FEDERAL COURT OF AUSTRALIA

OECD

ASEAN-Australia-New Zealand Free Trade Area (AANZFTA)
Economic Cooperation Support Program (AECSP)

Competition Primers for ASEAN Judges

Developed as part of the AANZFTA Competition Law Implementation Program

Economics for judges in the competition law context

1. Introduction

1.1 This primer is intended to:

a. be a principles-based document for use by members of the judiciary in each of the Member States of the Association of Southeast Asian Nations ('ASEAN');

b. provide a practical and informative guide for judges focusing on challenges and issues faced in evaluating complex expert evidence in the course of making and reviewing decisions under competition laws in ASEAN Member States; and

c. assist in developing competition law precedent, which increases legal certainty, promotes efficiency and fosters consistency and predictability within ASEAN Member States, and ultimately contributes to shaping sound competition policy.

1.2 The primer has been developed in the context of the differences in and the varying stages of development of competition laws in the ASEAN Member States. It is not intended to provide country-specific information.

1.3 This primer has been developed by judges of the Federal Court of Australia for judges in the ASEAN Member States, in close cooperation with the OECD. It is one in a series of competition law primers developed at the initiative of the ASEAN Australia New Zealand Free Trade Area Competition Committee as a part of the Competition Law Implementation Program ('CLIP').

2. What is economics and why is it important in competition law?

2.1 Economics can be defined as a "social science concerned with the production, distribution and consumption of goods and services". Economics is regarded as a social science because it applies scientific methods to study society and social relationships. Economics is a powerful tool for assessing the effect of conduct and arrangements on markets.

2.2 Competition is an economic concept characterising a market process of rivalry between sellers to increase their profits by offering to the buyers a better combination of price, quality, and service than the combinations offered by competitors.

2.3 The introduction of competition laws provides the market with a set of "rules of the game" that protect the competition process itself, rather than protecting competitors in the market. In this way, the pursuit of fair or effective competition can contribute to improvements in (economic) welfare, efficiency, and economic growth and development.

2.4 Welfare is a standard concept used in economics which aggregates the welfare (or surplus) of different groups in the economy. In a given industry, welfare can be measured by total surplus, which is the sum of consumer surplus (the difference between what all consumers are willing to pay for a product and what it actually costs them) and the producer surplus (the sum of all profits made by producers in the industry). Such measures of welfare are standard concepts in assessing the effect of conduct and arrangements on markets.

2.5 In the context of competition law, economics provides a rigorous framework for analysing markets and the effect of conduct on markets, including (the effects of) unilateral or coordinated conduct of market participants (competitive effects). Economic analysis can also be a useful tool to identify and evaluate the relevant facts in competition cases. Around the world, economic evidence is often given by economic experts on behalf of the parties in competition law cases.

2.6 Economic evidence can assist courts by explaining and applying economic concepts that may be embedded within competition laws, such as:

a. competition, namely rivalry in price, quality, service and other variables of value to consumers so as to achieve business objectives, such as maximising profits;

b. welfare, including subjective value, well-being and preference-satisfaction; and

c. efficiency, namely static efficiency (the level of efficiency at one point in time, focusing on existing products, processes or capabilities) and dynamic efficiency (the level of efficiency over time as this changes through innovation, leading to new or better products, processes or capabilities). The two main types of static efficiency are the allocation of available resources to their highest possible value (allocative efficiency) and the maximisation of output from the available resources at the lowest possible cost (productive efficiency).

2.7 Competition can promote both welfare and efficiency by increasing value and encouraging optimal allocation and use of resources. These economic concepts generally underpin and inform the objectives of competition laws.

3. Economic terms and concepts for assessing competition

3.1 A market is made up of buyers and sellers transacting in goods and services. A market is the field of rivalry, or a potential field of rivalry, between sellers to sell their products or services. If a seller increases its price (relative to its cost) of a product or service, the profit for every unit sold will increase, but sales to certain customers may be lost if they are not willing to buy the given product or service for the increased price and instead switch to another seller, product or service.

3.2 The exercise of establishing the relevant market, called market definition, provides an analytical framework for the ultimate inquiry of whether particular conduct or a particular transaction is likely to produce anticompetitive effects.

3.3 A market may be defined having regard to its product and geographic dimensions, including by considering economic substitutes in supply and demand. The product dimension defines the different competing products that should be considered as being in the same market; the geographic dimension defines the extent of the geographic areas that should be considered as being in the same market. For example, a town may only have one pizza shop, but this is unlikely to be a monopoly because if it raises its prices substantially, consumers might switch to burgers or a neighbouring town's pizza shop might expand its delivery area. If substitution to burgers and/or pizza sellers in other towns prevented the pizza shop owner from profitably raising prices, those products and sellers would be included in the so-called relevant market.

3.4 Market power is another core concept in competition law and in economics. It is commonly defined as a firm's ability to sustain prices above, or quality levels below, competitive levels. The benefits of market power provide strong incentives for firms

to compete to acquire it. Market power may be acquired, maintained and used without falling foul of competition laws. Competition laws are generally only engaged when market power is acquired, maintained and/or used in an anti-competitive way.

3.5 A firm's degree of market power is not easy to measure objectively. Market share is often relatively easy to measure and is therefore sometimes used as an indicator of, or a proxy for, market power. However, care should be taken with this approach as market share may provide only an incomplete or temporary picture of a firm's market power. Other relevant factors may include:

a. barriers to entry and/or expansion, namely the ease with which new competitors can enter, or existing competitors can expand, into the market if prices in that market rise above competitive levels. This possibility of new firms entering the market, or current rivals expanding, prevents or makes it more difficult for firms to charge prices above competitive levels. Consequently, if barriers to entry and expansion are low, then incumbent firms will not be able to sustainably exercise market power even if they have a large market share;

b. 'countervailing' (buyer) power, namely the buyer's bargaining strength in its negotiations with the seller. The ability of buyers to negotiate with sellers, for instance due to the buyer's size, its commercial importance to the seller, or its ability to self-supply or sponsor new entry of another seller, acts as a disciplining force and promotes competitive behaviour on the supply side;

c. economic regulation can be a relevant factor in sectors where for instance price and/or quality levels are subject to controls by a government regulator. This can limit the extent to which firms can exploit their market power; and

d. the characteristics of the particular firm and market, including having regard to the appropriate market structure.

4. Economic models for assessing competitive effects

4.1 Economists often use economic models to explain the real world through a number of simplifications and abstractions. There are different economic market models that may be used for assessing competitive effects. The suitable model will depend on the facts of the particular case. Four of the basic economic market models, which differ in terms of the amount of competition that occurs in the market, are described in more detail below.

4.2 The (hypothetical) perfect competition model describes a market structure where competition is at its greatest possible level. It is defined by several idealised market conditions including that, for instance, perfect information is available to all consumers and producers, there are no entry or exit barriers, and there is a large number of buyers and sellers of homogenous goods or services who all act perfectly rationally. In this model, no firm has substantial market power or an ability to influence prices. This model produces optimal outcomes in terms of welfare and efficiency and is the benchmark for assessing the effects of conduct in imperfectly competitive market structures.

4.3 The monopolistic competition model also assumes a large number of buyers and sellers that can easily enter and exit, but the products in this model are not homogenous. Product differentiation allows firms to exercise some market power and make independent price decisions, potentially leading to higher prices or idle capacity compared to a situation of perfect competition.

4.4 In an oligopoly model there are only a few sellers of significant size. These firms are aware of, and take account of, each other's actions and expected reactions when making pricing and other competitive decisions. Firms in oligopoly markets are therefore interdependent. In an oligopoly situation, the degree of competition may differ substantially, depending significantly on the specific circumstances of the market. The sellers may compete fiercely, or individual firms can have significant market power and an ability to interact tacitly, combining market power to drive up prices and profits to the detriment of efficiency and welfare (and consumers). As a result, oligopoly outcomes can look similar to monopoly.

4.5 In a monopoly model, there is only one seller with effective control over the whole market. That seller can use its monopoly market power to maintain prices and profits above efficient levels and to produce less than the optimal amount. Competition laws do not generally prohibit monopolies themselves, only the use of monopoly power to harm competition. Competition laws may also prevent monopolies from forming as a result of a transaction (merger or acquisition) or anti-competitive conduct.

4.6 Competition laws predominantly target conduct by firms that operate in oligopoly or monopoly markets. This is because firms operating in these types of markets have the greatest potential to use their market power to harm competition.

5. Assessing competitive effects

5.1 An assessment of competitive effects is generally not necessary in cartel cases because cartel agreements are ordinarily considered the most egregious violations of competition law and are generally prohibited without having to take into account the specific effects of the cartel. Cartels almost invariably injure consumers by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others.

5.2 By contrast, an assessment of competitive effects is more commonly required in considering other (non-cartel) forms of conduct or arrangements, in particular in considering the approval of mergers and acquisitions, in assessing agreements that may substantially lessen competition, and in evaluating abuse of dominance cases, in which a finding of liability usually requires both a substantial degree of market power and an anticompetitive object or effect.

5.3 In assessing competitive effects, economists generally focus on the state of competition in a market as a whole, rather than the effect of the conduct on particular competitors. Of particular relevance is considering whether the conduct creates, increases or maintains market power in the market by, for example, increasing barriers to entry and expansion or excluding rivals from competing effectively in the market. There are several tests that may be useful in assessing competitive effects, including:

a. the 'with or without' test, which compares the likely state of competition in a market with the tested conduct to the state of competition in that market without the tested conduct;

b. the '(no) economic sense' test, which asks whether the tested conduct would still make economic sense absent any anticompetitive purpose or effect; and

c. the 'as efficient competitor' test, which considers whether the tested conduct tends to exclude even those competitors that are at least as efficient as the firm engaging in the tested conduct, in a way which harms competition in the market as a whole.

5.4 The application of the above tests to assess competitive effects is rarely straight forward and may require expert economic analysis and evidence. For example, in applying a 'with or without' test to a merger approval it may not be possible to simply assume that the current state of competition in the market would be preserved 'without' the merger. In a recent Australian merger approval involving marine freight

services, it was found that without the merger the target's existing freight services would cease and the prospective purchaser would in any event be able to secure all of the customer contracts that made the freight services viable. In the circumstances, the merger was approved subject to conditions, commitments and undertakings to reduce its anti-competitive effects.

5.5 It is always necessary to consider the competitive effects keeping in mind the legislation to be applied and the purpose of that legislation. Economic analysis and evidence can assist in bringing to light the effects on competition and market outcomes of the conduct or arrangements in question. At the same time, it is important not to let technical economic concepts replace the language of the legislation.

6. Related information sources

6.1 The following resources provide further information in relation to economics in a competition law context. The material may be useful as a general reference for judges in the ASEAN Member States:

a. OECD, *Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels*, 1998

b. Massimo Motta, *Competition Policy; Theory and Practice*, 2004

c. OECD Competition Policy Roundtables, Barriers to entry, 2005

d. OECD Competition Policy Roundtables, *Quantification of harm to competition by national courts and competition agencies*, 2011

e. OECD Competition Policy Roundtables, Market definition, 2012

f. OECD, *Glossary of statistical terms*

g. International Competition Network, *Training on demand*, including modules on market power, competitive effects, and economics of dominance

Competition Primers for ASEAN Judges

Developed as part of the AANZFTA Competition Law Implementation Program

Expert evidence in the context of competition law cases

1. Introduction

1.1 This primer is intended to:

a. be a principles-based document for use by members of the judiciary in each of the Member States of the Association of Southeast Asian Nations ('ASEAN');

b. provide a practical and informative guide for judges focusing on challenges and issues faced in evaluating complex expert evidence in the course of making and reviewing decisions under competition laws in ASEAN Member States; and

c. assist in developing competition law precedent, which increases legal certainty, promotes efficiency and fosters consistency and predictability within ASEAN Member States, and ultimately contributes to shaping sound competition policy.

1.2 The primer has been developed in the context of the differences in and the varying stages of development of competition laws in the ASEAN Member States. It is not intended to provide country-specific information.

1.3 This primer has been developed by judges of the Federal Court of Australia for judges in the ASEAN Member States, in close cooperation with the OECD. It is one in a series of competition law primers developed at the initiative of the ASEAN Australia New Zealand Free Trade Area Competition Committee as a part of the Competition Law Implementation Program ('CLIP').

2. The usual role of expert evidence in a competition law case

2.1 In many jurisdictions, including those in ASEAN, courts face competition law issues mainly in the context of judicial review of decisions made by competition authorities. There are two main types of judicial review that a court may have to engage in. A first type of review concerns whether the decision was lawful. This may entail examining

the lawfulness of the action of the authority based on specific limited grounds which are usually the (il)legality, (un)reasonableness or procedural (in)accuracy of the contested act. Review on those grounds can still involve a fairly detailed examination of facts and evidence and the appropriateness of the action taken on their basis. Judicial review can also be on the merits, i.e. on the substance of the act or decision, involving a full reassessment of its correctness. The extent to which reconsideration of the merits is permissible varies between jurisdictions.

2.2 Both types of judicial review, as well as other cases that might involve competition law issues, may require courts to define relevant markets or to assess competitive effects. This will, in turn, require courts to use economics and economic concepts, as well as engage technical or industry specific know-how, although different sophistication of analysis may be required, depending on the case. This may not be required in every case. Economic concepts can help inform the examination of particular issues in a given case and help shed light on often complex sets of facts. For example, competition law incorporates concepts such as "market", "restriction of competition", "foreclosure", "abuse of dominance" and others which may be unfamiliar to judges dealing with other sorts of cases. These concepts cannot be construed by looking at the ordinary meaning of the words but require an understanding of economics that underlie and inform these concepts. Further, these concepts may develop over time as economic research further develops the understanding of the role of competition in helping markets work.

2.3 Therefore, economic criteria play a central role in competition policy and enforcement and in interpreting competition laws, judges may thus be assisted by a consideration of the relevant economic concepts and principles.

2.4 A judge may benefit from an impartial expert's explanation and interpretation of economic concepts and industry expertise, relevant to a particular question or issue arising in a competition law case.

2.5 The primary role of an expert witness in a competition law case is to assist the court by providing an objective and impartial opinion in relation to a question or issue that falls within the expert's field of specialised knowledge. The role of the court is to evaluate the expert evidence and to reach its own conclusions on questions of fact and law. However, the precise responsibilities of courts vary from jurisdiction to jurisdiction and there are differences in the use of experts and in the relationship between judges and experts across jurisdictions. In both common and civil law jurisdictions, judges are ultimately responsible for evaluating expert evidence. The main differences concern how expert evidence is introduced and how much control judges have over the production of expert evidence. In common law systems, it is for

the parties to present and challenge evidence, and the role of judges at this stage is primarily to control what evidence led by the parties is admissible. In civil law jurisdictions, on the other hand, it is more common for judges to decide what expert evidence should be introduced and to select the expert.

2.6 Across the world, the role of an expert witness is not to act as an advocate for any party. Regardless of who retains their services, the overriding duty of an expert witness is to assist the court.

2.7 The complexity of economic evidence, and concerns about the impartiality of expert witnesses, create challenges regarding how to manage and assess such evidence. Such challenges have led to the development of case management techniques across many jurisdictions, including rules on the:

a. qualification of experts;

b. admissibility of expert evidence;

c. examination of expert evidence; and

d. appointment of joint or court-appointed experts.

2.8 It has also led to the endowment of courts with internal sources of economic expertise, and to efforts to develop competition judges' technical capacity and expertise.

2.9 Different jurisdictions have adopted different approaches to the case management of expert evidence. This primer discusses a number of insights arising mainly from the experience of judges in Australia which may be relevant for members of the judiciary in the ASEAN Member States.

2.10 As the role of an expert witness is to assist the court, it is common around the world for a court to be able to order the appointment of an independent expert witness at its own motion. In some systems, only court-appointed experts are allowed and it is important that the appointment of such experts is impartial and transparent. The main shortcoming of this approach is that it may preclude the court from having access to multiple valid views, even if this can be mitigated by the appointment of a panel of experts or through the intervention of the parties during the proceedings.

3. Requirements for admissibility of expert opinion evidence

3.1 When the laws of a jurisdiction allow the parties to lead expert evidence, a court may refuse or limit the use of such evidence according to the court's own rules of evidence. Economic experts retained to present economic evidence in court are more likely to be perceived as credible and impartial witnesses if they are asked to explain why a certain economic theory is sound and why it should be applied to the facts of the case, rather than plead for the application of any theory with the only purpose of serving the client's cause. They may also bring new perspectives to the table.

3.2 Courts may be able to find evidence inadmissible or of little weight, depending on the relevant rules of evidence. It should be noted that there are differences across jurisdictions concerning the extent to which rules and procedures regulating economic expert witnesses in court proceedings have been developed.

3.3 In Australia, expert evidence submitted by the parties may be found to be inadmissible or of little weight, if the:

a. particular question or issue that the expert opines upon falls outside that expert's field of expertise;

b. instructions given to the expert are not disclosed;

c. assumptions or material facts underlying the opinion have not been disclosed or made good by other evidence;

d. expert has not been able to make all of the inquiries which the expert believes to be desirable and appropriate; or

e. reasoning is not clearly stated.

3.4 In some jurisdictions, courts have found it useful to develop a list of practical questions for judges to ask experts in order to assess their credibility. These questions may focus on issues of reliability, relevance and internal consistency, as well as on whether the advanced theory has been published in a peer-reviewed publication.

4. Properly qualified experts

4.1 An expert's opinion evidence will only be of assistance to a court if it is based wholly or substantially on specialised knowledge arising from the expert's training, study or experience.

4.2 In assessing the weight to be given to expert evidence submitted by the parties, or when selecting a court-appointed expert, a judge should consider the qualifications of

the expert to opine on the particular question or issue arising in the case. For example, an academic in the field of economics may not be appropriately qualified to opine on the operation of a particular industry that the academic has not studied or worked in.

4.3 The credibility of an expert witness selected by the parties may be the subject of an adverse assessment by a judge if the qualifications of the expert are not robust and clearly set out in the evidence, or if the expert's opinions appear to lack objectivity or be partisan.

5. Expert reports

5.1 It is common practice across the world for expert evidence in competition matters to be submitted in the form of expert reports. The content of those reports may then be challenged in accordance with the evidence rules of each jurisdiction, e.g. through cross-examination in court or through the submission of expert reports from other parties.

5.2 Expert reports will be of most assistance to a court if they are:

a. clearly expressed, including a brief summary at the beginning and setting out the reasoning for each opinion, and avoiding technical jargon where possible;

b. centrally concerned to express an opinion upon a clearly defined question or issue, rather than being discursive or offering general theories; and

c. not adversarial or argumentative in tone.

5.3 Particularly in the event of the expert having been appointed by one of the parties, the court might also consider whether the report includes:

a. the qualifications of the expert who prepared it;

b. the instructions given to the expert, including any specific questions that the expert was asked to address;

c. any assumptions and material facts on which each opinion is based;

d. reasons for and any relevant literature or other material utilised in support of each opinion;

e. any examinations, tests or other investigations on which the expert has relied, including the identity and qualifications of the person who carried them out;

f. particulars of any opinion expressed by another person whose opinion the expert has accepted and relied upon;

g. an appropriate disclaimer if any matter falls outside the expert's field of expertise or if a concluded opinion cannot be expressed because of insufficient data or for any other reason; and

h. any other appropriate qualifications on the opinions expressed in the report without which the report may be incomplete or inaccurate.

6. Appropriate use of expert evidence and witnesses

6.1 The management of expert evidence is essential in most competition cases. As noted above, the mechanisms and powers available to courts to manage expert evidence vary across jurisdictions.

6.2 To facilitate the efficient use of expert evidence in Australia, the court may seek to establish early on:

a. the number of expert witnesses proposed to be relied on by each party;

b. their respective areas of expertise;

c. the issues that it is proposed each expert will address; and

d. how the expert evidence may best be managed.

6.3 It will often be desirable for the parties to attempt to agree in advance on the questions or issues proposed to be the subject of expert evidence as well as the relevant facts and assumptions. A court may consider making orders to facilitate this.

6.4 Where possible, early involvement of the court in managing the expert evidence can ensure that any questions or assumptions provided to an expert are provided in an unbiased manner and in such a way that the expert is not confined to addressing selective, irrelevant or immaterial issues. It can also ensure that the expert evidence explains not only the economic theory, but also how it is applicable in the particular circumstances of the case before the court.

6.5 Good case management can also overcome many of the other risks of using expert evidence, including managing its volume, the timing of its preparation and its cost.

6.6 More broadly, a number of important principles have been identified by the OECD that may help the court when experts are involved in a competition law trial. Economic experts should not be relied upon as fact witnesses; rather, they should focus on the economic or econometric analysis of facts that have already been introduced and established through other witnesses. Economic theories and methodologies that are advanced should already have been sufficiency tested in the economics community. Experts should not be narrowly confined in the data they

analyse. Economic experts should not be advanced as industry experts, otherwise their credibility risks being significantly jeopardised during the trial. Finally, it is important to remember that experts may have both an offensive and defensive role to play in a given case.

7. Models of expert evidence

7.1 Australia is a common law jurisdiction with an adversarial system. Accordingly, in cases before Australian courts each party to contested proceedings may seek to call evidence in chief from one or more experts in support of their case. Traditionally, such evidence is challenged by opposing counsel during cross-examination.

7.2 In some matters, this traditional approach to expert evidence will be the most appropriate model for the presentation of expert evidence. Other systems have other approaches to expert evidence that will also be well-suited to some cases. For example, in civil law jurisdictions it is common for experts to be either jointly appointed by the parties or solely by the court.

7.3 In any event, other approaches to expert evidence may be preferable for individual cases. In Australia, where courts have extensive case management powers, the court may consider alternative models for the presentation of expert evidence.

7.4 One alternative model that can be considered is the giving of concurrent expert evidence, known in Australia as a 'hot tub'. This approach is commonly used in Australian competition law cases, as well as in New Zealand and occasionally in the United Kingdom. It involves the experts preparing a joint report setting out where they agree and where they disagree. An independent facilitator may be appointed to oversee this process. At the hearing, the experts are then called to give evidence at the same time. The process of concurrent evidence should allow for a sensible and orderly series of exchanges between the expert witnesses for each party, as well as between each expert witness, the lawyers for each party and the court. At the hearing, the expert witnesses may be given the opportunity to provide a summary of their opinions and to explain what they consider to be the principal issues of disagreement between the experts, as they see them, in their own words.

8. Related information sources

8.1 The following resources provide further information in relation to the use of expert evidence in the Federal Court of Australia. The material may also be useful as a general reference for judges in the ASEAN Member States:

a. Justice Middleton, *Expert Economic Evidence*, 16 October 2007

b. OECD, *Presenting Complex Economic Theories to Judges*, 2008

c. OECD, *Procedural Fairness: Competition Authorities, Courts and Recent Developments*, 2011

d. Justice Rares, *Using the "Hot Tub" – How concurrent expert evidence aids understanding issues"*, 12 October 2013

e. Federal Court of Australia, *Expert Evidence Practice Note (GPN-EXPT)*, 25 October 2016

f. OECD, *The resolution of competition cases by specialised and generalist courts: Stocktaking of international experiences*, 2016

g. Federal Court of Australia, *Expert Evidence & Expert Witnesses Guide*

Competition Primers for ASEAN Judges

Developed as part of the AANZFTA Competition Law Implementation Program

Circumstantial evidence in the context ofcompetition law

1. Introduction

1.1 This primer is intended to:

a. be a principles-based document for use by members of the judiciary in each of the Member States of the Association of Southeast Asian Nations ('ASEAN');

b. provide a practical and informative guide for judges focusing on challenges and issues faced in evaluating complex expert evidence in the course of making and reviewing decisions under competition laws in ASEAN Member States; and

c. assist in developing competition law precedent, which increases legal certainty, promotes efficiency and fosters consistency and predictability within ASEAN Member States, and ultimately contributes to shaping sound competition policy.

1.2 The primer has been developed in the context of the differences in and the varying stages of development of competition laws in the ASEAN Member States. It is not intended to provide country-specific information.

1.3 This primer has been developed by judges of the Federal Court of Australia for judges in the ASEAN Member States, in close cooperation with the OECD. It is one in a series of competition law primers developed at the initiative of the ASEAN Australia New Zealand Free Trade Area Competition Committee as a part of the Competition Law Implementation Program ('CLIP').

2. What is circumstantial evidence?

2.1 A party may prove a fact in issue in a proceeding:

a. with direct evidence, by leading evidence of that fact; or

b. with circumstantial evidence, by leading evidence of one or more other facts from which a court may be invited to infer the particular fact in issue.

2.2 The difference between direct evidence and circumstantial evidence is that the former does not require the process of inferential reasoning. In a cartel case, direct evidence would identify a meeting or communication between the subjects and describe the substance of their agreement. Circumstantial evidence would not specifically identify these elements, but would allow the court to infer that the agreement took place, the parties to it, and its content. For example, a waitress at a lunch meeting between three competitors may give evidence that she heard two of them reach a cartel agreement and saw all three patting each other on the back at the end of the meeting. Although this only provides direct evidence of an agreement between two competitors, a judge may be able to infer a tripartite cartel agreement from the circumstances.

3. Role of circumstantial evidence in competition law cases

3.1 Competition law cases are seldom based exclusively on direct evidence. Instead, competition law cases are generally based either on a combination of both circumstantial and direct evidence, or wholly on circumstantial evidence. Where direct evidence is available, circumstantial evidence can assist a judge in assessing the credibility of that evidence. For example, direct evidence regarding a meeting between competitors may be corroborated or contradicted by circumstantial evidence, like travel records.

3.2 Circumstantial evidence is accepted in every OECD country and in many other jurisdictions. This reflects the importance of this type of evidence for the successful enforcement of competition law.

3.3 In the case of cartels, sophisticated cartel operators realise that their conduct is unlawful and that their customers would object to the conduct if they knew about it. They may take measures to conceal their conduct and avoid entering into formal, documented arrangements. Indeed, commonly across jurisdictions, cartels include informal agreements, understandings, “meeting of minds”, or some “conscious

commitment to a common scheme". This effort of concealment means that direct evidence of a formal cartel agreement may not be available. In such cases, the best evidence that may be available of an agreement between competitors is circumstantial evidence of communication between them.

3.4 A country with a new enforcement regime and/or lacking a strong competition culture may face particular obstacles in obtaining evidence, and particularly direct evidence of anticompetitive conduct. The country may not have an effective leniency programme (a primary source of direct evidence) nor be able to generate cooperation with individuals or businesses engaged in economic activity that could facilitate evidence gathering. Furthermore, obtaining direct evidence of a cartel agreement may require special investigative powers, tools and techniques which may not be at the disposal of less experienced or new authorities. This may mean that the competition agency in such jurisdictions would have greater difficulty in generating direct evidence in cartel cases, and have to rely more heavily on circumstantial evidence.

3.5 A common misconception is that a case based on direct evidence must necessarily be stronger than one based on circumstantial evidence. This is not always correct. A case based wholly on the direct evidence of one or more witnesses will fall over if their evidence is found by a court to lack credibility. Meanwhile, circumstantial evidence can point so strongly towards a contravention that no other reasonable inference is left open.

3.6 Depending on the standard of proof required in a particular case, an inference that a court is invited to draw from the evidence may need to be the only reasonable inference available or merely the most likely one.

4. Different types of circumstantial evidence

4.1 There are different types of circumstantial evidence that may be of assistance to a court. In a cartel case, for example, the circumstantial evidence may generally be divided into communication evidence and economic evidence.

4.2 Circumstantial communication evidence is evidence that communications between competitors took place, although not necessarily of their content. Circumstantial communication evidence may include:

a. phone records, such as call logs and location tracking data;

b. diary or calendar entries;

c. financial records, such as food or accommodation receipts, placing competitors at the same location at the same time;

d. notes from meetings, which may record attendance and broad topics of discussion; and

e. internal documents indicative of communications having taken place between competitors.

4.3 Circumstantial economic evidence includes conduct evidence and structural evidence. Both types of evidence should ideally be considered.

4.4 Conduct evidence is evidence that competitors behaved consistently with the existence of the alleged cartel agreement. Conduct evidence will be most persuasive if it cannot be explained by ordinary market forces or competitive business behaviour. A judge should consider whether particular behaviour would have occurred in the absence of a cartel, having regard to unilateral commercial and economic interests of the competitors. Conduct evidence can include evidence of parallel conduct, bidding patterns, information exchanges between competitors, abnormally high sustainable profits and past violations of competition laws.

4.5 Structural evidence is evidence that explains why certain structural features make a particular market more susceptible to cartel conduct. Structural evidence is not by itself sufficient to show the existence of cartel conduct, but can affect a judge's assessment of the probability of such conduct in a particular market. Structural evidence includes evidence about the number of competitors, market concentration, barriers to entry, vertical integration, pricing transparency and homogeneity of products. It is the typical example of economic evidence, which is discussed in more detail in the CLIP Competition Primer on 'Economics' and 'Expert evidence'.

5. Assessing evidence holistically

5.1 A piece of circumstantial evidence may be capable of supporting a number of inferences, some of which may be conflicting (see 5.2 et seq. in the CLIP Competition Primer on 'Abuse of Dominance'). For example, a price cut could reasonably give rise to an inference of predatory pricing or to an inference of competitive conduct. For that reason, circumstantial evidence should not be assessed in a vacuum.

5.2 The inference or inferences to be drawn from circumstantial evidence should be assessed by a judge holistically, in light of all of the available evidence. Take a cartel case where the evidence shows:

a. phone calls between competitors on three separate dates;

b. parallel price rises by those competitors a few days after each phone call; and

c. an oligopoly market structure.

5.3 In the example above and considered individually, no one piece of circumstantial evidence would provide a sufficient basis on its own to infer collusion. A cumulative assessment of all three, however, may give rise to a reasonable inference of cartel conduct. This consideration is applicable to many instances where circumstantial evidence is relied upon, as commonly a single piece of circumstantial evidence may not provide a conclusive inference of anti-competitive conduct.

6. Examples of circumstantial evidence in cartel cases

6.1 In Australia, the following are some examples of cartel cases in which circumstantial evidence played a key role:

a. direct evidence of an agreement between hoteliers to stop discounting their prices of packaged beer fell away at trial after the key witness failed to adhere to his prior statement. The existence of the alleged agreement was still able to be inferred, including from circumstantial communication and conduct evidence.

b. construction companies bidding on government projects were found to have colluded during the bidding process. A company that did not want to win a tender sought a “cover price” for the project. It was inferred that there was an agreement to the effect that the company seeking the cover price would bid above that price, whilst the company providing it would bid below it.

c. a cable manufacturer was found to have engaged in bid rigging in a tender for the supply of high voltage land cables to a hydro electricity project. It was inferred that the manufacturer in question requested a “preference” in tendering for the project, thus giving effect to a global cartel arrangement between European and Japanese cable suppliers for the allocation of projects around the world.

7. Related information sources

7.1 The following resources provide further information in relation to the use of circumstantial evidence in competition law cases. The material may be useful as a general reference for judges in the ASEAN Member States:

a. OECD Competition Policy Roundtables, *Prosecuting cartels without direct evidence*, 2006

b. OECD Policy Brief, *Prosecuting cartels without direct evidence of agreement*, June 2007

c. Justice Mansfield, *Opportunities & challenges: Evidence in cases under the Trade Practices Act 1974*, 24 May 2008

d. Australian Competition and Consumer Commission, *Cartels case studies & legal cases*

e. International Competition Network, *Proving agreement or concerted practice with indirect evidence*

Competition Primers for ASEAN Judges

Developed as part of the AANZFTA Competition Law Implementation Program

Abuse of dominant position: what is it and how is it assessed?

1. Introduction

1.1 This primer is intended to:

a. be a principles-based document for use by members of the judiciary in each of the Member States of the Association of Southeast Asian Nations ('ASEAN');

b. provide a practical and informative guide for judges focusing on challenges and issues faced in evaluating complex expert evidence in the course of making and reviewing decisions under competition laws in ASEAN Member States; and

c. assist in developing competition law precedent, which increases legal certainty, promotes efficiency and fosters consistency and predictability within ASEAN Member States, and ultimately contributes to shaping sound competition policy.

1.2 The primer has been developed in the context of the differences in and the varying stages of development of competition laws in the ASEAN Member States. It is not intended to provide country-specific information.

1.3 This primer has been developed by judges of the Federal Court of Australia for judges in the ASEAN Member States, in close cooperation with the OECD. It is one in a series of competition law primers developed at the initiative of the ASEAN Australia New Zealand Free Trade Area Competition Committee as a part of the Competition Law Implementation Program ('CLIP').

2. The concept of 'dominance' or 'substantial market power'

2.1 Competition regimes around the world have converged toward the notion that prohibitions on unilateral conduct should be applied only to firms that have "substantial market power". Unilateral acts by a firm with a high degree of market power are more likely to distort the competitive process and to have anticompetitive effects than conduct by a firm that has no or little market power. In economics, market power is usually defined as the ability of a firm to keep the price of its product (or products) profitably above the competitive price for an extended period of time.

2.2 Different concepts and language are used around the world to identify the market power threshold beyond which unilateral conduct shall be deemed harmful to competition and can infringe competition law. In Europe and a number of other jurisdictions around the world, this threshold is 'dominance'. US federal law deploys a threshold of 'unlawful or attempted monopolisation'. Australia's threshold is 'substantial market power'. In most jurisdictions in ASEAN the threshold is 'dominance'. Despite these differences, competition regimes have converged towards the notion that prohibitions of unilateral conduct should be applied only to firms that have substantial market power – a threshold which, for ease of reference, will be referred to as 'dominance' or 'substantial market power' throughout this primer.

2.3 In order to assess the degree of power that a firm holds within a market, it is necessary to first define the relevant market. Market definition focuses on the area of close competition, the substitutability between products or the field of rivalry between competitors, having regard to both economic concepts and commercial realities. For example, if the only pizza shop in town raises its prices, consumers might switch to burgers or a neighbouring town's pizza shop might expand its delivery area. If substitution to burgers and/or pizza sellers in other towns prevented the pizza shop owner from profitably raising prices, those products and sellers would be included in the relevant market.

2.4 As this example shows, market definition will often require a judge to consider the product (e.g. pizza v. fast food) and geographic (e.g. one town v. numerous towns) dimensions, including by applying the principles of:

a. demand side substitution, namely substitution between goods or services from the point of view of consumers; and

b. in some jurisdictions, supply side substitution, namely substitution between goods or services from the point of view of suppliers. Supply side substitution may be considered in some jurisdictions for market definition, in particular if its effects on the competitive behaviour of incumbents is equivalent to those of demand side

substitution. Other jurisdictions only consider supply side substitution when assessing competitive effects.

2.5 Depending on the applicable competition laws, evidence of the following may be considered by a judge in assessing dominance:

a. market share, including its stability and durability;

b. barriers to entry or expansion;

c. ability of buyers to influence terms and conditions (countervailing buyer power);

d. market characteristics, including openness to imports; and

e. firm characteristics, including relative size, profit levels, vertical integration, available resources and economies of scale.

2.6 Holding a dominant position or substantial market power is not of itself prohibited. Competition laws generally proscribe only unilateral conduct that may harm competition because it amounts to an abuse of dominant position.

3. Abuse of 'dominance' or 'substantial market power'

3.1 Abuse of dominant position is characterised by conduct with the effect or likely effect of harming competition.

3.2 Whilst there is considerable divergence across jurisdictions about the range of conduct that may be considered as an abuse of dominance, examples include:

a. predatory pricing – unsustainably low prices aimed at eliminating or weakening competitors;

b. refusal to deal or exclusive dealing – arrangements aimed at restricting the freedom of parties to decide with whom, in what, or where they deal;

c. tying, bundling and loyalty schemes – linking the sale of separate goods or services with a view to discouraging competition;

d. margin squeeze – a vertically integrated enterprise, selling essential inputs to a rival, that lowers downstream prices and/or raises upstream prices to 'squeeze' margins at a particular functional level or levels of a market; and

e. exploitative conduct – unfair terms, price discrimination, reduction in production, innovation or quality.

4. Legal tests for abuse of dominance

4.1 In many countries there is an effects-based approach, focusing on the economic impact that the examined conduct has on consumers and competition. A number of other countries use a more form-based approach that focuses on how that conduct can be categorised under the relevant law. In such cases, economic analysis still plays an important role in those jurisdictions, but it is not necessary to establish that conduct actually restricted competition to find a violation of the law.

4.2 Whilst the form-based approach may provide greater legal certainty and faster resolutions than effects-based methods, it may generate results that are inappropriate, given the actual market effects. Indeed, most of the practices, which, in certain circumstances, could be an anticompetitive abuse of dominant position, could also have, in other circumstances, an overall pro-competitive or efficient effect.

4.3 A tool used to determine the potential harm to competition is analysis done by reference to a counterfactual test.

4.4 The counterfactual test involves a comparison of the likely state of competition in a market with and without particular conduct alleged to constitute an abuse of dominant position. It may also be useful in assessing loss or damages. A number of other tests that agencies and courts can apply in abuse of dominance cases exist: these include the profit sacrifice test, the no economic sense test, the equally efficient firm test, and various consumer welfare balancing tests. There is general agreement that no single test is suitable for every type of case.

4.5 Counterfactual analysis is not an exact science. In some cases, it may be possible to conclude that the state of competition within a market would have been preserved but for the conduct in question. In other cases, for example where the conduct is alleged to have deterred a new competitor, it may be difficult to reliably predict whether a new competitor would have entered the market without the conduct in question and, if so, what effect the new entrant would have had on the state of competition in the relevant market.

4.6 No matter what test or standard has been used to determine that the conduct should be unlawful, many jurisdictions complete the analysis by considering efficiency gains or plausible objective justifications as there are sometimes valid, even pro-competitive reasons why a dominant firm engaged in that conduct. An objective justification is essentially a special circumstance that excuses otherwise unlawful conduct, such as public considerations (e.g. health and safety reasons). Efficiencies would include, for example, economies of scale or encouragement of innovation. There may also be a regulated conduct defence, which allows antitrust immunity where conduct is

required by federal or state regulation. The regulated conduct defence ensures that the state can exercise its sovereign power to apply regulation that it deems justified for economic and/or social reasons even though the regulation may conflict with competition policy. Typically, in such jurisdictions the burden of proof shifts so that it is up to the firm under investigation to demonstrate the existence of these efficiencies or objective justifications, to show that the conduct in question is necessary and proportionate and that such efficiencies cannot be achieved through less anticompetitive means.

5. Evidentiary sources and issues

5.1 As for all competition cases, a court will apply the laws of its jurisdiction and its own rules of evidence to determine the nature and extent of the evidence required to establish abuse of dominant position. Sources of evidence that may assist a court include:

a. evidence from market participants and observers, including evidence from competitors, potential market entrants, suppliers and customers;

b. internal documents and business records, such as accounts and board papers; and

c. expert evidence, including economic and industry experts. Expert evidence is discussed in greater detail in the CLIP Competition Primer on 'Expert evidence'.

5.2 In assessing dominance, it is common for a court to rely primarily on indirect evidence concerning the structure of the relevant market, such as evidence of market share, barriers to entry and expansion and countervailing power. Direct evidence may be relied upon to supplement indirect evidence, but is not likely to conclusively establish dominance. For example, evidence of a firm's profitability is only useful in context and may be capable of different interpretations. The use of indirect / circumstantial evidence is discussed in greater detail in the CLIP Competition Primer on 'Circumstantial evidence'.

5.3 In some cases, anticompetitive effect or likely effect may be established by reliable direct evidence. When no such evidence is available, a judge may be able to rely on circumstantial evidence and the process of inference. It is not unusual for there to be significant overlap between the evidence used to establish dominance and that used to establish purpose or likely effect.

5.4 Wherever possible, proactive case management can benefit judges dealing with complex and voluminous evidence in unilateral conduct cases. Judges should consider what case management tools are available to narrow issues in dispute, control the scope and form of evidence and assist in the orderly conduct of the hearing.

6. Presumptions based on market share

6.1 In some jurisdictions, market share thresholds at both ends of the spectrum may be applied in analysing whether a firm holds a dominant position or substantial market power.

6.2 A safe harbour market share may be prescribed such that any firm with a market share below the safe harbour will be presumed not to hold a dominant position or substantial market power.

6.3 A market share threshold may also be prescribed above which a firm will be presumed to hold a dominant position or substantial market power.

6.4 Safe harbours and dominance thresholds based on market share may create presumptions that are conclusive or rebuttable. As a rule, such presumptions in most jurisdictions are rebuttable. This is particularly the case for presumptions that create dominance thresholds, since market shares are blunt instruments that are unable to conclusively demonstrate market power. High market share alone should therefore not be conclusive proof that a firm has substantial market power, even if market share analysis can nevertheless be a useful first step in competition analysis. For example, exceeding a market share threshold may create a rebuttable presumption of dominance by shifting the burden of proof from the regulator to the firm in question.

7. Conduct deemed to be an abuse of dominance

7.1 In Australia, the following conduct has been found by the courts to be an abuse of dominant position:

a. a major grocery retailer refused to deal with bread suppliers if their bread was also sold at nearby independent grocery retailers at a discounted price. This conduct made it more difficult for independent grocers to compete with major retailers for sales of bread to consumers;

b. a provider of ticketing services for live entertainment events shut down or refused to set up last minute discounted ticket deals at the request of event organisers because the discounted tickets were to be promoted by a competitor. This conduct made it more difficult for any competitors to sell last minute discounted tickets to consumers;

c. a manufacturer with dominance in the market for sterile fluids, but not in the market for dialysis fluids offered a discount to hospitals who agreed to bundle

their purchasing of both. This conduct made it more difficult for other sellers of dialysis fluids to compete for hospital sales.

8. Sanctions and remedies

8.1 There is an important difference between sanctions and remedies. Sanctions are usually meant to deter unlawful conduct in the future, and in some jurisdictions also to force violators to disgorge their illegal gains and compensate victims. Remedies cure, correct, or prevent unlawful conduct, whereas sanctions penalise or punish it. Typically, a competition law remedy aims to stop the violator's illegal behaviour, its anticompetitive effects, and its recurrence, and may seek to restore the competitive process.

8.2 The sanctions and remedies available where an abuse of dominant position is made out will depend on the competition laws of the relevant jurisdiction. The following types of sanctions and remedies may be available:

a. structural remedies – divestiture of the whole or a part of a business, or of particular assets, may be ordered to restore the market to a competitive state;

b. behavioural remedies – orders restraining or compelling certain conduct may be made to restrain anticompetitive conduct and to guide future behaviour;

c. penalties – sanctions, either monetary or criminal, and directed at either the legal entity or responsible individuals; and

d. damages for loss – compensation payments for loss or damage suffered as a result of the prohibited conduct and disgorgement of profits earned from the conduct in question.

8.3 The relief imposed may take into account the seriousness, severity and, in some cases, the economic impact of the violation. In some jurisdictions the notion of proportionality is used to ensure that relief imposed by the competition authorities and courts will not unduly intrude into the competitive process in the market, or itself distort the market. The scope and form of proportional relief should not exceed what is necessary to achieve competition law objectives.

8.4 Most jurisdictions authorise courts and/or competition agencies to impose both behavioural and structural remedies, but some allow structural remedies only when there is no equally effective behavioural remedy or when any such remedy would be more burdensome to comply with than the structural remedy. In many cases, behavioural remedies will be sufficient to effectively end the competition

infringement. In some cases, however, the only effective or less burdensome remedy is a structural one.

9. Related information sources

9.1 The following resources provide further information in relation to abuse of dominant position. The material may be useful as a general reference for judges in the ASEAN Member States:

a. OECD Competition Policy Roundtables, *Evidentiary issues in proving dominance*, 2006

b. OECD Competition Policy Roundtables, *Remedies and sanctions in abuse of dominance cases*, 2006

c. OECD Competition Policy Roundtables, *Safe harbours and legal presumptions in competition law*, 2017

d. International Competition Network, *Recommended practices on the assessment of dominance/substantial market power*

e. International Competition Network, *Unilateral conduct workbook*

Competition Primers for ASEAN Judges

Developed as part of the AANZFTA Competition Law Implementation Program

Market definition in competition law

1. Introduction

1.1 This primer is intended to:

a. be a principles-based document for use by members of the judiciary in each of the Member States of the Association of Southeast Asian Nations ('ASEAN');

b. provide a practical and informative guide for judges focusing on challenges and issues faced in defining markets in the course of making and reviewing decisions under competition laws in ASEAN Member States; and

c. assist in developing competition law precedent, which increases legal certainty, promotes efficiency and fosters consistency and predictability within ASEAN Member States, and ultimately contributes to shaping sound competition policy.

1.2 The primer has been developed in the context of the differences in and the varying stages of development of competition laws in the ASEAN Member States. It is not intended to provide country-specific information.

1.3 This primer has been developed by judges of the Federal Court of Australia for judges in the ASEAN Member States, in close cooperation with the OECD. It is one in a series of competition law primers developed at the initiative of the ASEAN Australia New Zealand Free Trade Area Competition Committee as a part of the Competition Law Implementation Program ('CLIP').

2. The concept of a 'market'

2.1 Competition law is concerned with the protection of competition, or rivalry, between firms engaged in trade or commerce. The law generally seeks to prevent commercial conduct or transactions that may harm competition in the supply or acquisition of products (in this primer, the term "products" is used to encompass both goods and services).

2.2 The word "market" is used to describe the area of trade or commerce in which competition occurs. The market can also be described as the "field of rivalry" between firms, whereby firms compete against each other to supply or acquire products. In the application of competition law, the market that is the subject of a competition assessment is often referred to as the "relevant market".

2.3 Identifying and describing a relevant market in which competition occurs may be necessary in competition law for a number of reasons:

a. First, competition law may prohibit conduct that harms or diminishes competition in a market. Defining the relevant market—the area in which competition occurs—is the first step in analysing whether the conduct in question will harm or diminish that competition.

b. Second, competition law may prohibit certain types of agreements between competitors in a market. Defining the relevant market may help determine whether the parties to the agreement are competitors.

c. Third, competition law may require calculation of market shares. For example, a law may specify a particular market share above which a firm may be considered to be dominant or to have market power.[1] In other jurisdictions, market share may be one factor in the assessment of whether a firm has a substantial degree of market power. Market shares may also be relevant to whether conduct, such as a merger, must be notified to the relevant competition authority, and to the calculation of penalties for contravening conduct. In a merger control context, market shares are sometimes used to determine whether or not in-depth scrutiny of a merger is required. In the case of vertical agreements, market shares may be relevant to qualification for safe harbours or exemptions. Defining the relevant market is a necessary first step to calculate market shares.

2.4 Market definition is an economic concept and has been incorporated into the competition laws of ASEAN countries in different ways. In some jurisdictions, market definition is a statutory prerequisite on the competition authority in the enforcement of the law, or a requirement to define the relevant market may be established in the case

[1] See *Competition Primers for ASEAN Judges 2018*, Primer IV at [6.1] – [6.4].

law. In other jurisdictions, there is no legal obligation to define the "relevant market", though it may still be necessary in practice (e.g. to establish a dominant position). Some countries have chosen to incorporate the term "relevant market" into their competition laws, and the notion of relevant market may also be included in the implementing regulations which accompany competition laws.

2.5 Therefore, market definition plays an important role in the assessment of market power in many jurisdictions. However, market shares have to be considered together with other factors when making an overall assessment in a particular case (see factors in paragraph 4.6). Market definition may have a more limited role in hard core cartel cases.

2.6 If a relevant market is incorrectly defined, the assessment of the effect of particular conduct on competition—or of whether a firm is dominant in the relevant market—will be affected. If the market is defined too narrowly, important competitive constraints are not taken into account and market power is overstated, or products that in fact constrain each other are not considered in the market at all. If the market is defined too broadly, products are considered competitive constraints that in fact do not substantially constrain the behaviour of firms.

2.7 Markets are usually defined by two dimensions: the product that is being traded; and the geographic area in which it is being traded.

2.8 The boundaries of the relevant market are usually determined by the possibility of substitution by buyers and sellers in response to changing prices. Substitution refers to switching by customers and suppliers between products and between geographic sources of supply. For example, if a grocery store increased the price of ripe bananas, its customer might choose to buy unripe bananas from that store, to travel to another store, or to buy a different fruit (e.g. mangoes). In each case, the customer would be substituting between products (ripe/unripe bananas and mangoes) or sources of supply (the first and second stores).

2.9 Substitution by a customer between different products and sources of supply is known as "demand-side substitution". Assessment of demand-side substitution plays a critical role in market definition.

2.10 Similarly, a supplier can engage in substitution when they can profitably use their existing resources to supply a new product, or to expand their supply of a product into a new geographic area, quickly and without significant investment. For example, a bakery which had previously only sold bread might begin selling cakes as well. Alternatively, a baker which delivered bread and cakes in one suburb might begin delivering them into a neighbouring suburb.

2.11 Substitution by suppliers between products and geographic locations is known as "supply-side substitution". Some jurisdictions consider supply-side substitution when

defining the relevant market. However, other jurisdictions only consider supply-side substitution when assessing competitive effects (see para 3.11).

3. The task of market definition

3.1 The task of identifying the relevant market is called "market definition". In the real world, trading activity is not divided neatly into clearly delineated markets. Markets will commonly overlap, to some degree, with other markets. The object of market definition is to determine the competitive constraints faced by a firm for its products or services and to provide the clearest picture of the competitive processes affecting the relevant area of trade. Recognising that markets may not be clearly delineated, it is sometimes possible to exercise flexibility in defining a relevant market, or leave the question of precise market definition open, and still accurately assess the impact of conduct on competition.

3.2 A practical approach to market definition begins with the trading conduct that is the subject of complaint and the area of trade in which that conduct occurs. For example, in the case of a merger, this will typically require identifying the area of trading "overlap" between the merger parties. In matters concerning an agreement or other trading conduct, this will require identifying the trade that is affected by the agreement or conduct. Usually, particular products and geographic areas are affected by the conduct being examined.

3.3 The next step is to consider the competing products and sources of supply for the products in question. In particular, what *products* are substitutes for those products (are mangoes substitutes for bananas?), and over what *geographic area* does substitution occur (one province? Several provinces? An entire country?). This question is first asked narrowly: what are the closest substitutes? It is then repeated, each time a little less narrowly, until all relevant substitute products and geographic regions have been identified. The product and geographic dimensions are typically undertaken separately. Typically, the characteristics of the product, its transport costs, regulatory and trade barriers, consumer preferences and market dynamics can play a relevant role in the analysis.

3.4 Assessing demand-side substitution requires considering customers' willingness and ability to switch between different products and geographic regions in response to different prices or quality of products. For example, a customer wanting to eat fruit might substitute a mango for a banana, but might not be prepared to travel very far to buy it. However, a customer may be prepared to travel for an hour or longer to buy more expensive products (such as a television), or may be able to buy some products (such as books) online from suppliers who are located several hours' travel away, or even in another country, but can send the product by mail.

3.5 Whether customers are willing to substitute one product or source of supply for another is usually a question of degree. Two products or sources of supply are regarded as being in the same market if they are close substitutes. That means that the first product or source of supply acts as a close competitive constraint on the second product or source of supply.

3.6 The test that is commonly applied for these purposes is the hypothetical monopolist test (HMT). The HMT determines the smallest area in product and geographic space within which a hypothetical current and future profit-maximising monopolist could effectively exercise market power. In general, the exercise of market power by the hypothetical monopolist is characterised by the imposition of a small but significant and non-transitory increase in the price (SSNIP)[2]. Typically, a price increase in the order of 5 to 10% is used as the measure of "small but significant". Transitory price increases are ignored because it is common in markets to have brief fluctuations in prices. The relevant question is whether customers would switch to another product or source of supply in response to a non-transitory increase in price. If customers would switch, the second product or source of supply is a competitor of the first product or source of supply, and they are regarded as being part of the same market.

3.7 Typically, in merger control cases, as well as in some abuse of dominance cases, the competition authority will take a prospective analysis, considering currently prevailing prices as a starting point for the SSNIP test. In other abuse of dominance cases, where the currently prevailing price has already been increased substantially above the competitive level, the competition authority will likely use the competitive (but-for the conduct) price as a benchmark price, and not the currently prevailing price.

3.8 While a useful tool, the SSNIP test may need to be adapted in certain circumstances, such as in two-sided markets. A two-sided market is a market in which a firm acts as a platform and sells two different products or services to two groups of customers, while recognising that the demand from one group of customers depends on the demand from the other group and, possibly, vice versa. Typical examples of two-sided platforms include social media platforms that sell content and advertising space, and payment card platforms, that sell the use of a card to consumers and a point-of-sale (POS) terminal to retailers. In such cases, an attempt to define the market assessing only one side of the market may disregard the competitive constraints exerted by the other side. So a SSNIP test in such cases should be undertaken on both sides of the market to avoid, for instance, markets being defined too narrowly, resulting in higher market shares and higher levels of concentration than is actually the case.

3.9 In the case of two-sided markets where 'free' products are offered to one side of the market, which are monetised on the other side of the market, such as social media

[2] Generally, the SSNIP can be applied to the prevailing price of the products. However, if a firm already has a complete or near monopoly over the relevant products, that firm's price may reflect a monopolistic, rather than competitive, price. In such cases it may be necessary for the SSNIP to be applied to an estimated competitive price rather than the firm's prevailing price.

platforms or general search services, a small but significant deterioration in quality might be used as an alternative test for considering whether customers would switch to competing services.

3.10 A number of quantitative economic tools exist that can help with market definition. The utility of such economic tools depends on the availability of the necessary data, the specificities of the case and legal or practical constraints.[3] These include those tools listed in Annex A.

3.11 The assessment of demand-side substitution is often considered key to defining markets. In some jurisdictions, such as in the European Union, supply-side substitution can also be considered in defining the relevant market where its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. In other jurisdictions supply-side substitution is considered only at the stage of the competitive assessment – the U.S. Horizontal Merger Guidelines focus only on demand substitution at the market definition stage of the analysis, for instance.

3.12 Where supply-side substitution is considered as part of market definition, it is necessary to also consider how suppliers might respond to a SSNIP of the relevant products. A supplier will be in the same market as another supplier if, in response to such a price increase by the second supplier, the first supplier will commence supplying the relevant product, or commence doing so in the relevant area of supply, quickly and without significant investment. Supply-side substitution requires that the firms producing substitutes possess the necessary production facilities and the technological know-how, access to the necessary distribution channels and marketing and be able to restructure production quickly. Therefore, production and supply capacity tied up under long-term contracts may make supply substitution unlikely, for example.

3.13 Ordinarily, where activities at two stages in the supply chain are undertaken by different firms (e.g. by separate manufacturers and retailers), there will be separate functional markets (e.g. separate manufacturing and retail markets). However, in some cases it may be appropriate to identify a market which encompasses more than one functional level. This can be appropriate if participants at one functional level constrain participants at another functional level. For example, in an industry where many manufacturers are vertically integrated and also distribute and retail their own products, standalone retail businesses might be competitively constrained by the vertically integrated businesses. In those circumstances, it could be appropriate to define a market for the manufacturing, distribution and retailing of a particular product.

[3] For further information, see OECD (2012), Market Definition, http://www.oecd.org/daf/competition/Marketdefinition2012.pdf.

4. Features of a market

4.1 Once a market has been defined, the features of that market which influence the process of competition in that market can be described and need to be considered. This in turn facilitates an assessment of the effect of particular conduct on competition, or of whether a firm is dominant in the relevant market.

4.2 Key features of a market that should be considered in this respect include the following.

a. The number and size of competitors, and their market share (i.e. the degree of concentration in the market).

b. Barriers to entry, and the height of any such barriers.

c. Durability of market power.

d. Economies of scale, economies of scope or network effects (i.e. where the value of a product improves/increases by increasing the number of users of such product).

e. The extent of product differentiation and sales promotion.

f. The nature of the relationships between customers and suppliers, and any countervailing power of customers or suppliers in their dealings with each other.

g. The nature and extent of any vertical integration (i.e. instances at which a single firm operates at more than one level of the supply chain).

h. Any long-term contracts or other arrangements between firms which restrict their ability to function independently of each other.

i. The dynamic characteristics of the market, including growth, innovation and product differentiation.

4.3 Market definition can be a complex task and in some cases, market definition and market shares are less important. For example, markets where products are highly differentiated, bidding markets (i.e. markets in which players compete through auctions to be the supplier of a whole market of product or services, rather than for market shares), two-sided markets, aftermarkets and highly dynamic markets require additional considerations. In such markets, market shares are only an indicator of market power.

a. In differentiated product markets, the intensity of competition and substitution between products is a more important indicator of market power than market shares.

b. In bidding markets, where competition is “for the market” (i.e. for being the sole supplier of a whole market) and not “in the market”, more weight has to be placed on identifying the (potential) market participants, i.e. those suppliers that have the

capacity to compete for the contract and can participate in future bidding competitions.

c. In two-sided markets, which serve two or more distinct groups of customers that would like to interact but cannot do so without the firm serving as a platform, market shares on one side of the market are only weak indicators of market power as competitive constraints from the other side might limit any existing pricing power. In such markets the competitive constraint exercised by the other side of the market needs to be considered to understand whether a firm has market power.

d. In markets characterised by primary and secondary products, such as printers and printer cartridges or cars and spare parts (known as aftermarkets), it may be necessary to define the market as a 'systems market' rather than two separate markets.

e. In highly dynamic markets, developments are often unpredictable, leading to the creation of new markets or the convergence of formerly separate markets. As a result, market boundaries may shift rapidly. In such industries it is not the price that is the main competitive parameter but innovation or the introduction of a new superior product.

5 Evidentiary sources

5.1 As for all competition cases, a court will apply the laws of its jurisdiction and its own rules of evidence to determine the nature and extent of the evidence required when defining a relevant market.

5.2 The types of evidence that may be relevant to market definition include the following:

a. characteristics of the products in issue, including the purpose they serve for customers and their price and other features;

b. the behaviour of customers and suppliers in buying and selling the products and their willingness to switch to alternative products or sources of supply – such evidence of demand-side substitution can be obtained by consumer surveys, for example, where consumers are asked how they have or would react to a SSNIP; and

c. empirical evidence from recent changes in the market structure and from past natural experiments (for example the entry of a new competitor in the past).

5.3 The views and practices of those operating in the relevant industry will often be the most useful evidence to assist the court in identifying a commercially realistic market definition. Competitors themselves may have collected data on demand-side substitution to identify their rivals. For example, board minutes or presentations, plans, strategies or other internal documents of a business may identify who they consider

their customers to be, who they consider their competitors to be, and their past experience of gaining or losing customers in response to changes in price, quality or other features of their products or their competitors' products. In some cases, these types of documents may also contain a business' views about the market in which it operates. However, as a matter of language, the word "market" can be used in various ways, many of which do not reflect the economic concept of a market. Accordingly, caution is often required before relying on such evidence as identifying the relevant market for the purpose of competition law.

5.4 Expert evidence from economists and industry experts, former business executives, suppliers or distributors may also assist a court undertaking the task of market definition. An expert economist may give evidence on the meaning of relevant economic concepts (such as demand and supply-side substitution) and the extent to which they are observed on the facts of a particular case. An industry expert might give evidence on behaviours and practices in the relevant industry.

5.5 Expert evidence is discussed in greater detail in the CLIP Competition Primer on 'Expert evidence'.

6 Examples of relevant market definitions

6.1 In Australia, courts have adopted the following market definitions in previous cases, based on the particular facts of, and the conduct in issue in, those cases.

a. In a case considering misuse of market power and other conduct by a newspaper owner, the court identified a market in the particular regional area in which the newspaper was sold, which it described as a market for the supply of regional newspapers which provided the services of providing information, news and advertising to persons within that area.[4]

b. In a case considering whether airlines had engaged in price fixing by reaching an understanding to impose certain fees and surcharges on the carriage of air cargo, the court identified that the relevant markets were markets for the service of flying cargo from individual ports of origin in Singapore, Hong Kong or Indonesia to individual destination ports in Australia.[5]

c. In a case considering whether the acquisition by a rail linehaul operator of a rail terminal would be likely to have the effect of substantially lessening competition in a market, the court identified a market for the supply of rail linehaul services for intermodal freight on particular corridors to a subset of customers for whom

[4] Described in *Rural Press v ACCC* (2003) 216 CLR 53 at [27]

[5] Described in *Air NZ v ACCC* (2017) 262 CLR 207 at [16].

neither road services nor sea services provided an effective substitute for rail linehaul services.[6]

6.2 In Europe, in several cases the European Commission adapted its market definition tools to markets with specific characteristics. For instance:

a. In a merger concerning the sale of branded deodorants, where product differentiation played an important role, the European Commission considered the degree of competitive constraints between male deodorants and non-male (female and unisex) deodorants, applying a simulation approach based on a model of demand estimation to assess patterns of customer substitution across different products in response to their changes in price.[7]

b. In a merger between two suppliers of seeds, pesticides and crops, when assessing the relevant markets for crop protection, the European Commission considered the "innovation spaces" (i.e. the level of products where innovation competition takes place) and their geographic dimension, in addition to the product markets.[8]

7. Related information sources

7.1 The following resources provide further information in relation to market definition. The material may be useful as a general reference for judges in the ASEAN Member States:

a. Decision of the Australian Trade Practices Tribunal in *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169.

b. Brunt, "Market definition issues in Australian and New Zealand trade practices litigation" (1990) 18 Australian Business Law Review 86.

c. OECD (2012), Market Definition

d. OECD (2016), Defining Geographic Markets Across National Borders

[6] *ACCC v Pacific National* (No 2) [2019] FCA 669.

[7] Case M.5658 – *Unilever/Sara Lee*, European Commission decision of 17 November 2010.

[8] Case M.8084 – *Bayer/Monsanto*, European Commission decision of 21 March 2018.

Annex A. Quantitative economic tools

A number of quantitative economic tools exist that can help with market definition. The utility of such economic tools depends on the availability of the necessary data, the specificities of the case and legal or practical constraints.[9] These include:

(a) **Price correlation analysis**. It examines the extent to which the prices of two products move together over time. If the price of one product constrains the price of the other, the two price series usually have similar patterns. The interpretation of price correlation analysis raises complications, for instance how high does a correlation coefficient have to be for two products or geographic areas to be in the same relevant market?

(b) **Critical loss analysis**. It measures the minimum volume of sales that a hypothetical monopolist would need to lose to make a 5-10 % price increase unprofitable. The critical loss is compared to the actual loss the hypothetical monopolist would incur in response to the 5-10 % price increase to determine whether such a price increase would be profitable. If the actual loss is smaller than the critical loss, the price increase would be profitable for the hypothetical monopolist, which would be indicative of a relevant product market.

(c) **Natural experiment**. It analyses past events in a market to understand the competitive dynamics of that market. These past events include new product launches, market entry, advertising campaigns, input cost shocks or regulatory interventions.

(d) **Demand estimation**. It observes how consumer behaviour adapts to changes in the price of products, consumer income, or other variables that impact demand. In other words, it provides information about the prices and quantities that consumers are willing to demand by estimating demand elasticity.

[9] For further information, see OECD (2012), Market Definition, http://www.oecd.org/daf/competition/Marketdefinition2012.pdf.