

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*](#)