



Asia-Pacific
Economic Cooperation

Advancing Free Trade
for Asia-Pacific **Prosperity**

Use of Economic Evidences

Experience from APEC Members and Implications to APEC Developing Economies and Viet Nam

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List of acronyms/abbreviations

APEC	Asia-Pacific Economic Cooperation
ACCC	Australian Competition and Consumer Commission
DOJ	Department of Justice
FTC	Federal Trade Commission
GSO	General Statistic Office
IAP	Individual Action Plan
OECD	The Organisation for Economic Co-operation and Development
RAASR	Renewed APEC Agenda for Structural Reform
SSNIP	Small but Significant and Non-Transitory Increase in Price
TDLC	Tribunal de Defensa de la Libre Competencia (Court of Defense of Free Competition of Chile)
TFEU	Treaty on the Functioning of the European Union
U.S.	the United States

Introduction

In recent years, APEC has made significant efforts and support for promoting the effectiveness of competition policy and market functioning in the APEC region. Meanwhile, competition authorities in the APEC region remain uneven in terms of knowledge, tenure, and experience in dealing with actual competition cases. The more recently established competition authorities in developing APEC economies like Viet Nam appear to lag behind their counterparts in more developed economies in terms of knowledge and legal framework.

The use of economic evidence in competition cases presents an area where Viet Nam needs meaningful efforts to improve. Since the competition authority in Viet Nam often encounters difficulties in collecting direct evidence, even information from major enterprises, popularizing and making use of economic evidence may prove to be helpful. However, economic evidence is not yet legally recognized in handling of competition cases in Viet Nam, while inadequate preparation of capacity to use such evidence poses another concern. Thus, promoting use of economic evidence has been identified in Viet Nam's individual action plan (IAP) to implement Renewed APEC Agenda for Structural Reform (RAASR) as one of the top priorities. Sharing knowledge and information on the use of economic evidence in competition policy formulation and enforcement will benefit other developing economies in APEC region that face similar situations and contribute to APEC's ultimate objective of a more inclusive and sustainable growth in the region.

The APEC funded project on “Promoting the use of economic evidence for more effective competition policy and market functioning” (EC 02 2017A) requires preparation of a Report on key experiences of using economic evidences in competition cases and implications for APEC developing economies.

This paper is to help guide efforts to build capacity for competition authorities in APEC developing economies (especially Viet Nam) to use economic evidence in competition cases; To share selected experiences of APEC member economies in using competition cases; To support the improvement and enforcement of regulations over competition policy in Viet Nam. While a new version of Viet Nam's Competition Law is under

drafting this paper may help to provide valuable inputs in terms of the use of economic evidence.

The paper is based on literature review and is aimed at documenting experience, good practices from advanced economies in APEC and discussions on the topics and its implication to developing economies and to Viet Nam. The main contents of the paper include; (i) summary of key experiences of APEC member economies in using economic evidences regarding market definition, merger analysis, and use of entry experience to identify barriers; (ii) discussion on the implications/preconditions for APEC developing economies to enhance their capacity of using economic evidence in competition cases; (iii) relevant implications/issues for Viet Nam. The paper therefore is structured according to these contents.



I. MARKET DEFINITION

Market is the place where supply and demand interacts. The interaction between supply and demand help to determine prices for goods and services. The diversity and number of transaction between consumers, buyer, suppliers... create different type of market: e.g. perfect competition, monopoly, group monopoly. Among these type of market, a perfect competition market is considered to be the one in which scarce resources are best allocated to the best use. In other type of markets, the market is under the control of a limited number of enterprises and they therefore have the power to decide on prices, production and other factors.

To understand whether a business or group of business has dominating position in the market, competition authority often takes such criteria into account as: market, market entry barriers, market exit barriers, buyer purchasing power, elasticity of demand, the difference between price and cost... Among these, market is an important criterion which is used by competition authority. When a business holds a large market share for a long period, it can be presumed that the business is holding the market dominating position without having to spend much efforts on collecting evidences. However, with business which hold low market share, it will take much stronger efforts to collect evidences to come up with a conclusion on the dominating position of such an enterprise.

Market definition is one of the most fundamental concepts underpinning essentially all competition policy issues, from mergers, through dominance/ monopolisation to agreements. As a result, this section reviews the market definitions used in more advanced economies of APEC and its implications, lesson learnt for developing ones.

1. Experience of more advanced economies

In Australia, according to the presentation by Australian Competition and Consumer Commission, APEC Economic Committee – Second Plenary Meeting 2017 on 25 August 2017, Ho Chi Minh City, in Australia:

“...The market concept is an instrumental concept, designed to assist in the analysis of processes of competition and sources of market power..” (Maureen

Brunt, 1991). This implies a strong link between the competition law/antitrust concept of a market; and the notion of competition... ”.

Competition is not an outcome but a process. Competition is a process rather than a situation ... It is the way in which firms interact, and respond to each other, to ensure they best achieve their individual objectives. According to Harper Review (2015), “competition is the process by which rival businesses strive to maximize their profits by developing and offering desirable goods and services to consumers in most favorable terms”.

There is a strong link between market power and competition. A firm possesses market power when it can behave persistently in a manner different from the behavior that a competitive market would enforce on a firm facing otherwise similar cost and demand conditions... ”.

In Australia,

“Markets are enshrined in Australian antitrust legislation and common law. Each of the functions described above, invariably requires the Australian Competition and Consumer Commission (ACCC) to assess relevant markets and define the boundaries of those markets. Even where there is no legislative proscription, market definition provides a useful framework for analysing the likely consequences or harm to competition from conduct that may breach the Act”.

“The basic tenet of market definition in Australia is substitution. The product dimension of markets are typically determined by the willingness and scope for customers to substitute between one product and another product (demand-side substitution) and for producers to shift their production capabilities from one product to another (supply side substitution). A similar approach is often used to define the geographic boundaries of markets”¹.

In the United States, according to notes by the United States, OECD Roundtable on Market Definition (2012):

¹ OECD Roundtable on Market Definition (2012)

“....For the U.S. federal antitrust agencies (the Federal Trade Commission (“FTC”) and the Antitrust Division of the Department of Justice (“DOJ”), collectively the “Agencies”) or private plaintiffs to prevail in a civil case under the antitrust laws, they must “prove harm . . . to the competitive process, i.e., to competition itself.”¹ In some cases, notably those involving obvious price fixing among competitors, that harm is presumed from the nature of the conduct. In most other cases, competitive harm must be shown through a fact-intensive analysis of the challenged conduct or merger and its context. Traditionally, courts have examined market power or monopoly power in such cases, and the defendant’s share of a defined relevant market has played an important role in the analysis... ”.

“....Even when they are called for, however, market definition and shares are not in themselves dispositive. In those situations, requiring a detailed analysis of competitive harm, the Agencies are often able to employ an increasingly sophisticated range of economic tools to assess competitive effects. For instance, the Agencies’ 2010 Horizontal Merger Guidelines describe several economic analyses that the Agencies may undertake depending on the particular competitive dynamics at issue. Market definition is thus appropriately viewed as one of many tools that the Agencies may flexibly employ to assess potential harm to consumers and competition... ”.

*“....Using this approach, a presumption of illegality may obtain “from the close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare,” without the need to assess market definition or evidence of actual competitive harm. Courts and the Agencies occasionally rely on evidence of direct harm in lieu of defining relevant markets to assess the lawfulness of collaboration among competitors. For instance, in *FTC v. Indiana Federation of Dentists*,⁹ the Supreme Court reviewed a Seventh Circuit judgment of an FTC decision that a dental association violated Section 1 of the Sherman Act (and thereby Section 5 of the Federal Trade Commission Act) by enforcing a rule requiring withholding x-rays requested by dental insurers to evaluate claims. The association claimed that the decision was wrong as a matter of law because the FTC had not specifically defined the relevant market. Thus, in some circumstances,*

competitive harm can be shown without defining the boundaries of a market with precision or identifying a narrow set of products. Notably, the Supreme Court has held that: Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effect, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effect....”.

“... While market shares are important elements of an antitrust assessment in the United States, they are not dispositive. Many cases call for a detailed analysis of competitive harm, and in such cases the Agencies often employ a variety of economic methods to assess competitive effects. Some of the tools the Agencies use—including defining a relevant geographic market—are described in the Agencies’ 2010 Horizontal Merger Guidelines.¹ The Agencies employ a flexible approach to the use of these tools that depends on the facts of each matter when assessing potential harm to competition and consumers....”.

*“...The Agencies’ approach to geographic market definition is consistent with and informed by that taken by U.S. courts. In *Brown Shoe, Inc. v. United States*, the U.S. Supreme Court instructed that the geographic market employed in a given case must “both correspond to the commercial realities of the industry and be economically significant,” requiring a “pragmatic, factual approach” to market definition, rather than a formalistic one.² Thus, the Court recognized that determinations will vary from case to case and that “although the geographic market in some instances may encompass the entire nation, under other circumstances it may be as small as a single metropolitan area...”*

“....The Agencies define relevant geographic markets around the locations of producers unless it is possible to discriminate based on customer location, and then the Agencies define the relevant geographic markets as regions into which sales are made... ”.

In Japan, also according to the paper of Japan presented at the OECD Roundtable on Market Definition (2012):

“....When enterprises argue against the violation of the prohibition on the unreasonable restraint of trade, they usually dispute how the market is defined. In addition, enterprises sometimes dispute the “relevant products or services” (basis of calculation of surcharge payment amount which is ordered to be paid) when the JFTC issues surcharge payment orders against enterprises whose activities are found to be unreasonably restraining trade. Although the definition of “category of subject products” is the different concept from market definition (definition of particular field of trade), factors considered in defining market are used in the definition of “category of products which are subject to violations (hereinafter referred as “subject products”)” in the decision on “relevant products or services”.

“....Unreasonable restraint of trade is an enterprise’s activity which substantially restrains competition in that particular field of trade through mutually restricting business in concert with other enterprises by contracts, agreements or any other means irrespective of its name (Article 2, Paragraph 6 of the Antimonopoly Act). In Japan, “market definition” means defining the “particular field of trade....”.

In Chile, Chilean Competition Law does not require competition authorities to define a relevant market, nor specifies a way or methodology to delimitate it. However, this analysis is always done in practice in order to find whether a unilateral conduct or a merger might be considered to be an infringement to competition law, or to set the conditions that the parties of a merger will have to accomplish for it to be regarded in accordance to it.

“....In Chile, any deed, act or contract might be regarded as an infringement to competition law only if it prevents, restricts or hinders free competition, or tends to produce such effects. In fact, Article 3º of the Chilean Competition Law gives the legal description of a competition law infringement. It provides that, "Any person who enters into or executes, whether individually or collectively, any deed, act or contract that prevents, restricts or hinders free competition, or tends to produce such effects, will be subject to the measures prescribed by article 26 of this law, notwithstanding other corrective or restrictive measures that may be imposed in each case" (Subsection 1). Thus, only when current or likely effects on competition are established, a deed, act or contract might be prevented,

corrected or punished by the TDLC (Tribunal de Defensa de la Libre Competencia/ Court of Defense of Free Competition of Chile) in accordance to Chilean Competition Law. A definition of the relevant market is then needed to ascertain market power and determine such effects... ”.

“...Market definition identifies the relevant market in which firms could effectively exercise market power if they were able to coordinate in their actions. This concept has been widely used as a test for assessing the consequences of specific actions or market configurations, asking whether a hypothetical profit-maximizing monopolist could impose a small -but significant and non-transitory-increase in price (what is usually known as the SSNIP test), assuming that the prices of all other products are held constant. The relevant market will then correspond to the group of products and geographic area that are no bigger than necessary to satisfy this test... ”².

2. Implication to developing economies and Viet Nam

Concerning monopoly control, competition laws of economies around the world focus on four key issues: (1) definition of a relevant market, (2) definition of a dominant / monopoly position, (3) control of practices in restraint of competition and (4) sanctions.

Defining a relevant market is a decisive and important step in identifying a competitive restraint case. The definition helps to assess the market power that an enterprise has, competitors, and the impact of behaviors of the enterprise with the market power on the market. In other economies, an enterprise is considered to be dominant when it has significant market power (under Article 102 of TFEU1). The narrower the relevant market (i.e. the fewer substitutes), the more dominant the enterprise is, and the greater its ability of the restriction of competition and vice versa. Market definition in reality does not cause market power.

Usually, the competition authorities define the relevant market based on both the product aspect and the geographic aspect. The purpose of defining the market on both aspects is to identify the true competitors of a dominant enterprise as well as the ability of these competitors to prevent the dominant enterprise from taking unilateral actions

² Chile Official Notes for the OECD Roundtable on Market Definition (2012)

to raise prices or imposing higher prices than competitive prices. On the other hand, the definition of the relevant market supports the calculation of market share (without taking into account other factors), thereby identifying the market power of the enterprise involved in a competitive restraint behavior. Enterprises with small market share often do not possess significant market power, although, in principle, any enterprise has its own market power, more or less. Defining the relevant market is also the process of finding the answer to the question: What are the products that consumers consider to be acceptable substitutes for a product when considering the characteristics, prices, use purposes and other important attributes of the product?

There is a variety of information and materials that can help a competition authority determine the degree of substitution between the products or the difference between the product selling areas. For each case, different types of information and evidence will play a decisive role in the process of reviewing and analyzing the case, which largely depends on the characteristics and features of the industry and the products or services that the competition authority considers.

Concerning the definition of a relevant market, there are two major methods of definition that can be applied in developing economies: the demand substitution and the supply substitution. In most cases, a market is usually defined based on its customers' perspective, namely, from the perspective of the demand substitution. If it is necessary to define the market from the point of view of the suppliers, that is called the supply substitution. From an economic point of view, a lack of market power or an impossibility of substitution, the impossibility of substituting products and services creates a constant, effective and immediate power for the suppliers of a particular product. If customers can easily switch to an available substitute product or switch to another supplier in other geographic areas, the supplying enterprise, or a group of enterprises, is not considered to have a significant impact on normal sales conditions such as the price of goods or services.

Basically, a market definition consists of identifying the product's supply sources and the geographic locations of the suppliers that can effectively substitute each other in the market. In general, the competitive effects that arise from the possibility of supply substitution often do not immediately affect the business behavior of other enterprises in the market. Thus, some competition authorities consider a possibility of supply

substitution in the relevant market definition phase, while some other authorities consider the possibility of supply substitution in the competition assessment phase.

A dominant / monopoly position is understood as an enterprise that can increase the market price of a product, or restrict the amount of the product's output, or even restrict the product's renovation process, and thereby can restrict the competition in the market. Regarding the notion of dominant / monopoly position, under Article 102 of the Treaty on the Functioning of the European Union (TFEU), the dominant position is defined as an economic power formed by practices of preventing effective competitions that are maintained in the relevant market, through which an enterprise can behave significantly independent of competitors, customers, and ultimately the consumers. Under Section 2 of the United States Sherman Antitrust Act, a monopoly power is understood as the ability of an enterprise to (1) fix a price substantially higher than the competitive price and (2) sustain the material price increase because of barriers to entry.

Although there are many different definitions of market power available in the world, these definitions share some common characteristics. First, the assessment of market power or a dominant position is often linked to a specific relevant market, not a general one. This means that the enterprise itself (or a possible combination of many enterprises that form a dominant enterprise group) often must have a leading position in the market. Second, it is necessary to distinguish clearly between the notion of "market power" and of "substantial market power / or dominant position": a market power is understood as the ability of an enterprise to control prices of goods and services on the market. In other words, in some instances firms may have market power with lower shares and that firms need not have the highest share in a market to have market power. Although differing in degree, the notions of market power and significant market power (or dominant position) are related. Under Section 2 of the United States Sherman Act, a monopoly power requires a significant market power to control prices or to eliminate competition in the marketplace. Besides, a monopoly power exists over a long period and is not temporary. Under Article 102 of TFEU, a dominant position is the ability of an enterprise to hinder an effective competition in the market and to act independently from its competitors.

The notion of independence, which characterizes the monopoly/dominant position of an enterprise in the market, is related to the level of competition restriction that the enterprise is able to do. Being in the dominant position of the market, the

enterprise/group of enterprises is not necessarily those who hinder effective competition. In other words, an enterprise needs to have a significant market power, not just a market power, to be able to limit competition. As discussed above, competition laws and legal regulations use a number of different notions and definitions to determine applicable entities of each anticompetitive behavior of enterprises in a dominant position or having monopoly power, or significant market power. Although using different notions, the legal frameworks for competition around the world are consistent with the view that the rules prohibiting anti-competitive behaviors apply only to enterprises with significant market power. A significant market power exists when efforts to hinder competition from competitors have almost no impact on the enterprise. In this case, the decision of enterprises with dominant positions on output and prices may affect the output market.

In order to distinguish between market power and substantial market power, it is necessary to determine whether a market power exists for a long time, or significantly. An emphasis on the persistence of market power explains why the identification of barriers of market entry and expansion, besides the calculation of market share, is an important step in determining whether the enterprise has a market power or not.

An enterprise's possession of significant market power does not violate competition laws, but an evaluation of the possession plays an important role in reviewing and determining whether that enterprise is able to unilaterally conduct any anti-competitive behavior. This is an important parameter that should be taken into account in APEC economies. In addition, some competition laws, such as the Viet Nam's Competition Law, clearly distinguish between an unilateral behavior caused by an enterprise with significant market power (or, in other words, in dominant position) and combined effects that are formed by a group of dominant / monopolistic enterprises (or can be understood as combined market dominance).

In Viet Nam, the Competition Law of 2004 defines a relevant market including relevant product market and relevant geographical market. In which, (1) "A relevant product market means a market comprising goods or services which may be substituted for each other in terms of characteristics, use purpose, and price; (2) A relevant geographical market means a specific geographical area in which goods or services may be substituted for each other with similar competitive conditions and which area is

significantly different from neighboring areas.” Basically, the definition of the relevant market in Viet Nam’s Competition Law is similar to that of other economies.

Decree No. 116/2005/NĐ-CP stipulates that: “Goods or services shall be deemed capable of being substituted for each other in terms of price if above 50% of a random sample quantity taken from one thousand (1,000) consumers living in the relevant geographical area change to purchasing or intend to purchase other goods or services with the same characteristics and use purpose as the goods, services they are currently using or intend to use where the price of such goods or services increases more than 10% and remains stable for six consecutive months...”

This can be seen as a simple form of the SSNIP test in defining relevant markets, which is widely accepted by competition authorities around the world. Basically, the SSNIP (small but significant and non-transitory increase in price) test intends to evaluate the ability of a hypothetical monopolist to get benefit from an increase of product/ service prices to a certain level (5% -10%) in a certain period (6 months - 1 year). In case the monopolist can make a profit from the price increases (the decrease in sales volume, corresponding to the number of customers switching to other products/ services, is not large enough to reduce the return on price increases), the relevant product market is defined. In case the monopolist cannot make a profit from the price increases, the relevant product market is expanded.

In fact, the demand elasticity is often difficult to get and is what makes the SSNIP test difficult to conduct in practice. The use of the pure SSNIP is very little due to the difficulty of collecting market data and the high cost of getting consumer opinions. The SSNIP test is often followed conceptually to provide a framework for analyzing market definition.

In many economic theories, competition is related to the (relative) size of a mark-up on the cost price as a component of the output price. However, data on the price-cost margin (PCM) are generally not available.

The regulations on determining the capability of substitution in term of price in Decree 116 of Viet Nam have the following disadvantages:



- The requirement that above 50% of a random sample quantity switch to using other goods or services to determine the substitutability between the two products/services is too strict. The reason is that when the price increases by 10%, maybe over 50% of consumers of the products/services decide not to continue to use those products/services anymore. However, it is not feasible for over 50% of customers to switch to another product/service, and it often results in the relevant market defined as the market for the product or service being investigated or it can be interpreted as the investigated enterprise being the monopolist in the relevant market defined in accordance with the Competition Law. This does not reflect the reality of competition in the market.
- The requirement to conduct a survey in all cases of determining of price substitutability causes waste of resources to the Competition Authority. Instead, an introduction of principles to determine price substitutability and allowing the Competition Authority to use the most appropriate tools according to the characteristics of each case will save both time and money. For example, given the nature of the SSNIP test as described above, the Competition Authority may evaluate the ability of a hypothetical monopolist to increase a price by calculating own and cross-price elasticity of demand³.

Under Clause 1, Article 3 of the Competition Law of 2004, the relevant geographic market is (i) a specific geographical area in which goods or services may be substituted for each other (ii) with similar competitive conditions and (iii) which area is significantly different from neighboring areas. A geographic area is market areas measured by space distance, including locations where substitutable products are distributed to customers, can be a district, a city or economywide etc. Within the boundaries of that geographical area, there is a business establishment of an enterprise involved in the distribution of the relevant product and in a nearby geographic area sufficiently close to that area there is a business establishment of another enterprise which may involve in the distribution of the relevant product to the first geographical area.

³ Own-price elasticity is used to calculate the SSNIP, cross-price elasticity can be helpful for identifying which products are substitutes to include in the candidate market.

Viet Nam has no experience in defining relevant markets. As shown in the above literature review, it may be within the scope of a particular product of an industry, at a certain stage in a business process, and may be limited to a narrow geographic area but maybe also a very large geographic area. This is an issue that needs to be addressed by developing economies and Viet Nam as they develop legal, policy and institutional frameworks for competition.

In the past there have been cases where the company is not having a dominant position (by threshold of market share) but can still act to substantially lessen competition. This is the case of the Decree 109/2010 on rice export business which regulated unreasonable conditions for enterprises for obtaining the right of exporting rice. The decree allowed the enterprises having no dominant production of rice but having facilities of storage and processing meeting the conditions regulated by the decree to have right of exporting rice leading to their dominant position of the rice export market. This legislation has faced extreme protest from the rice production enterprises in Viet Nam for several years before it is canceled by the Government.

As stipulated by the Law on Statistic of Viet Nam No. 04/2003/QH11 the Government and different ministries will regulate the statistism within their own sector. Accordingly, the Government issue the Decree No. 81/2015/NĐ-CP on the publishing of state own enterprises' information and the Decision No. 77/2010/QĐ-TTg on the requirement of statistism for state own enterprises and foreign direct invested enterprises and under this the Ministry of Planning and Investment issued the Circular No. 04/2011/TT-BKHĐT guiding for the statistism for state own enterprises and foreign direct invested enterprises. The information collected under these legislation will be summarised by the General Statistic Office of Viet Nam (GSO). However, for the other types of enterprises the statistism are regulated by different ministries therefore GSO are not the hub of information for these enterprises, especially for the private enterprises which occupy a major portion of business number in Viet Nam. For example, Ministry of Industry and Trade issued the Circular No. 38/2011/TT-BCT regulating the basis of statistical reporting applicable to corporations and companies under the Ministry of Industry and Trade; Ministry of Culture, Sport and Tourism issued the Circular No. 27/2014/TT-BVHTTDL regulates the statistical reporting applicable to tourism management agencies; Ministry of Transportation issued the Circular No. 58/2014/TT-BGTVT regulating the statistical reporting of the transport sector and etc. While some of those legislation require the statistic reports on market share and other information

of business's performance while the others do not. Therefore, the statistic information of Viet Nam's businesses is not complete and consistant and further the information is not shared with and summarized by a central statistic agency like GSO causing difficulties for the seeking of economic evidence in competition settlement. This situation requires to have policy of having better statistic system for business governance in Viet Nam.

II. MERGER

1. Experience of other economies

According to OECD, “economic evidence can play a very important role in the assessment of mergers. However, this role needs to be put in to perspective. Sound economic analysis is time consuming, costly, and burdensome, and not all merger assessments require economic evidence. Many can be cleared on the basis of simple thresholds that are not related to economic analysis (e.g. market share thresholds). Even where economic evidence does have a role to play in the assessment of a merger, this evidence should not in general be given a privileged position. Instead, the economic evidence should be considered along with the other evidence in the case (e.g. internal documents from the parties). Where the economic evidence is consistent with other evidence, it strengthens the conclusions that can be drawn. When the economic evidence is not consistent, it should not be assumed that either evidence is wrong, but efforts should be made to understand why different types of evidence are leading to different conclusions. It might be that the economics is pointing out an insight that the other evidence has missed. Equally, it could be that the economics is missing something. Understanding what is driving the divergence can often provide useful insights into the likely effect of the proposed merger.

The US “Horizontal Merger Guidelines” (2010)⁴ state that:

“A merger between firms selling differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the premerger level. Some of the sales lost due to the price rise will merely be diverted to the product of the merger partner and, depending on relative margins, capturing such sales loss through merger

may make the price increase profitable even though it would not have been profitable prior to the merger.”

The EU “Guidelines on the assessment of horizontal mergers” (2004)⁵ state that:

“The most direct effect of the merger will be the loss of competition between the merging firms. For example, if prior to the merger one of the merging firms had raised its price, it would have lost some sales to the other merging firm. The merger removes this particular constraint. Nonmerging firms in the same market can also benefit from the reduction of competitive pressure that results from the merger, since the merging firms' price increase may switch some demand to the rival firms, which, in turn, may find it profitable to increase their prices”.

The Japanese “Guidelines to application of antimonopoly act concerning review of business combination” (2010):

“When goods are characterized as differentiated by brand, etc. and the price of the goods of one brand is increased, the users of the brand do not necessarily intend to buy goods of other brands indiscriminately as a substitute. On the other hand, users may buy goods of another brand that is next in their order of preference to the first brand; in other words, which has higher substitutability. In this case, even though the company group increases the price of the first brand goods, if the group also sells the second brand goods that have high substitutability, the increase in sales of the second brand compensate for the loss of sales of the first. It is then possible for the company group to increase the price without decreasing total sales.”

The Australian “Merger Guidelines” (2008)⁷ state (para. 5.5) that

“Horizontal mergers may give rise to unilateral effects by eliminating the actual or potential competitive constraint that the merger parties exerted on each other pre-merger. Two competing firms may constrain each other, including via the (actual or potential) transfer of sales from one to the other as customers switch, or threaten to switch, between them. If these two firms merge, the merger ‘internalises’ any such transfers within the merged firm, thereby removing this constraining effect. Where there

are limited effective constraints from other sources, this unilateral effect can amount to a substantial lessening of competition.”

In advanced economies, empirical analysis can be used to collect evidence for merger cases. Among the most commonly used empirical methods are:

- Critical loss analysis: Critical loss analysis is used in market definition and allows one to answer the hypothetical monopolist question directly using data only on price-cost margins and elasticities;
- Price tests such as correlation analysis and stationarity tests: Price tests look at the relationship between different price series in order to try and derive implications for competitive interaction and market definition. Price correlation analysis looks at whether the prices of two products have moved together over time.
- Shock analysis: Shock analysis is another common technique that is often used in merger analysis. It involves looking at past shocks to an industry, such as input cost shocks, new product entry and so on, and trying to understand if the response of the industry to the shock tells us anything about competitive interactions.
- Price concentration studies: Price concentration tests investigate the relationship between price and concentration, or market share, in a given industry or industry segment. They do this by considering how price and concentration vary over a number of separate “markets”. The question that they seek to answer is: does the price in a “market” increase as concentration increases? This question is relevant to market definition and to unilateral and coordinated effect type analysis
- Diversion ratios: Diversion ratios measure the proportion of sales lost by one firm when it raises its price that are won by another firm.

Regarding the analysis of vertical mergers, the use of economics in vertical merger analysis has improved dramatically in recent years. There are now clear theories of harm in unilateral effect cases that the competition authorities need to articulate: input foreclosure and/or customer foreclosure.

- Input foreclosure occurs where the upstream merging party either stops supplying its input to the downstream competitors of the downstream merging party or supplies the input on less favourable terms, with the result that the downstream competitors face higher input costs, become less competitive and hence relax the competitive constraint on the downstream merging party.
- Customer foreclosure arises where the downstream merging party stops buying inputs from the competitors of its upstream merging partner. If the downstream merging party is sufficiently large, this may have the effect of reducing the

ability of upstream firms to compete with the upstream merging party as a result of a loss of economies of scale.

There is an increasing use of a standard approach to analysing the incentive of the merging parties to foreclose competitors: vertical arithmetic. This looks at the costs and benefits to the merging parties of a foreclosure strategy in order to understand whether the benefits outweigh the costs⁴.

2. Implication to developing economies and Viet Nam

In developing economies and Viet Nam, economic concentration (EC) activities are mainly acquisitions of part or all of enterprises and very few of the higher level activities such as consolidation, which require a high level of management and cooperation. In addition, many ECs take the form of financial investments, buying shares to become strategic partners, and not seeking acquisitions to control ownership and control enterprises.

Developing economies often use simpler measures to monitor ECs and mergers activities. In Viet Nam, the Competition Law provides for notification procedures (from Article 20 to Article 26). Applicable entities: In the cases where enterprises participating in an EC have a combined market share in the relevant market of from thirty (30) percent to fifty (50) percent, except for cases where enterprises after the implementation of EC are still small and medium enterprises. Enterprises participating in an EC must file for notification of the EC under Article 21 of the Competition Law to submit to the administrative authority and take responsibility for the truthfulness of the file. A file for notification of an EC comprises necessary information on finance, products and market share of enterprises on the relevant market etc. in the last two consecutive years which form the basis for the administrative authority to analyze and evaluate the case.

The Competition Law uses market share as the basis for classification of Economic Concentrations (ECs) and as the only criterion for making decisions. In fact, although the number of EC transactions was quite large and has increased sharply in recent years, the size of many transactions was not small, but the number of transactions reported to the Viet Nam Competition Authority was still relatively low. A part of the reason is that for the enterprises that have performed EC in markets which have a low combined

⁴ OECD Policy Roundtable “Economic Evidence on Merger Analysis” (2011)

market share (below the control threshold of 30%), the obligation to report accurately on the market share of the parties involved in ECs is a difficulty. Actually, an enterprise can only know and be responsible for its sales without obligation to know the sales of its competitors on the market (the basis for calculating the market share of the participants of an EC). Requiring enterprises to collect a large amount of information related to markets and market shares has caused a great pressure for those enterprises which wish to carry out notification procedures or seek advice from the Competition Authority.

This partly explains why so many EC cases have taken place but only a few have been notified to the Competition Authority. Besides, from the enterprises' perspective, the identification of competitors to make appropriate decisions on production and sale also has many differences compared with that described in the techniques of defining the relevant market (both product markets and geographic markets) in accordance with the Competition Law. This also results in different calculations of the combined market share of the Competition Authority and the enterprises. In addition, the use of combined market share as a basis for controlling ECs indicates that the Viet Nam Competition Law only controls cases of horizontal EC.⁵ Therefore, mergers, consolidations, acquisitions, joint ventures between enterprises that not in the same relevant market (i.e. vertical and mixed ECs) are not adjusted by the Competition Law.

In principle, Article 18 of the Competition Law only prohibits the implementation of EC when the enterprises participating in the EC have a combined market share in the relevant market of more than fifty (50) percent. Once the combined market share of the enterprises is only 50% or less, the Competition Authority suppose that the case is not prohibited. In other words, the notification procedure is simply a process of re-definition in order to have a more accurate result of the combined market share of enterprises participating in the EC but not a process for assessing the impact of the EC on the market in many aspects.

In the competition theory, the ability of ECs to restrict competition does not only include an alteration of the competitive structure of a market but also the ability to strengthen their market power to conduct anti-competitive behaviors in future. Therefore, in a

⁵ The Competition Law does not mention on controlling vertical and mixed ECs.

certain situation, an EC may also be considered harmful to a competitive market if it gives enterprises involved in the EC the ability to dominate the market and the potential for conducting anti-competitive behaviors although their current combined market share is not sufficient to be prohibited by law. Considering the historical context, this prohibition may be reasonable at the time of the promulgation of the Competition Law. However, due to the movement of the economy as well as based on the experience of the Competition Authority, that regulation needs to be adjusted appropriately. This is also a challenge that needs to be addressed by developing economies.

III. BARRIERS TO MARKET ENTRY

1. Experience of other economies

How to assess entry barriers are also guided in guidelines of competition agencies in many economies. According to the documentation of OECD Policy Roundtable – Barrier to Entry (2005), some economies have taken the approach as below in using economic evidence for barriers to market entry:

“United States Horizontal Merger Guidelines (1997): Barriers to entry influence two stages of horizontal merger analysis in the U.S. horizontal merger guidelines. First, they affect the process of identifying the firms that will be counted as participants in a market for the purpose of determining market concentration. All firms that would be likely to enter within one year in response to a small but significant non-transitory increase in price (—SSNIP) without having to commit significant investment in sunk costs of entry and exit are treated as though they are already in the market. A —significant sunk cost, in turn, is defined as one that would not be recouped within one year of the commencement of the firm’s supply response”.

“...The Australian Merger Guidelines (1999), give the term —barriers to entry a precise definition: —any feature of a market that places an efficient prospective entrant at a significant disadvantage compared with incumbent firms. That definition is clarified with examples of factors that could constitute entry barriers, such as sunk costs and economies of scale...”

“...Canadian Merger Enforcement Guidelines (2004) state that firms that would begin selling products in the relevant market within one year of a small price increase, and that could do so without investing in significant sunk costs of entry or exit, are counted as current market participants in the determination of market shares and concentration levels. This includes firms that could enter quickly by diverting their production capacity from other markets to the relevant market...”.

“...European Guidelines on the Assessment of Horizontal Mergers (2004) allows—reasonably certain entry to be counted as though the potential entrants are already in the market for the purpose of determining concentration (though there is no specific requirement regarding how quickly that entry should take place). Then it uses the familiar likeliness, timeliness, and sufficiency criteria to determine whether other entry will be enough of a constraint on the merging parties to prevent them from posing a significant anti-competitive risk. The European Guidelines define entry barriers as—specific features of the market, which give incumbent firms advantages over potential competitors. This pragmatic definition avoids the shortcomings associated with Bain’s definition and is broad enough to encompass the wide variety of factors that can potentially affect the ease of entry. The guidelines helpfully list many of those factors...”

“...According to United Kingdom Guidelines on Assessment of Market Power (2004), entry barriers are relevant to the evaluation of market power in non-merger cases, as well as in merger cases, so it is also worthwhile to examine the approach used in non-merger guidelines. Regarding the analysis of entry, the U.K. Guidelines use a thoroughly practical approach. There are no formulae or other mathematical requirements. Instead, the guidelines acknowledge that assessing the effects of entry barriers can be complex and that a variety of steps may be involved. Then they set forth a number of subjects on which incumbents and potential entrants could be usefully questioned and on which it might be helpful to obtain documentary evidence. Relatively fast and easy entry is taken into account as supply side substitution, just as it is in several other agencies’ guidelines...”

Barriers to exit is also an important area that more advanced economies take into account from the perspective of competition policy. “...The more expensive it is to get

out of a market, the riskier it will be to enter it in the first place. Just as entering a market is usually not costless, exiting is rarely free, either. A firm may have to make severance payments to employees, for example, or it may face costs associated with the early termination of contracts with customers or suppliers. In addition, any sunk costs the firm may have absorbed that have not yet been covered or fully depreciated could be thought of as exit costs, as well. These types of costs make exiting a market less appealing, and if they are high enough, they could make exit virtually impossible. They can therefore be considered —barriers to exit. The likelihood and degree of barriers to exit, however, will also be considered by a rational potential entrant when it makes its decision about whether to enter a market...”⁶.

2. Implication to developing economies and Viet Nam

Experience from developed economies shows that developing economies need to focus on and promote the important role of sunk costs in decisions of entering (and exiting) a market. The sunk costs are unrecoverable costs when an enterprise leaves a market, thus acting as a commitment to retain one or more enterprises in the market. The Horizontal Merger Guidelines of the U.S. Department of Justice defines sunk costs as “the cost of buying movable properties and real estate that cannot be recovered outside the relevant market.” There are three important aspects that sunk costs can affect decisions of entry and exit of a market. First, the sunk costs reduce the possibility of market entry because they cannot be recovered when an enterprise leaves a market. Second, the sunk costs result in a disproportion in costs between incumbents and new entrant enterprises. When the costs are not recoverable, they are no longer a part of the opportunity cost, so the incumbent enterprises will require lower compensation to stay in an industry than the costs incurred by new entrant enterprises which are required to participate in the industry. Third, the sunk costs may be used by incumbents as a commitment not to exit from the industry. Therefore, the sunk costs are considered a basis for calculating the number of potential enterprises entering the market as market entry requires new entrants to take into account the non-recoverable costs and incumbent enterprises can take advantage of this fact strategically in many ways.

⁶ OECD Roundtables “Barrier to Entry” (2005).

Recently, the arguments of the industrial organization theory also recognize that investment instruments that relate to non-recoverable costs can be strategically used to limit or prevent entry to more complex markets. These costs ca

- Investments to lower the cost of incumbent enterprises, which is related to the cost of the potential entrants, that is, capacity enhancement, invention, research and development, contract preparation and payments for input suppliers, work-study, etc.
- Investments to adjust the cost structure of competitors, for examples, preparing and paying contracts, buying patents and then not developing further, maintaining a monopoly position on input yield, vertical control, etc.
- Investments to change demand conditions including advertisement, branding, long-term contracts with buyers, etc.

Developing economies should also not use market share as the sole criterion for determining if an enterprise is a monopolist or has a significant market power in a market. Experiences from developed economies show that barriers to market entry play an important role in determining whether an enterprise is a monopolist or has a significant market power in a market. From the economic perspective, an enterprise with 100% market share may not be a monopolist. Market share does not tell us about the market's potential competition or why the enterprise has such a high market share. Market share only provides us information on the enterprise's current competitive status. An enterprise will not be able to fix market prices monopolistically if other enterprises are free to enter and compete in that market. It is the monopoly prices tell other enterprises whether to enter the market is beneficial. Whether an enterprise really has a monopoly power on fixing prices depends on the level of vulnerability it causes to new entrants. Whether a market is vulnerable to new entrants depends on "barriers to market entry". If the barriers to market entry exist, an enterprise can enforce its market power for a considerable period of time.

In Viet Nam, Article 8 of Decree No. 116/2005/NĐ-CP stipulates the types of barriers to market entry, including:

- Patents, utility solutions, industrial designs, trademarks and geographic indications in accordance with the laws on industrial property.

- Barriers regarding financial matters including costs of investment in production and distribution, commercial promotion and ability to access financial sources.
- Administrative decisions by administrative bodies.
- Regulations on business conditions, on use of goods or services, and on professional standards.
- Import duties and import quotas.
- Practices of consumers.
- Other barriers to market entry⁷.

The approach to entry barriers in Viet Nam is therefore different from that of the more developed economies. This is an area where Viet Nam and other developing economies in APEC should consider and study in the process of improving their policies, regulations, and institutions on the competition. It is clear that, just as in developed economies, barriers to market entry may slow down, reduce or completely stop a process of controlling market power for a normal market-oriented mechanism, which is reflected in the appeal to and involvement of new competitors. In developing economies and Viet Nam, in addition to the currently applied criteria, barriers to market entry need to be taken into account when assessing dominant positions, determining the ability to prevent another enterprise enter the market derived from the abuse of the dominant position of an enterprise, and analyzing the ability to influence competition through mergers. If a merger increases the market concentration to a threshold that the Competition Authority deems to have the potential to cause anticompetitive effects, then an analysis of the market barriers is important because competition will not be reduced if new enterprises are able to enter the market easily, quickly, and on a deeper level.

Besides, it is not necessary to have an accurate definition of barriers to market entry. In fact, in competition cases, it is important not to determine whether a market entry constraint meets one definition or another, but to address the more pragmatic issues of whether there is a barrier, when it arises, and to what extent. In many cases, the barriers are highly temporary. A barrier cannot permanently prevent enterprises from entering a market, affecting the competition and consumer welfare. Sometimes, just delaying the market entry process of new enterprises is enough to cause problems. Therefore, market entry conditions are usually analyzed from a dynamic context, not from a static one.

⁷ For example, the act of some enterprises entering into an agreement or alliance to prevent another company/enterprise to enter the market if not joining the agreement or alliance.

The interests of consumers can be severely affected if a monopoly price is maintained indefinitely as barriers to market entry cannot be overcome by potential enterprises. On the other hand, the interests of the consumers can also be affected when barriers only delay the process of market entry, as the price drop may also be a reason for delaying fiercer competition in the future.

A barrier analysis is a determination of whether or not obstacles exist, so that barriers to market entry may occur. In the case of barriers, it is often necessary to determine whether they are strong enough to make anti-competitive matters the focus of the case. Hence, most competition authorities evaluate the market entry conditions in a practical and flexible manner in each case, rather than formalizing or defining a complete abstraction of what constitutes a barrier to enter the market.

In addition, an evidence of past market entry may be useful in assessing current market access conditions. However, that evidence is often not considered a decisive factor. Previous market entry cases do not necessarily prove that market entry is easy, strong enough to compete or may recur. Furthermore, potential competitors may not face the same market conditions that preemptive enterprises have experienced. In addition, the absence of new entrants to the market over a long period of time does not imply that barriers to market entry are high, or a massive market entry cannot occur in the future. In contrast, the evidence may indicate that the market is too competitive or that it is declining, which reduces its appeal to potential competitors. However, the history of the market entry process of an industry can help identify the potential and the nature of market entry in the future. For example, if market conditions have not changed dramatically since a period in the past that has been used for comparison, it is possible to deduce what might happen in the future based on what has been taking place during that period. Although the evidence is related to market entry, they are not sufficient to draw the conclusion.

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