

## **CONTRIBUTION OF ASEAN TOWARDS THE GROWTH OF COMPETITION LAW DEVELOPMENT IN MALAYSIA**

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### **ABSTRACT**

Malaysia, which is one of the ASEAN member countries, has announced its national competition legislation, known as the Competition Act in 2010 which came into effect in 2012. The introduction of the Malaysian national legislation on competition reflects the aim of the ASEAN leaders to encourage ASEAN Member States to introduce their domestic competition law by 2015, to enable ASEAN to become a competitive region. In order to achieve that purpose, efforts have been done at the regional level to assist member countries in moulding their domestic competition law such as establishing the ASEAN Experts Group on Competition and issuing ASEAN Guidelines on Competition Policy. This is to ensure that member countries adopt at least a consistent set of competition rules for effective implementation of the competition law in the region. Hence, this paper seeks to identify assistance extended to the ASEAN member country, particularly Malaysia at the regional level for the purpose of implementing competition law. In addition to that, this paper will analyse to what extent Malaysia has responded towards the recommendations suggested by the ASEAN. This study is a qualitative research and analyses data using content and critical analysis. The result of this study indicates that ASEAN has contributed in shaping the legislative framework of competition law in Malaysia.

**Keywords:** Malaysia; ASEAN, AEC Blueprint 2015; AEC Blueprint 2025; ASEAN Regional Guidelines.

### **INTRODUCTION**

The Association of Southeast Asian Nation (ASEAN) is a regional grouping of sovereign states comprises of Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei, Vietnam, Cambodia, Laos and Myanmar. The formation of ASEAN was as a result of Bangkok Declaration signed in 1967 which among others seek to accelerate the economic growth, social progress and cultural development throughout the region, promote regional peace and stability as well as collaboration and mutual assistance among the member states. For the purpose of transforming ASEAN into a region which is highly competitive, the ASEAN leaders agreed to the formation of ASEAN Economic Community (AEC) which shall be the goal of regional economic integration by 2020. This was agreed during the ASEAN Economic Ministers Meeting (AEM) held in August 2006 in Kuala Lumpur, Malaysia. Amongst the aims of the AEC are to establish a single regional market in order to drive ASEAN to be more

dynamic and competitive. The AEC resembles the following features which are (a) a single market and production base, (b) a highly competitive economic region, (c) a region of equitable economic development, and (d) a region fully integrated into the global economy. For that purpose, the ASEAN Economic Ministers develop a blueprint known as the ASEAN Economic Community Blueprint 2015 (AEC Blueprint 2015) which identifies the characteristics and elements of the AEC by 2015. Some of the core areas highlighted by the AEC 2015 especially in matters relating to competition have been achieved by most ASEAN member countries. Hence, the ASEAN Economic Community Blueprint 2025 (AEC Blueprint 2025) was adopted during the 27<sup>th</sup> ASEAN Summit which took place in Kuala Lumpur, Malaysia on the 22 November 2015. The AEC Blueprint 2025 succeeded the AEC Blueprint 2015 and remains relevant until now. It is against these background that the competition law and policy has become one of the AEC agenda which will be further discuss below.

## **RESEARCH MATERIALS AND METHODOLOGY**

This article is based on a legal study which is qualitative in nature. Research methodology employed by this study is library research and the materials used in this study includes the AEC Blueprint 2015, AEC Blueprint 2025, the ASEAN Regional Guidelines on Competition Policy (Regional Guidelines), the Malaysia Competition Commission Act 2010 and Competition Act 2010. Content and critical analysis were performed on all materials in determining the assistance extended by the ASEAN towards the growth of competition law in Malaysia.

## **CONTRIBUTION OF ASEAN ON THE DEVELOPMENT OF COMPETITION LAW AND POLICY IN THE REGION**

The following are efforts of ASEAN in relation to competition law and policy development in the ASEAN region.

### **AEC Blueprint 2015**

ASEAN initiative on the development of competition law and policy can be traced from the AEC Blueprint in which Malaysia is one of the signatory of the Declaration on the ASEAN Economic Community Blueprint signed in 2007. The aim to become one of the competitive economic region led the ASEAN Economic Blueprint 2015 to develop a comprehensive structure of competition law and policy among ASEAN Member States. The AEC Blueprint 2015 acknowledges that while laws related to competition policy have been established, some ASEAN member states are yet to introduce their domestic legislations on competition. The table below indicates the presence of competition law among ASEAN member states.

Table 1 Domestic competition law in ASEAN member states

ASEAN Member States	Competition Law	Name of Competition Legislations
Singapore	Yes	Competition Act 2004
Malaysia	Yes	Competition Act 2010
Cambodia	No	No
Thailand	Yes	Trade Competition Act 1999
Philippines	Yes	Philippines Competition Act
Indonesia	Yes	Law No. 5 of 1999
Vietnam	Yes	Law on Competition 2004
Laos	Yes	Law on Business Competition (No. 60/NA)
Myanmar	Yes	60/NA)
Brunei Darussalam	Yes	The Pyidaungsu Hluttaw Law No. 9 /2015 Brunei Competition Order 2015

Laos and Brunei introduced their competition law in 2015 while Cambodia is the only ASEAN member which is yet to pass its competition law.

### **AEC Blueprint 2025**

The AEC Blueprint 2025 was adopted on the 22 November 2015 during the 27<sup>th</sup> ASEAN Summit. The AEC Blueprint 2025 aims among others to build a cohesive ASEAN economy and work towards a common aim and increase ASEAN's role and voice at international economic level. In matters relating to competition, the AEC 2025 emphasized the need to have effective rules on competition in order to enable ASEAN to be a competitive region. For that purpose, the AEC Blueprint 2025 provides strategic measures, some of which are; to establish and implement domestic competition law, cultivating competition law awareness in the region and harmonising competition policy and law in the region.

### **ASEAN Experts Group on Competition (AEGC)**

ASEAN Experts Group on Competition (AEGC) was established in 2007 endorsed by the ASEAN Ministers during The Thirty-Ninth ASEAN Economic Ministers' (AEM) Meeting in Makati City, Philippines, 24 August 2007. The prime objective is to promote exchange of information, experience and cooperation on competition policy in the region. It functions as a regional forum for discussion among ASEAN member states on matters relating to competition law, identifying best practices in competition law among ASEAN member states and to assist them in strengthening them through various advocacy programs. AEGC also successfully produces ASEAN Regional Guidelines on Competition Policy which seeks to provide non-binding guidance in facilitating ASEAN member states to develop their national

competition laws and a Handbook on Competition Policies and Laws in ASEAN for Businesses during the 42nd ASEAN Economic Ministers meeting in Vietnam in 2010.

### **Handbook on Competition Policies and Laws in ASEAN for Businesses**

The Handbook on Competition Policies and Laws in ASEAN for Businesses was launched on 24 August 2010 at the 42nd ASEAN Economic Ministers Meeting which aim to provide basic competition rules applicable in ASEAN Member States. The Handbook on Competition Policies and Laws in ASEAN for Businesses is designed in a simple language which is understandable especially for businessman and non-legal experts. Some of the information laid down in the Handbook on Competition Policies and Laws in ASEAN for Businesses includes the scope of competition law, prohibitions under the competition law namely, participating in anti-competitive agreement, abuse of dominant position and mergers, and procedures attached to the implementation of competition law in ASEAN Member States.

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

The Regional Guidelines was established in response of the ASEAN Economic Ministers Meeting in 2007. The basic aims of the Regional Guidelines is to provide set of rules relating to the competition law best practices based on country experiences. The main aim of the Regional Guidelines is to provide a general framework to the ASEAN Member States to establish and implement competition policy based on their legal and economic background. There is no binding commitments on the ASEAN member States and it only serves as a reference for ASEAN Member States in building its domestic competition policy. The Regional Guidelines considers staggered implementation of competition law by the ASEAN member States when it provides that “*the AMSs may consider implementing competition law in phases*” under paragraph 5.3 of the Regional Guidelines. The discussion below attempts to highlight core areas recommended by the Regional Guidelines to the ASEAN Member States in establishing their domestic competition policy.

#### ***The Aim and Objectives of Competition Policy***

According to paragraph 2.1.1, competition policy relates to “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.” The competition policy is made of set of policies aims at promoting competition in the market and the competition itself. The Regional Guidelines mentions that the “*promotion and protection of competitive process*” are the most common objective of the

competition policy which may lead to economic efficiency, economic growth and consumer welfare.

### ***The Competition Regulator***

The Regional Guideline highlights the importance of establishing competition regulating body in order to achieve the objectives of the competition policy. Hence, by virtue of Chapter 4 of the Regional Guidelines, it provides recommendations relating to the setting up of competition regulatory body. The Regional Guidelines recommends five core areas to be mandated to the competition regulatory body which are, enforcement of competition law, advocacy, advices and explains on the competition policy and law as well as acting as representatives of the country in competition matters.

### ***Legislations on Competition Law***

The Regional Guidelines specifies ways in which competition policy may be implemented, namely via legislations and soft law. The existence of specific legislation relating to competition law may contain broad provisions, which may include among others provisions relating to the extent of coverage of the competition legislation, prohibited acts under the competition law, exemptions and exclusions, functions and powers of the completion regulatory body, appeal process and procedures relating to finding of infringement and non-infringement. Paragraph 3.6 of the Regional Guidelines strongly encourages the ASEAN Member States to issue guidelines so that it can guide entrepreneurs in their daily business practices.

### ***Advocacy Programmes***

The Regional Guidelines encourages advocacy and outreach programme to educate the public especially business players to comply with competition rules. Examples given are via electronic media, websites and publication of articles and pamphlets. Other options are through programmes organized by the competition authority such as competition compliance programme in order to raise awareness and create competition environment among enterprises.

### ***Other Related Areas for Consideration***

There are other related areas for consideration by the ASEAN Member States in building up their own domestic competition law such as technical assistance and international cooperation. The Regional Guidelines also encourage capacity building via “*direct recruitment, procurement and organizational learning.*” In addition, the Regional Guidelines promotes international cooperation, which can be achieved by way of cooperation between regulatory

bodies and inclusion of common competition related provisions in free trade agreements.

## **ESTABLISHMENT OF COMPETITION LAW AND POLICY IN ASEAN: MALAYSIA EXPERIENCE**

The competition regulation in Malaysia was initially regulated by sectors which are the energy and the communication sector. The provisions relating to competition rules are incorporated in their respective legislations, indicating prohibitions relating to anti-competitive practices. For example, the Communications and Multimedia Act 1998 in section 133 prohibits a licensee from *“engaging in any conduct which has the purpose of substantially lessening competition in a communications market”* while Section 135 Communications and Multimedia Act 1998, prohibits a licensee from entering into any understanding, agreement or arrangement which provides for rate fixing, market sharing, boycott of a supplier of apparatus or boycott of another competitor. On the other hand, the energy sector provides a general provision relating to competition which can be seen in Section 14(1) (h) of the Energy Commission Act 2001. Section 14(1) (h) of the Energy Commission Act 2001 gives power to the Energy Commission to *“promote and safeguard competition and fair and efficient market conduct or, in the absence of a competitive market, to prevent the misuse of monopoly or market power in respect of the generation, production, transmission, distribution and supply of electricity and the supply of gas through pipelines.”* It is pertinent to note that, although competition law has been regulated by the abovementioned sectors, yet it does not cover other kinds of commercial activities.

As such, this event led the Malaysian government to introduce a national competition legislation covering commercial activities in the business market. Hence, a Bill known as Fair Trade Practices Bill was introduced and approved on the 26<sup>th</sup> October 2005 in the Parliament, the purpose of which is to accommodate the growth of trade and business and encourage fair competition in business. The Fair Trade Policy seeks to accomplish several policy objectives which, among others include; to promote and protect market competition, produce active and competitive entrepreneurs, create fair and competitive market prospects as well as to hinder anti-competitive practices inside and coming from outside of Malaysia that affects domestic market and to prevent unjust trade practices

### **Establishment of the Malaysia Competition Commission (MyCC) as the Competition Regulator in Malaysia**

The MyCC is an independent body corporate established by the Competition Commission Act 2010. The MyCC is an agency placed under the Ministry of Domestic Trade, Co-operatives and Consumerism whose function is to enforce provisions contained in the Competition Act 2010. The chairperson of the MyCC is YB Tuan Che Mohamad Zulkifly Jusoh. Apart from the Chairperson, the MyCC consists of a Chairman, four representatives from the government and three to five members made up of those knowledgeable in

commerce. Some of the key areas in which the MyCC is given power to act includes enforcement of competition law by way of imposing penalty for infringement of the provisions of the competition laws, to raise awareness programmes among public concerning competition law, advices and alert the Minister in matters relevant to competition law such as when dealing with international agreements, to carry out studies in relation to issues relevant for competition law in Malaysia as well as to act as an advocate for competition matters.

Competition advocacy is placed under the responsibility of the MyCC. According to Section 16(i) of the Competition Commission Act 2010, it expressly indicates that one of the important functions of the MyCC is to raise awareness among the public relating to competition law. In addition to that, the MyCC is also responsible to inform and educate the public relating to the ways in which competition may benefit consumers and Malaysia economy. Some of the instances in which MyCC organizes competition awareness seminars includes the “1<sup>st</sup> MyCC Competition Law Conference New Standards for Business in Malaysia” which was held in 2013 at Kuala Lumpur Convention Centre and participated by the members of the public. Apart from that, competition compliance programmes for government officers, public bodies and government link companies (GLC) have been held throughout the year for the purpose of educating and raising awareness among the public on the importance of complying with the competition rules.

### **Competition Commission Act 2010, Competition Act 2010 and its Relevant Guidelines**

The Competition Commission Act 2010 provides provisions relating to the establishments of the MyCC, provisions relating to its powers and functions as well as other matters connected therewith. There are altogether 47 sections under the Competition Commission Act 2010 separated by six parts. Part I explain the terms used in the Competition Commission Act 2010 while Part II elaborates on the establishment of the MyCC. In relation to functions and powers of the MyCC, these are mainly discussed under Part III of the Competition Commission Act 2010 while Part IV provides provision relating to employees of the MyCC. The financial aspect of the MyCC is provided by Part V of the Competition Commission Act 2010 followed by Part VI of the Competition Commission Act 2010 which provides on general matters.

On the other hand, the Competition Act 2010 contains extensive provisions than the Competition Commission Act 2010. This is mainly due to the fact that the Competition Act 2010 aims to promote economic development and to protect the interests of the consumers. It further provides that in order to promote economic growth, the process of competition is to be protected because the process of competition encourages efficiency, innovation and entrepreneurship which in turn promotes competitive prices, improvement in the quality of products and services as well as serving wider choices for consumers. The Competition Act 2010 consists of 67 sections divided into six parts. Part I of the Competition Act 2010 mainly provides explanation relating

to the application of the Competition Act 2010 as well as interpretation of the terms contained in the Competition Act 2010. Prohibited conducts in relation to competition law are dealt with under Part II of the Competition Act 2010 which is further divided into four chapters. Chapter 1 and 2 of Part of the Competition Act 2010 focus on two main prohibited conducts, namely participating in anti-competitive agreement and abuse of dominant position. The remaining chapters discuss on market review and matters excluded from the application of the Competition Act 2010. In matters relating to the enforcement of the provisions contained in the Competition Act 2010, Part III of the Competition Act 2010 explains the procedures adopted by the MyCC in executing its investigation and enforcement of powers. In addition to that, the Competition Act 2010 also explains the manners in which decision will be delivered by the MyCC for instance, especially in determining infringement or non-infringement matters. These are particularly discuss by the Competition Act 2010 under Part IV.

In the event that any aggrieved party disagrees with decisions delivered by the MyCC, such party may appeal to an appeal tribunal known as Competition Appeal Tribunal. The establishment, compositions and manners in which the Competition Tribunal operates are provided under Part V of the Competition Act 2010. The final part of the Competition Act 2010 which is Part IV elaborates on general matters such as penalty and compounding offences, offences committed by body corporate, rights of private action, power to make regulations and issue guidelines as well as provision relating to Public Authorities Protection Act 1948. For the purpose of assisting the MyCC in implementing provisions contained under the Competition Act 2010, several guidelines have been issued by the MyCC in accordance with the functions and powers vested to the MyCC under Section 16(e) of the Competition Commission Act 2010 and Section 66 of the Competition Act 2010. The guidelines issued by the MyCC are Guidelines on Leniency Regime, Guidelines on Financial Penalties, Guidelines on the Market Definition, Guidelines on Complaints Procedures, Guidelines on Abuse of Dominant Position and Guidelines on Anti-Competitive Agreement.

## **CONCLUSION**

The discussion above indicates that the Malaysian government adopts most of the recommendations set by the Regional Guidelines especially the core areas highlighted by the Regional Guidelines such as the establishment of the competition regulatory body, legislations on competition policy and competition advocacy. Despite the fact that the rules contained in the Regional Guidelines are non-binding, implying that competition law may be pursued by ASEAN Member States including Malaysia based on their own interest due to its non-binding nature, ASEAN has shaped the framework of competition law and policy in ASEAN member States generally and in Malaysia particularly.

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Scope: Governance and Social Development