

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:
- particular question or issue that the expert opines upon falls outside that expert's field of expertise;
 - instructions given to the expert are not disclosed;
 - assumptions or material facts underlying the opinion have not been disclosed or made good by other evidence;
 - expert has not been able to make all of the inquiries which the expert believes to be desirable and appropriate; or
 - 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:

- 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*](#)