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Consumer Protection Competition and Fraud Repression Directorate-General “CCF”

Frequently Asked Questions on Competition Policy and Law in General Context for Cambodia

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Frequently Asked Questions on
Competition Policy and Law in General Context for Cambodia

1. Why does Cambodia need to enact a competition law?

Competition has become a cornerstone of any market economy in modern times. Market competition spurs firms to be more efficient and innovative which generally leads to more choices, lower prices, and better products and services. The economy benefits from competition law through greater productivity gains and more efficient resource allocation.

Competition policy and law set the framework within which a competitive market economy can develop and operate. Competition law provides clear rules and codes of conduct to create a level playing field for small, medium and large entities to compete fairly within the Cambodian economy. A strong, well-established competition policy and law will actively promote competition and enhance the benefits of a market economy by providing greater opportunity for businesses to compete in terms of price and quality and differentiated goods and services with greater protection from anti-competitive behaviour. It is reported that approximately 120 countries have enacted competition laws, many in the last 20 years. The importance of competition law can be observed in the actions of Cambodia's neighbours, both Thailand and Vietnam have recently made substantial revisions to their competition laws to increase their scope and effectiveness. In fact, many countries regularly review and amend their competition laws to ensure that they can effectively regulate their market economies – for example both Malaysia and Indonesia are considering amendments to their laws.

Competition law can provide a defence against local and international anti-competitive conduct. A World Bank study showed that in 1997, developing countries imported $81.1 billion of goods from industries in which international price-fixing cartels were discovered during the 1990s. These imports represented 6.7 percent of imports and 1.2 percent of GDP in developing countries.[1] International anti-competitive practices will continue to have serious implications for the competitiveness and development of developing economies, such as Cambodia, unless a suitable legal framework and relevant institutions for self-protection are established.

The importance of the protection offered by a competition law can also be seen, in the recent merger of Uber and Grab, three ASEAN Members with active merger regimes have taken some form of action in response to its perceived anti-competitive effects on their local economies and consumers; in fact, the inability to address Uber/Grab has been linked to Malaysia's current consideration of incorporating a merger control regime into its competition law.

In addition, competition law can have greater impact in developing economies as the potential consumer benefits are enhanced where the costs of unregulated anti-competitive conduct were largely imposed on a low-income population as even small anti-competitive surpluses have significant impacts on the spending of such consumers and the benefits of strong competition enforcement may be quickly realized by lower costs of staples and other necessities.

Additionally, by promoting and enforcing a level playing field, competition policy and law enhance the ability of small and medium sized entities, who often make up a large percentage of the private sector to compete and grow when challenged by larger national and international competitors who may be in a position to exercise market power.

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[1] Levenstein, Margaret and Valerie Suslow, *Private International Cartels and Their Effect on Developing Countries* (Background Paper for the World Bank's World Development Report 2001, 9 January 2001)

A properly functioning market economy protected by a strong competition law will enhance the attractiveness of the Cambodian economy for greater regional and international trade and investment as foreign entities will be more confident that they will not be denied opportunities by anti-competitive behaviour of local market participants.

Finally, enactment of a competition law will satisfy one of Cambodia's obligations to ASEAN and the World Trade Organization (WTO). With respect to the former, Cambodia is the last ASEAN Member State without a comprehensive competition law enacted in accordance with the approved ASEAN Economic Community Blueprint 2025.

2. What are the costs and benefits of competition law?

Effective competition law and policy can be costly. Costs are incurred for drafting and adopting the competition law as well as in conducting regular legislative reviews and enacting potential amendments to the competition law and other laws and regulations as required to promote effective competition policy. Additionally, there may be significant costs to institute, train and operate the competition authority including developing and maintaining expertise, conducting market and legislative studies, conducting investigations, advocacy activities and more. In the private sector, costs are also imposed on businesses to comply with the competition law, including any required notifications under the merger regime and implementing compliance programs.

There does not appear to be a lot of direct evidence on the economic impact of adopting competition law on economies, particularly with respect to developing economies. Numerous studies have described the difficulties in quantifying the overall impact of competition policy and law. One approach is to analysis the costs/benefits of enforcement in specific cases and make assumptions about total likely implications for the economy.[2] For example, the Peruvian competition agency, *Indecopi*, found that, in the first seven years of its operation, its operations generated economic benefits of $120m compared to operating costs of $20m.[3] In another instance, the positive impact on consumer welfare generated by a single cartel decision of the Indonesian competition authority, the *KPPU*, was estimated at approximately $148 million.[4] One study of cartel enforcement data determined that the average overcharge of all cartels in the period studied was 23%.[5] An OECD Report noted the difficulty in estimating the harms from cartels given the lack of detection, difficulty with evidence and variations in mark ups, but noted that, conservatively, the global cost was many USD billions a year.[6] Hence the equal amount as benefits of competition law enforcement at least, if these harmful conducts could be penalized and/or prevented.

Another approach is to consider counter-factuals – either evaluating the same economy in periods of both competition enforcement and non-enforcement, or cross-economies comparative studies in which comparisons are made between economically similar jurisdictions with and without competition law. In each case, these types of studies are illustrative, but it is difficult to make firm conclusions given the difficulties in comparing economies or even the same economy over time. However, a review of these studies suggests that "[o]n balance, … [they] do provide a limited body of cross-economy evidence that there can be a positive relationship between competition law and economic growth."[7]

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[2]See Baker J., The Case for Antitrust Enforcement, *Journal of Economic Perspectives—Volume 17, Number 4—Fall 2003—Pages 27–50* and UNCTAD Secretariat (2014), *The benefit of competition policy for consumers*

[3] See Caceres, A (2000), "Indecopi's first seven years" in Beatriz Boza, ed., *The Role of the State in Competition and IP Policy in Latin America: towards an academic audit of Indecopi*, Lima.

[4] See Kompetisia, Newsletter of Indonesia Competition Law and Policy, Vol. 2/2011 – KPPU Decision for the Interests of Consumers

[55]Conner, J.M. (2004), Price-Fixing Overcharges (Revised 3rd Edition)

[6]See OECD (2002), *Fighting Hard Core Cartels:Harm, Effective Sanctions and Leniency Programmespgs. 72-6*

[7]See Lee and Yuhua (2015), SMEs, Competition Law and Economic Growth, ISSUES PAPER No. 10 in Michael Schaper

3. How are regulatory authorities normally structured?

Internationally, different structures for regulatory authorities are used with some jurisdictions integrating all functions within a single entity and others having two or more entities performing adjudicative and enforcement/policy functions. There are benefits and disadvantages of each basic model and there does not appear to be any clear consensus on which approach is best to structure regulatory authorities.

Given the range of responsibilities and powers required, competition authorities are generally expected to be independent of direct government influence and to require suitable financial and other support including maintaining a highly trained and qualified staff. According to a survey carried out by the OECD, one-third of all competition authorities are independent from the respective government with their budgets being decided by the legislative assembly. Around 45% of competition authorities are incorporated into a Ministry with their budget set by the Ministry. Finally about 20% of competition authorities, while not part of any Ministry, still consider themselves to be responsible to the Government. Regardless of the formal independence of the regulatory authority's structure, it is common for the competition commission to be appointed either directly by a relevant Ministry or by the head of government (sometimes based on recommendations of the relevant Minister).

In terms of financing, some authorities have independent budgets, others are built into relevant Ministries. In addition, some authorities have the power to collect revenues or penalties that can be incorporated wholly or in part as revenues.

4. What are the main tasks, functions and powers of the regulatory authority?

The powers and responsibilities of competition authorities varies widely; however, there are a few basic elements which normally fall within the scope of a competition commission/enforcement agency. As noted above, there are various common basic structures for regulation authorities, but generally, regardless of their specific structure, competition authorities are normally tasked with implementing the national competition law and promoting competition policy.

With respect to the competition law, a regulatory authority would normally be expected to have the power to receive complaints and investigate possible violations of the law based on such complaints or on its own initiative. Depending on the structural model chosen, such powers may also be delegated to a secretariat or similar agency. The authority will normally have access to investigatory powers – such as wiretapping, search and seizure of evidence, interrogations and leniency policies – directly or through other police or judicial authority.

Normally the investigating authority would then report to some form of commission or other entity, which may be within the same agency, to hear and decide cases, impose interim sanctions and orders to maintain competition while an investigation or adjudication is on-going, impose final civil remedies and sanctions or refer cases to other adjudicative entities such as courts or specialized tribunals for final decisions (criminal or civil). A regulatory authority will also generally have power to set standards, forms, processes and potentially various applicable thresholds, etc. Finally, the regulatory authority would normally have power to cooperate with international competition authorities to ensure international investigations and evidence gathering and to promote best practices.

With respect to competition policy, competition authorities frequently consult with the national legislature, sectoral regulators and local governments on other laws, regulations and policies to promote competition within the economy. Such consultations can be done either formally or informally depending on the jurisdiction. It is also common for competition authorities to promote competition related education and advocacy in both the private and public sector. For example, the

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and Cassey Lee *eds, Competition Law, Regulation and SMEs in the Asia Pacific: Understanding the Small Business Perspective*

Philippines Competition Commission is very active in this regard including promoting competition education at law schools, for judges and for regulators, private businesses and local and national government entities and legislators.

5. How to start the implementation of the competition law? What should be the first steps and priorities?

It is normally advisable for a developing competition regime, such as Cambodia, to phase implementation of its competition law, an example of one strategy is set out below.

Different Stages of Institutional Development of National Competition Regimes

I. Start	*II. Enhancement*	*III. Advancement*	*IV. Maturity*
1. Competition advocacy and public education	6. Merger control	9. Regulation	11. Second-generation international arrangements
2. Control of horizontal restraints	7. Vertical restraints	10. International cooperation arrangements	12. Pro-active competition advocacy
3. Checking abuse of dominance	8. Development of the effect doctrine		
4. Exceptions and exemptions, including on public interest grounds			
5. Technical assistance			
Source: Pradeep S. Mehta (2003), Friends of Competition – How to building an effective competition regime in developing and transition economies, CUTS, India, p.20			

Other initial steps not set out above, are to a) develop plans to identify the competition regime's needs and priorities and the steps required to develop and implement an effective regime and b) market/sector studies. The plans should include identifying needs and opportunities for donors and technical assistance to ensure that aid and assistance is given in an efficient manner and targeted to areas specifically required by the competition authority. With respect to market/sector studies, these are useful to help identify key areas for competition authorities to focus on to more effectively implement competition law and policy.

Given its limited resources and novelty, a competition authority should start with actions which will most likely benefit the market and build its own acceptability. Many countries in ASEAN, including Malaysia, Singapore and Vietnam, started implementing their competition law with advocacy and public education. This not only educates stakeholders on the competition regime, but also gives the authority time to properly train and establish procedures.

With respect to enforcement, it is common in ASEAN for competition regimes to stagger enforcement beginning with anti-competitive horizontal agreements as these cases are typically less difficult in terms of analysis and more focused on investigative techniques. Other regimes also initially include enforcement of abuse of dominance as, while it requires sophisticated economic analysis of market conditions and conduct, it is focused on past and present conduct. In some cases, such as Malaysia and Singapore, implementation started with "low hanging fruit"–which were small local cases that were less sophisticated and complex than international cartels. Merger regimes are generally

implemented last as they require sophisticated predictive analysis of the likely future implications of the merger.

6. What are the pros and con of mentioning some thresholds in the Law, such as market shares?

The use of thresholds in competition law is common to two main areas: (i) the assessment of market power/dominance, and (ii) merger control. Thresholds can provide important guidance to stakeholders and for the regulatory authority if properly used, but can also lead to results that are not linked to the promotion of economic efficiency and other common purposes of competition regimes if improperly applied.

One issue that is common to both abuse of dominance and merger control thresholds is where the thresholds are set. The difficulty is that including thresholds in the legislation itself may not be advisable as this often requires formal amendments of the law to revise the thresholds which can be difficult and time-consuming. To ensure that thresholds can be more easily adjusted to ensure relevance and effective enforcement, many jurisdictions provide for thresholds to be set by regulations or directives that may be issued by the regulatory authority. Thailand is an example of a competition regime which took the latter approach. Interestingly, the Philippines combined both approaches with initial thresholds for their merger notification regime set in the legislation which also granted the regulatory authority the power to issue new thresholds.

Regardless of whether Cambodia chooses to provide for initial thresholds in the legislation, it is recommended that any thresholds required be set or amended by regulation or directive in a manner that permits re-evaluation and careful amendment of the threshold over time.

Assessment of market power/dominance

The use of market share thresholds can be very important in dealing with abuse of dominant positions under competition law. However, market share thresholds are used differently in various jurisdictions. In some jurisdictions, market share thresholds are used as either the sole determinant of dominance or as one factor of such determination. In other jurisdictions, the market share thresholds are used only as indicative or as guidelines.

While some argue that using market share thresholds to determine dominance provide clear guidance to stakeholders and simplify matters for the regulator, use of determinative market share thresholds are rarely so clear or straightforward based on both practical and conceptual issues. From an analytical perspective, generally, having a dominant position or market power is interpreted to mean that a company can ignore competitive influences or act independently of the market or its competitors. High market share is a necessary, but not sufficient, condition for the existence of market power, and, in economic terms, there is no market share threshold that is sufficient to establish a dominant position in all markets across an entire economy.

The weakness of using a market share threshold can be illustrated in a hypothetical example of a market with no barriers to entry, in such a market, even a company with 100% market share would not be able to exercise market power as it would also be concerned with competition from new entrants. To further illustrate the problem of using a single market share threshold across all markets in an economy regardless of the actual market conditions in which the relevant companies operate, one can simply consider a competition regime with a market share threshold for dominance of X% (for this example, let's assume that X = 35). While it is possible that a firm with X% market share might be dominant in some relevant markets, it would clearly not have such market power in a specific market where a competitor had X+1% market share.

Another indicator of the difficulty of incorporating determinative market share threshold for dominance from an analytical perspective is that there is no international standard on what market share is enough to establish such dominance in all markets. In ASEAN, we see a range from 50% determinative share in Thailand to 30% in Vietnam. In the case of Vietnam, it is interesting that the

2018 legislation also expressly deals with situations where there may be dominance with less than a 30% market share by incorporating a broader examination of factors to establish market power as an alternative to the market share threshold; it is unfortunate that the new law does not also consider the possibility that an entity with a market share over 30% may not be dominant due to market factors such as a lack of barriers to entry, countervailing power or competitors possessing higher market shares. As noted in more detail below, while not excluding dominance to exist at a lower market share, Singapore, while using market share threshold solely as a guideline, has a threshold of 60%.

From a practical perspective, problems with using determinative market shares arise from difficulties in defining relevant markets and data available to calculate market shares. In many cases, these conditions are challenging for a competition authority, but are much more problematic for private companies which may not have access to required data. In both cases, these challenges can be greater in developing economies where accurate information is often not available.

In contrast, market share thresholds for dominance can be very useful when they are indicative or considered as only part of a regulator's analysis. For example, where dominance is presumed at a given market share threshold, but is rebuttable by the relevant company or the threshold is provided in a set of guidelines stating that a market share threshold is indicative of when the regulator will make a more focused investigation. In either case, this form of threshold provides the advantage of giving guidance and focus to both stakeholders and regulators while still requiring a market specific analysis to determine whether a company possesses market power. While indicative market shares are not as simple for regulators to apply, they generally lead to determinations of market power based on economic analysis and thus more effective and efficient competition regimes.

For example, Singapore does not provide for any market share threshold for determining dominance in its legislation. Instead, it requires determination that an entity possesses a dominant position. In its guidelines on the relevant prohibition, the regulator notes that there is no such threshold in the legislation and that "market share is an important factor in assessing dominance but does not, on its own, determine whether an undertaking is dominant." The guideline goes on to state that a market share of 60% or greater is likely to indicate market power. Similarly, Canada's Competition Bureau publishes a guideline for abuse of dominance which sets out that market share is only used as an initial screening mechanism and then provides an explanation on what thresholds are used and how they are applied.

Merger control

Generally, thresholds are used in merger control regimes with respect to notification or prohibitions. With respect to the former, some jurisdictions, such as Vietnam in its 2004 Competition Law, use market share thresholds as the test to determine whether a merger is notifiable. However, market share thresholds, as described above, can be difficult to calculate and apply in practice. For that reason, most jurisdictions use financial thresholds instead of market shares to determine notification obligations. Common financial thresholds include size of the transaction and size of the relevant parties. It is worth noting that, in its 2018 competition law, Vietnam incorporated financial thresholds in its notification requirements. As noted above, even where financial thresholds are used, it is preferable to set those thresholds in regulatory instruments or resolutions of the Commission instead of in the legislation itself. The advantage of flexibility can be observed when the Philippines Competition Commission significantly increased the notification thresholds as they realized that they were getting too many notifications of transactions that caused no competition law concerns and were thus wasting resources.

With respect to prohibitions, some jurisdictions, such as Vietnam in the 2004 Competition Law, have used market share thresholds as a test to determine when an economic concentration should be prohibited. However, it is more common for jurisdictions to use a substantive threshold such as substantial or material lessening of competition as the basis for prohibition. The problem of using

market share thresholds, similar to the use of them as determinative of market power, is that there is no economic basis to state that a given market share would always lead to a material anti-competitive effect in every market and there are often difficulties with market definition and calculation of market shares. For that reason, an economic analysis of the specific transaction and market is a preferred approach to establish potential anti-competitive effects. We note that in its 2018 Competition Law, Vietnam moved away from market share thresholds for prohibition and moved to a more common substantive threshold of significantly restricting competition.

In summary, there is no market share threshold that should be considered as determinative of a dominant market position or substantial lessening of competition in a merger context. Instead, substantive examination should be undertaken of the relevant market and concentration or conduct. Indicative market share thresholds for dominance can provide important guidance to stakeholders and the regulator.

For merger notification, financial thresholds are generally more effective and justifiable than market share thresholds; whereas for determining standards for prohibition, a substantive analysis is generally considered more appropriate than market share thresholds. However, if thresholds are to be used, it is generally advisable to place them in guidelines, directives or regulations to retain the flexibility to amend them in response to changing market conditions and experience.

7. Should State-owned enterprises (SOEs) be exempted from the competition law?

Modern competition laws generally are applied comprehensively across the economy; both private companies and SOEs should be subject to the same treatment as they compete in a market economy. For greater clarity, SOEs in this case include public-private partnerships and situations where the government is the sole or part owner of the relevant entity. This is because several studies and empirical evidences have shown that SOEs often have the incentives and ability to act anti-competitively, and did so to the detriment of the market or the overall economy. Another way to consider the issue is that all market participants should be subject to a level playing field as they compete. This issue was recently considered by Thailand as it re-considered its competition law. Thailand's previous competition law excluded SOEs from its scope, but given the competitive impact of SOEs in Thailand's economy, they have largely included SOEs, subject to certain exemptions, within the scope of their new competition law. In other jurisdictions, such as Singapore and Malaysia, the scope of the law incorporates commercial activities regardless of whether conducted by state- or privately-owned actors.

8. Should any sectors be exempted from the competition law?

Competition laws are generally comprehensive across all sectors of the economy; however various jurisdictions exempt certain sectors from the application of their competition law or create dual responsibility between sectoral regulators and competition authorities. It is common for some overlap to exist between sectoral regulators and competition authorities and they work closely together in various jurisdictions as they each often have expertise in different areas and different regulatory focuses.

Some jurisdictions exempt specific sectors from the application of the competition law; although even in those cases, they occasionally require cooperation or coordination between the regulators. The decision to exempt a specific sector will depend on the specific regulatory and economic considerations of the jurisdiction and should be carefully considered as it may hinder the competition authority's ability to exercise its mandate effectively.

9. Could the competition commission's power to pass decisions on competition cases overlap with judicial decision?

Competition authorities may have the power to adjudicate competition cases. In some jurisdictions, such powers rest with the courts. However, even in such cases, these jurisdictions avoid general

courts hearing competition cases and have adjudication to be done by specialized tribunals or specific courts (such as commercial or IP courts (e.g. Thailand). Adjudicative powers are either assigned to Competition Commissions or specialized courts because, while such decisions are generally fully enforceable as court orders, competition cases are highly specialised subject matters that requires special knowledge and skills, in particular with regards to market analysis, impact assessment, etc. A normal court of law, therefore, might not be sufficiently equipped to evaluate the economic and other evidence which are often the basis of competition cases. One common approach in ASEAN Member States (such as Indonesia, Lao, Myanmar, Thailand and Vietnam) is for the Competition Commissions to decide on the merits of an investigation and either make administrative decisions directly or submit matters to courts for criminal prosecutions.

There does not appear to be one international standard for decision-making as it varies considerably based on the nature of the relevant competition law and the legal tradition/culture of the jurisdiction. For example, in the United States, decision-making depends on which competition authority deals with the matter, with the Department of Justice referring matters to courts and the Federal Trade Commission issuing administrative decisions. In contrast, as the EU-level competition law is administrative in nature, all decisions are made by the European Commission, which is then subject to judicial review by the courts (the European Court of First Instance and then the European Court of Justice).

In many jurisdictions, appeals from the decisions of the competition authority are to regular or appellate-level courts, but given the concerns with specialized knowledge and expertise required in competition cases, some jurisdictions, such as Malaysia and Brunei, even provide for appeals regarding competition cases to be referred to specialized competition appeal tribunals or for initial appeals to be heard by the Commission itself.

10. While most enterprises in Cambodia are micro, small and medium by size, how would these enterprises benefit from the introduction of a competition law? Should they be exempted from the purview of the competition law?

A competition law is meant to provide a level playing field for all entities undertaking commercial activities in a market; regardless of size. From that perspective, small entities are generally protected from potential anti-competitive effects of entities that unilaterally or collectively possess market power. A competition law should make it easier for small entities to enter and compete in relevant markets and provide an environment in which costs are reduced and more competitive alternatives are available across the economy. Some competition laws also include objective clauses that specifically address the promotion of SMEs. However, it is not clear what the implications of such objective clauses are in practice, other than to explicitly ensure that the impact of (potentially) anticompetitive conducts or agreements on SMEs is a factor for consideration in the analysis of potential competitive effects.

One important consideration when contemplating exemptions, including for SMEs, is that having too many exclusions and exemptions weakens the effectiveness of a competition law. While some competition laws either provide exemptions for SMEs, or provide for the Competition Commission to issue such exemptions, or to exclude SMEs from the merger regime (e.g. Vietnam), there is no economic basis to exclude SMEs completely from the purview of competition law.

First, with respect to the anti-competitive agreement provisions, many competition laws treat at least hard-core types of agreements as *per se* offenses and do not consider economic effects. In that situation, an exemption for SMEs would not be appropriate. For example, one can easily imagine a bidding situation where all bidders are SMEs, hence there does not appear to be any reason to exclude those businesses from the application of the anti-bid-rigging provisions of the competition law. Additionally, particularly in developing economies, small geographic markets may exist where SMEs have market power, therefore exclusion from the application of the abuse of dominance provisions in

such cases would be problematic to competitors (who are also likely to be SMEs) in such small markets. With respect to merger control, on a practical basis, where competition laws use financial thresholds for merger notification, it is likely that most transactions involving SMEs would fall under the thresholds and not be subject to an obligation to notify even without an explicit exemption.

11. Why is it important for bid-rigging to be included in the competition law?

There are many definitions of bid rigging – sometimes referred to as collusive tendering – but it can generally be said to occur when bidders or potential bidders who are expected to compete for a tender, secretly agree to not compete for that business resulting in higher prices or lesser quality for those seeking tenders. Bid rigging can occur in both the private and public spheres.

Most regimes that have competition laws include bid-rigging as a prohibited anti-competitive horizontal agreement. In many cases, bid rigging is treated as a *per se* hard core offense and may be subject to criminal penalties under the competition law. All ASEAN members with a competition law incorporate bid-rigging prohibitions in their competition laws; many also address bid-rigging in other statutes such as public procurement laws or criminal codes.

Bid-rigging is a major component of competition law enforcement internationally and many jurisdictions have stated that bid-rigging cases can comprise a significant percentage of cartel investigations, leniency applications and penalties in those jurisdictions.

Thank You!!