 *Asian Journal of Comparative Law* 175, 178 et seq.

⁴⁵Watson, 'Legal Transplants and European Private Law' (n 30). Similarly, Husa (n 3) 184 et seq.

Yet, the transplant may not always sit entirely comfortably within the context of the host jurisdiction. What makes Legrand's critique so important is his insistence that we must study the transplant in its cultural context to actually understand it rather than presuming the initial similarities to be the final answer. If the context and the law clash too dramatically the transplant may fail or cause major irritation. If a transplant is working, then this may exactly be due to legal mutation or adaptation to the country to which it has been transplanted.⁴⁶ Vice versa, the transplant may also, to an extent, change the context.⁴⁷ After all, this is what is envisioned by law reform projects. This is then where the culturalist critique regarding the underlying influence of capitalism and Western hegemony comes in, which it is important to take seriously and to consider when studying the transplant. Yet, change through the transplant does not always and necessarily have to be entirely negative. Change could have been wanted locally and may be actively pursued (eg, by accompanying advocacy work) or tools in a transplanted law could be used by marginalised groups to achieve positive change (whether the intended one or not).⁴⁸ The effects of and on the transplant may also differ depending on the area of law, as they may be differently receptive to cultural context⁴⁹ with potentially more technical areas of law less so than areas such as public or family law.

Therefore, as Chen-Wishart puts it, 'asking whether legal transplant is "possible" is the wrong question'.⁵⁰ Instead, what we can take away from the debate is that we need to investigate more thoroughly what exactly happens when law is being transplanted.⁵¹ To develop a way to do this is precisely the point of this article. It is not assumed that a transplant is smooth, can only have foreseen consequences or is even working at all. Instead, it is the aim of this article to develop a method to study the transplant in its context as well as the circumstances that led to its implementation in order to understand the law in the receiving jurisdiction fully. Having such a method then also allows comparing it with other jurisdictions which have equally transplanted the EU competition model. In ASEAN, for example, four jurisdictions have adopted competition law regimes which bear close resemblance with EU law. Comparing different transplants would make it even more apparent how context can change the transplant and potentially lead to layered legal traditions⁵² in the host countries which may differ from each other despite the common starting point of EU competition law.

Comparative approaches

This then brings us to the question how to properly investigate an EU competition law transplant in context? In order to develop a method for comparison, we will thus have to engage with the existing approaches in comparative law. On a general level, three main approaches can be distinguished, though, of course, more precise (sub-)classifications could be made. In the following we will briefly examine these and assess their suitability for our purposes (ie, as a method for investigating the reception of EU competition law transplants).

Comparative Legal Functionalism

Functionalism was the generally accepted comparative method for much of the 20th century and still is a mainstream approach in comparative law today.⁵³ It focusses on comparing the functional

⁴⁶Husa (n 3) 172.

⁴⁷Michaels (n 40) 74 et seq.

⁴⁸Michaels (n 40) 75, 77 (further reference on an example from India).

⁴⁹Chen-Wishart (n 8) 27.

⁵⁰Chen-Wishart (n 8) 2.

⁵¹Tran, Pham & Nguyen particularly stress the importance of this in cases of mixed legal transplants: Tran, Pham & Nguyen (n 44) 178, 207.

⁵²H Patrick Glenn, *Legal Traditions of the World* (5th edn, Oxford University Press 2014) 383.

⁵³Husa (n 3) 118; Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Bloomsbury 2014) 15.

equivalents of social problems; the comparatist identifies the laws or other means (eg, practices, institutions) that address the same problem and proceeds to compare the solutions in different legal systems.⁵⁴ Yet, for the last few decades, functionalism received a lot of criticism. One such critique relates to the placing of law at the heart of the analysis (ie, functionalism's legocentricism). When applying functionalism, comparatists would rarely engage with what the law actually is and only arbitrarily decide what the same function could be.⁵⁵ By considering laws as solutions to problems, functionalism disregards that law itself has a socialising function and that legal problems/solutions are not universal problems/solutions. It claims objectivity and sees law as neutral. With globalisation and transplantation of laws, such assertions of neutrality become increasingly problematic.⁵⁶ In the case of competition law, for example, there are clear underlying Western, free market ideologies.⁵⁷

Another, related, criticism is that functionalism separates the studied norms from the historical, social, political, and cultural contexts as well as from their systematic context in the legal system of the country as whole.⁵⁸ Indeed, different systems may not even face the same social problem or may not even consider the same behaviour as problematic given that identifying something as a problem already entails a normative perspective.⁵⁹ For example, in the area of competition law in ASEAN, much anecdotal evidence suggests that collusive behaviour was (and partly is) not regarded as problematic in many AMSs. Thus, arguably, the perception of such behaviour as problematic was only created through the introduction of competition law and, indeed, accompanying advocacy work was needed for actors and society more generally to view it as such.⁶⁰ This is not to say that the introduction of competition law was therefore necessarily wrong or that it cannot bring benefits, but that merely studying the 'solutions' in black letter and case law would not reveal the full story. Furthermore, the abstract function of a law is not necessarily congruent with the aims pursued by the legislator (or other originator of the norm), especially when it comes to legal transplants.⁶¹ In the context of competition law implementation in ASEAN, it seems likely that the norm-givers may have felt the need to comply with a trade agreement, to fulfil the commitment in the AEC Blueprint 2015,⁶² or to create conditions (at least on paper) which would entice foreign investment, rather than doing so upon having a sudden, unconnected realisation that anti-competitive behaviour was bad. Therefore, again, simply comparing the equivalent norms would only tell part of the story. Finally, similar laws may not end up meaning the same in the relevant legal systems or may not ever be used after being promulgated.⁶³

While functionalism does not always and entirely disregard context (eg, it may utilise context to find equivalents in the first place or to look for explanations of identified differences),⁶⁴ for the part of the actual comparison, it requires that 'the solutions we find in the different jurisdictions must be

⁵⁴Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law* (3rd edn, Clarendon Press 1998) 34 et seq.

⁵⁵Peer Zumbansen, 'Comparative Law's Coming of Age? Twenty Years after Critical Comparisons' (2005) 6 *German Law Journal* 1073, 1075.

⁵⁶*ibid* 1076; similarly, Husa (n 3) 118; Günter Frankenberg, *Comparative Law as Critique* (Edward Elgar 2016) 85, 88 et seq.

⁵⁷See the brief discussion about Western/US-centricism above; see more generally on the underpinnings of competition law, Alison Jones, Brenda Sufrin & Niamh Dunne (eds), *Jones & Sufrin's EU Competition Law* (7th edn, Oxford University Press 2019) 2 et seq.

⁵⁸Mulder (n 1) 730 et seq; Frankenberg (n 56) 86.

⁵⁹Mulder (n 1) 730 et seq.

⁶⁰For a rather innovative approach to advocacy work see, for example, the competition law manga series and corporate videos of the Competition and Consumer Commission Singapore: Competition and Consumer Commission Singapore, 'Collaterals' (18 Jan 2019) <<https://www.cccs.gov.sg/resources/collaterals>> accessed 26 Oct 2021.

⁶¹Mulder (n 1) 731, 733.

⁶²*ASEAN Economic Community Blueprint 2015* (ASEAN Secretariat 2008) para 41.

⁶³Mulder (n 1) 733. For an example for the former, see Chen-Wishart (n 8).

⁶⁴Mulder (n 1) 745; Husa (n 3) 126.

cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the light of their function, as an attempt to satisfy a particular legal need'.⁶⁵ This rule orientation limits the analysis; it remains at the surface of identifying similarities and differences of the rules as such. This does not mean that this can never be a useful approach. If used properly it can, for example, help identifying the rules to compare for a particular research question. However, for our current purposes it is less helpful because the question is not how different countries solve certain legal conflicts that are addressed by competition law in the West. We already know that whether or not there even was a problem, the 'solution' chosen was the transplant. Instead, the aim is to investigate thoroughly the reception of specific legal institutions derived from EU law in countries with a completely different context. A functionalist approach which would, after identifying the laws, require them to be assessed outside of their context would completely fail the task at hand.

Comparative Legal Structuralism

In structuralism, as conceived by Sacco, simply identifying a legal rule and comparing it is considered a '*misleading simplification*', as no single thing can explain everything.⁶⁶ Instead, structuralism tries to identify the structural elements, referred to as 'legal formants',⁶⁷ which make a legal system work. Legal formants include statute, academic writing, and case law, but also issues such as the background of a judge or interpreter of the law (influenced by, inter alia, history and previous interpretations), the reasons given for a judgement/rule, propositions about the law, declamatory statements (which in turn show a certain philosophy, ideology or even religion), practice, and legal borrowing.⁶⁸ Sacco differentiates between expressed, semi-expressed (synecdoche), and unexpressed, possibly even cognitive, legal formants.⁶⁹ The latter category (called cryptotypes) are part of one's legal mentality and it is difficult to free oneself from them. Yet, this is what the comparatist needs to attempt in order to fully identify the legal formants in another system and understand their value.⁷⁰

Once the legal formants have been identified, they are examined as to their origin, current form, relationship, and function.⁷¹ The interpretation of the legal formants together lets one arrive at a rule or, in some cases, at a conflict which may prevent arriving at a rule. The comparatist must be able to appreciate this and cannot claim that there is only one correct interpretation.⁷² Thus, even if the statute is the same in two countries, the rule as applied may not be, and even if courts state a certain rule, what they really apply in a particular case on the basis of the facts may not necessarily be the same as what was previously stated. The comparatist should not be dogmatic but observe all the formants at play in a system and investigate what has influenced the different outcomes.⁷³

Therefore, structuralism can help illuminate the reasons why legal systems work differently even if the positive law seems nearly identical.⁷⁴ Yet, a challenge is to identify the weight of the formants

⁶⁵Zweigert & Kötz (n 54) 44.

⁶⁶Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' (1991) 39 *The American Journal of Comparative Law* 1, 21 (henceforth 'Legal Formants (Installment I)'); Sacco, 'Legal Formants (Installment II)' (n 43) 393.

⁶⁷Sacco, 'Legal Formants (Installment I)' (n 66) 22.

⁶⁸Sacco, 'Legal Formants (Installment I)' (n 66) 24, 30 et seq; Sacco, 'Legal Formants (Installment II)' (n 43) 343, 345, 394 et seq.

⁶⁹Sacco, 'Legal Formants (Installment II)' (n 43) 384.

⁷⁰Sacco, 'Legal Formants (Installment I)' (n 66) 33; Sacco, 'Legal Formants (Installment II)' (n 43) 387.

⁷¹Mulder (n 1) 745 et seq; Husa (n 3) 127.

⁷²Sacco, 'Legal Formants (Installment I)' (n 66) 22 et seq.

⁷³Sacco, 'Legal Formants (Installment I)' (n 66) 24 et seq.

⁷⁴Mulder (n 1) 746.

towards each other and how to analyse them correctly. While Sacco appreciates this difficulty, no solution is offered for how to address it. It appears to be implicit that, with thorough study, all the legal formants can be correctly addressed, that the comparatist can remain objective in her endeavour, and that cultural bias is not much of a concern.⁷⁵ As such the approach equally has some limitations for deep investigation of a transplant.

Critical Legal Comparison

During the last few decades, earlier approaches, especially functionalism, have increasingly been criticised for their lack of theory and self-examination by various critical and post-modern scholars,⁷⁶ who have stressed the need for new, research specific approaches in comparative law. As such one cannot talk about ‘the’ critical or postmodern approach. Yet, it would also not be possible in the space of this article to discuss the work of all critical scholars as whole. Instead, in the following we shall have to content ourselves with identifying some of the main points that the critical and post-modern school teach us.

One strand of this criticism revolves around the Western and legocentric outlook by previous comparatists, who would just assume that comparison can be objective, that institutions are comparable between legal cultures, that law can generally be a solution as such, and that issues resolved by it are universal issues.⁷⁷ In particular, Western legal concepts and the liberal legal system, to which the individual and the state voluntarily submit, are simply perceived as a universal standard.⁷⁸ A second and related strand of criticism concerns the private law focus and the assumption that (private) law is politically neutral. Critical scholars stress that laws, including private laws, ‘are as little “natural” as they are “pre”- or “extra legal”, or merely technical’.⁷⁹ This is also true for competition law, which, despite its partly more technical rules, has a clearly Western origin and fundamentally a free market ideology as its underpinning. A method aimed at truly understanding competition law in context thus needs to acknowledge this ideological dimension and allow room for studying how it may or may not compete with other ideologies within a legal system, which the method introduced below attempts to incorporate. Thirdly, and again related to the previous points, the lack of deep analysis has been criticised. Without deep analysis, any comparison would stay at the surface and only point out similarities; when actually the comparatist should emphasise the differences. One should attempt to find the epistemic assumptions (legal mentality) behind the rule by understanding culture and history. Only then will the comparatist be able to take her own preconceptions into consideration.⁸⁰

Critical approaches, in order to avoid these shortcomings, appreciate that ‘[l]aw does not exist in a vacuum; it is a social phenomenon if only because, at the minimum, it operates within a society’.⁸¹ Thus the aim is to take a more holistic view. One is to evaluate the place of the law as such, self-critically expose one’s own assumptions about the law, and consider power structures and ideologies.⁸² A particular rule or act must be considered as part not only of a whole legal system, but of a whole society with its specific history, culture, national psyche, and social and political struggles.⁸³

⁷⁵Frankenberg (n 56) 85, 87 et seq; Mulder (n 1) 746.

⁷⁶One of the first scholars to famously raise such a critique was Günter Frankenberg, ‘Critical Comparisons: Re-thinking Comparative Law’ (1985) 26 *Harvard International Law Journal* 411. For an updated summary, see also Zumbansen (n 55).

⁷⁷Zumbansen (n 55) 1075; Frankenberg (n 56) 14 et seq, 96 et seq.

⁷⁸Husa (n 3) 138 et seq.

⁷⁹Zumbansen (n 55) 1078.

⁸⁰Mulder (n 1) 747, Husa (n 3) 135 et seq.

⁸¹Pierre Legrand, ‘How to compare now’ (1996) 16 *Legal Studies* 232, 238.

⁸²Mulder (n 1) 747; Zumbansen (n 55) 1078; Legrand (n 81) 235 et seq; Nelken (n 24) 484.

⁸³Zumbansen (n 55) 1080 et seq; Legrand (n 81) 235 et seq.

Any assumption of similarity should not be stretched, but critically engaged with.⁸⁴ To achieve that, the comparatist should stop thinking like a national lawyer from her own cultural background. Instead, she should try to see her own legal culture as foreign to allow for more objectivity and engage in cultural immersion in the foreign legal culture to appreciate it better.⁸⁵ Even then, one is still external, but this need not be a disadvantage, as an outside perspective can be useful as long as one does not fall into the trap of making cultural assumptions.⁸⁶ The comparatist, indeed, has to navigate between 'going native' and staying part of the (kn)own, usually Western, perspective.⁸⁷ Such a self-critical and deep comparison can then contribute to theory formation of law as a cultural phenomenon.

However, this is not to say that a comparatist can ignore feedback effects.⁸⁸ The origins of a legal concept may be able to be traced back to an entirely different jurisdiction than the ones one intends to study. Furthermore, feedback effects from international or supranational organisations may play a role. That does by no means indicate that, therefore, the law and underlying concepts stay the same (homonyms). In each jurisdiction, the law will be influenced by a variety of factors, especially national historical and cultural ones. Yet, feedback effects can also be one such factor. In Singapore's competition law, for example, one can see certain tendencies towards a more US style 'total welfare' approach,⁸⁹ despite this being an EU transplant. This clearly indicates that when transplanting EU law, the legislator also took feedback and knowledge from other jurisdictions into consideration. Yet, the reason for doing so is informed by the country's own political and economic circumstances in that a strongly interventionist approach likely seemed unnecessary, because Singapore thrived economically before the introduction of competition law (despite collusive tendencies and a strong state capitalist sector), and would also be inconsistent with Singapore's long-term open trade policy. As such, feedback effects and other factors can play together.

Attempting to conduct a critical comparison where the comparatist considers history, culture, sociology, economy, etc, as well as feedback effects, may first appear like an overwhelming task and, naturally, nobody can manage to thoroughly investigate everything that might be remotely relevant for a comparison.⁹⁰ This is well appreciated by critical scholars who encourage the comparatist to view comparative law as 'a learning experience and for it to become one, we must first acknowledge the complexity of the challenge, which alone defies all easy answers and remedies'.⁹¹ The comparatist is to see comparative law as a process of discovery (heuristic) which she must attempt to approach as best as possible while acknowledging her own limitations.⁹² As such, after an initial review of data, the comparatist needs to set some guidelines for the comparison to avoid becoming lost in details, while at the same time being transparent about what she is doing and why.⁹³

⁸⁴Mulder (n 1) 726; Husa (n 3) 184.

⁸⁵Legrand (n 81) 241; Mulder (n 1) 747.

⁸⁶Nelken (n 24) 485; Husa (n 3) 156, 176 et seq, 205. Similarly, Chen-Wishart (n 8) 30.

⁸⁷Frankenberg (n 56) 81. Frankenberg suggests a grid with a vertical axis demarcating similarity and difference and a horizontal axis representing detachment and commitment. It is supposed to reveal problems through overemphasising any track (eg, cognitive control approaches such as functionalism and structuralism overemphasise detachment and similarities, while overemphasising difference and commitment can lead to romanticised journeys into the foreign). The grid thereby encourages the comparatist to avoid such extremes through self-reflection and attempting to stay in the middle, though it may be impossible to get it precisely right. See on the grid itself (ibid 79–83), on the four extreme tracks approaches can fall into (see ibid 84–112), and on the middle of the grid were pitfalls can possibly be avoided (see ibid 225–233).

⁸⁸Mulder (n 1) 726; Nelken (n 24) 486 et seq.

⁸⁹This is visible in both the omission of the 'fair share' for the consumer in the net economic benefits exemption (Third Schedule, para 9) and the limited (if any) focus on exploitative abuses when it comes to abuse of dominance (Competition Act, s 47).

⁹⁰Zumbansen (n 55) 1077.

⁹¹Zumbansen (n 55) 1078.

⁹²Husa (n 3) 178, 207.

⁹³Husa (n 3) 146, 180; Legrand (n 81) 239.

Both the criticisms of previous approaches as well as the general advice given to the comparatist by critical and postmodern scholars are important if one wishes to conduct an in-depth study. However, this advice remains general, they do not offer particularly clear methodological guidance.⁹⁴ This may partly be because critical scholars focus on critiquing and disrupting the mainstream which leads some of them to become ‘radical skeptics’ who avoid actually conducting any comparative studies at all in order ‘not to risk encounters with the other, both in comparison as on the pathways of transfer, so as to avoid mainstreaming the other’.⁹⁵ Partly, the lack of methodological guidance could also be due to sections of postmodern scholars rejecting methods in general. They emphasise that methods cannot cover every domain, they are not absolute in that there is no single best method, they are subjective as they are produced by individuals, and they remain speculative, as they are designed to do more than describe.⁹⁶ Because of these shortcomings, they see methods as a problem in themselves rather than as a solution. Yet, this does not mean that they advise that comparatists ‘renounce coherence and consistency and turn themselves into dilettantes’.⁹⁷ Instead, they should ‘assume responsibility for their own strategic decisions, instead of reflexively implementing a given methodological agenda’.⁹⁸

It is essential to acknowledge the criticism of these scholars, even if one does not go as far as rejecting methods entirely. One has to keep in mind that there can be no universal method, that no method can produce universal truth, be entirely unbiased or can be used for every study. Each comparatist (if she decides to do so at all) must develop a method that fits her particular study topic and accept that it will inevitably not produce omniscient results. If one acknowledges these inevitable shortcomings, there can, however, arguably also be a lot of value in methodological discussions. Setting out why one has chosen to approach a particular topic in a particular way achieves transparency and helps locate oneself in the ‘comparative constellation’⁹⁹ one aims to investigate, but more than that, in a field like comparative competition law, where research that does more than just comparing the positive law is limited, discussions about method can encourage new kinds of enquiry. Furthermore, methodological approaches set out by comparatists can provide inspiration even to those in other areas of law. For example, Mulder, developed a critical approach for studying the reception of EU directives on non-discrimination law in the Member States of the EU.¹⁰⁰ While her method thus has a particular application, some of her methodological suggestions can also be usefully employed when studying a competition law transplant as we will see below. While methods developed by others should naturally not be blindly copied, they can give ideas on approaching topics in different ways. It is with this in mind that, in the next section, a new method to study EU competition law transplants is introduced.

A method for culturally informed investigation of the reception of EU competition law transplants

While the suggested method does not claim to be a postmodern approach, it aims to overcome some of the criticisms that critical and postmodern scholars have made against mainstream approaches

⁹⁴Husa (n 3) 138.

⁹⁵Frankenberg (n 56) 110.

⁹⁶Simone Glanert, ‘Method?’, in Pier Giuseppe Monateri (ed), *Methods of Comparative Law* (Edward Elgar 2012) 65 et seq.

⁹⁷ibid 80, with further references.

⁹⁸ibid 81.

⁹⁹Frankenberg (n 56) 229.

¹⁰⁰Mulder suggests a three-step approach where, first, the theoretical and normative framework of the EU directive is being addressed (Mulder (n 1) 750 et seq), second, the legal (national and international), historical, sociological, cultural, and stakeholder engagement narratives are studied to arrive at a hypothesis on how society in those countries would stand towards the directive (Mulder (n 1) 754 et seq) and, third, this is then tested in in-depth case law analysis of the dialogue between the national courts and the Court of Justice of the European Union (Mulder (n 1) 762 et seq).

and to find a new way of more critically studying competition law transplants. It is meant to enable a thicker kind of analysis by going more deeply into the legal and non-legal context and thereby to help overcome reductionism. The method can be utilised to study one transplant in and off itself or as a basis to compare two (or more) transplants of EU competition law in different countries. Further, aside from introducing it as the method for future transplant studies of EU competition law, it is hoped that it will spark some methodological discussions in comparative competition law (and potentially beyond) more generally.

Studying or comparing transplants differs, to a certain degree, from other comparative law, as it is clear from the outset that the law has a particular origin and destination. Merely setting the law of the origin and the host country side-by-side thus seems of limited use. The similarities will likely appear overwhelming, but it does not actually tell us much about how the law is received and likely to develop in the host country. It would also be too legocentric as it would not question the premises of the law in the country of origin at all. Instead, it is suggested here that a thicker kind of comparison is necessary to attempt to explore the transplant in its new context. As such, the method is trying to be both explanatory, by identifying relevant national influences on the transplant in the home and host country, and evaluative, in that it evaluates how the law works in its new context.

To achieve this, a five-step approach is suggested: (1) EU competition law and the aims pursued by it are addressed rather than considered as granted, universal or neutral, (2) the legal and non-legal contexts in the transplanting country are analysed to get an idea which factors may play a role in the reception of the transplant, (3) the reasons and background to the transplant are investigated to understand why the transplant is being implemented at all, (4) the transplanted law is being scrutinised to see which deliberate changes have been made to accommodate both the local context and the reasons for implementation, and (5) the application of the law by authorities (and, if applicable and relevant, courts) is considered to appreciate the law in practice. Each step, the relevance of which will be demonstrated more fully below before reflecting on the method in its entirety, is meant to build on the previous to allow a fuller picture of how the transplant is received. By utilising this culturally and contextually informed method of investigation, a more solid basis for understanding how far the national legal and non-legal contexts do influence a transplant of Western law into non-Western countries is envisaged.

EU Competition Law and its Aims

When investigating EU competition law transplants, it is important to understand what EU competition law actually stands for, as a first step. As Mulder convincingly argues in her critical method for investigating the implementation of EU non-discrimination directives in the Member States, the theoretical and normative framework behind the EU-level legislation needs to be determined to assess its reception.¹⁰¹ Law, including EU law, is not neutral. It has certain underlying notions, ideologies, and theories, and tries to achieve certain goals. To expose these is important in order to be able to assess how it is received, be it in an implementing Member State or third country which chose to transplant EU law. By doing so, a more critical set-up can be achieved than would be possible by simply placing the formal laws next to each other.

Especially in competition law, with its US-centric tendencies, it is important to ‘probe universalistic concepts and bring to the fore their (Western) particularity’¹⁰² in order to avoid cultural biases. This involves asking what EU competition law is trying to achieve (ie, goals), what this is based on (ie, theory), and how this is accomplished. Only once we have identified this for EU competition law itself, can we then fruitfully consider how the transplant of EU competition law fits into the legal and non-legal context of the receiving countries with their unique history, ideology, and

¹⁰¹Mulder (n 1) 750 et seq.

¹⁰²Frankenberg (n 56) 231.

normativities. Do these have similar ideologies and economic aims and a supporting general cultural and historical context or is the context so different that the likelihood of a successful transplant is small or, at least, so that the transplant would have to significantly adapt? To engage with these questions in the following steps we need to first be clear on what EU law itself stands for to identify a comparative factor (*tertium comparationis*).

As a very basic starting point, competition law, like other economic law, assumes the presence of free markets. Yet, even in Western free market ideologies, it is recognised that leaving the market entirely unrestrained will not have optimal outcomes and, as such, some intervention is necessary.¹⁰³ Exactly how much intervention in the market is deemed desirable depends on the exact aims to be achieved by competition law. Does a country only wish to prevent the most extreme cartels, or is more steering of the economic system deemed useful? This is a disputed area and the answers that countries find may differ significantly. The EU competition model has found its own tentative answers in legislation and case law coloured by its own history and development, but even these are not stoic and are still hotly debated. It will be necessary to engage with its aims and underlying schools of thought before, in the following steps, assessing the congruency or tension with the legal and non-legal contexts in the countries which have transplanted the EU model.

Legal and Non-Legal Context in the Transplanting Country

As a second step, the broader legal and non-legal context in the receiving country is being explored to better understand how the EU competition law transplant is likely to be received. In investigating this, it is important to aim for a certain neutrality/distance (even if it may not be possible to entirely avoid biases). The traps one may fall into range from strong conviction of the superiority of the Western EU law and contexts to ‘*sentimental journeys*’ into the exotic.¹⁰⁴ Explicitly identifying the theoretical and normative framework of EU competition law in the previous step was intended to avoid taking it (and as such the Western background) as granted or universal, thus helping to overcome the former trap. One can fall foul of the latter trap when romanticising the foreign. Frankenberg describes the latter kind of comparatists as the ‘last amateurs’ who, like travellers, conduct sentimental journeys into the foreign law without method or theory, thereafter, displaying their treasure trove of findings of differences which they strive to conserve. While the advantage of such approaches is that they recognise differences and do not support the Western hegemony, they ‘run the risk of closing the doors to comprehension and avoiding comparison’ rather than ‘bringing us into genuine contact’ with other legal systems.¹⁰⁵

Considering points of enquiry for the legal and non-legal context in the transplanting country in a more systematic and structured manner can help overcome the trap of approaching it in an exhibitivish fashion. For this purpose, we will consider a variety of points of enquiry which have been chosen because, on the basis of initial engagement with the material, they seem most likely to bring insight into the mentality of the receiving countries in the relevant spheres, as well as into how they would react to the competition law transplant. This is not to say that there could not be other areas which could also be considered. However, it is impossible to research absolutely every aspect of a country’s legal and non-legal context and a deliberate choice has to be made on the basis of what would be relevant for the reception of a transplant in a certain area of law, in our case competition law. For example, while the physical geography and meteorological conditions of a country may be important for environmental law or gender norms for family law, these aspects appear less important for competition law. Therefore, it is suggested here that for the

¹⁰³Glenn (n 52) 384.

¹⁰⁴On the rarer approaches to comparative law which fall into the latter trap through overemphasising commitment and difference, see Frankenberg (n 56) 104 et seq.

¹⁰⁵Frankenberg (n 56) 107.

investigation or comparison of EU competition law transplants it would be useful to engage with the following interlinked points of enquiry. First, the history of the country under scrutiny will be considered. This will be followed by engagement with the current political system and state ideology which resulted from the country's past and is now prevalent. Next, it seems fruitful to investigate the legal traditions which inform the country's legal and wider culture and, of course, also are a product of its history. Finally, the economic system of the country would be an important area to consider for a market-related area of law such as competition law. Naturally, when actually conducting the comparison, one may stumble across other areas which could provide useful insight and one should not be deterred to follow these. While it is important to set out which points of enquiry should normally be considered to avoid being too exhibitively, strict abidance by the method is not necessary, as the study is meant to be a learning experience.

Furthermore, it is important to appreciate the fluid, contradictory nature one may find when examining the local legal and non-legal context. The local context will not be a homogenous, closed system, but, for example, politics and culture may change and are influenced by many factors. As such it is important to appreciate that, in order to avoid romanticising the foreign, one can at best only detect tendencies which could also shift over time. Therefore, at the end of this analysis we will only have an idea of the relevant national legal and non-legal context rather than an ultimate truth. Yet, we can utilise this to discuss how an EU competition law transplant with its particular theoretical and normative framework is likely to fit it into this context. How each point of enquiry under this step is considered and why it is deemed important will be discussed in more detail in the following, before we turn to step 3.

History

The history of the country in question is a useful first strand of enquiry to explore the national legal and non-legal context. History has been said to be possibly the most important dimension to consider in comparative law, given that law is built on the past.¹⁰⁶ The historical process in a legal culture needs to be understood to assess the workings (or lack thereof) of the transplant, as historical connections may be essential for the law to work.¹⁰⁷ Furthermore, understanding the country's history, can help us to identify what to focus on in the following stages of enquiry. For example, a country such as Singapore has had a colonial past which brought the common law to the country. It also had migration from China which brought with it aspects of Chinese culture, such as Confucianism. These aspects of history thus alert us to which legal traditions may be relevant in the country's legal culture.¹⁰⁸ Equally, its history as a port and international transport hub have affected its economic system,¹⁰⁹ which emphasises the small and open economy. As these examples show, the history of a country thus gives us useful clues when continuing the research into the national legal and non-legal context.

As with all points of enquiry, however, it is important to stay focussed on what is relevant for the competition law transplant. To use the example of Singapore again, while immensely fascinating, its earlier, pre-colonial past appears to have had less influence on its current economic and political system, as far as they are relevant for the reception of competition law transplants. As such, it is important not to get lost in the past when conducting this strand of enquiry.

Political system and state ideology

As a second point of enquiry, it is suggested to explore the current political system and state ideology in the receiving country. This is, of course, informed by the historical observations described

¹⁰⁶Husa (n 3) 172.

¹⁰⁷Husa (n 3) 105 et seq.

¹⁰⁸On legal culture and tradition see relevant section below.

¹⁰⁹On the enquiry into the economic system of a country see relevant section below.

above and, as such, acts as a continuation of that discussion. In the West, it is often assumed that democracy, liberalism, capitalism, and good governance are intrinsically linked.¹¹⁰ However, this does not necessarily have to be the case. Furthermore, countries rarely fall on the extremes of each of these features (eg, capitalist versus communist, democracy versus dictatorship etc), but may display hybrid forms. Singapore is an interesting case in point: while it is an electoral democracy with strong anti-corruption measures and efficiency in government, it also displays a certain authoritarianism in governance style and does not subscribe to Western-style liberalism, but follows a more communitarian approach. In addition, its economic system combines direct public steering of the economy with an extremely open capitalism and strong government linked companies which, in contrast to neo-liberal assumptions, function very efficiently.¹¹¹

As non-Western countries often display different features than Western countries, the transplant of Western competition law may have to be adapted or will adapt itself in order to work. In Singapore, the government left itself sufficient room for pursuing economic and other policies through a large variety of exclusions and exemptions from competition law (eg, for the government and statutory bodies, behaviour prescribed by other legislation, public interests, certain public services). Some of these exemptions, especially those for public services, are prone to benefit some of the government linked companies (GLC) and thus certain parts of the state capitalist sector are somewhat shielded from the wrath of competition law. However, a deliberate decision has been made to let the less socially and politically sensitive GLCs fall under the Competition Act and, in the *SISTIC* case,¹¹² a strong and dominant GLCs has already been found to have infringed the Act. Further, as briefly mentioned above,¹¹³ when competition law is applicable, a total rather than consumer welfare approach is followed, as this seems to better suit Singapore's economic policy, especially its open market policy.

It is, therefore, important to engage with sociological and political science works on the receiving country's political system in order to appreciate its state ideology and self-understanding, and how this may affect the implementation of competition law. These can, inevitably, only be identified as tendencies, as, naturally, within a society there are different currents and diverging voices. As with the country's history, investigating its political system and state ideology, in addition to the insights this delivers in and of itself, will also help us to identify focus points for the remainder of the enquiry (eg, as regards the country's economic system).

(Legal) culture and tradition

At this point of the enquiry, it is suggested to investigate the legal traditions which inform the receiving country's legal culture,¹¹⁴ in which the EU competition law transplant is expected to function. The term 'legal traditions' (sometimes also 'legal families') refers to the clustering of legal systems into groups based on common characteristics¹¹⁵ derived from, for example, religious or philosophical roots. As such they are deeply connected with the wider cultural background of a country and can be a very useful tool when studying transplants of Western law into very different contexts.

Mainstream comparative law approaches have been criticised for limiting legal families to common and civil law and ignoring or relegating other legal traditions.¹¹⁶ Such a Western-centric outlook disregards that even where a country has adopted civil or common law, it is often influenced

¹¹⁰Beng Huat Chua, *Liberalism Disavowed* (NUS Press 2017) 10–24, 194 with further references.

¹¹¹For more detail on Singapore, see Andrea Gideon 'Transplanting EU competition law to Asia: The Singapore approach' (work-in-progress).

¹¹²Decision CCCS 600/008/07 *SISTIC*.

¹¹³Text surrounding note 89.

¹¹⁴See on the term 'legal culture': Nelken (n 24) 482; Husa (n 3) 5.

¹¹⁵Husa (n 3) 102.

¹¹⁶Frankenberg (n 56) 89.

simultaneously by other, usually older legal traditions as well. Indeed, especially in Southeast Asia, legal traditions are often mixed within a country. It is thus suggested here to employ a broader understanding of legal traditions for which especially the work by Glenn, who was one of the most influential scholars in the field of legal traditions,¹¹⁷ can be utilised, though it should be supplemented with other works where possible.¹¹⁸

Glenn identified seven major legal traditions: a chthonic legal tradition, a Talmudic legal tradition, a civil law legal tradition, an Islamic legal tradition, a common law legal tradition, a Hindu legal tradition, and a Confucian legal tradition.¹¹⁹ Through colonial imposition of Western law, civil or common law have often become part of Southeast Asian legal systems. Yet, the expansion of Western law also left room for some existing law to stay in place (at least for those who previously relied on it) which contributed to mixed legal systems.¹²⁰ Previously existing legal tradition may also have played a more subtle role influencing, for example, interpretation¹²¹ or remaining as forms of private ordering.¹²² In Southeast Asian countries in particular, the Islamic and Confucian legal tradition have had a strong impact long before Western law.¹²³ Yet, there is also still some influence from the even older chthonic¹²⁴ and Hindu legal traditions (eg, in the *adat*¹²⁵ law in Malaysia as regards the former).¹²⁶ The different legal traditions may stand differently towards how competition law may develop in a country. For example, while, as we have seen above, some have argued that a common law legal system is more conducive for competition law, a country may simultaneously be influenced by other legal traditions such as the Confucian legal traditions in which there is an emphasis on networks and reciprocity which may clash with the assumptions of EU competition law. As such it is important to try to identify and engage with all relevant legal traditions that form part of a country's legal culture in order to understand how these may affect the reception of the EU competition law transplant. The first two points of enquiry, especially the study of the country's history, will already have provided us with insight to identify the relevant traditions to study here.

Economic system

In this point of enquiry, it is suggested that studying the economic system and political economy environment of the country under scrutiny will help to develop an understanding of, how this relates to the likely pitfalls or successes of transplanting EU competition law. For example, in the

¹¹⁷Duve analyses Glenn's work in detail: Thomas Duve, 'Legal traditions: A dialogue between comparative law and comparative legal history' (2018) 6 Comparative Legal History 15.

¹¹⁸While his work has been criticised as exhibitivite comparison (see Frankenberg (n 56) 106, with reference to Legrand; the former does not appear to share the criticism himself), Glenn is actually acknowledging and engaging with the complexity of legal traditions: see similarly, Frankenberg (n 56) 106. Firstly, he explicitly recognises that a theory of legal traditions is a 'rational construction' and that '[t]heories, and the logic they entail, are part of the tradition of western rationalist thought': Glenn (n 52) 3. Secondly, he makes clear that he does not see legal traditions as static or absolute, but as 'a series of interactive statements', the categorisation of which could always be challenged: Glenn (n 52) 21 et seq, 21 (quote on that page), 361 et seq. However, all the major traditions, as Glenn defines them, have certain things in common. They all have a form of normativity and they are all complex in that they can (more or less easily) combine partly contradictory ideas without the need to insist on universality: Glenn (n 52) 366 et seq, 372 et seq.

¹¹⁹Glenn (n 52) 3.

¹²⁰Glenn (n 52) 272 et seq.

¹²¹Chen-Wishart (n 8) (on the Confucian legal tradition influencing interpretation of common law constructs).

¹²²See Cheng Han Tan, 'Private Ordering and the Chinese in Nineteenth Century Straits Settlements' (2016) 11 Asian Journal of Comparative Law 27 (on private ordering of the Chinese during British colonial administration).

¹²³Glenn (n 52) 226 et seq, 229, 345 et seq.

¹²⁴The term 'chthonic' refers to peoples living in close harmony with the earth and is chosen by Glenn as less Western-centric alternative to the term 'indigenous': Glenn (n 52) 60 et seq.

¹²⁵Customary law of chthonic peoples in Malaysia and Indonesia.

¹²⁶Glenn (n 52) 77 et seq.

Philippines, ‘a small oligarchic clique of prominent families’¹²⁷ is said to dominate the economy as well as politics and one may thus wonder how effective competition law introduction would be under these circumstances. Equally, a small market size, such as in Brunei, may well make the market more transparent which could facilitate concerted practices. An economic system with heavy government involvement, as in Singapore, may lead to strong incumbents potentially with special or exclusive rights, or with public monopolies which in conventional competition law logic could be considered as interfering with free competition.

There are thus several factors in the economic system and political economy context of a country which may have an influence on the reception of competition law. Factors such as market size, openness of the economy, global position, etc, would need to be considered as part of this point of enquiry. The previous points of enquiry within the broader step of analysing the national legal and non-legal context, especially the history and political system, will have aided in this step by having provided some guidance on which aspects to start with and focus on.

Evaluating the legal and non-legal context

Having considered the various points of enquiry under step 2 on the legal and non-legal context, the comparatist is invited to reflect on how the EU competition law transplant, with its own contextual contingency, would fit into this context. One may come to the interim conclusion that the transplant fits well. However, one may also conclude that there are certain aspects which result from the countries wider context (eg, the oligarchic structures in the Philippines or the strong government involvement as well as Confucian legal tradition with the pronouncement of networks in Singapore) that could potentially pose challenges for a successful transplant. This then brings us to the next step, and the question why the transplant was implemented. After all, potential external pressure may slim the chances of a transplant being successful, while an intrinsic desire for reform may lead to an entirely different conclusion, even if the transplant might not be a natural fit for the local legal and non-legal context.

Reason and Background for the Transplant

In the third step, we thus turn to the background and reasons for the transplant. Dolowitz and Marsh¹²⁸ have, in the sphere of the political sciences, created a framework of questions to ask in order to understand the process of policy transfer which can be helpful for our step 3. In particular, the first two questions (with sub-questions) that Dolowitz and Marsh propose to ask are equally relevant for our purposes; namely (1) why transfer/transplant and (2) who is involved. The first question goes to the reasons for the transplant and whether it was voluntary, coercive or something in between. More precisely, did a country just decide that it needed a competition law? Or were there external influences (eg, from trade agreements, regional organisations, etc)? Oftentimes, it was not a sudden epiphany by a national legislator (or other norm-giver) that led to the adoption of competition law. In Singapore bilateral trade agreements played a role,¹²⁹ and in Malaysia, Brunei Darussalam, and the Philippines it would appear likely that the enactment of competition law was related to the commitment in the AEC Blueprint 2015 to implement competition policy by 2015.¹³⁰

¹²⁷Mark Williams, ‘Introduction’, in Mark Williams (ed), *The Political Economy of Competition Law in Asia* (Edward Elgar 2013) 6.

¹²⁸David P Dolowitz & David Marsh, ‘Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making’ (2000) 13 *Governance: An International Journal of Policy and Administration* 5.

¹²⁹Andrea Gideon, ‘Competition in the healthcare sector in Singapore – an explorative case study’ (NUS CLB Working Paper Series No 16/05, Oct 2016) 18 (with further references) <https://law.nus.edu.sg/ewbclb/wp-content/uploads/sites/6/2020/04/009_2016_Andrea-Gideon.pdf> accessed 26 Oct 2021.

¹³⁰The ASEAN Secretariat (n 62) para 41.

However, these external influences may not have stood alone. In Singapore, for example, the introduction of competition law was part of a more general economic reform programme.¹³¹

Investigating the background around the implementation of the law not only gives us ideas as to why the law has been introduced, but also as to why an EU law transplant has been chosen. A certain path-dependency, when much existing law has been inherited from colonial rulers, may play a role. In Singapore, for instance, when implementing law in new areas, the legislator still often follows English law, which in turn is influenced by EU law in the area of competition law.¹³² Equally, if an AMS introduced their competition law after the issuance of the ASEAN Regional Guidelines on Competition Policy,¹³³ the choice to transplant EU law may have come through the back door of those Guidelines, which in many respects resemble EU competition law closely.¹³⁴

However, the latter cannot be the entire explanations as other countries (eg, Lao PDR and Myanmar) have not opted to implement an EU competition law transplant (and, as such, are not envisaged as the systems to be studied using the method introduced here), despite also having implemented their competition law after the issuance of the Guidelines. Thus, it seems likely that other factors played an equal role in the decision to transplant EU law. Neighbouring countries can, for example, be a source of inspiration.¹³⁵ In the case of Brunei Darussalam and Malaysia it seems probable that they looked to their neighbour Singapore. Singapore had already successfully implemented its competition regime by the time the former two implemented theirs. Especially in the case of Brunei Darussalam, we can also find resemblance to elements of Singapore's competition law which we cannot find in EU law (eg, Brunei Darussalam's Third Schedule to the Competition Order bears a striking resemblance with Singapore's Third Schedule to the Competition Act which contains exemptions that are absent from EU competition law such as certain sectoral exemptions or exemptions for specified activities). Investigating the background around implementation more thoroughly will thus provide insights which would be otherwise missed.

Dolowitz and Marsh's second question, relatedly, attempts to ascertain influences during the process of implementation. Was the law passed by and debated in parliament? Were consultants or international development cooperation organisations involved in the drafting process? The investigation of the legal and non-legal contexts in the previous step, as well as the first question asked under this step, will partly already have given us thoughts on the reasons for the EU transplant and/or cross-influences between countries (eg, a common colonial past or other linkages). However, in this second question, we may find further information as to why competition law has been implemented, why an EU transplant had been chosen, and why the law was eventually drafted as it was. Here, it is important to engage with potential stakeholder debate through academic writings or newspapers, as well as with the records of parliamentary debate. In the case of Singapore, for example, the parliamentary debate sheds light on the thinking behind the Act as well as on why certain exemptions were added in order for the law not to become a 'blunderbuss law'.¹³⁶

At the end of this third step, we can adjust and supplement any tentative conclusions drawn from step 2. If, for instance, we found that EU competition law might not be an easy fit for a country's

¹³¹Ong, 'The Origins, Objectives and Structure of Competition Law in Singapore' (n 10) 271 et seq.

¹³²Similarly, Kenneth Khoo & Allen Sng, 'Singapore's competition regime and its objectives: the case against formalism' [2019] Singapore Journal of Legal Studies 67, 70.

¹³³The ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy* (ASEAN 2010).

¹³⁴Andrea Gideon, 'Application of competition law to public services: the EU experience, the ASEAN approach and implications for regional integration in ASEAN', in Burton Ong (ed), *The Regionalisation of Competition Law and Policy in ASEAN* (Cambridge University Press 2018) 318 et seq.

¹³⁵Husa (n 3) 158.

¹³⁶Parliament of Singapore, 'Competition Bill', 19 Oct 2004, vol 78, col 863 (Dr Vivian Balakrishnan, Senior Minister of State for Trade and Industry).

legal and non-legal context, but the implementation of it was a more intrinsic policy choice, one could speculate that there is a higher potential for successful adaptation than if implementation was due entirely to external factors.

The Transplanted Law

Only in this step will the positive law be examined for differences to EU competition law. The legislation to consider is the actual competition act in the recipient country, but might also go beyond that (for example, in some AMS, sectoral legislation has been issued for certain sectors and this needs to flow into the analysis). On the EU side, the basic competition provisions can be found in Title VII, chapter 1 of the Treaty on the Functioning of the European Union. However, it would not be sufficient to only consider the Treaty provisions. After all, these provisions are rather concise and much of the workings of the law can only be understood through case law. It would thus need to be considered how far case law has found its way into the legislation in the receiving country. For example, the Malaysian Competition Act 2010 in its section 3 defines the scope of its application as any commercial activity which does not include the exercise of government authority, an activity conducted on the basis of the principle of solidarity, and any purchasing activity to provide input for a non-commercial activity. This essentially codifies how the Court of Justice of the European Union delineated the difference between economic and non-economic activities to determine the scope of EU competition law in its case law.¹³⁷ Furthermore, there may be relevant secondary legislation on the EU side, such as the EU Merger Regulation, several concepts of which seem to have inspired the merger control regime in Division 4 of Singapore's Competition Act 2004.

After having compared the positive law as such, it is suggested to next consider academic commentary on the suitability of the law, if available. We can then reflect on how (and if) the law mirrors the previously identified legal and non-legal context in the recipient country, while also taking into account the background to the transplant as investigated in step 3. By the end of step 4, we should have a fairly comprehensive insight into how the EU competition law transplant fits into the legal and non-legal context and what adaptations (if any) have been made to make the law more appropriate. On the basis of this, we can revise our considerations as to the success (or lack thereof) of the transplant in the recipient country.

Application

In this final step, it is suggested to examine the national application of competition law to test if the results of the previous steps seem to materialise in practice. The main attention here will be on decisions by national competition authorities and, if applicable, judgments by national appeal tribunals or courts. In addition, guidance on national application may be found in guidelines issued by national authorities. If necessary and possible, it should be considered to supplement the information gained through document study with interviews with officials. The questions that would guide us in this fifth and last step are if the countries developed their own approach in line with their national legal and non-legal context or if they are following EU law quite strictly?¹³⁸ For example,

¹³⁷See C-41/90 *Höfner* EU:C:1991:161, para 21 (determining that EU competition law applies to 'every entity engaged in an economic activity'). See, for example, C-364/92 *Eurocontrol* EU:C:1994:7, para 19 et seq (in particular paras 30 and 31, on the non-economic nature of activities in the service of the state's prerogatives to conduct acts of official authority) and C-159, 160/91 *Poucet et Pistre* EU:C:1993:63, para 18 et seq (on the non-economic nature of activities based on the principle of solidarity). See C-205/03 P *FENIN* EU:C:2006:453 (on the non-economic nature of activities which are not severable from a non-economic activity, such as purchasing inputs).

¹³⁸This may be more likely if EU decisions are regarded as persuasive guidance as is the case, for example, in Singapore CCCS 400/001/09 *Guideline on Fees*, para 34.

does the application of the law reflect the country's legal traditions.¹³⁹ Furthermore, can we identify feedback effects between courts or authorities in different countries, especially in different countries which have all transplanted EU competition law? Are there perhaps gaps in application where recourse to other forms of resolution is sought (eg, commitments or informal discussions before it would need to come to a decision)? Or is the transplant perhaps failing in that it is not (successfully) applied at all?

It may not be possible to conduct this last step in all circumstances, as some countries may have only started application recently or are still in the process of setting up their national authorities. In such cases, there may thus not yet be any decisions to analyse and the previous four steps, perhaps supplemented with interviews, must suffice to give an initial appreciation of the reception of the EU transplant in the recipient country. One can, in such cases, always return to this fifth step in future research once application has begun. After all, in the context of Southeast Asia, even the oldest regimes result only from the late 1990s and the first EU law transplant was by Singapore in 2004. Therefore, from a mere time perspective, the application cannot yield that many results. As such, application is unlikely to be the most important factor in EU competition law transplant studies of these regimes, though it should naturally be considered as far as possible and useful.

Reflection on the introduced Method

The suggested method starts by making explicit the theoretical background and goals of EU competition law rather than taking it for granted. This is followed by an in-depth study of the legal and non-legal context including the country's history, political system and ideology, legal traditions, and economic system. Legal tradition here is understood broader than the limiting notion of differentiating only between common and civil law. Instead, other older legal traditions are considered, which facilitates a deeper insight into the country's culture (eg, in the form of religious and philosophical roots). Supplemented with the other points of enquiry under step 2, this provides us with a fairly comprehensive foundation for analysing how an EU competition law transplant will be received. The method introduced here then suggests engaging with the background and reasons for the transplant, before considering the positive law and how it reflects both the legal and non-legal context, as well as the circumstances around its implementation. The final step studies the law's application. Each step builds on the previous one and the comparatist is meant to question any preliminary findings on the basis of each new step in order to come, in the end, to a more considered and deeper appreciation of how the EU competition law transplant has developed in its new context.

While the suggested method thus addresses some of the critique discussed in the previous sections (in particular by exposing the normative and theoretical framework of EU competition law rather than taking it as universal, by considering the national legal- and non-legal contexts and how they may influence the transplant, and by taking into account the reasons and pressures around the implementation of the transplant), there are naturally limits to what is possible. For example, when studying the national legal- and non-legal context, it is impossible to research absolutely every aspect and a deliberate choice of which points of enquiry to focus on has to be made. While this is an informed-choice based on initial engagement with the material, it necessarily means that other aspects are not considered. However, omniscient approaches to culturally informed transplant studies are unfeasible. One has to concentrate on a set of criteria to ensure that one can develop sound (if partial) critical insights.

Another obstacle, in certain countries, may be the language barrier. While all those AMs that adopted an EU transplant have English at least as a recognised, if not official, language, this does not

¹³⁹For example, in the Confucian legal tradition, being adversary is regarded as undesirable. See Husa (n 3) 158; Glenn (n 52) 325.

necessarily mean that all relevant material will always be available in English. Further, if the method would be used for EU competition law transplants in other countries, English may not necessarily be a recognised or official language. Even if knowledge of other relevant languages exists, it is unlikely that one is fluent in all of them. There are thus always going to be limits and it may be impossible to ever understand a foreign law entirely and fully in its context. One can always miss something, even after extensive immersion and arguably even in one's (kn)own country. It is never possible to have the perfect method, just as it is not possible to be entirely objective. It is thus not claimed that the method introduced here will lead to an ultimate truth or that it is the best or only way to approach a transplant. It is just one suggested way of conducting a more critical, context-informed study.

The mentioned limitations of what is possible do not mean, however, that one cannot understand anything or that it would be worthless to try to study law in another country. Yet, it makes it even more important to set out clearly what one is doing and why. Setting out one's method will have led one to think about what one is doing and arrive at a considered approach to try as best as possible to conduct the study in question, while also achieving transparency by making the parameters, as well as where one set the limits of what is feasible, explicit.

Conclusion

Comparative research on competition law displays certain gaps. Legal scholars have been criticised for focussing too much on EU-US comparisons, as well as on more descriptive accounts of formal law. Outside the legal arena, work has largely been done in law and economics which tends to stay at a more macro level, compares entirely on the basis of efficiency considerations, and has been accused of being Western-centric. Little scholarship in either discipline considers broader legal and non-legal contexts. As such, there is a need for methodological discussion on how to conduct more contextually and culturally informed studies in comparative competition law and this article aimed to contribute to that by suggesting a method for a context-informed study of EU competition law transplants.

Legal transplants and their possibility have been hotly debated in comparative law. Yet, asking whether they are possible is, as Chen-Wishart puts it, possibly the wrong question since they undoubtedly take place. Instead, it may be more fruitful to take the criticism raised against the notion of transplants, including that little is done to appreciate them in their new context, as a prompt to study them differently and try to understand how they work (or not) in the recipient country. Critical and postmodern scholars in comparative law teach us that for such an in-depth study, we must avoid being too legocentric, try to understand the law in context, and try to unearth our biases and make these explicit. Yet, the discussion, partly out of conviction, largely remains general with few concrete methodological suggestions.

The aim of this article was to take the criticism raised against mainstream approaches onboard and explore how to broaden the focus to be able to conduct a deeper study of EU competition law transplants in non-EU countries. The idea is not to place EU law and the law in the receiving regime side by side, as the sense of this seems limited. Instead, EU law is perceived as a starting point, but it is acknowledged that Western rules work differently in non-Western systems. As such, the first step is to understand the aims and theoretical framework envisaged by EU competition law. This is followed by investigating the receiving country's legal and non-legal contexts to understand how an EU law transplant would fit into these contexts. Step 3 then considers the reasons and background for the transplant and how these align with the national context. The actual law is explored in step 4 and again the comparatist is encouraged at this step to conduct this analysis against the background of the results of the previous steps. Finally, step 5 contrasts the insights gained against the application of the law in practice, though this step may not always be possible if the regime in question is a very young regime. Each step builds on the previous one in order to, by the end, have achieved a

fuller picture than what a mere comparison of positive law would have provided. While no method can consider everything or reveal an unquestionable truth, it is suggested that this method can be one useful way of studying EU competition law transplants in a deeper fashion.

As such the method is not meant for macro-level work, which serves a different purpose (such as an initial exploratory study of a particular theme with a larger number of countries),¹⁴⁰ but to go deep into one or a few countries' systems to understand them more profoundly. It can be utilised for both a comprehensive transplant study of a single competition law regime (eg, Singapore) or as a tool to comparing two or more competition regimes which were all initially based on EU competition law transplants (eg, Singapore and Malaysia). The socio-political and legal contexts affect the implementation and effectiveness of the transplant. Therefore, in addition to studying the reception of the transplant in a single system, having a method that takes account of the legal and non-legal contexts can provide the parameters for comparing the reception of the transplant in a small number of different countries which may have some commonalties (eg, historically or geographically), but also partly different cultural, economic, religious, and political factors.

The method is particularly intended to facilitate the study of the regimes in one or more of the four ASEAN Member States which have transplanted EU competition law. However, it could also be employed to study such transplants elsewhere or perhaps to even provide some useful inspiration for transplant studies in other fields of law. Furthermore, beyond its immediate aim of suggesting a method for particular studies, it is hoped that the discussion in this article and the proposed method can serve as a basis for future methodological debate more generally. In particular, in the area of comparative competition law, where such a debate is sorely needed.

¹⁴⁰See for example the exploratory study of the treatment of public services in competition law in all ASEAN Member States and at the ASEAN level in Gideon (n 134).