

Marking Asean Produce Towards A Common 'Conformite Asean' Certification Mark

SYED SAGOFF ALSAGOFF

ABSTRACT

Since its formation in 1967 ASEAN have played a considerable role both regionally and globally. Unlike the European Union, which binds its 27 member states through a comprehensive legal framework, this article will discuss the challenges in tandem with Mutual Recognition Agreement, which is aimed to facilitate intra ASEAN trade. With over 520 million consumers in ASEAN, this paper will discuss with reference to challenges faced by Malaysia and the pressing needs towards institutionalization of standards for a wider array of products and a proposed common "CA" [Conformite Asean] certification marks which mirrors the "CE" [Conformite Europeene] marking in the European Union which is easily identifiable by consumers.

ABSTRAK

Semenjak penubuhannya pada tahun 1967, negara-negara ASEAN telah memainkan peranan yang penting di peringkat serantau dan antarabangsa. Berbeza dari Kesatuan Eropah, yang menguasai 27 negara kesatuannya melalui kerangka perundangan yang lengkap, rencana ini akan membincangkan cabaran-cabaran yang akan dihadapi selaras dengan matlamat Perjanjian Pengiktirafan Persefahaman (Mutual Recognition Agreement) bagi membantu mengembangkan pasaran dagangan serantau ASEAN. Dengan lebih dari 520 juta pengguna di rantau ASEAN, rencana ini akan membincangkan cabaran yang dihadapi oleh Malaysia dan keperluan kepada suatu institutinalisasi standad bagi pelbagai produk. Rencana ini juga mengesyorkan suatu cap pengiktirafan dagangan 'CA' [Conformite Asean] yang setara dengan cap dagangan 'CE' [Conformite Europeene] yang digunakan di Kesatuan Eropah supaya mudah dikenalpasti oleh pengguna.

INTRODUCTION

ASEAN countries had previously moved towards *eASEAN* in response to a call to facilitate electronic commerce¹. Similarly, ASEAN Free Trade Agreement commonly referred as AFTA, provides a platform to facilitate trade and free movements of goods among member states. Varieties of products are being developed, marketed and exported yearly. The main bulk of these products are being supplied and consumed by majority of buyers who makes up of, consumers. As consumers, we lack the knowledge and technical know-how which often succumbed us to the representation of producers. The current issue is that some products are not required to undergo testing while other are being tested repetitively in jurisdictions which they are exported.

Since, the inauguration of AFTA, trade has become more competitive and while goods are expected to become cheaper by at least 15% than it was before.² It is also foreseeable that some enterprises will unfortunately have to compromise product safety and quality due to stiff market competition and cost/benefit factor, in order to ensure their existence and survival in the market place. The need to conform to a single regime is fundamental in ensuring standards are being observed and recognized among member states as well as the community at large.

EUROPEAN UNION LEGAL FRAMEWORK

Unlike ASEAN which lacks legal framework in its harmonization efforts, the European Union has throughout the years managed to integrate what is called "common policies" which is the backbone behind its successful multinational integration. Under its common legal policy, legislation, which is enacted by the European Commission, has a binding effect on its member states.³ Divided into five forms⁴ [*Regulations, Directives, Decisions, Recommendations and Opinions & Resolutions*], some of these legislations are directly applicable while others provide the necessary framework and objectives for member states to enact its own national legislation taking into account the existing state of affairs in each member states while at the same time providing room for manoeuvring in order to reach a common tenor.

¹E-Asean Reference Framework For Electronic Commerce Legal Infrastructure at www.asean.org/EAWG_01pdf.

² Lawan Thanadsillapakul, *Open Regionalism and Deeper Integration : The Implementation of ASEAN Investment Area (AIA) and ASEAN Free Trade Area (AFTA)* : Adianto P Simamora, *Asean urged to crank up campaign on AFTA benefit : Business and Investment* March 07 2003, The Jakarta Post, Bali

³ European Communities Act 1972 Section 2(1) the principle of direct effect is expressly stated as "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable Community right' and similar expressions shall be read as referring to one to which this subsection applies."

⁴ Regulations (binding), Directives (binding), Decisions (binding on addressee), Recommendations (non-binding) and Opinions & Resolutions (non-binding)

With the ability to synchronize the vital aspect of integration through its firm legal foundation, the EU has today managed to overcome many social, economic and political divergences through compliance with its laws.

STANDARDIZATION AND CERTIFICATION POLICY IN EUROPEAN UNION

Since 1985,⁵ technical standardizations are achieved through a mutual recognition policy throughout the European Union. Being fully aware of the divergence of national laws among member states, the European Union adopted and confined its legislative harmonization to the essential *safety requirements* as opposed to *technical standards*, which could be far reaching, in order to facilitate free movements of goods and promote intra EU trade.⁶

Nevertheless, in its endeavour to achieve a common technical standardization policy, the European Committee for Standardization⁷ (CEN), the European Committee for Electrotechnical Standardization⁸ (CENELEC) and the European Telecommunications Standards Institute⁹ (ETSI) are commission to ensure amicable agreement are reached among the parties concerned such as producers, consumers and users. Thus, products, which comply with the "*essential requirements*", are reciprocally deemed to conform to the Directives.

Similarly, in order to ensure reciprocal recognition of standards, a product must be certified and recognized as meeting such standards by their relevant national bodies. The European Organization for Testing and Certification (EOTC) lay down the guidelines for mutual recognition of tests and certificates. Thus, "CE"¹⁰ marking symbolizes conformity and evaluation efforts aimed at ensuring legally place product in the market, which is easily identifiable, by the consumers.

CE MARKING DIRECTIVES

Conformite Europeene or synonymously referred as "*Passport to Europe*" is a mark of compliance to standards set within the European Community. This certification mark gives the community a sense of assurance that their health, safety and environmental requirements have been given a paramount consideration when such product leaves the manufacturing plant and put into circulation. To date there are over 25 Directives concerning standards which involves a wide array of products ranging from toys to heavy machinery. *The purpose of which is designed to strengthen general confidence and proper functioning of the internal market (European Commission's Explanatory Note of 1989).*

⁵ Council Directive 85/374/EEC of 25 July 1985

⁶ Nicholas Moussis, 1998, *Access to European Union: Law, Economics, Policies*, 8th Edn, Euroconfidential.

⁷ CEN deals with standards relating to goods and services

⁸ CENELEC deals with standards relating to electrical engineering such as electricity, electromotive and electro-magnetism

⁹ ETSI deals with standards relating to telecommunications equipment, network and operators including broadcasting, intelligence transport and medical electronic

¹⁰ *Conformite Europeene* otherwise known as Conformity Europe

Despite the many sectoral Directives which are used to ensure compliance, the birth of the so called “*catch all directive*”- the General Product Safety Directive 2001/95/EC [hereinafter referred as GPSD] was finally realized and put into place in the United Kingdom through the General Product Safety Regulations 2005. Although the GPSD does not intend to oust other Directive, nevertheless it was much anticipated since the EU was aware that it was impossible react to every product that exists or may be developed. In the same note, the European Commission too realized that they were unable to keep the pace with national standards and regulations that was moving at greater leaps than before they could finalized their earlier Directives [“*Old Directives*” as it was heavily drawn on technical details] which go against the essence and fundamental of Article 100a. of the Treaty of Rome [establishment of a single market]. In summary, the so called *New Directive*, particularly the GPSD 2001/95/EC was intended to fill the gaps (*lacunae*) left by other directives. The end result is, the GPSD being applied to all consumer products placed on the market in line with Article 129a of the Treaty of Rome which addresses consumer protection as being of a paramount concern.

CE MARKS

This marks once used primarily for the internal market has now found its place in products coming from many countries, among others include the US, Japan, Canada, Israel, New Zealand and Australia through Agreements on Mutual Recognition of Conformity Assessment. The reliability of the mark over the years has also managed to influence at one time non EEA [European Economic Area] member country like Turkey to adopt it as a representation of conformity.

Although the CE mark is a mandatory marking, there are two other similar marking which is synonymously used associated with it. The ‘e’ mark which is used on motor vehicle and its components and another ‘e’ mark which is used as a sign of estimation on food labels ¹¹.

CE MARKING AND ITS PROCESS

Since there are many products in the market, one cannot expect an extensive list of products that require CE marking. With the *New Directives*, there are certain requirements that a manufacturer needs to fulfill before a particular product can be CE marked and gained access to the European Community. Thus, it is the responsibility of the manufacturer to determine which product can be self-certified and which needs to be tested by laboratory affiliated with the European Notified Body. Once this has been complied with, the manufacturer needs to affix the CE mark on their product together with a statutory Declaration of Conformity and technical file before goods can be shipped into the European Union.

Directive that can be self-certified among others includes; *Safety of Machinery Directive*; *Electromagnetic Compatibility (EMC) Directive*; *Low Voltage*

¹¹ http://en.wikipedia.org/wiki/CE_mark

Directive; Class I Products of the Medical Device Directive; Radio Telecommunications Terminal Equipment (R&TTE) Directive.

Directive that cannot be self-certified and requires laboratory testing includes; *Simple Pressure Vessels Directive; Appliances Burning Gaseous Fuels Directive; Pressure Equipment Directive; Equipment and Protective Systems in Potentially Explosive Atmospheres Directive.*

Under the New Directive, manufacturers are required to keep a detailed technical file with information relating to conformity of the harmonized standards. This technical file is divided into two parts, in which the first part requires information relating to manufacturer such as address and product identification; description; operating instructions; plan of the product (blue-print) and list of harmonized standards adopted, while a more detailed second part requires matters relating to test report; quality manual; processes and standards applied, etc.

ASEAN MUTUAL RECOGNITION ARRANGEMENTS

The impetus towards Mutual Recognition Arrangement¹² was the consequence of ASEAN Free Trade Agreement of 1992¹³, which focuses towards liberalization of trade. Thus, in order to facilitate AFTA, co-operation among member state was primarily focused towards harmonization of standards, which includes drawing-up of reciprocity arrangements that relates to products certification and testing standards.

Some, thirteen years later after its initial arrangement a sectorial recognition on the Electrical Electronic Equipment Agreement was finally harmonized in Kuala Lumpur on the 9th December 2005¹⁴. With the fundamental concept of "*tested once tested everywhere*", this agreement was drafted on *voluntary* compliance in accordance with standards and guidelines set by the International Standardization Organization (ISO) and the International Electromechanical Commission (IEC) Guidelines¹⁵. The outcome of this agreement is a list of 20 products¹⁶ which are required to meet the ISO/IEC standards before they are afforded the "EEE"¹⁷ marks and free excess within the Asean region

CURRENT SITUATION IN MALAYSIA

In Malaysia, mandatory product testing is required for 12 main products under the relevant Act/s which include electrical items, safety belts for motorized vehicles, crash helmet and non-pressurized gas cooker¹⁸. As, such the need to expand the ambit

¹² *Asean Framework Agreement on Mutual Recognition Arrangements* - Ministry of Commerce - Kingdom of Cambodia at http://www.moc.gov.kh/laws_regulation/treaties/asean_mra.htm

¹³ Singapore Declaration of 1992 "*ASEAN shall constantly seek to safeguard its collective interest in response to the formulation of large and powerful economic groupings among the developed countries*"

¹⁴ *Agreement on the ASEAN Harmonized Electrical and Electronic Equipment (EEE) Regulatory Regieme*, Kuala Lumpur, 9th Dec 2005.

¹⁵ *Interpretative Notes to the Asean Framework on Mutual Recognition Arrangement*. Articles/Definitions

¹⁶ *Harmonization of National Standards in ASEAN member Countries to International Standards* - TISI, Thailand

¹⁷ "EEE" - Electrical Electronics Equipment

¹⁸ see: Electricity Supply Act 1990; Road Ordinance 1958; Gas Supply Act 1993

of this mandatory testing is inevitable in order to facilitate the concept of free trade and free movement of goods among member states.

In a recent article in Malaysia's *Berita Harian*, entitled "*Risiko Motosikal Murah*"¹⁹ [Risks of Cheap Motorcycles] revealed that the main bulk of components imported from China did not comply and conform to specifications of the Standards and Industrial Research Industries of Malaysia (SIRIM). Further, to this the most appalling report made known was that motorcycles [either imported or locally produced] were not required to obtain any form of approval or undergo stringent test as those required for other vehicles [under the mandatory supervision of Ministry of Transport]. Similarly, it was also reported that in a single year of 2005 alone there were more than 600,000 thousands motorcycles that were registered with the Ministry and of this, it is estimated that more than 22,000 thousands, were defective²⁰. This not only increases the risks of accidents, but it concurrently creates a hazard among other road users. In dollars and cents, this hampers competitive edge among local producers in the industry since cheaper products were made available. Some of these shoddy products were also identified as being imported from ASEAN member states like those of Indonesia and Philippines.

In another article entitled "*Cheaper Car Parts, Costly Result*"²¹, the Ministry of Domestic Trade and Consumer Affairs, managed to seize RM 300,000.00 worth of counterfeit and inferior car parts and of this 90% were made up of products coming from China. Last year alone the Ministry seized a total of RM19 million worth of defective products. In 2003, the Drug Control Authority of the Ministry of Health removed some 346 drugs from the shelves making it the highest product recall in its history²². In view of this where many still resort to traditional herbal medicine, the Traditional and Complementary Medicine Bill 2006 was drafted to "*bring unethical practices and use of low quality traditional and complementary medicine (T/CM) products under control*"²³.

In view of this, the need to rely on reliable Standards Testing Agency becomes more demanding in this era of technological and scientific advancement. Lessons could and should be learned from Thalidomide²⁴ tragedy which impetus for the introduction of strict liability for defective product.

In Malaysia, under Section 19 of the Consumer Protection Act 1999, a Minister may by regulations prescribed safety standards in respect of (a) *any goods or class of goods; and (b) any services or class of services*, nevertheless the Act does not provide *specific list* of product that falls under this rule²⁵.

¹⁹ *Berita Harian* 21st May 2006

²⁰ *ibid*

²¹ *Straits Times* 16th October 2006

²² *The Malay Mail* 3rd May 2003

²³ *The Star* 29th July 2006

²⁴ *Sr. Distillers Co (Biochemical Ltd) (1969) All ER 1412 [1970], 1 WLR 114 30th July 1969*

²⁵ see Section 19(6) CPA1999 - although healthcare goods and food are explicitly excluded from Part III of the CPA 1999 which means all other goods must meet safety standards nevertheless, mandatory testing is only applicable to 4 main categories of product such as electrical items, safety belts for motorized vehicle, crash helmet and non-pressurized gas cooker. Whereas safety standards for the rest of the categories are voluntary. in nature see tenor of Section 19(4).....where no safety standard has been prescribed.....shall adopt and observe a reasonable standard of safety.....:

Further to this Section 19 (4) provides where no safety standard has been prescribed the standard that is to be applied and observed shall *be a reasonable standard of safety to be expected by a reasonable consumer*. The nexus is that safety standard ought not to be measured by what is expected of a consumer but of a competent standard testing agency since a consumer cannot be expected to have reasonable technical knowledge of what is expected in a product. Thus, equating reasonable safety standard to a reasonable consumer is synonymous to measuring gravity in a vacuum.

ASEAN DILEMMA

Unlike the European Union which has its own parliament, court of justice, common currency, free movement of labour and many other agreements drafted to their mutual benefit, to begin with each ASEAN country has different sets of laws²⁶. Basically, the formation of ASEAN is based primarily on voluntary association with no central authority like the EU. Thus, conformity towards total harmonization of the many categories of products which requires testing is yet to be fully established. A common certification mark among ASEAN member states is at present far fetched. The "CE" certification marks, [*Conformite Europeene*] which literally means *European Conformity* is a product of EU Directive 93/68/EEC which is currently being used in the European Union ensures products comply and conform to mandatory European Standards. The success of these standards, which are being reviewed at intervals, is partly due to its common integration and legal policies, which are binding on member states. As such matters with regards to information sharing and policing is becoming imperative and accessible.

Primarily, it is about time for ASEAN to develop and market its own identity "CA" certification marks that is reliable. Although at present efforts have been made on sectoral²⁷ products arrangements nevertheless, the issue of repetitive testing and differing standards, maybe inevitable especially so, when it is heavily reliant on ISO because ISO's is a management based system, which signify manufacturer's reliability in terms of low failure rate as opposed to product quality and safety standards. Similarly, the tendency for an organization which produces many products to misuse ISO compliance could arise especially when third party certification is approved for only a particular product.

If ASEAN member states are able to adopt a more rigorous approach swiftly and promptly, it will have a positive and promising future in terms of knowledge, information sharing and a reduction of workload, while at the same time increase export and minimize trade obstacles. In the same premises, a more detailed product testing, research and after market surveillance could be beefed-up since collaboration signifies that workload and expertise are shared among member countries. Although experience has revealed that compliance to international safety standards ensures both local as well as exported products are well received, meeting

²⁶ Some of the ASEAN countries imported laws from US, Spain <Dutch and the UK. See Noboyuki Yasuda, *Law And Development From The Southeast Asian Perspective in Law and Development in East and Southeast Asia* edited by Christoph Antons, Routledge Curzon, 2003, London.

²⁷ Hendro Kusumo, *Implementation of MRA in Facilitating ASEAN Trade Asean Standards and Quality*, BSN Indonesia

international safety standards will not eliminate so called "double standards" of product safety. A common example is when a product is approved to be marketed locally but failed overseas safety standards when such makes were exported abroad. In a recent press release of 1st April 2008, local carmakers, Proton has recalled more than 34000 of its Savvy's for defective wheel bearing²⁸. In June 2008, the Malaysian Government stop exports of fishery product to EU to avoid ban²⁹. When such an incident occurs, the first question we as consumers ask ourselves: Does this mean shoddy products are being marketed locally?

CONCLUSION

Malaysia is the third most important trading partner with 19 out of the 25 EU Member states with trade export amounting to Euro 15.6 billion or RM 71 billion in 2005³⁰. In a recent statistics compiled by US Consumer Protection Safety Commission (CPSC) it was reported that the number of product recalls coming from world largest exporter China to America has raised over the years from 27% in 1999 to 44% in 2004 despite export revenue for China raised from US62.6 billion in 1997 to US179 billion in 2004³¹. In light of this ASEAN countries should cash-in on the opportunities, while at the same time increase export revenue and remain competitive. The need to ensure legally placed product in the market is incumbent in the interest of consumers and flourishing trade exports.

With the current climate, it seems that ASEAN needs to clean-up its back-end in order to ensure all products which reached the consumers conform to safety standards. This task is not one of supervening impossibility since ASEAN has managed to work closely together in many respects including working towards harmonizing of national law on drug trafficking³².

Last but not least, fair competition has always been seen as the heart of any internal market and accordingly *"supplying unsafe goods is a form of unfair competition as it gives the supplier of unsafe goods an unfair advantage over a competitor who is prepared to incur the costs associated with ensuring that his goods is safe"*³³

RECOMMENDATIONS

Although, ISO are widely used as a yardstick to associate product reliability, one has to bear in mind that these standards does not refer or has any bearings on product safety even though safety requirement processes may include or involve certain aspects of ISO compliance.

Considering the current situation, it is proposed that a common mandatory certification mark [*"CA"* – *Conformite ASEAN*] for *all consumer products* in tandem with Mutual Recognition Arrangement [rather than sectoral or state/national marking

²⁸ The Star 1st April 2008 *"Proton to Recall Savvy Cars"*

²⁹ The Star 25th July 2008 *"Seafood items must meet EU Standards"*

³⁰ Paul Gabriel. *Bridging the info gap on EC*, Sunday Star 15th October 2006

³¹ Joseph P Mohorovic - Chief of Staff US Consumer Product Safety Commission, *Chinese Imports and the Implementation of CPSC Regulations*. www.cpsc.gov/

³² Cooperation on Drugs and Narcotics Overview – <http://aseansec.org/5682.htm>

³³ Speech by UK Minister of Consumer Affairs – April 27, 1987, Hansard H.C., 51

which will be confusing to consumers when each sectors or state carries with it different marks]. Clearly, this move will facilitate and promote free movement of goods in response to AFTA while at the same time increase export commerce among intra-Asean states and consumers abroad. The researcher is also of the view that with the proposed approach it will then be easier to weed out non compliance product at a glance and increase market surveillance. Inevitably, integration, synchronization, institutionalization and the introduction of a common mandatory certification mark and identity that is reliable and safe will ensure ASEAN produce is well respected and accepted by member countries and the international community at large since this is also in tandem with the mission behind the *WTO Doha Declaration* of 2001 which propagates and prioritizes product safety which is aimed at reducing technical barrier to trade.

Syed Sagoff Alsagoff
Ph.D student
Faculty of Law
Universiti Kebangsaan Malaysia
43600 UKM Bangi
Selangor Darul Ehsan
Malaysia