

Competition Primers for ASEAN Judges

Developed as part of the AANZFTA Competition Law Implementation Program

Circumstantial evidence in the context of competition law

1. Introduction

- 1.1 This primer is intended to:
 - a. be a principles-based document for use by members of the judiciary in each of the Member States of the Association of Southeast Asian Nations ('ASEAN');
 - b. provide a practical and informative guide for judges focusing on challenges and issues faced in evaluating complex expert evidence in the course of making and reviewing decisions under competition laws in ASEAN Member States; and
 - c. assist in developing competition law precedent, which increases legal certainty, promotes efficiency and fosters consistency and predictability within ASEAN Member States, and ultimately contributes to shaping sound competition policy.
- 1.2 The primer has been developed in the context of the differences in and the varying stages of development of competition laws in the ASEAN Member States. It is not intended to provide country-specific information.
- 1.3 This primer has been developed by judges of the Federal Court of Australia for judges in the ASEAN Member States, in close cooperation with the OECD. It is one in a series of competition law primers developed at the initiative of the ASEAN Australia New Zealand Free Trade Area Competition Committee as a part of the Competition Law Implementation Program ('CLIP').

2. What is circumstantial evidence?

- 2.1 A party may prove a fact in issue in a proceeding:
- with direct evidence, by leading evidence of that fact; or
 - 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:
- phone calls between competitors on three separate dates;
 - parallel price rises by those competitors a few days after each phone call; and
 - 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:
- 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.
 - 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.
 - a cable manufacturer was found to have engaged in bid rigging in a tender for the supply of high voltage land cables to a hydro electricity project. It was inferred that the manufacturer in question requested a “preference” in tendering for the project, thus giving effect to a global cartel arrangement between European and Japanese cable suppliers for the allocation of projects around the world.

7. Related information sources

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

- a. OECD Competition Policy Roundtables, [*Prosecuting cartels without direct evidence*](#), 2006
- b. OECD Policy Brief, [*Prosecuting cartels without direct evidence of agreement*](#), June 2007
- c. Justice Mansfield, [*Opportunities & challenges: Evidence in cases under the Trade Practices Act 1974*](#), 24 May 2008
- d. Australian Competition and Consumer Commission, [*Cartels case studies & legal cases*](#)
- e. International Competition Network, [*Proving agreement or concerted practice with indirect evidence*](#)