

**KINGDOM OF CAMBODIA**  
**NATION RELIGION KING**



**Consumer Protection Competition and  
Fraud Repression Directorate-General**  
**“CCF”**

**Background Paper on Competition  
Policy and Law in General Context for Cambodia**



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# Background Paper on Competition Policy and Law in General Context for Cambodia

## I. INTRODUCTION

- Over 130 WTO members have enacted a Competition Law including 9 of 10 ASEAN Members (“AMS”).
- Cambodia has been working on a draft Competition Law for almost 20 years with assistance from a number of international advisors and many versions prepared. It is important to note that Competition Law is complicated economic legislation that has broad application throughout the national economy and is quite different than most other types of legislation. Because of the complexity and different approaches of international advisors from different jurisdictions, Cambodia has essentially redrafted its competition law in its entirety with each change in international advisor that has supported the drafting of this legislation
- Cambodia has recently been focusing on several business framework laws (such as E-Commerce Law, Consumer Protection Law and Commercial Contract Law) and Competition Law is a key component of this framework.
- This backgrounder explains why Competition Law is vital to a market economy and for participation in global trade and investment, compares the proposed Competition Law to international practice and identifies challenges to its implementation.
- More detailed review of the provisions of the proposed Competition Law are provided in the Explanatory Notes.

## II. WHY COMPETITION LAW IS IMPORTANT

### KEY POINTS

- Competition Law and Policy establishes the basic framework for and sets out a level playing field for participation in, a market-based economy.
- Competition Law, a key component of Competition Policy, prohibits certain types of anti-competitive behaviour that would otherwise distort a market and typically establishes the regulator that will enforce Competition Law and promote Competition Policy.
- There are significant benefits of implementing an effective Competition Regime and potential costs of not doing so.
- Establishment of a Competition Regime is an important part of Cambodia’s international obligations and required for effective participation in the regional and global economy

### COMMENTARY

#### A. Market Economy

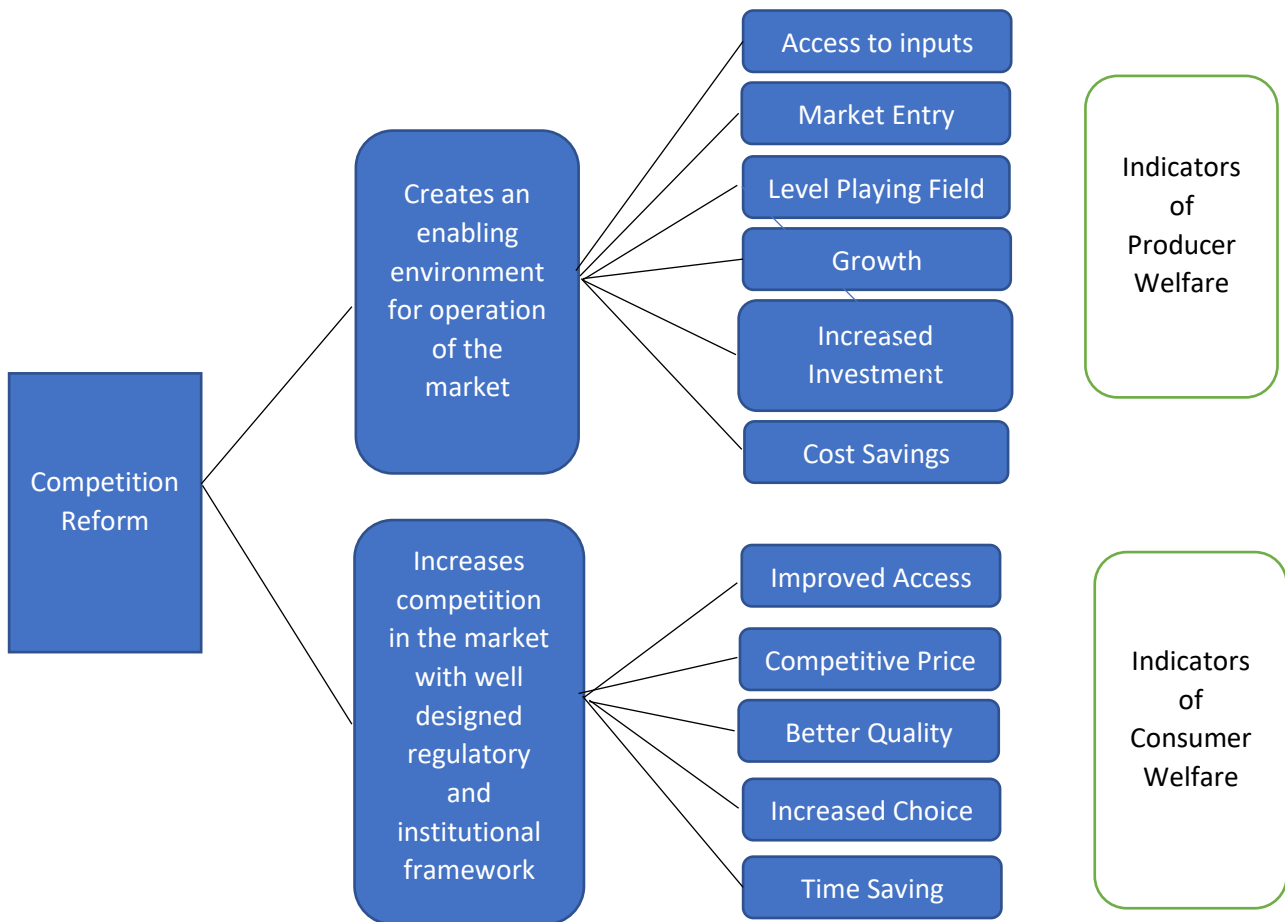
*“Competition puts businesses under constant pressure to offer the best possible range of goods at the best possible prices, because if they don't, consumers have the choice to buy elsewhere. In a free market, business should be a competitive game with consumers as the beneficiaries.”* European Commission Website - [https://ec.europa.eu/competition/consumers/what\\_en.html](https://ec.europa.eu/competition/consumers/what_en.html)

- Article 56 of the Constitution of the Kingdom of Cambodia provides that a market economy will be adopted.
  - There are many definitions of a market economy, but a commonly accepted principle is the requirement that the markets function based on competition among businesses and consumers.
  - Competition is the driving force behind a market economy as it forces firms to greater efficiency, increased investment and innovation and leads to more selection, lower prices and increased quality.
  - Overall, increased competition tends to lead to greater productivity and more efficient resource allocation.
  - Competition Law and Policy are an important part of the Royal Government's efforts to alleviate poverty and create greater job opportunities in Cambodia.
    - Lower prices resulting from increased competition tend to have greater benefit to lower income consumers.
    - Economic growth supported by a well implemented Competition Regime can lead to more innovation, greater competitiveness in exports, and faster GDP growth which is linked to more jobs and opportunities as increased resources available to finance social and other national policies.
    - In South Africa, the World Bank estimated that poverty would decrease by 0.4 percentage eliminating only four Cartels: wheat, maize, poultry and pharmaceuticals.<sup>1</sup>

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<sup>1</sup> Cited on <https://blogs.worldbank.org/psd/competition-and-poverty-how-far-have-we-come-understanding-connections> (last viewed 21 February 2020)

## *Competition Reform Links to Welfare Indicators*



From CUTS Submission to Session III of Global Forum on Competition, 7-8 December 2017

- Promotion, enhancement and protection of the competitive process is one of the key functions of Competition Policy
  - Competition Law and Policy are necessary to identify and correct issues in regulatory frameworks and market processes that may affect the competitive process in a market.
  - Competition Law identifies abuses of market power and actions of market participants that may prevent the proper functioning of competitive markets. Competition Law also creates an enforcement regime to prevent and correct anti-competitive conduct and abuses.

### **B. Competition Policy**

*Art 2.1.1 "Competition policy can be broadly defined as a governmental policy that promotes or maintains the level of competition in markets and includes governmental measures that directly affect the behaviour of enterprises and the structure of industry and markets."*

*Art. 2.1.1.1 The first involves putting in place a set of policies that promote competition in local and national markets, such as introducing an enhanced trade policy, eliminating restrictive trade practices, favouring market entry and exit, reducing*

*unnecessary governmental interventions and putting greater reliance on market forces.*

*Art. 2.1.1.2 The second, known as competition law, comprises legislation, judicial decisions and regulations specifically aimed at preventing anti-competitive business practices, abuse of market power and anti-competitive mergers. It generally focuses on the control of restrictive trade (business) practices (such as anti-competitive agreements and abuse of a dominant position) and anti-competitive mergers and may also include provisions on unfair trade practices.*

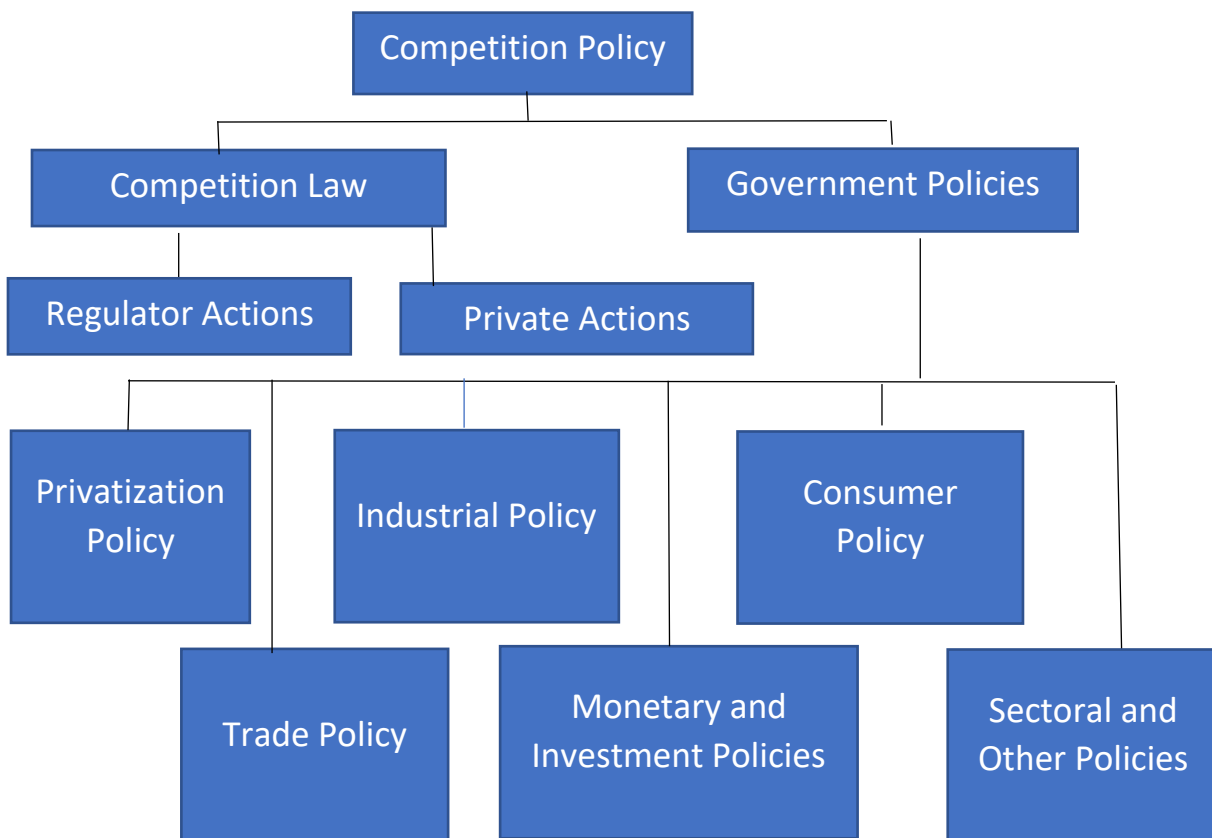
**ASEAN Regional Guidelines on Competition Policy, pg. 3**

- Competition Policy is the larger framework within which the Royal Government of Cambodia will establish, enhance and regulate the Cambodian market economy.
- Competition Policy itself is only one part of the national economic policy that will establish and enforce market-based principles and ensure that the Cambodian economy is effective.
- Competition Policy incorporates all government measures that impact competition including the regulatory environment for business, industrial and trade policy, foreign investment, sectoral regulation, non-trade barriers and promotion/protection of national markets or market participants.
- Competition Policy operates to promote Cambodia's interest in an efficient market economy, but can also be used to protect the competitiveness and participation of specific national interests such as small and medium sized entities. These SMEs, who often make up a large percentage of the private sector, often face greater challenges to compete and grow when challenged by larger national and international competitors that may be in a position to exercise market power or engage in anti-competitive conduct.
- Competition Law is a key element of Competition Policy that normally functions to:
  - Create the framework for the regulator which will promote Competition Policy and enforce the Competition Law;
  - Establish the rules and codes of conduct to create a level playing field for both foreign and domestic small, medium and large entities to compete fairly within the Cambodian market economy.
- The importance of Competition Law can be observed in the actions of Cambodia's neighbours, both Thailand and Vietnam have recently made substantial revisions to their Competition Laws to increase their scope and effectiveness.
  - Other AMS are also revising or considering revisions, such as Malaysia and Indonesia.
- Another important statutory element of this legislative framework is Consumer Protection. Competition Laws often have Consumer Protection or Unfair Trade provisions in them which address non-economic based market distortions.
  - Consumer Protection and Competition Laws are often seen as complimentary regimes that both operate to ultimately promote consumer welfare.
  - In several countries, including other AMS, the Consumer Protection and Competition Laws have the same regulator.

*The ultimate goal of both competition and consumer policies is to enhance consumer well-being. Both policies are directed at ensuring that markets function effectively and at correcting market failures, but approach this goal from different perspectives." The Benefits of Competition Policy for Consumers.*

**UNCTAD Secretariat, 29 April 2014**

## Competition Law and Policy



Based on a presentation "Competition Policy: Definition and Scope" by Dr. M.A. Razaque

### C. Costs and Benefits of a Competition Regime

*"Competition Policy and Law (CPL) is an important tool to promote fair competition and make markets work more efficiently. Effective competition law enforcement can contribute substantially to economic efficiency, economic growth and development, and consumer welfare."*

*Handbook on Competition Policy and Law in ASEAN for Business 2017, page v*

- Competition Laws typically prohibit or regulate the "three pillars" of competition law (anti-competitive agreements, abuses of dominance and anti-competitive economic concentrations) that have effects within the national jurisdiction.
- Competition Law can benefit an economy in several ways; two of the most significant are i) preventing and remedying specific anti-competitive harms and ii) generally enhancing the process and operation of a competitive market economy and making it more effective.
  - Not only does Competition Law clarify the "rules of the game", but effective implementation and enforcement will also discourage anti-competitive behaviours.
- With respect to specific harms, there is substantial evidence that horizontal anti-competitive agreements ("**Cartels**") lead to significantly increased prices with international Cartels often leading to even higher overcharges than domestic ones. There is also evidence and general acceptance that abuses of dominance and anti-competitive economic concentrations will also result in economic harms and costs, but these vary widely on individual case by case basis and, particularly with the latter, are difficult to quantify.<sup>2</sup>

<sup>2</sup> Productivity and Competition : A summary of the evidence. Competition and Markets Authority UK. 9 July 2015

**Some examples of specific harm:**

- the positive impact on consumer welfare generated by a single Cartel decision of the Indonesian competition authority, KPPU, was estimated at approximately \$148 million.<sup>3</sup>
- One study of a large data collection determined that the average extra price charged by Cartels over the period studied was 23%.<sup>4</sup>
- One OECD Report estimated, conservatively, that the global cost of Cartels was many USD billions a year.<sup>5</sup>
- In considering more general benefits to the economy, numerous studies have attempted to estimate the benefit of enacting Competition Law or implementing Competition Policies,

**For example:**

- Empirical findings from various kinds of [pro-competitive] policy changes ... confirm that competition brings about productivity gains, consumer welfare gains, and long-run economic growth.<sup>6</sup>
- Data from 154 states from 1960 to 2007 evidences that the introduction of an antitrust regime has a strongly significant positive effect on economic development and growth.<sup>7</sup>
- Evidence suggests that anti-competitive conduct may cause greater harm in developing economies as the potential welfare harms are greater where the costs of unregulated anti-competitive conduct are largely imposed on a low-income population as even small overcharges will have significant adverse impact on their spending.<sup>8</sup>
- The importance of the protection provided by effective Competition Law is demonstrated in the recent merger of Uber and Grab. Three AMS with active merger regimes (Singapore, Philippines and Vietnam) took action in relation to the merger, one without a merger control regime has acted under its abuse of dominance provisions and the failure to act more directly on the merger has been linked to consideration of incorporating a merger control regime into its Malaysia’s Competition Law. In a number of AMS, competition regulators were able to take measures to ameliorate some of the anti-competitive effects of the transaction despite not being able to prevent it from taking place. Competition officials in the relevant AMS have publicly commented that they had cooperated and consulted amongst each other during the investigation of this economic concentration and discussed issues such as evidence, market definition, theories of harm, etc. This type of cooperation ensures that pan-ASEAN competition concerns can be dealt with more effectively with consistent approaches.

Costs	Benefits
Direct Costs of Regulatory Authority (e.g. administrative)	
Direct Costs of Companies	Direct Benefit to Companies
<ul style="list-style-type: none"> <li>● Compliance Costs</li> <li>● Costs of Specific Proceedings</li> </ul>	<ul style="list-style-type: none"> <li>● Reduction of anti-competitive market practices</li> </ul>

<sup>3</sup> See Kompetisia, Newsletter of Indonesia Competition Law and Policy, Vol. 2/2011 – KPPU Decision for the Interests of Consumers

<sup>4</sup>Conner, J.M. (2004), Price-Fixing Overcharges (Revised 3<sup>rd</sup> Edition)

<sup>5</sup>See OECD (2002), *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes* pgs. 72-6

<sup>6</sup> Competition, Innovation and Productivity Growth: A review of theory and evidence, Sanghoon Ahn, OECD Working Paper 317, 17 Jan, 2002

<sup>7</sup> Antitrust Law and the Promotion of Democracy and Economic Growth Niels Petersen January 2011, pg. 3

<sup>8</sup> Bespoke Competition Policy for Developing Countries Dovile Venskutyte & Maarten Pieter Schinkel University of Amsterdam June 2015



	<ul style="list-style-type: none"> <li>Increased opportunities/lower costs in more efficient markets</li> </ul>
Negative Effects to the Economy	Positive Effects to the Economy
<ul style="list-style-type: none"> <li>Allocative Inefficiency</li> <li>Productive Inefficiency</li> <li>Distortion of incentives (reduced dynamic efficiency/innovation)</li> <li>Reduced Product/Service Quality</li> <li>Restriction on Market Functioning</li> </ul>	<ul style="list-style-type: none"> <li>Allocative Efficiency</li> <li>Productive Efficiency</li> <li>Enhanced Dynamic Efficiencies/Innovation</li> <li>Increased Product/Service Quality</li> <li>Enhanced Market Functioning</li> </ul>
Indirect Regulatory Costs	Indirect Regulatory Benefits
<ul style="list-style-type: none"> <li>Legal Uncertainty</li> <li>Regulatory Capture</li> </ul>	<ul style="list-style-type: none"> <li>Legal Certainty</li> <li>Deterrent Effects</li> <li>Enhanced Functioning of Market Economy</li> <li>Improved Quality of Competition Regime</li> <li>Fulfillment of International Obligations</li> <li>More Attractive Environment for International Trade and Investment</li> </ul>
Social Costs	Social Benefits
<ul style="list-style-type: none"> <li>Distributive Costs</li> <li>Reduced Security/Quality of Supply</li> <li>Negative Effect on Vulnerable Customers</li> </ul>	<ul style="list-style-type: none"> <li>Distributive Benefits</li> <li>Enhanced Security/Quality of Supply</li> <li>Positive Effect on Vulnerable Customers</li> </ul>

Based on <https://www.oxera.com/agenda/the-costs-and-benefits-of-measuring-the-costs-and-benefits-of-competition-policy/>

- Effective Competition Law and Policy can be costly. Direct costs will be incurred in adopting the Competition Law as well as in conducting regular legislative reviews and enacting potential amendments to the Competition Law and other laws and regulations as required to promote effective Competition Policy. Additionally, there may be significant costs to institute, train and operate the competition authorities including developing and maintaining expertise, conducting market and legislative studies, conducting investigations, advocacy activities and more. In the private sector, costs are also imposed on businesses to comply with the Competition Law, including any required notifications under the merger regime, terminating anti-competitive practices and implementing compliance programs.
- However, while there is little direct evidence on this issue, there is a strong suggestion that the direct benefits of implementing Competition Law (in addition to the other more general benefits to the economy discussed above) strongly outweigh these costs:

- the Peruvian competition agency, *Indecopi*, found that, in the first seven years of its operation, its operations generated economic benefits of USD120 million compared to operating costs of USD 20 million.<sup>9</sup>
- one review of the evidence on specific competition interventions in the United States and Netherlands suggested that, considering distributional effects and deadweight loss, the realized benefits of Competition Law enforcement exceeded the total costs by far.<sup>10</sup>

#### **D. International Implications of Enacting Cambodia’s Competition Law**

##### **International Commitments**

- Enactment of the Competition Law will satisfy two important international obligations:
  - Cambodia committed to enact a competition law by 2006 as part of its 2004 negotiated agreements in relation to its WTO accession;<sup>11</sup>
  - All AMS committed to introduce competition policy by 2015 under the ASEAN Economic Blueprint. This was generally interpreted to mean introduction of a Competition Law and 9 of 10 AMS had enacted a Competition Law by the end of that year.
- While ASEAN’s current Free Trade Agreements (“FTA”) have limited competition related obligations, chapters and provisions on Competition Law and Policy are becoming an increasing part of FTAs with 90% of FTAs registered with the WTO containing competition related provisions (up from 60% before 1990).<sup>12</sup>
  - The Regional Comprehensive Economic Partnership which Cambodia is expected to ratify will require parties to maintain Competition Law and regulations that proscribe anti-competitive activities and ensure independent enforcement.

##### **Global Economy/FDI**

- Competition Law is part of the framework of the global economy and global trade with more than 130 countries having enacted competition laws, many in the last 30 years. As noted above, it has become a major part of FTAs.
- Cambodia will be more attractive for regional and international trade and investment with a properly functioning market economy protected by a strong Competition Law as foreign entities will be more confident that they will not be denied opportunities by anti-competitive behaviour of local market participants.

*Competition therefore increases a country's attractiveness as a business location, triggering national and foreign investments. Competition also delivers benefits for consumers through lower prices, improved services and greater choice. In this sense, Competition generates total consumer welfare.*

UNCTAD – Why Competition and Consumer Protection Matter - <https://unctad.org/en/Pages/DITC/CompetitionLaw/why-competition-matters.aspx>

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<sup>9</sup> See Caceres, A (2000), “Indecopi’s first seven years” in Beatriz Boza, ed., *The Role of the State in Competition and IP Policy in Latin America: towards an academic audit of Indecopi*, Lima.

<sup>10</sup> See Hüscherlath, K. (2008), *The costs and benefits of Antitrust Enforcement*

<sup>11</sup> See the Report of the Working Party on the Accession of Cambodia (WT/ACC/KHM/21 15 August 2003).

<sup>12</sup> Competition Policy within the context of Free Trade Agreements, François-Charles Laprévôte, 5 December 2019

- Competition Law provides an important defence against local and international anti-competitive conduct. A World Bank study showed that, in 1997, developing countries imported \$81.1 billion of goods from industries in which international price-fixing Cartels were discovered during the 1990s. These imports represented 6.7 percent of imports and 1.2 percent of GDP in developing countries.<sup>13</sup>
- Supply chains are global, as evidenced by the production problems caused by Covid-19 in China, and it is important that Cambodia ensure that its Competition Regime is enacted and effectively implemented to protect and enhance its place in global and regional trade.

*It is increasingly clear that anti-competitive practices, both domestic and transnational, impair the process of trade expansion of developing countries more significantly than has previously been thought.* Competition Policy for Development: A Report on UNCTAD's Capacity Building and Technical Assistance Programme,

**UNCTAD 2004, pg. 8**

- Many of the most significant competition investigations have international implications which suggest that Cambodia will require an effective regime that is in a position to cooperate and coordinate with competition regulators in other jurisdictions:
  - Conduct may have been committed outside Cambodia that affects markets within Cambodia – e.g. foreign to foreign mergers and international Cartels;
  - Evidence required for a Cambodian investigation may be located in another jurisdiction or vice versa;
  - Cooperation between national regulators might assist or simply provide a harmonized approach on international transactions – e.g. Uber/Grab

### **Focus on ASEAN/Regional Implications**

*For ASEAN to be a competitive region with well-functioning markets, rules on competition will need to be operational and effective. The fundamental goal of competition policy and law is to provide a level playing field for all firms, regardless of ownership. Enforceable competition rules that proscribe anti-competitive activities are an important way to facilitate liberalisation and a unified market and production base, as well as to support the formation of a more competitive and innovative region.*

**ASEAN Economic Blueprint 2025 Art. 26**

- As the ASEAN regional market develops and there are increasing opportunities for regional and global trade and investment, Cambodia will want to ensure that its domestic businesses become efficient and productive through a competitive domestic market economy so that they can effectively compete and do business in other AMS and around the world.
- Robust Competition Law enforcement will protect Cambodian market participants from anti-competitive conduct of foreign companies doing business in or into Cambodia that may have more resources than local market participants and potentially be able to exercise market power.
- The ASEAN Competition Action Plan (2016-2025) contains five strategic goals which are:
  - I. Effective competition regimes are established in all AMS;

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<sup>13</sup>Levenstein, Margaret and Valerie Suslow, *Private International Cartels and Their Effect on Developing Countries* (Background Paper for the World Bank's World Development Report 2001, 9 January 2001)

- II. The capacities of competition-related agencies in AMS are strengthened to effectively implement Competition Law and Policy;
  - III. Regional cooperation arrangements on Competition Law and Policy are in place;
  - IV. Fostering a competition-aware ASEAN region; and
  - V. Moving towards greater harmonization of Competition Law and Policy in ASEAN.
- Enacting and effectively implementing a Competition Law that, as discussed below, is comparable to the Competition Laws of other AMS is an important step towards Cambodia satisfying these goals.
  - It can be expected that competition cases may require cooperation and coordination between AMS competition authorities as well as among other jurisdictions:
    - Evidence gathering may be coordinated between agencies
    - Evidence and analytical approach may be shared – particularly where is an international component to a case
    - Expertise and advice may be sought – for example where another authority has looked at a similar case or sector

*Greater harmonization of competition policy and law in ASEAN is expected to create a seamless policy environment for goods, services and capitals to move around freely and without barriers; while companies could operate and allocate their resources in the most efficient ways possible. It would also contribute to enhancing the transparency and predictability of the investment climate.*

**ASEAN Competition Action Plan (2016-2025) pg. 8**

### **III. CAMBODIA'S COMPETITION LAW IN RELATION TO ASEAN AND INTERNATIONAL PRACTICE**

#### **KEY POINTS**

- There are many forms of Competition Law even within ASEAN, however, there are several provisions which are commonly found within most Competition Laws.
- Cambodia's proposed Competition Law, in terms of its general framework, compares favourably with ASEAN and international practice.
- With respect to the substantive prohibitions, Cambodia's proposed Competition Law largely accords with international practice.
- Penalties and sanctions in competition laws can vary considerably between jurisdictions and may include criminal fines, imprisonment, administrative fines, behavioural remedies, etc. The penalties contemplated within Articles 35, 37 and 38 largely accord with international practices in this regard.
- It is important to remember that Competition Law and Policy are not static but should be evolving to reflect changing market and legal realities and to become more effective. There is no one correct or perfect Competition Law, but commitment to re-evaluating the Competition Law and Policy and amending it to make it more effective is crucial.
  - As noted above, both Vietnam and Thailand have recently made significant changes to their Competition Laws, and other AMS are regularly examining and make more modest changes.

## COMMENTARY

- There is no one internationally accepted standard Competition Law, Competition Law and Policy must be tailored to local economic and legal factors.
- However, there are a number of features that are commonly incorporated into a Competition Law. The ASEAN Regional Guidelines lists 21 elements that may be included (see Section 5.1.3). Other organizations such as UNCTAD and OECD have produced model Competition Laws or other guidance setting out different approaches to common Competition Law issues.
- In a modern Competition Law, one would normally expect to find provisions related to:
  - Scope and Application of Law;
  - Regulatory Authority;
  - Substantive Prohibitions – these commonly include anti-competitive agreements, abuse of dominant market power, anti-competitive economic concentrations and unfair trade practices;
  - Investigative Process;
  - Adjudicative Process;
  - Penalties; and
  - Private Rights
- Attached as Appendix 1 is a detailed table comparing the basic provisions of ASEAN Competition Laws from the ASEAN Secretariat’s Handbook on Competition Policy and Law in ASEAN for Business 2017. The information in the table is based on an earlier draft Cambodian Competition Law which did not fully reflect the current proposed draft (e.g. the current proposed law prohibits anti-competitive mergers and it is contemplated that the Directorate-General of Consumer Protection, Competition, and Fraud Repression be the implementing agency for both Competition Law and Consumer Protection Law). Despite the information being outdated and not fully reflecting the provisions of the proposed Competition Law, the attached table still evidences that even an early draft Cambodian Competition Law compared favourably with its ASEAN enacted counterparts.
- In the below table, the “three pillars” of substantive prohibitions of Competition Law are compared among AMS (based on Cambodia’s current proposed Competition Law).

AMS	Anti-Competitive Agreements	Abuse of Market Power	Anti-Competitive Mergers
Brunei	X	X	X
Cambodia	X	X	X
Indonesia	X	X	X
Laos	X	X	X
Malaysia	X	X	N/A (under consideration)
Myanmar	X	X	X
Philippines	X	X	X
Singapore	X	X	X
Thailand	X	X	X
Vietnam	X	X	X

## **Anti-Competitive Agreements**

*3.2.1. AMSs should consider prohibiting horizontal and vertical agreements between undertakings that prevent, distort or restrict competition in the AMSs' territory, unless otherwise exempted. ASEAN Regional Guidelines on Competition Policy*

- There are several approaches taken internationally to control anti-competitive agreements:
  - Some jurisdictions deal only with horizontal (between competitors) vs. others which control vertical agreements (between entities at different levels of a supply chain) as well;
  - Some jurisdictions have prohibitions that are *per se* (the action is automatically an offense) vs. rule of reason (there must be an anti-competitive object or effect);
  - Some jurisdictions have criminal penalties (including imprisonment) or administrative sanctions or both (e.g. Vietnam now deals with anti-competitive agreements administratively under its Competition Law and criminally under its Penal Code);
  - Some jurisdictions permit exemptions (e.g. for efficiency, national security, etc.); and
  - Some jurisdictions have formal pre-clearance procedures.
- The most common prohibitions are for the four types of horizontal anti-competitive agreements often referred to as “hard-core Cartels” and which are more commonly treated as *per se* offences and subject to criminal penalties (many jurisdictions including the European Community do not impose criminal penalties even on hard-core Cartels) given the general acceptance of their anti-competitive effects. They are:
  - Agreement to fix prices;
  - Agreement to limit outputs;
  - Agreements to allocate or share markets or customers;
  - Bid-rigging.
- Article 7 of the Competition Law prohibits each of the hard-core Cartels based on an effect on competition (although the prohibition on bid-rigging is limited to private procurement) and also provides for the prohibition of non-hard core Cartels on the basis of actual or potential significant anti-competitive object or effect.
- Article 8 of the Competition Law deals with vertical anti-competitive agreements in the following manner:
  - Resale price maintenance is automatically prohibited;
  - Other vertical anti-competitive agreements (including those listed in the Article) are prohibited only where they have an actual or potential significant anti-competitive effect.
- While significant guidance is required on how these provisions will be implemented, at this stage, they generally fall within the scope of international practice on the control of anti-competitive agreements.

## **Abuse of Dominance**

*3.3.1 AMSs should consider prohibiting the abuse of a dominant position. In this chapter,*

*3.3.1.1 “Dominant position” refers to a situation of market power, where an undertaking, either individually or together with other undertakings, is in a position to unilaterally affect the competition parameters in the relevant market for a good(s) or service(s), e.g., able to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels. AMSs may consider whether the*

*competition law should contain a market share threshold test, whether prescriptive or indicative.*

*3.3.1.2 “Abuse” of a dominant position occurs where the dominant enterprise, either individually or together with other undertakings, exploits its dominant position in the relevant market or excludes competitors and harms the competition process. It is prudent to consider the actual or potential impact of the conduct on competition, instead of treating certain conducts by dominant enterprises as automatically abusive.*

#### **ASEAN Regional Guidelines on Competition Policy**

- Abuses of dominant market power are a complicated area of Competition Law and are subject to a variety of approaches both with respect to the determination of market power or dominance and identifying when conduct that may otherwise be non-problematic should be prohibited as abusive.
  - An important concern is to ensure that dominance or market power on its own should not be prohibited, but only when this power is used for anti-competitive purposes or with an anti-competitive effect.
- Article 9 of the Competition Law prohibits certain listed and other conduct by a person with market power if the conduct has or could have a significant anti-competitive effect or object.
- Article 10 of the Competition Law provides a limited exemption if the person can demonstrate that certain criteria are satisfied.
- Article 3(6) defines “Dominant Position” to exist when a person can act without effective competitive constraint in a market.
- While there are a number of clarifications that must be provided by regulation or guidelines (e.g. specifics on the determination of market power), the approach taken under the Competition Law to address abuses of dominant market power generally falls within the scope of international practice.

#### **Anti-Competitive Mergers**

*3.4.1 Mergers constitute, in principle, legitimate commercial transactions between economic operators. However, AMSs may consider prohibiting mergers that lead to a substantial lessening of competition or would significantly impede effective competition in the relevant market or in a substantial part of it, unless otherwise exempted.*

#### **ASEAN Regional Guidelines on Competition Policy**

- Article 11 of the Competition Law prohibits anti-competitive mergers in accordance with common international practice that such mergers be prohibited or regulated.
- However, the details of Cambodia’s merger control regime (e.g. thresholds for prohibition, notification procedures, remedies) are to be dealt with by Sub-Decree and determination by the Competition Commission. It is therefore not possible to comment on how the prohibition will be implemented in comparison to common international practice.

#### **Other Provisions**

- Generally, the proposed Competition Law accords with AMS and/or international practice in terms of form and approach as applied to the Cambodian legal and economic perspective.
  - More specifically, it generally provides for the basic elements outlined above.
  - While there is no right of private action in the proposed Competition Law, it is notable that compensation to identified victims is contemplated.

- One would expect the Competition Law to be reviewed as part of the ongoing application of Competition Policy to ensure that it remains effective in protecting and promoting Cambodia’s market economy.

**For example:**

- Both Vietnam and Thailand have recently significantly amended their Competition Laws, Malaysia is considering adding merger control, Indonesia has made or is considering amendments to its merger regime and cartel enforcement, Philippines regularly reviews its merger review thresholds and is now considering amendments to its regulator’s powers, etc.

**IV. CHALLENGES FOR COMPETITION POLICY IN ASEAN**

- There are many challenges commonly identified for effective implementation of Competition Law and Policy, particularly in ASEAN, including:
  - Lack of competition culture, judicial systems, lack of economic and business data, regulatory environment, prioritization of competition policy, need to develop national champions and protected sectors, resources constraints, lack of expertise, established business interests and more.
- There are no easy or quick solutions, but there are several strategies to overcome these challenges. A key issue is government commitment to promote Competition Policy (the importance of this is discussed above). Common strategies to address these challenges include:
  - Advocacy to promote competition culture and educate private and public stakeholders of their rights and responsibilities;
  - Government Support for the promotion of Competition Law and Policy throughout the economy - this goes beyond financial support to include issues such as:
    - ensuring Competition Law and Policy are applied in an unbiased manner to demonstrate Cambodia’s commitment to a properly functioning market economy to local and international market participants and stakeholders, trading partners and investors and
    - ensuring that other laws and regulations are enacted, revised and implemented in accordance with Competition Law and Policy, including necessary coordination with sectoral regulators.
  - Training and development (e.g. capacity building) in Competition Law and Policy at various levels including the competition regulator, sectoral regulators, judiciary, legislators, et al.
  - Staggering Implementation of the Competition Law to ensure there is a suitable period with no enforcement in which the regulator can focus on advocacy and education, followed by selective enforcement in a manner which allows the regulator to develop capacity and experience and for market participants to change their behaviours to accord with the Competition Law.
    - For example, in some jurisdictions, after a period where advocacy is the focus, the prohibitions against Cartels are implemented first as they generally require less sophisticated economics and analysis. After a reasonable period in which the capacity of the regulator is enhanced, the prohibitions against abuse of dominance and anti-competitive mergers are enforced.
- ASEAN and International assistance can make overcoming a number of these challenges quicker, more efficient and less costly with transfers of knowledge, best practices, experience,



expertise and other resources as well as cooperation between regulators to assist in ongoing investigations and enforcement issues.

*Increasingly, many competition problems have a cross border component. Companies and supply chains are international, while competition laws and enforcement agencies are primarily national. Individual countries have struggled to address anticompetitive practices at the international level, which requires regional and global collaboration to set and enforce competition rules.*

**UNCTAD – Why Competition and Consumer Protection Matter**

<https://unctad.org/en/Pages/DITC/CompetitionLaw/why-competition-matters.aspx>

## **V. CONCLUSION**

- Competition Law is an essential tool to protect, promote and grow a market economy.
- Effective Competition Law and Policy are generally linked to lower prices, more efficiency, more innovation, increase in GDP, FDI and trade and reduction in poverty.
- Cambodia is subject to several international commitments to implement a Competition Law and there are likely to be more.
- Cambodia's participation in the global economy – both in trade and investment – will benefit from a well implemented Competition Law and Policy.
- There is no single correct form of Competition Law; the proposed Competition Law is generally in accordance with regional and international practice.
- In order to effectively implement Competition Law and Policy, the Royal Government of Cambodia must ensure that it is properly supported, including both human, financial and political investments.

APPENDIX 1 – Comparison of ASEAN Competition Laws