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ECONOMIC ANALYSIS AND EVIDENCE IN ABUSE CASES

Summaries of contributions

-- Session II --

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This document reproduces summaries of contributions submitted under Session II of the Global Forum on Competition to be held on 6-8 December 2021.

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

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Table of contents

Economic analysis and evidence in abuse cases 3
Albania 4
Brazil 5
Canada 6
Fiji 7
Japan 8
Kenya 9
Latvia 10
Russian Federation 11
Slovenia 12
Turkey 13

Economic analysis and evidence in abuse cases

-- Summaries of contributions –

Abstract

*This document contains summaries of the various written contributions received for the discussion on "Economic analysis and evidence in abuse cases" held during the 20th meeting of the Global Forum on Competition (6-8 December 2021, Session II). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.*

Albania

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. 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. 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 law no.9121/2003 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.

In ex-post analysis, the ACA in accordance with articles 28, 41, and 42 of the law no. 9121/2003 may conduct market studies/ sector inquiry or open preliminary and in-depth investigation and assess abuse of dominant position. The first step in all cases is defining the relevant market which includes both the product and the geographic market, then theory of harm is defined based on the industrial economics principles, Structure-Conduct-Performance Paradigm, on different literature review and best cases from OECD, ICN etc. During the investigation procedure the ACA identifies public institutions and search for public data before it compiles requests for information (RFI). On down raids data related to sales, prices, financial statements, and contracts are. Collected. Then the data is gathered, administered, organized, statistics and indices are compiled, and the results are reported. Depending on the infringement type other analysis on prices and costs is done especially in margine squeeze, loyalty rebates, tying and bundling, predatory prices, and excessive prices. Benchmark analysis and "as efficient competitor" can be used as well. In refuse to deal/supply cases mostly legal assessment of unfair trade conditions in contracts is analyzed.

Economists play an essential role in abuse of dominant position cases as they are part in each team of investigators. The Chief Economist is part of the ACA's structure since 2017 and its role is included when required in abuse cases where in-depth econometric analysis needs to be done, and when fine has to be calculated.

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. 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.

Brazil

In Brazil, a dominant position is presumed whenever a company or group of companies is able to unilaterally or coordinately change market conditions, or when it controls twenty percent or more of the relevant market[1]. However, it should be noted that presumption of dominance is not absolute, and market dominance is not illegal per se. As stipulated by the Brazilian Competition Law (Law 12529/2011), it is illegal to use a dominant position to harm and/or restrict competition.

The Brazilian Competition Law mentions different types of abuse of dominance practices as infringement of the economic order and confers the Administrative Council for Economic Defense (CADE) the power to investigate and punish such practices. Attachment I of CADE's Resolution 20/99[2] provides guidance on how to analyze some of these practices, such as predatory pricing, price discrimination, price squeeze or margin squeeze, resale price maintenance, exclusive deals, tying, refusal to deal, among others.

This document briefly presents how CADE has analyzed these practices, particularly regarding the variables adopted and methods applied. Price-cost margins, diversion ratios and market shares are some of the measurements CADE employs to help assess market power and, for this endeavor, economic tools may help to estimate these parameters. However, these same tools have limitations that must be considered by the antitrust authority's analysis. For this purpose, the Department of Economic Studies (DEE/CADE) has endeavored to shed light on these limitations and on how to better address them.

As an example, in March 2021, the DEE launched a study called "The problematic binary approach to the concept of dominance", which looks into the complex concepts of dominance and market power. In this study, the DEE considers that a simplistic, discrete and binary definition of what is a dominant firm actually conceals a great continuum of possibilities, characterized by the same variables that help framing these concepts. In the document, the DEE stated that the so-called adequate market power necessary for a dominant player to be identified as such varies greatly because it is not possible, in abstract terms, to determine whether an enterprise has market power or not.

This document brings together part of this discussion. Aiming to improve abuse cases analysis, economists can help to measure parameters that are of interest to the debate (for example, by estimating directly the effect in terms of prices a conduct of abuse of dominant position has had on the market) and to assess effects in abuse of dominance or monopolization cases, by using different techniques, such as differences in differences analysis, event studies, simulations and indexes like VGUPPI.

[1] This percentage may be changed by CADE for specific sectors of the economy, according to Article 36, Paragraph 2 of the Brazilian Competition Law (Law 12529/2011).

[2] Available in Portuguese at < http://en.cade.gov.br/cade/assuntos/normas-e-legislacao/resolucao/resolucao-no-20-de-9-de-junho-de-1999.pdf/view#:~:text=Resolu%C3%A7%C3%A3o%20n%C2%BA%2020%2C%20de%209%20de%20junho%20de%201999.pdf>.

Canada

The submission by Canada's Competition Bureau ("Bureau") focuses on the Bureau's investigation process, and specifically the collection and treatment of economic evidence in the context of civil abuse of dominance cases. The Bureau's investigation process consists of several stages: preliminary examination, formal inquiry and civil litigation phase where the Commissioner seeks a remedial order before the Competition Tribunal ("Tribunal"). At each stage, the Bureau considers the types of evidence to collect, evaluates the allegations in light of the evidence and decides whether to pursue enforcement action.

The Bureau has adopted a multidisciplinary team approach in its investigations, by combining legal and economic skills in an attempt to provide efficient and effective resolution to competition issues. The investigating team is made up of a mix of lawyers, economists and paralegals, and the team may also engage with external economic experts.

The Bureau may select and retain an external economic expert in one of two roles: 1) as a consulting expert when they are not expected to testify; and 2) to provide opinion evidence in litigation before the Tribunal. A testifying economic expert is required to submit a report to the Tribunal. The content of the expert report will vary depending on the types of analysis that the expert is able to undertake and this depends on the nature of information that was available to the expert including the availability of data.

The Bureau's submission also provides a brief overview of the elements under section 79 of the Competition Act ("Act"), informed by the relevant case law in this area. Economic analysis of the evidence and data collected is critical in the Bureau's assessment of a the three elements under section 79 of the Act. The Bureau's Abuse of Dominance Enforcement Guidelines contain a detailed description of the Bureau's enforcement approach under the elements of section 79, which is based upon jurisprudence, as well as recent economic thinking.

Finally, the submission sets out illustrative examples of the Bureau's economic evidence submitted under each element in two abuse of dominance cases successfully brought before the Tribunal. In the Commissioner's case against the Toronto Real Estate Board ("TREB"), the Tribunal relied heavily on the testimony of the Commissioner's economic expert and a variety of evidence relating to market definitions in reaching its conclusion with respect to the issue market power under 79(1)(a). In the Commissioner's case against Air Canada, the Bureau engaged three experts, including an economic expert who carried out an analysis of the cost and revenue data to determine whether Air Canada had engaged in predatory conduct on a number of passenger airline service routes under 79(1)(b). In TREB, the Tribunal placed significant weight on the Commissioner's qualitative evidence in order to satisfy the requirements of paragraph 79(1)(c).

Fiji

Over the last two years, many competition authorities have faced a rapidly changing environment. While these have naturally been exceptional circumstances, we nonetheless believe that there are lessons to be learnt from our experience of the Sars-CoV-2 pandemic which can be carried forwards into the future, and inform our approach to tackling abuse of dominance cases in "normal" times. The exceptional circumstances we have faced have affected every aspect of competition enforcement.

The approach we have taken to adapting our economic analysis to the rapidly-changing enforcement terrain is twofold: firstly, an emphasis on providing a strong central analysis of the likely kinds of consumer harm that might arise from the abuse of dominant positions on the part of businesses, which can be adapted easily to different circumstances; secondly, an active monitoring policy to take action against anti-consumer abuse as it happens.

Our experience in enforcing competition law in these circumstances has led us to a number of conclusions, which we consider applicable to competition enforcement more generally.

Firstly, economic analysis should be couple with a flexible, adaptable and dynamic framework for implementation, enforcement and information gathering. This is especially true in crisis scenarios, but is true even in normal times. By having the ability to track down even low-level abusive practices quickly and efficiently, consumers can be protected before serious harm has been allowed to occur.

Secondly, economic analyses should be based around flexible frameworks which can be adapted repeatedly to similar cases. While every market is unique, there are categories of problem which are likely to repeatedly occur across many markets. Having broad frameworks that can be adopted easily by implementation and enforcement teams, and which are readily understood by these teams, can allow consumer protection bodies to cast a much wider net, and detect consumer harms that might otherwise have gone undetected.

Thirdly, competition authorities should be willing to use the whole range enforcement tools as complements to one another, and the manner in which this is done should be informed by careful economic assessments of the effects of these tools, with the primary objective of averting the worst abuses while refraining from the creation of unintended harms by unduly aggressive use of these instruments.

Fourthly, we must recognise the trade-off between deep-dive economic analyses, implementation speeds, and the need to have staff working always on the most useful tasks for them to be working on. A dynamic approach can allow us to retain staff capacity to work on the highest-public-return assignments, while still allowing for rapid implementation across the board.

Finally, we have also been reviewing the substance of our analysis, for application in future abuse of dominance cases. Increasingly, for example, we are incorporating analysis of common shareholdings in our analyses. While this has principally been in merger cases so far, we believe that it has applications more generally in dominance cases. Similarly, we are increasingly expanding our advocacy focus into the relationship between significant market players and industry self-regulation bodies where we believe that this relationship can create a position of dominance for one of these firms through the misuse of regulatory tools.

Japan

Since a competition law is a basic act to protect market mechanism, it is essentially important that competition agencies understand the competition situation in each market in their law enforcements or policy makings; agencies need to understand and utilize economics whose subjects are market mechanism or corporate behavior and others.

As digitalization in economy advances, new types of business or marketing such as platform business or marketing utilizing big data has emerged which requires competition agencies careful evaluation in considering, for example, an impact of a certain conduct of an enterprise on a market, etc. As a result, the importance of economic analysis in law enforcement has been getting more and more obvious.

In fact, the Japan Fair Trade Commission (hereinafter the "JFTC") has been trying to utilize economic analysis in various situations of law enforcement such as establishing theories of harms, defining relevant market, evaluating impact of anticompetitive conduct or contents of commitment plan.

The contribution paper from the JFTC introduces two antitrust cases of Amazon Japan G.K. (hereinafter "Amazon Japan") to explain how the JFTC utilizes economics to establish theory of harms and evaluate the contents of commitment plan. Even though in those two cases the JFTC did not conclude abuse of dominance or monopolization of Amazon Japan or the illegality of Amazon Japan's conduct, both are unilateral conduct cases and economic analysis introduced in the paper can be used in the cases of abuse of dominance etc. too.

There are many areas or cases that economic analysis can be utilized and the JFTC will continue updating reliable methods of economic analysis concerning both quantitative and qualitative approaches, and strengthening organization structure or capacity/ability for economic analysis.

Kenya

The Competition Authority of Kenya ('the Authority') is established under the Competition Act No.12 of 2010 ('the Act') and is mandated to investigate complaints and /or initiate investigations on its own volition where anti-competitive practices are suspected. In investigation of abuse of dominance cases, the Authority considers; (i) whether an undertaking has a dominant position in a market by establishing if it controls not less than one-half of the total goods or services of any description supplied or rendered in Kenya or any substantial part thereof, (ii) that market power indicates whether or not an undertaking has the ability to act unconstrained by, or to an appreciable extent, independently of its customers, competitors and suppliers, and the ability of an undertaking to control prices, profitably sustain prices above competitive levels or restrict output or quality below competitive levels, and (iii) market share levels assessed against the market concentration levels, possible likelihood of entry, any entry barriers, and countervailing buyer power may yield a better mapping of whether an undertaking has market power.

In assessing abuse of dominance cases, the Authority focuses on the impact of the conduct on the market —whether the conduct is likely to restrict or harm competition in the market. Thus, the Authority defines the relevant market to assess whether an undertaking has market power and can harm competition and to ascertain who the market players are with a view to establishing the effect of the conduct on the competitive process as a whole. The starting point in analyzing any abuse of dominance case is, therefore, to define the relevant market. Consequently, any assessment of the effects of the abuse on the market will necessarily require a definition of the relevant market. To establish this, the Authority considers that abuse of dominance may be manifested by the use of practices that allow an undertaking to preserve, entrench or enhance its market power. In order to ensure effectiveness, the Authority embraces prioritization of cases to direct resources, time, and energy to those activities that are deemed most relevant to achieving the Authority's strategic plan and operational Guidelines. The Authority's priorities are generally set taking into account Kenya's national economic development agenda in so far as it relates to competition issues and from an assessment of where the greatest impact can be made.

Latvia

In the recent years the Competition Council of Latvia (CC) has developed its approach towards competitive neutrality matters. Three main directions how CC ensures competitive neutrality can be distinguished. Firstly, CC uses its advocacy powers. Secondly, Article 88 of State Administration Structure Law imposes an obligation for public administrative bodies to consult with CC and receive CC opinion prior establishing a new SOE or expanding the scope of activities of existing SOE. Thirdly, in 2020 came into force articles 14.1 and 14.2 of Competition Law that prohibit public administrative bodies and SOEs to distort competition and provides liability for competitive neutrality infringement.

As to the advocacy powers, CC has the rights to prepare and submit to the Cabinet of Ministers opinions regarding draft regulatory enactments that affect or could affect competition issues, in the meantime opinion of CC is required if draft is related to matters of competition protection and development. CC also has the rights to participate in the State secretaries' meetings in the advisory capacity. If CC reveals a violation of competitive neutrality in the legislation already in force CC submits proposal to the relevant ministry on how to interrupt distortion of competition.

Article 88 of State Administration Structure Law provides obligation to state and municipalities prior establishing a new SOE or expanding the scope of activities of existing SOE to consult and receive opinion of CC and the relevant entrepreneurs NGOs on whether activities of SOE meets the exemptions allowing SOE to operate in the market. In addition, state and municipalities are obliged likewise to re-evaluate activities of SOE every 5 years.

As to the enforcement powers of CC, ¬Article 14.1 of Competition Law establishes that public (state and municipal) administrative bodies and SOE in which a public administrative body has a decisive influence are prohibited from hindering, restricting or distorting competition. In accordance with ¬Article 14.1 of Competition Law violation of competitive neutrality may occur as: 1) Discrimination of market participants by creating different conditions for competition; 2) Conferring advantages for the SOE; 3) Actions that force private company to leave a relevant market or create barriers for entry or make it difficult to operate in a market.

Competition Law states that in the case if CC recognizes a breach of competitive neutrality, CC is obliged firstly to negotiate with respective public administrative body or SOE to prevent and restrain it from further breach of competitive neutrality.

If the negotiations with SOE are unsuccessful, CC may take a decision establishing a violation of competitive neutrality, and therefore impose a legal obligation and a fine that amounts up to 3 % of the net turnover for the previous financial year of SOE.

CC also monitors public procurement compliance from competitive neutrality's perspective, however the main competent authority in the field of public procurement is Procurement Monitoring Bureau.

The CC is entitled on its own initiative to ask explanation for contracting authority on its requirements in procurement documentation regarding the proportionality and impact of the specified requirements on competition and whether it is possible to impose less restrictive requirements on competition.

The fact that the requirement included in the procurement documentation complies with the regulatory enactments in the field of public procurement does not automatically assume that it will be in conformity with the provisions of the Competition Law and there is no risk of a breach of competition neutrality.

Russian Federation

Economic analysis is a basic tool in the practice of the FAS Russia in the investigation of cases of abuse of a dominant position.

The basic criteria for dominance are established in the Federal Law of July 26, 2006 No. 135-FZ "On Protection of Competition", the methodology for conducting market analysis is approved by the Order of the FAS Russia and several important Guidelines of the FAS Presidium which have been adopted and are used in the investigation of this category of cases and economic analysis.

When conducting an economic analysis as part of the investigation of such cases, it is important to conduct a proper analysis of the affected commodity market in terms of market boundaries, the composition of players, the level of concentration and barriers to entry to the market. In each case, the FAS Russia needs to establish an objective relationship between the market power of an economic entity, its actions and possible consequences which will be expressed in restrictions of competition, including in related markets or infringement of the interests of counterparty companies or an indefinite circle of consumers.

Slovenia

The essay takes a closer look at the approach of the Slovenian Competition Authority (hereinafter: The Agency) when undertaking assessments in abuse of dominance cases. More specifically, it aims to provide the reader with a general overview of the investigative procedure carried out by the Agency in the context of abuse of dominance cases, as well as offer other helpful insights, in particular, on the role of the Agency's Department of economics in the aforementioned procedure.

The economic insight may vary from case to case depending on evidence the Agency obtains during the procedure as well as on the theory of harm. Nevertheless, it should be noted that the role of the Agency's Department of economics is of significant importance for handling abuse of dominance cases, both in administrative and minor offence procedures.

Turkey

Economic Analysis and Research Department (EARD) renders opinion, upon request, in inquiries/investigations conducted under the scope of article 6 of the Act no 4054 on the Protection of Competition, which regulates abuse of dominant position, with respect to showing the harm theory examined by the rapporteurs (case handlers) in charge of the file. The opinion consists of economic and/or econometric analysis of the harm theory that is the subject of the investigation. Moreover, in some cases, depending on the findings obtained from the analysis of the file and the relevant data set, the Department also submits opinion about other possible harm factors and assessment methods.

The results of the analysis are fundamentally based on statistical and econometrical tests made on the basis of the data set obtained specifically for the matter in hand from the parties to the investigation and the competitors in the sector. The results of the quantitative analysis and their interpretation are submitted as a "report" to the Supervision and Enforcement Department that conducts the investigation. Rapporteurs evaluate those findings together with the other facts and findings in the file.

Exclusionary effects of discount systems as well as detection of excessive and predatory pricing are among the current opinions submitted by the EARD. The methods used in two of those opinions and facts of the respective cases are summarized below.

1. In the case file concerning Coca Cola Satış ve Dağıtım A.Ş. (CCSD), whether discount systems applied and increasing the number of cooling cabinets by the CCSD caused de facto exclusivity by foreclosing final sales points was assessed by means of statistical and econometric analysis.

   The analysis revealed findings that were likely to raise competitive concerns, and those findings were submitted to the relevant Supervision and Enforcement Department as a report. The investigation process was terminated after the CCSD applied for commitment procedure and the Board approved the comprehensive commitments offered by the CCSD.

2. In the investigation that was initiated to determine whether Ortadoğu Antalya Liman İşletmeleri A.Ş. (PORT AKDENİZ), which operated Antalya Port, violated article 6 of the Act no 4054 by means of excessive pricing in several loading and unloading services[3], the so called "Economic Value Test" was applied.[4]

   According to the results of the analysis, the prices charged by PORT AKDENİZ particularly between 2016 and 2018 for container services could be regarded as excessive pricing. The analysts had the opinion that, it was difficult to make an assessment about whether the prices for solid bulk cargoes were excessive. The prices charged for general cargo load services did not seem to be supporting the excessive price argument.

   When considered together with the qualitative issues such as the dynamics of the relevant market, arguments stated by the party to the investigation and the opinions of the relevant third parties, the Board concluded that the result of the economic analysis showed that the prices applied by PORT AKDENİZ was unreasonably and continuously high. Thus, PORT AKDENİZ violated article 6 of the Act no 4054 by means of excessive pricing in container handling market between 2016 and 2018.

[3] Namely container, bulk cargo and general cargo handling services.

[4] Decision of the Competition Board dated 05.11.2020 and numbered 20-48/666-291.