CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
August 2015 (1)

The Ongoing Development of Competition Law in Cambodia

David Fruitman
DFDL

The Ongoing Development of Competition Law in Cambodia

David Fruitman[1]

I. INTRODUCTION

When asked to contribute to this publication, while honored, I was quite nervous about having been given responsibility to describe developments in one of ASEAN's last competition law holdouts. While the Royal Government of Cambodia has committed on numerous occasions to meeting its ASEAN commitments in this area and significant resources, efforts, and expertise has been applied, thus far, the development of competition law in Cambodia has not produced the sought after results.

This article will first review the modern history of the development of competition law in Cambodia and outline some of the motivating and guiding influences. While my original brief for this article suggested an extensive description of the current legislation, as there is no enacted competition law or publicly circulated "final" draft, this article will focus on the key features of the last publicly circulated draft legislation. Where possible, the article will also note comments made by government officials in relation to that draft. Unfortunately, from a timing perspective, I was recently informed that the most recent draft will soon be made publicly available, but I suspect this will happen well after the deadline for this article. Finally, the article will look ahead and try to provide some perspective on the potential impact of competition law in Cambodia once implemented.

II. HISTORY OF COMPETITION LAW IN CAMBODIA

The development of competition law in Cambodia predates both Cambodia's commitments under the ASEAN Economic Community Blueprint and even its World Trade Organization ("WTO") Accession obligations. While some refer as far back as Article 56 of the 1993 Constitution of the Kingdom of Cambodia, which provides for the adoption of a market economy determined by law, as the motivating factor behind the development of completion law in Cambodia it seems more appropriate to link ongoing development efforts to more recent international sources. The first comprehensive competition law draft of which I am aware was prepared with the assistance of international experts from Korea in 2001-2002. While this legislation was not enacted, the Government did pass legislation around that time that often seems to arise when competition law matters are considered in Cambodia. Article 22 of the Law Concerning Marks, Trade Names and Acts of Unfair Competition in February, 2002 (with the Sub-Decree on Implementation passed in July, 2006)[2] ("Trademark Law") provides as follows:

> Any act of competition contrary to honest practices in industrial, commercial, service matters shall be considered as act of unfair competition.

[1] Regional Competition Counsel/Senior Advisor, DFDL, based in Cambodia.

[2] Royal Decree № NS/RKM/0202/06 (Feb. 07, 2002).

Article 23 of the Trademark Law goes on to list certain acts that "in particular shall be deemed to constitute acts of unfair competition." These activities focus on what we would commonly consider deceptive marketing practices or misleading representations. Given the lack of clarity under Cambodian law in relation to the scope of application of Article 22 of the Trademark Law, this Article has regularly been cited in relation to competition-related issues arising in Cambodia as it is not clear that it will be restricted to these specific forms of unfair trade practices. To my knowledge, there has been no judicial or regulatory application of this Article that provides guidance as to whether it would apply to more general competition concerns.

Moving ahead a few years, the next significant effort to enact a competition law in Cambodia derives from its accession in October 2004 to the WTO. As part of its accession, Cambodia committed to enacting a competition law by 2006.[3] By 2005, the European Union ("EU") and the United Nations Conference on Trade and Development ("UNCTAD") were both providing support for this endeavor with various studies as well as meetings with government and stakeholders. The Ministry of Commerce ("MOC") established a Working Group on Competition Law and Policy in 2005 with representatives from relevant Ministries and the Council of Ministers. As an outside observer at the time, it appeared that Cambodia was moving forward to meet its WTO Accession commitment.

In 2006, with technical assistance from UNCTAD, a competition law was drafted and an English version was circulated. As stated recently by a government official, this draft was written in plain language to be more easily understood by stakeholders at the time who had limited experience with competition law issues. The English language version of the draft included explanatory notes and addressed economic concentrations, abuse of dominance and various forms of co-ordinated behavior. This draft raised a number of concerns including:

- potentially excluding significant industries from the general competition regime (e.g. telecommunications, banking, agriculture);
- incorporating general commercial issues into the competition law (e.g. mandatory invoicing of all commercial transactions); and
- not explicitly dealing with substantive aspects of the competition regime (e.g. determination of a dominant position).

While there was a public consultative process in relation to this draft, and the Cambodian government announced intentions to enact a competition law, in 2010, it formally announced that there would be a delay.

Perhaps the most important external motivating force on the development of competition law in Cambodia has proven to be the ASEAN Economic Community ("AEC"). In 2003, the ASEAN Member Countries had agreed to establish the ASEAN Community, including the AEC, by 2020. After witnessing rapid changes in the global trading environment, in 2007 the ASEAN Member Countries committed to accelerating the establishment of the AEC to 2015 and, to that effect, adopted the AEC Blueprint. Article 41 of the AEC Blueprint states:

[3] *See* the Report of the Working Party on the Accession of Cambodia (WT/ACC/KHM/21 15 August 2003).

> The main objective of the competition policy is to foster a culture of fair competition. Institutions and laws related to competition policy have recently been established in some (but not all) ASEAN Member Countries (AMCs) (ed: Footnote omitted). There is currently no official ASEAN body for cooperative work on CPL to serve as a network for competition agencies or relevant bodies to exchange policy experiences and institutional norms on CPL.
>
> *Actions:*
>
> *i. Endeavour to introduce competition policy in all AMC by 2015;*
>
> *ii. Establish a network of authorities or agencies responsible for competition policy to serve as a forum for discussing and coordinating competition policies;*
>
> *iii. Encourage capacity building programmes/activities for AMC in developing national competition policy; and*
>
> *iv. Develop a regional guideline on competition policy by 2010, based on country experiences and international best practices with the view to creating a fair competition environment.*

While the debate of what Article 41 actually requires is beyond the scope of this article, given the recent legislative initiatives in Brunei, Laos, Myanmar, and the Philippines, it appears that there is a consensus among ASEAN Member Countries that the AEC Blueprint requires the enactment of a generally applicable competition law. To my understanding, subsequent to the UNCTAD initiatives in this area, numerous international sources provided offers of assistance to Cambodia to assist in the development of this legislation. The Asian Development Bank ("ADB") began the process of assisting the Cambodian government with drafting a competition law in 2009. The ADB started with a blank slate, but over the course of this project, the draft legislation was extensively revised. While it appears that the ADB may no longer have been actively involved at the time, the Cambodian government appeared to be focusing on that draft in its further work on the competition law. In mid-2013, public announcements were made in regards to the potential inclusion of a leniency policy. In later 2013/early 2014, a draft competition law labeled Version 4.8 was released to stakeholders for public comments.

In January 2015, with assistance from the AANZFTA Competition Law Implementation Programme, a seminar was organized by the MOC to provide further background on competition law concerns and provide an update on the current status of the draft competition law. At this event, it was confirmed that the government had reviewed the comments received in relation to Version 4. It was noted that the current version at that time, which was identified as Version 5.3, was based more on the ASEAN Guidelines on Competition Policy and Law and reflected the numerous consultation processes. At that time, on inquiring about obtaining a copy of the most recent draft, I was informed that it was not yet ready for public dissemination. More recently, I was told that the MOC was waiting for authorization from the Council of Ministers to circulate the most recent draft legislation.

The Cambodian government has stated that it expects to enact a competition law in compliance with its AEC commitments, which may be interpreted as by enactment by the end of 2015. That being said, once the current draft has been finalized, it will still be required to be approved by the Council of Ministers, adopted by the National Assembly and Senate, and then promulgated by the King. It is not clear how long this enactment process will take and, it is

expected that implementing legislation as well as regulations expanding on various provisions of the competition law will be required in order to fully implement the enacted competition law. Essentially, while there is no reason to doubt that the Cambodian government will be able to enact a general competition law in 2015, it is not clear when this law will be fully implemented and effective.

III. THE DRAFT LEGISLATION

As noted above, one of the mandates for this article was to describe the existing or pending competition law; however, since, at the time of writing, neither Version 5.3 nor any later version of the draft legislation has been publicly circulated, with apologies, the descriptions below are based on Version 4.8. While it is expected that at least some of these descriptions are already out of date, as this is, to my knowledge, the last publicly circulated draft, it will provide some context with respect to the proposed legislation. Where the Cambodian government has suggested issues arising in Version 4.8 are being addressed, note of this will be made.

A. Scope

Article 3 of Version 4.8 sets out the scope of the proposed competition law to incorporate an effects test based on actual harm to competition in Cambodia that explicitly contemplates application of the law to conduct that may originate outside of the Kingdom of Cambodia. In addition, the law is intended to apply broadly to any person conducting a business including Public Utilities and those in government monopoly sectors subject to certain listed exceptions. Despite this restriction of application to businesses, as noted below, Version 4.8 also contains provisions specifically applicable to public authorities that regulate business conduct.

B. Relevant Definitions

Article 4 of Version 4.8 sets out a number of definitions used throughout the competition law. For these purposes three of the most pertinent are:

- Dominant position means a situation of market power, where a business, either individually or together with other business operators, is in a position to unilaterally affect the competition parameters in the relevant market for a good(s) or service(s).
    - Supplementing this definition, Article 17 sets out specific market share thresholds that deem a business to be dominant where its market share is:
        - 50 percent or greater;
        - 35-49 percent unless the business can prove that it does not have market power; or
        - less than 35 percent if the business has market power.
    - Article 17 also deems joint dominance to exist where two to four businesses act together to restrain competition and have a combined market share of 75 percent or greater.
- Market Power means the power of a business to control prices, or to exclude competition, or to behave to an appreciable extent independently of its competitors, customers, or suppliers.

- Public Utility means a business operator providing services of general economic interest that provide essential services to the public, and that are subject to regulation by any level of Government in Cambodia.

C. Regulatory Authorities

Version 4.8 contemplates two regulatory bodies—the Competition Commission and the Directorate. The Commission is contemplated as being initially composed of five representatives of various Ministries and the Council of Ministers and four members appointed by the Prime Minister based on the recommendation of the Minister of Commerce (each of the latter to possess relevant qualifications). After five years, Article 6 provides that all nine members would be directly appointed by the Prime Minister based on the Minister of Commerce's recommendations.

Under Article 9, the Commission is tasked with issuing decisions and orders against violators of the competition law, including imposing fines and non-criminal sanctions; issuing regulations; conducting competition studies; supervising the Directorate; and exercising other powers related to promoting competition in Cambodia. One power delegated to the Commission in Version 4.8 that seems somewhat unusual is the power to establish rules concerning the Commissioners' conflict of interest.

While more specific procedures related to the Commission will be outlined below, it is interesting to note that Version 4.8 provides that the Commission's meetings will be private although all of its final actions will be made public.

Much of the Version 4.8's implementation appears to be left to the Commission's regulation issuing power including defining terms; determining rights and obligations of parties participating in hearings; establishing criteria for remedies and sanctions; and, perhaps most importantly, implementing a merger regime including establishing the criteria for determining what mergers are permitted and a merger notification regime (which may also include notification fees as determined by the Commission).

Version 4.8 contemplates the Directorate as having two distinct tranches of authority. A Director-General for Investigation and Enforcement is to be appointed by the Prime Minister with responsibility for all investigative and enforcement provisions of the competition law and also to represent the Commission in court; a Director-General for Dispute Resolution is to be appointed by the Commission and be responsible for all dispute resolution functions of the Directorate. Many of the details in relation to the organization and functioning of the Directorate are left to sub-decree.

In addition to conducting competition and other relevant studies, a power assigned to the Directorate that may prove important is to draft advisory opinions on the application of the competition law to specific business practices or regulatory measures if it is determined that such an opinion would be in the public interest. After review of a proposed advisory opinion, the Director-General for Investigation and Enforcement would have the power to reject it, issue it as a non-binding staff opinion, or forward it to the Commission with a recommendation that it be issued as a formal opinion. In the latter case, it is not clear on whether this opinion would therefore bind the Commission and be effective as a general statement of the application of

competition law in Cambodia and, if so, how this opinion might be revised over time if market circumstances evolve such that the opinion is no longer appropriate.

Based on recent statements of government officials, it seems that the independence of the regulator is still being considered in more recent drafts of the competition law with the principal options being an independent regulatory authority or direct supervision of the regulator by the MOC. On a practical basis, in the context of the Cambodian economy and political structure, it is hard to predict what the implications of these different models will be on the effective implementation of the competition law.

D. Prohibited Activities

1. Horizontal Agreements

Version 4.8 addresses horizontal agreements in two ways; under Article 15, businesses in a horizontal relationship are prohibited from engaging in specified conduct such as agreeing to:

- directly or indirectly fix the prices, or limit quantities or types, of goods or services,
- limit technological development,
- allocate exclusive rights to sell within designated territories or to designated customers, or
- exclude businesses that are not parties to the agreement from any market.

In contrast, Article 16 provides a more general prohibition against any other agreement between businesses in a horizontal relationship if such agreement significantly prevents, restricts, or distorts competition unless the parties can prove that the resulting pro-competitive gains outweigh any anticompetitive effects.

Version 4.8 provides a number of exemptions to the provisions of Article 15 based on the nature of the coordinated behavior including:

- adopting voluntary health, safety, or compatibility standards;
- non-competition agreements between buyers and sellers of a business;
- joint purchasing, production, or marketing where the parties to the agreement can demonstrate that these activities will not significantly reduce competition; and
- joint research if the parties to the agreement can demonstrate that they lack access to capital to conduct research individually and each party may separately market any products resulting from the research.

2. Abuse of a Dominant Position

Article 18 of Version 4.8 prohibits businesses from significantly preventing, restraining, or distorting competition for any good or service, although there is no explicit limitation on this prohibition to businesses in a dominant position other than the title of the provision itself. Similar to the approach taken under Article 15, an apparently exhaustive list of potentially abusive conduct is provided including tied selling, selling below costs, and refusing access to an essential facility. In contrast to Article 16, there does not appear to be any defense where the pro-competitive gains of the impugned conduct exceed the anticompetitive effects.

Pursuant to Article 20, Version 4.8 also prohibits a dominant business from various forms of price discrimination. However, an exemption is provided where the price

discrimination is a reaction to a competitor's price or is in response to changing market conditions.

3. Vertical Agreements

In Article 19, Version 4.8 prohibits agreements between businesses in a vertical relationship that are similar to the examples provided if they have the effect of significantly preventing, restraining, or distorting competition unless the parties can prove that the pro-competitive gains from the conduct outweigh the anticompetitive effects. The examples provided include resale price maintenance, market restrictions, bundling, and exclusivity requirements.

An exemption is made to the Article 19 prohibition with respect to various potential restrictions and obligations imposed through a franchise agreement. However, oddly enough, Version 4.8 also includes a requirement for franchisors to compensate franchisees for loss of certain unrecovered investments where a franchise agreement is terminated for reasons other than the failure to meet the requirements of the franchise agreement.

In addition, an exemption is made for recommended minimum resale prices provided that it is made clear that any such recommendation is non-binding and, if the product has a stated price, the words "recommended price" appear next to the stated price.

4. Unfair Trade Practices

Article 21 prohibits certain forms of misleading representations by businesses such as false or deceptive statements about itself or its products or similar misrepresentations in relation to the goods of competing businesses.

5. General Exemptions

General exemptions to the prohibited conduct provisions are provided for collective bargaining agreements between workers and employers and for SMEs (defined as independent small businesses whose profits are tax-exempt).

Based on recent public comments, it appears that a general exemption is also being considered for state-owned enterprises ("SOE"). This is somewhat surprising as Version 4.8's broadly defines the scope of the competition law and includes specific provisions addressing even the regulatory activities of public authorities. While SOEs do not play as important a role in Cambodia as compared to some of the other AMCs, given regional issues in relation to the conduct of SOEs, this potential exemption will require careful consideration.

E. Public Sector

Despite the scope of Version 4.8 being expressly limited to entities doing business, the draft also addresses potential anticompetitive effects originating from the public sector. Article 65 prohibits a number of activities by public authorities that prevent, restrict, or distort competition such as discriminating between businesses, requiring trade with specific businesses, requiring businesses to associate in order to exclude other businesses, and a very broadly worded prohibition against adopting practices that hinder lawful business activities. On its face, it is not clear that the Article 65 prohibition is restricted to situations where the anticompetitive effects are determined to be substantial or significant nor does there appear to be any balancing of anticompetitive effects against pro-competitive gains or other government objectives.

Pursuant to Article 66, Version 4.8 limits the scope of government regulation of pricing, production, and tendering to defined authorized monopolies and businesses that produce or supply defined public utility products or services.

Finally, Article 67 permits the Directorate to review measures taken or proposed by other public authorities and, should it determine that potential anticompetitive effects are not justified, it may refer the matter to the Commission for further consideration (although it is not clear what actions the Commission could take in this regard). Article 67 also provides for the creation of an inter-agency forum including the Directorate and sector specific public authorities to coordinate concurrent functions, share best practices and expertise, and determine whether specific inquiries would be best conducted jointly by the relevant authorities.

F. Penalties

Version 4.8 contemplates a variety of penalties with imprisonment contemplated for individuals who contravene certain provisions relating to the investigation of matters or dispute resolution panels. Such conduct by individuals may also be subject to fines, and businesses engaging in similar conduct may be subject to significantly larger fines.

Articles 70 and 71 address remedies in relation to the substantive prohibitions of the competition law, which may include, among other remedies:

- warnings,
- fines against businesses or individuals,
- sale or transfer of assets (including licensing or transfer of intellectual property), and
- compensation for harmed businesses.

G. Procedures

1. Investigation and Enforcement

Under Article 31 of Version 4.8, the Director-General for Investigation and Enforcement is to send a written communication informing a person that he is under investigation or is a potential witness. The communication will state that the recipient must preserve all documents relating to the investigation. Destruction of documents after receipt of such notice may lead to imprisonment for individuals.

Some of Version 4.8's more notable investigatory provisions include:

- a person submitting evidence of a violation may request that her identity be kept confidential although she may be required to testify before a dispute resolution panel;
- the Director-General for Investigation and Enforcement may grant immunity from fines to an informant that provides significant evidence of a substantive violation;
- voluntary requests for information or access to premises are explicitly contemplated;
- warrants may be granted by a judge of a competent court to conduct a search and seizure of relevant evidence; and
- warrants may also be issued by the Director-General for Investigation and Enforcement for production of documents, testimony, or to search and seize evidence if he believes that delay incurred by obtaining a warrant from a judge would adversely affect an investigation or make it likely that the evidence would be tampered with or destroyed.

After an investigation is completed, if the Director-General for Investigation and Enforcement has reason to believe that the competition law has been violated, an enforcement action is commenced by filing a formal complaint with the Director-General for Dispute Resolution. The complaint must be filed within 15 days of an investigation being concluded. A copy of the complaint is to be provided to the person charged and, once the complaint is assigned to a Dispute Resolution Panel, made public. The complaint is to specify the alleged violations, summarize the relevant evidence, and the potential remedies being sought. The Director-General for Investigation and Enforcement may also require alleged violators to admit or deny specific factual matters relevant to the charges and that they respond within 15 working days unless written consent is obtained from the chief enforcement officer to extend this period.

After receiving a complaint, an alleged violator must file a formal answer with the Dispute Resolution Panel admitting or denying each allegation of fact and law within 15 working days of receiving the complaint. By written agreement with the Directorate's chief enforcement officer, this time period may be extended. The answer shall also be copied to the chief enforcement officer and be made public.

Where an alleged violator of the competition law agrees to a voluntary resolution of the matter, the Director-General for Investigation and Enforcement may file a proposed Commission Decision, proposed Commission Statement on Remedies and Sanctions, and a proposed Commission Order with a recommendation that the Dispute Resolution Panel accept the voluntary resolution of the matter.

Prior to commencement of a hearing, a person alleged to have violated the law may request the Dispute Resolution Panel to order third parties to submit documents or provide evidence. The relevant Directorate officials are to be copied on such request and, if the order is granted, be provided copies of all obtained documents and be able to observe any interviews obtained pursuant to the order. Both witnesses and alleged violators may request the chief enforcement officer to restrict the scopes of warrants where they can demonstrate that the required information is irrelevant to the investigation, unnecessary, unduly burdensome, or requires the submission of privileged information that is not subject to disclosure even as confidential business information.

2. Dispute Resolution Panels

Dispute Resolution Panels are charged with the authority to conduct hearings, order alleged violators to attend hearings and file answers, order witnesses to appear, testify, and provide documents, and to draft proposed Commission decisions, Commission orders, and statements on remedies.

Decisions of Dispute Resolution Panels are to be determined by majority vote and the Director-General for Dispute Resolution may be president, or a member, of such a panel. Version 4.8 requires each Dispute Resolution Panel to have at least one member with five years' experience in Cambodia as a judge, an arbitrator, or a lawyer who has litigation experience; and knowledge of Cambodian competition law. Each Panel must also have at least one member possessing experience in the management of a business, or training in business or economics, and training or experience in the protection of consumer rights. Finally each Panel shall also have one member who is not otherwise a government employee. Panel members are prohibited from

participating in a matter in which the member or his relatives has an economic interest and from accepting payments or gifts from any business that might be prosecuted under the competition law.

A hearing of the Dispute Resolution Panel is to commence within 30 days of the Director-General for Dispute Resolution having received the complaint unless the Commission has agreed to extend this period by an additional 30 days. Despite this stated period, hearings are not to commence before the alleged violator has had a reasonable opportunity to interview potential witnesses, examine documents, and prepare its defense.

Presentations of arguments, witnesses, and exhibits, except where documents contain confidential business information, are to be open to the public. Hearings are to be concluded within 90 days unless the Commission grants a 30-day extension. Version 4.8 provides detailed proposed stages for the process of the hearing, which sets out the roles of the parties in Article 45 and also provides general principles on handling confidential business information in hearings.

In relation to proceedings of Dispute Resolution Panels, Article 48 prohibits:

- knowingly lying or misleading the Panel about relevant matters,
- failing to submit documents or other evidence pursuant to an Order,
- withholding or falsifying documents or other evidence submitted voluntarily or under order,
- failing to appear or testify when ordered, or
- disrupting Panel proceedings.

Internal discussions of the Panel are not public. Once the Dispute Resolution Panel comes to a conclusion on a hearing, it is to draft its written conclusions as a proposed decision of the Commission. The conclusions are to be sent to the Director-General for Dispute Resolution who will submit them to the Commission within 30 days of the conclusion of the hearings.

3. Competition Commission

The Commission may make an interim order where an investigation is not yet completed if, on application by the Director-General for Investigation and Enforcement, it has reasonable grounds to believe there has been, or there is likely to be, a violation of the prohibitions against agreements between businesses in horizontal relationships and it is necessary to act urgently to prevent serious and irreparable harm or to protect the public interest in a declared emergency. Such interim order may require suspension of an allegedly infringing agreement, desisting from any allegedly infringing conduct or doing, or refraining from doing, any act other than the payment of money. Before making such an order, the Commission must give the parties subject to the order at least seven days' notice within which to make written representations.

In the normal course, the Commission may adopt, modify, or reject a Dispute Resolution Panel's recommendations after a non-public hearing at which the recommendations are considered. The Commission shall make its decision by majority vote within 30 days of receiving the Panel's recommendations. If the Commission modifies the proposed Commission Decision, Commission Statement on Remedies and Sanctions, or Commission order written by the Panel, it may add a statement providing reasons for the modifications. If the Panel's recommendations

are rejected, the Commission may issue a statement of reasons for its rejection and may refer the matter back to the Dispute Resolution Panel with instructions.

A person subject to a Commission Order may petition the Commission to reopen, modify, or revoke all or part of an Order. The merits of such petition will be investigated by the Directorate, which shall make recommendations to the Commission. The Commission may also, on its own initiative, correct obvious unintentional errors in an Order.

4. Courts

Version 4.8 provides that the Commission's Decision, Statement, and Order on Remedies and Sanctions may be appealed to a competent court within 30 days of the receipt of notice of the Commission's actions. The appeal from a Decision must demonstrate that the Commission's findings are inconsistent with the meaning of the competition law or not supported by the evidence arising from the Panel hearing. An appeal from an Order and Statement on Remedies may also demonstrate that the provisions will not remedy the determined violation.

If a court upholds an appeal, it shall return the matter to the Commission to modify the appealed Decision, Statement, or Order to be consistent with the court's decision.

The Commission may seek assistance from a competent court to enforce compliance with an order.

Based on comments by government officials, it appears that the appeal process is still being evaluated and there is a potential for judicial review of both the facts and law of Commission decisions as well as potentially consideration of procedural fairness. In addition, it seems that a specialized competition tribunal is being considered for this purpose.

IV. REACTION TO VERSION 4.8 OF THE PROPOSED COMPETITION LAW

Based on statements from the MOC, during the consultation processes most respondents expressed support for the introduction of competition law in Cambodia and, according to other government statements, almost all parties consulted agreed that Cambodia needs a competition law.

Some of the concerns identified in relation to the circulated drafts include:

- the need for a more clearly defined scope for the competition law (particularly given Cambodia's lack of experience in this area);
- more consideration of market definition and determination of dominance;
- concerns with broad prohibitions against horizontal conduct given the underdeveloped nature of the Cambodian market;
- the investigatory powers of the Director-General for Investigation and Enforcement (with particular reference to the power to issue warrants);
- whether the law will be considered criminal or civil given the differing implications of each; and
- potential overlapping jurisdiction and expertise between Directorate officials and police.

A number of issues were also identified in relation to the application of the competition law to specific sectors, with particular reference to electricity and telecommunications.

V. GOING FORWARD

Given the number of concerns identified in review of Version 4.8 and the known efforts to revise the competition law since that version was released, speculation on the details of the competition law to be enacted in Cambodia does not seem productive. However, as the MOC has stated that the current draft is based on ASEAN guidelines, and given the national and international expertise and efforts being brought to bear on this, I remain cautiously optimistic. Hopefully the concerns raised with Version 4.8 have informed the development of Version 5.3 and, if applicable, later drafts and the Cambodian government has had the opportunity to learn from the experiences of other ASEAN Member Countries.

That being said, it seems likely that key aspects of Cambodian competition law will be left to regulation or sub-decree, so it will be difficult to judge the potential impact of the competition regime based solely on the enacted legislation. While the competition law may be enacted in 2015, it is not clear when the fundamental sub-decrees and regulations will be issued. It may be therefore be some time before even the initial implementation of Cambodia's competition law can be properly evaluated.

Given Cambodia's lack of experience in competition law and policy, I am personally hoping that Cambodia resists the urge to leap into competition enforcement. Instead, I think it would be valuable for Cambodia to take a phased approach similar to what has been observed in certain other ASEAN Member Countries. This could be accomplished by specifically phasing in certain prohibitions over a period of time (perhaps commencing with cartels and misleading representations—both fairly easily comprehended by the business community and consumers) and incorporating an initial period in which the prohibitions would not be enforced so that the competition authorities can focus on institutional development and education and advocacy initiatives among Cambodian stakeholders (including other arms of the Cambodian government).

Significant discussions on post 2015 ASEAN Competition have been focused on ASEAN level cooperation, coordination, and even potential convergence. For ASEAN Member Countries, like Cambodia, who are at an early stage in the development of competition law and policy, this seems premature. While there is certainly scope for Members with more developed regimes to share their experience and expertise, it seems that the first post 2015 focus for countries like Cambodia should be on establishing a solid foundation for their domestic competition law and policy regime.

In addition to developing their expertise and promoting a competition law environment, it will take time for the Cambodian government to determine what policies and strategies will be most effective in a Cambodian context and one can expect that amendments and adjustments to the competition regime will be required within a five-to ten-year period. While businesses are apparently optimistic about the potential competition law, it remains to be seen how they will react when the competition regime is applied not only to conduct that affects them but also to market practices in which they regularly participate. The attitudes and practices of these stakeholders may adjust in unexpected ways that will have to be addressed as the competition regime develops.

From a Cambodian perspective, there are significant other issues beyond the scope of this article that need to be addressed in order to ensure the effective implementation of Cambodia's competition regime such as the appropriate role of government in the economy and justice system, transparency issues and the balancing of competing policy interests among others. When one considers these broader issues along with concerns such as lack of available expertise, allocation of scarce government resources, concerns with the availability of market data and more, one gets a perspective on the challenges to the implementation of an effective competition regime in Cambodia in the immediate future. However the path to such implementation will likely start with the enactment of the competition law and the chance to review it in its current form is eagerly awaited.