Competition Primers for ASEAN Judges
2018
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www.oecd.org/daf/competition/asean-capacity-building-for-judges.htm
Acknowledgements

The CLIP Competition Primers for ASEAN Judges (‘Primers’) were developed jointly by the Federal Court of Australia (‘FCA’) and the Organisation for Economic Co-operation and Development (‘OECD’). The Primers are an initiative of the ASEAN Australia New Zealand Free Trade Area Competition Committee, and supported by Australia and New Zealand under the Competition Law Implementation Program (‘CLIP’).

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Preface

Professor Frédéric Jenny

Judges play an essential role in the enforcement and development of competition law, and this is well recognised in the international competition community. Although judges’ roles may differ in each jurisdiction, they ultimately decide on the proper interpretation of competition law. Therefore, the active participation of judges well versed in competition law issues is key to have effective enforcement, especially in younger competition regimes. Moreover, in the context of the OECD’s strong engagement with ASEAN, we are witnessing the excitement for the role of competition law in the region and an increasing interest in learning more about international best practices.

These Primers bring together the Federal Court of Australia’s very rich technical knowledge and first-hand experience, with the OECD’s international experience working with judges and knowledge of the ASEAN region and laws. I strongly believe that this co-operation can help ASEAN judges to deepen their understanding of international best practices and to thus better navigate competition law cases that at times can be complex and seem daunting.

The topics covered in the Primers all raise challenging issues when competition law cases are litigated in courts. One of the main challenges is of course the economics that underlies the competition topic itself.

Trained as an economist, I had the privilege of serving as a judge for eight years on the French Supreme Court. As a former economist and enforcer, at first I felt the need to adapt my language, my mind set and methodology to the judicial approach. In fact, enforcers and economists, on the one hand, and courts, on the other hand, often have difficulties communicating, as they do not speak the same language. The words and concepts used by each of these actors are not known to the other, or have different meanings. In my view, these Primers will facilitate communication between the economists and judges and establish some common ground for a mutual understanding of competition laws and policy in ASEAN.

I am sure these Primers can serve as a solid and useful reference for judges in ASEAN and elsewhere, when they have to adjudicate competition cases.

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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.

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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 straightforward 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:


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.
Primer II - Circumstantial evidence in the context of competition law

1. Introduction

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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:


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

e. International Competition Network, *Proving agreement or concerted practice within direct evidence*
1. Introduction

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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 sufficiently 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:

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 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
“The Primers offer a first overview or port of call for the issues that courts will need to consider in most competition cases. I believe this collaborative work will prove very useful for judges in ASEAN as they will be increasingly faced with competition cases in the years to come.”
Frédéric Jenny, Chair, OECD Competition Committee

“It was a privilege to be able to draw on the expertise the FCA has acquired engaging with principles of both competition law and economics to develop, with input from the OECD, written tools to assist the diverse audience of judges in the ASEAN Member States. We trust that the Primers will prove a valuable and long enduring resource for judges in our region deciding competition law matters.”
The Honorable Justice John Middleton, Federal Court of Australia

“The Primers contain materials that are important for judges to understand the economic aspects of competition cases. Written in plain English, the Primers are easy to understand for judges with no economics background.”
Justice Syamsul Maarif, Supreme Court of Indonesia