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ECONOMIC ANALYSIS AND EVIDENCE IN ABUSE CASES – Contribution from Albania

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More documentation related to this discussion can be found at: oe.cd/eac.

Please contact Mr James Mancini if you have questions about this document [James.Mancini@oecd.org]

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Economic analysis and evidence in abuse cases

- Contribution from Albania-

This paper describes shortly the Albanian experience in economic analysis, theory, evidence, and role of economists in abuse of dominance cases.

1. Legal framework and Procedure

1. Albanian law no. 9121/2003 “On competition protection”, as amended, is fully aligned with *articles 101 and 102 of TFEU*. *Article 3 point 5 of law no. 9121/2003 defines the dominant position as “a position of economic strength held by one or more undertakings which enables them to prevent effective competition on the market by giving them the power to conduct, concerning demand or supply, independently of other market participants such as competitors, customers or consumers”.*

2. *Article 8 of law no. 9121/2003 determine how to evaluate the dominant position of one or more undertakings notably particularly by establishing the following: a) the relevant market shares of the investigated undertaking/s and those of the other competitors; b) the barriers to entry to the relevant market; c) the potential competition; ç) the economic and financial power of the undertakings; d) the economic dependence of the suppliers and purchasers; dh) the countervailing power of buyers/customers; e) the development of the undertaking's distribution network, and access to the sources of supply of products; ë) the undertaking's links with other undertakings; f) other characteristics of the relevant market such as the homogeneity of the products, the transparency of the market, the undertaking cost and size symmetries, the stability of the demand or the free production capacities.*

3. Abuse of the dominant position is determined in *article 9 of law no. 9121/2003 as “Any abuse by one or more undertakings which may, in particular, consist in: a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; b) limiting production, markets or technical development; c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; ç) concluding contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”*

4. The Albanian Competition Authority (ACA) under law no. 9121/2003 and all sub-legal acts has powers to address competition infringements and restore the competition in the market in both *ex-ante* and *ex-post* analysis.

5. In *ex-ante* analysis, the ACA assesses draft normative acts by the government that may impose barriers to entry, or grant special or exclusive rights to an undertaking in the form of Public-Private-Partnership or concession, pursuant to *article 69 of competition law: “Obligation for central and local administration bodies”*. The ACA may recommend or give obligation to the undertakings to respect the principles and rules of competition, being brought to market in order to comply with the provisions of *article 9 of the competition law regarding abuse of dominant position: - imposing, directly or indirectly, unfair purchase or sale prices or other unfair trading conditions; - restriction of production, markets or technical development.*

6. In *ex-post* analysis, the ACA in accordance with *articles* 28, 41, and 42 may conduct market studies/ sector inquiry or open preliminary and in-depth investigation and assess abuse of dominant position.
7. The first step in all cases is defining the relevant market which includes both the product and the geographic market as foreseen in the Guideline no. 76/2008¹ “On Market Definition” and Guideline 2015² “Appraisal of dominant position”.
8. Regarding procedures during investigations, dawn raids and data collection and access to file, the ACA has in force the following regulations and guidelines: Regulation 2011³ “On investigation procedures”, Regulation 2016⁴ “On administration of electronic data during inspections from the competition authority”, Regulation 2016⁵ “On personal data protection, Regulation 2018⁶ “On the Functioning of the Competition Authority”, Guideline 2021⁷ “On the best practices for submitting evidence of economic character and data collection, in cases related to the implementation of articles 4 and 9 of law no. 9121/2003 and in concentration cases”, Guideline 2020⁸ “On confidentiality and access to file”.

2. Methodology and Economic theory

9. The ACA uses the industrial economics principles and Structure-Conduct-Performance Paradigm to evaluate the conduct of an undertaking when it competes: the market structure: monopoly (natural monopoly or undertaking holding a concession or exclusive right/PPP); oligopoly; monopolistic competition; the number of competitors and degree of concentration, homogeneity of the product; barriers to entry/exit; countervailing power of buyers and suppliers; performance in terms of productive efficiency, allocative efficiency, and profitability;
10. Literature review and best cases from OECD, ICN, or other competition authorities are as well taken into consideration when a case regards a new market that hasn’t previously been under investigation.
11. After the theory of harm has been drafted the investigation procedure includes several steps to be followed like data request, inspections, data analysis, and compiling of the report. In preliminary investigations, this may last up to 3 months, while in in-depth investigations this may last up to 6 months.

¹ http://www.caa.gov.al/uploads/laws/Udhezim_tregu_perkates.pdf

² http://www.caa.gov.al/uploads/laws/Udhezimi_per_poziten_dominuuese.pdf

³ <http://www.caa.gov.al/uploads/laws/Rregullorja%20per%20regullat%20e%20hetimit%20finale.pdf>

⁴ http://www.caa.gov.al/uploads/laws/Regulation_on_administration_of_electronic_data.pdf

⁵ http://www.caa.gov.al/uploads/laws/Rregullore_Per_mbroj_te_dhena_personale.pdf

⁶ http://www.caa.gov.al/uploads/laws/Regulation_On_the_Functioning_of_the_Competition_Authority.pdf

⁷ http://www.caa.gov.al/uploads/laws/Udhezues_-_Mbi_praktikat_m_t_mira_pr_dorzimin_e_provave_me_karakter_ekonomik.pdf

⁸ http://www.caa.gov.al/uploads/laws/Udhezues_Mbi_Konfidencialitetin_dhe_Aksesin_n_Dosje.pdf

3. Data request and analysis

12. During the investigation procedure, the ACA identifies public institutions and search for public data before it compiles requests for information (RFI). Depending on the market, the ACA may request data from market regulators like in energy, telecommunications, banking, ports etc.; from the General Directory of the Customs, Institute for National Statistics, Ministries of Lines, and from undertakings under investigations.

13. The data collected are related to sales, prices, financial statements, and contracts. Special questionnaires and interviews are done with the representatives of the undertakings and other parties in regard to the infringement. The ACA does not have the budget to outsource this service, but with the help of students and online media, it succeeded in the past. RFI is usually also requested to the network that ACA has with international networks like the OECD-GVH/RCC, or competition authorities in the region and that ACA has Memorandums of Understanding (MoUs) (Spain, Italy, Austria, etc). Usually, a short case on the market and type of infringement is presented and countries present their experience in the same market. The ACA may request hiring an external expert in the market where extra knowledge is required. The expert works daily with the investigator's team in order to compile the report.

14. The data analysis includes gathering, administering, organizing, compiling statistics and indices, and reporting the results.

15. After the data is collected economic analysis is conducted. Market shares are calculated in terms of values or quantity. The concentration indicators the HHI and CR3 and CR4 indicators are calculated as well. If an undertaking is assessed to have more than 40% of the market, it is considered to hold a dominant position. Then the evaluation is done in terms of the degree of expansion (network of distribution), level of vertical integration, power of sellers and buyers, barriers to new entries, the economic power of competitors in terms of financial indicators, and other performance and financial indicators are calculated.

16. Depending on the supposed infringement other analysis on prices and costs is done especially in margin squeeze, loyalty rebates, tying and bundling predatory prices, and excessive prices. Benchmark analysis can be used as well when prices and conduct of an undertaking operating in Albania in the relevant market can be compared to another similar undertaking in the same relevant market in countries in the region. The analysis of the "as efficient competitor:" can be used in regulated markets, where the incumbent undertakings are compared to other competitors in regard to cost, prices and fees, and trade conditions.

17. In refuse to deal/supply cases analysis includes mostly legal assessment of unfair trade conditions in contracts between the undertaking that holds the dominant position and other undertakings in the other levels in the market.

4. Role of economists and compilation of the report

18. Unlike detecting cartel through unannounced dawn raids and indirect evidence, abuse of dominant cases include more in-depth long-term data analysis. When in abuses of refuse to deal and supply the role of lawyers is very much enhanced to evaluate specific criteria's in contracts, guidelines, and regulations, the role of economists in other abuse cases as margin squeeze, loyalty rebates, tying and bundling, predatory prices, excessive prices are essential.

19. Economists are part of each team of investigators in abuse of dominant position cases. Economists compile the RFI data format and perform all the economic analyses of the investigation report. A huge amount of data needs to be analyzed.

20. Economists represent 17 out of 46 (total number) staff in the ACA. Since 2017, the ACA has had the position of Chief Economist (CE) in the organic structure of the Secretariat of the Authority. The CE role is included when required in abuse cases where in-depth econometric analysis needs to be done.

21. While some abuse of dominant position cases have ended through Competition Commission (CC) decision giving recommendation or obligation to the dominant undertaking (Refer to CC decision no. 567/2018 EMS-APO refuse to deal case⁹ or CC decision no.812/2021 LPG margine squeeze case¹⁰), in other cases that end through a giving fine to the dominant undertaking, the CE role is very important. The calculation of the fine is done using a methodology that determines elements and financial data to be included in the amount and percentage of the fine (Refer to CC decision no. 696/2020 DCT refuse to deal case¹¹ or CC decision no. 572/ 2018 EKMA unfair trading condition case¹²).

22. Nowadays is more and more difficult to prove abusive conduct as gathering the relevant data has become more difficult than ever. Economic and Econometric analyses are performed using the relevant software tools. Special training is conducted for newcomers and existing staff in terms of economic theory, econometrics, ECJ recent cases, and usage of STATA and E-views software. Further training and in software is needed.

5. Final Remarks

23. Economic analysis in abuse cases is very essential and difficult. It requires in-depth insights from all market operators as well as long-term data from the dominant undertaking.

24. Competition authorities have to be proactive in cooperation with public regulators in data sharing and retrieving data during investigations. Special attention has to be given to the digital economy as it imposes conceptual and analytical challenges in all steps of economic analysis in abuse of dominant position cases.

⁹ http://www.caa.gov.al/uploads/decisions/Vendim_nr_567_dat_07.11.2018.pdf

¹⁰ http://www.caa.gov.al/uploads/decisions/Vendim_nr_812_dat_02.09.2021.pdf

¹¹ <http://www.caa.gov.al/uploads/decisions/21>

¹² http://www.caa.gov.al/uploads/decisions/Vendim_nr_572_dat_22.11.2018-3.pdf