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ECONOMIC ANALYSIS AND EVIDENCE IN ABUSE CASES – Contribution from BIAC

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Economic analysis and evidence in abuse cases

– Contribution from BIAC –

1. Introduction

1. *Business at OECD* (BIAC) appreciates the opportunity to contribute to the Global Forum on Competition (GFC) Roundtable on Economic Analysis and Evidence in Abuse Cases. The pursuit of abuse cases is probably the most challenging area of competition policy, and the area where over-enforcement is most likely to directly disincentivise investment and innovation by business, and to discourage aggressive competition, and thereby cause lasting harm to employees, consumers, and broader stakeholders. The standard abuse provisions target conduct that would, in many contexts, be seen as normal and efficient competition on the merits, but, in some specific circumstances, may be considered to harm competition. Agencies may impose substantial financial penalties, prohibit certain businesses from some forms of conduct, and force businesses to radically alter normal operations.

2. Separately, there is typically an asymmetry between agencies (and the State in general) in regard to both the degree of understanding of how relevant markets work, and the ability to respond to changing market circumstances. Private businesses typically have a deeper understanding of the nuances of how their own markets work and are better able to change their operations on a continuous real-time basis to respond to, and even anticipate, rapidly changing business environments. By contrast, the State often not only is challenged to understand historical patterns of business conduct, but also in keeping pace with the speed at which markets evolve.

3. While governments might make a policy decision that intervention is ultimately justified by the potential for preventing harm to competition, in many instances the application of abuse provisions appears selective, the analytical principles that are applied and the evidence that is considered are inconsistent and are often tailored to a specific case. In some cases involving intervention , cases that are not sufficiently supported by robust economic analysis and evidence create legal uncertainty and risk for all businesses. Also of concern are standards that are described in open ended terms, such as some positive obligation on large firms to assist small businesses, or to promote industrial policy objectives; in such cases there is no objective benchmark on which to reach a decision, and accordingly create uncertainty.

4. BIAC submits that the State's role in pursuing abuse cases should be focused on supporting economic output, facilitating, and even encouraging risky investment and innovation, and not applying regulatory interventions without a proper analysis, or applying abuse provisions in an unpredictable or inconsistent fashion. The latter approach may well discourage private sector investment, innovation, and growth.

2. Types of Abuse and Potential Unintended Consequences

5. From an economic point of view, competition policy seeks to prevent markets from moving away from competitive conditions and closer to monopoly due to abusive conduct. This is generally achieved through interventions that focus on the structural pre-conditions that can be expected to give rise to monopoly pricing. This can include the accrual of significant market power through mergers or coordinated conduct as well as abuse cases. In order to address the former, competition authorities typically implement merger control regimes, while coordinated conduct is targeted through the investigation and prosecution of cartel behaviour.

6. While mergers may lead to discrete changes in the competitive landscape (which motivates some degree of scrutiny), and cartel behaviour is widely recognised as overwhelmingly harmful to competition, the investigation of abuse cases should consider the costs and benefits of intervention. Unpredictable intervention into business operations can have significant costs, in particular dampening incentives for investment, and engaging in normal competition on the merits. The risks of the unintended consequences of overenforcement are likely even greater in the application of abuse of dominance, than in the case of merger control (and in the prohibition of coordinated conduct). This is because abuse of dominance provisions target conduct that in many circumstances would be correctly identified as normal competition on the merits. Abuse of dominance provisions are typically authorized in two types of putative abuses: exploitative conduct (such as excessive pricing), and exclusionary conduct, although some jurisdictions do not allow for pursuit of purely exploitative conduct and many others do not pursue such cases in practice.

7. Exploitative conduct might be seen as a particular case of the normal and efficient profit maximisation by firms, which is the incentive that drives all competitive conduct. Moreover, fluctuations in price in general, and high prices in particular, are critical and efficient signals to businesses to supply more, expand, invest, or innovate. A prohibition against excessive pricing (which is an exploitative and not an exclusionary abuse) seeks to regulate directly a firm's pricing and production decisions, and, unlike other aspects of competition policy, does not have regard to encouraging a market structure that is conducive to competition or which facilitates self-correction. Overly aggressive enforcement in this area is likely to directly disincentivise efficient business conduct.

8. Exclusionary conduct is conduct that directly impacts competitors, although normal competition on the merits, may also harm competitors. Any firm that provides customers with a better overall offering, such as lower prices, higher volumes, better quality, range, or service, will not only take business away from a rival, but will also reduce that rival's ability and incentive to win back that business. The rival in question would have to cut quality-adjusted prices even further and would earn less margin on any regained business. Accordingly, enforcement that is not sufficiently supported by robust economic analysis and evidence is likely to directly discourage aggressive competition on the merits. Insufficiently justified enforcement is therefore likely to directly discourage an efficient rival from cutting prices, expanding production, or innovating to provide new and better-quality products and services, for fear that these obvious consumer benefits might be seen to make business life too difficult for rivals. Of course, business life will be more difficult for rivals, but these consumer benefits are the very aim of rational competition policy.

9. Policymakers might consider the relative costs of over- or under-enforcement of abuse provisions by assessing the likely effects of erroneously prosecuting a firm that has not engaged in prohibited conduct (a false positive) with the likely effects of not prosecuting a firm that has engaged in prohibited conduct (a false negative). False positives have a high risk of producing deleterious effects, including lower investment and an inefficient allocation of resources. In contrast, in most circumstances the likely cost of false negatives, in particular for exploitative abuses, is small, since excessive pricing enforcement has limited prospects of sustainably producing lower prices, whereas allowing higher prices in the short term will very likely result in an efficient signal to encourage further investment, innovation and more vigorous competition in the longer term to the benefit of consumers and the economy more generally.

10. Policymakers in different jurisdictions may apply different weightings to the risks of over- and under-enforcement in their relevant contexts. BIAC submits that while the risks of over-enforcement are likely to predominate in most cases, particular jurisdictions with smaller, less established, or less developed economies may face disproportionate consequences arising from over-enforcement. While businesses have strong incentives to invest in advanced economies, smaller economies are much more vulnerable to disincentivising business investment. Separately, if smaller, less established, or less-developed economies are also served by less-developed competition authorities, those authorities may seek to apply simpler rules of thumb, and more form-based approaches, that have not been well supported by current economic thinking. These newer authorities may also wish to consider the risks, and likely costs to consumers, that may come from enforcement that is not sufficiently supported by robust economic analysis and evidence.

11. Similarly, policymakers may think that these trade-offs may be different across sectors, and hence there may be a temptation to apply a sector specific approach to abuse cases. However, given the interconnected nature of different sectors of the economy, and constant changes that affect each sector, and the inherent complexity of each situation, it can be difficult to assess the likely weightings that might apply to a specific sector. Accordingly, BIAC submits that the approach to competition policy should not be sector specific, but rather consistent economic principles should at least be applied across all sectors.

12. One of the key pillars in the administration of abuse cases is the application of robust economic analysis. In particular, economics provides qualitative and quantitative toolkits. A qualitative toolkit allows us to better understand (and test) how markets work and to assess what are the necessary conditions and assumptions that are embedded within an intuitive story (such as a theory of harm). Qualitative tools can be used to generate expectations about how markets work and then come up with intuitive stories (or theories of harm) in the first instance. Qualitative analysis can also be used to indicate the corroborating evidence that would be expected from, and then consistent with, an initial intuitive story of how a market works. The quantitative toolkit then allows us to test the existence of the necessary conditions and assumptions within an intuitive story (and to quantify the effects of particular types of conduct, or the relevant factors within a wider analysis). Separately, a scientific approach to quantitative assessment should consider the testability of propositions with respect to each proposition.[1] Under such a scientific approach, a theory of harm must be formulated in a rebuttable way and then tested against the available evidence.

[1] *See* J.H. Johnson & G.K. Leonard, *Economics and the Rigorous Analysis of Class Certification in Antitrust Cases*, 3(3) J. COMPETITION L. & ECON. 341 (2007).

13. In the remainder of this note, we set out some of the areas in which economic analysis can assist in establishing a more rigorous, more consistent, and more objective approach to abuse cases. While it is beyond the scope of this note, BIAC submits that other important pillars in the reduction of potential negative consequences include procedural certainty, an open and transparent process, and adequate rights of defence.[2]

3. An Objective Competition Standard—A Dynamic Process of Rivalry, Over the Longer Term

14. The first key principle that should be applied is that abuse of dominance provisions, and all competition policy, should target the maintenance and promotion of competition as a dynamic process of rivalry. Competition is a process by which firms continually try to offer their customers better bargains through cutting prices, expanding output, and providing better quality goods and services. As a normal part of this process, some new firms will enter and may have better ideas and more determination to succeed, and some firms may become inefficient and will naturally fail and leave the market. Ultimately it is the process of competition (and not the protection of any particular competitor) that is the focus. This fundamental economic idea is the basis of all competition policy and is motivated as effective competition is most likely to deliver the greatest consumer benefit over the longer term. The focus on this objective would prevent agencies from targeting other objectives that (while perhaps appealing in the short term), are very likely to lead to unintended adverse consequences for competition, consumers, and broader economic growth.

15. Accordingly, any putative intervention must be motivated by a robust likelihood that it will enhance competition (as a dynamic process of rivalry over the longer term). Intervention should not be motivated by enriching or protecting special interest groups, such as competitors, suppliers, or even providing short-term windfall gains for consumers, if this intervention does not also (and primarily) target the likely enhancement of competition in the longer term.

16. Intervention that is directed towards the protection of competitors, or special interest groups, simply invites manipulation of the enforcement system and results in inefficiency, and ultimately consumer harm.

17. Inherent in the notion of competition as an objective standard is that competition is a dynamic process of rivalry **over the longer term**. Most fundamentally, short term fluctuations are efficient signals to the market, and it would be highly inefficient if the State were to attempt to intervene to investigate and then smooth out any such short term fluctuation, as a market would then never obtain the signals that would otherwise allow it to operate efficiently. Such an approach would improperly assume that markets are static, whereas in reality markets are often highly dynamic and adaptive. It is their ability to evolve and even anticipate constant change that makes markets so effective at serving consumer needs. Accordingly, particularly in abuse cases, it is important that a competition authority develops an understanding of how competition and business models work over time, before considering formal intervention. Separately, the machinery of investigations cannot practically analyse short term fluctuations in markets in real-time. Thus, it would not be logical to investigate every minute market fluctuation in every market throughout the

[2] AM. BAR ASS'N, ASSESSMENT OF GLOBAL COMPETITION AGENCY IMPLEMENTATION OF ABA BEST PRACTICES FOR ANTITRUST PROCEDURE – REPORT BY THE PROCEDURAL TRANSPARENCY TASK FORCE (Apr. 29, 2019), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/april-2019/sal-procedural-transparency-2019-04-29.pdf.

economy. Even an occasional and arbitrary initiative to do so invites rent-seeking and inefficient lobbying and would be a misuse of State resources.

18. As discussed further below, different jurisdictions apply differing time periods to their analysis of market definition as well as competitive effects. As one rough guide, it seems unreasonable to consider potential market deviations (such as price changes), over a shorter time horizon then one would even allow a "hypothetical monopolist" to respond. By way of example, the U.S. *Horizontal Merger Guidelines* state that the hypothetical monopolist's price rise is "non-transitory,"[3] which is described as "into the foreseeable future,"[4] and the EC considers demand and supply-side constraints that are capable of acting in the "short term."[5] Less immediate constraints such as entry or potential competition are often taken into account after the market definition exercise, at the stage of competitive assessment. The EC notes that "entry is normally only considered timely if it occurs within two years,"[6] which is also the time period considered by the UK agencies.[7] Abuse of dominance cases should focus on deviations that are far more durable and persistent.

19. By way of a recent example, several countries have experienced supply shortages following blunt price regulation of PPE products during the COVID-19 pandemic. Italy was one of the countries that was hardest hit during the early stages of pandemic, and mask demand surged as Italy prepared to open up after the strictest stages of lockdown. On May 3, 2020, Domenico Arcuri, Special Commissioner for the Coronavirus Emergency, announced that surgical face masks must be sold at a fixed price of €0.50. However, within three days shortages were reported, and some pharmacies announced that they would stop stocking masks, because they couldn't secure them at a sufficiently low price. The Italian Consumer Association (Altroconsumo) claimed that price-capped masks were available only in one out of four pharmacies in major cities.[8]

[3] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 9 (Aug. 19, 2010), https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/hmg.pdf [hereinafter U.S. HORIZONTAL MERGER GUIDELINES].

[4] *Id*. at 17.

[5] Commission Notice on the Definition of Relevant Market For the Purposes of Community Competition Law, 1997 O.J. (C 372) 5, ¶ 16 (demand-side substitution), ¶ 20 (supply-side substitution) (describing supply substitution within the "short term" as the period in which firms can switch supply "without incurring significant additional costs or risks"), ¶ 20 n.4 (expanding that the short term is "such a period that does not entail a significant adjustment of existing tangible and intangible assets").

[6] Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31) 5, ¶ 74.

[7] COMPETITION & MKTS. AUTH., MERGER ASSESSMENT GUIDELINES ¶ 8.33 (Mar. 18,2021),https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1011836/MAGs_for_publication_2021_--.pdf [hereinafter UK MERGER ASSESSMENT GUIDELINES].

[8] *See, e.g.*, Flavia Rotondi, *Italy's Plan to Cap Price of Face Masks at 50 Cents Has Flopped*, BLOOMBERG (May 12, 2020), http://www.bloomberg.com/news/articles/2020-05-12/italy-s-plan-to-cap-price-of-face-masks-at-50-cents-has-flopped. *See also* Ferdinando Giugliano, *Italy Learns a Hard Lesson on Face Masks*, BLOOMBERG (May 14, 2020), www.bloomberg.com/opinion/articles/2020-05-14/coronavirus-italy-learns-a-hard-lesson-on-face-masks.

20. Fung and Roberts show that average prices for certain goods such as toilet rolls, saw a temporary sharp increase at the start of the pandemic, followed by prices returning to the original long-run price equilibrium. The pandemic led to a substantial increase in the quantity demanded for hand sanitizer, and temporary increases in price drove new entrants into the market.[9]

21. If States are determined to enact specific regulations against price increases within the context of a pandemic, BIAC recommends that specific anti-price gouging laws be adopted rather than utilising traditional competition law standards to address price-gouging in a manner which might undermine the traditional standards.[10] As noted above, an overly punitive approach to price gouging is likely to decrease incentives to invest or encourage supply side expansion particularly if the rules apply beyond a very short-term period.[11]

4. Dominance as a Substantive Notion

22. The initial point of departure for many abuse cases is the notion of dominance, or substantial market power. This is fundamental and requires that the firm in question enjoy a position of substantial and durable market power. The critical contribution of economics in this regard is to ensure that the notion of "dominance," relies on an analysis of market dynamics rather than an arbitrary market share threshold.[12]

23. While market share thresholds may have some utility as an initial filter, they provide an inadequate and incomplete picture of competition. As such, standing alone they provide a poor indicator of the likely incidence of abuse.

24. First, a simple market share threshold is not an economic test. While the general approaches that are most commonly applied to market definition have economic underpinnings (in that market definition is an exercise in assessing the degree of substitutability, as distinct from complementarity, that might apply amongst a group of

[9] San Sau Fung & Simon Roberts, *The Economics of Potential Price Gouging During COVID-19 and the Application to Complaints Received by the CMA* (Ctr. for Competition Policy, Working Paper 21-02, 2021), https://cdn.sanity.io/files/hr4v9eo1/production/36b0a4601b1aed6dcf7060aca8afb40721dded9c.pdf.

[10] *See* John Oxenham, Michael-James Currie & Charl van der Merwe, *COVID-19 Price Gouging Cases in South Africa: Short-term Market Dynamics with Long-term Implications for Excessive Pricing Cases*, 11 J. EUR. COMPETITION L. & PRAC. 524 (2020).

[11] The recent excessive pricing investigations of South African competition authorities do not pay much attention to the nature of the demand shock in the particular market. Indeed, the emphasis has been on preventing price increases for essential items. Put differently, excessive-pricing provisions, at least during the disaster period, has effectively been a tool for de facto price control. In addition, the focus has been on quite narrow geographic settings, often resulting in the prosecution of small firms, which would not be subject to competition policy scrutiny in normal times. As South Africa exits the crisis phase, and "normal" price pressures resume, the competition authorities will have to adjust focus and refrain from their attempt to intervene in price-setting on a large scale. A clearer focus on demand is likely to provide authorities with a means of selecting those cases that should receive more scrutiny. It will also provide retailers with improved legal certainty. *See also* Massimo Motta, *Price Regulation in Times of Crisis*, DAILY MAVERICK (Apr. 22, 2020), https://www.dailymaverick.co.za/opinionista/2020-04-22-price-regulation-in-times-of-crisis-can-be-tricky/.

[12] The key focus of the Canadian Competition Tribunal (which is composed of two Federal Court judges and an economist) has rightfully been on the extent to which the dominant firm is exercising market power through exclusionary or other conduct coupled with the degree to which those anti-competitive acts are in fact giving rise to a substantial lessening or prevention of competition. The trier of the case must be satisfied that the entity in the dominant position in the relevant market is indeed acting in an anti-competitive manner, which is having substantial effects in the relevant market. That threshold needs to be proven by concrete evidence.

goods or services[13]), not only are such tests applied with substantial variations amongst different authorities,[14] but more importantly, in practice it is often difficult to identify the strict confines of a market, particularly where there is insufficient data, or lack of historical episodes with which to perform an actual hypothetical monopolist test. In such cases, and often under the guise of a necessarily pragmatic approach, an assumption may be made regarding market definition, often including products and services that have ostensibly similar characteristics. Such limitations in the market definition exercise should be explicitly acknowledged, and a market definition based on such assumptions or assertions should not be extended into further assumptions that all products or services within such a market are equally close, or even close substitutes, and furthermore that competition is necessarily limited between products or services within such a market, and outside such a market. This approach to and caution regarding market definition exercises is well recognised in international guidance.[15]

25. Second, even if a market definition were definitive, and undertaken in an economically robust way, this would still only be the start of the assessment. Economists have identified myriad situations in which a firm may enjoy a high share of sales within a properly defined market, but may still not enjoy any substantial market power, for example within contestable markets, markets subject to substantial innovation or impending change, or other rapid changes on the demand or supply sides.

26. An abusive harm to competition is very unlikely without dominance. Thus, the establishment of dominance should be informed by a substantive test that seeks to establish persistent market power, rather than a simple market share threshold. For completeness, such a substantive test should establish over what activity a firm enjoys a position of persistent market power, and there must obviously be a clear causal link from that position, to the allegedly abusive conduct.

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[13] *See, e.g.*, SIMON BISHOP & MIKE WALKER, THE ECONOMICS OF EC COMPETITION LAW (3rd ed., 2010); MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE 101-115 (2004); Commission Notice on the Definition of Relevant Market For the Purposes of Community Competition Law, 1997 O.J. (C 372) 5, ¶ 7 (product market definition), and ¶ 17 (demand substitutability).

[14] There appear to be minor differences in the way in which the hypothetical monopolist test, or "SSNIP" test (an acronym for "small but significant non-transitory increase in price") is applied in different jurisdictions. *See, e.g.*, the Commission Notice on the Definition of Relevant Market For the Purposes of Community Competition Law, 1997 O.J. (C 372) 5; U.S. HORIZONTAL MERGER GUIDELINES, *supra* note 3; UK MERGER ASSESSMENT GUIDELINES, *supra* note 7.

[15] *See, e.g.*, U.S. HORIZONTAL MERGER GUIDELINES, *supra* note 3. Some scholars have even gone as far as questioning whether or not market definition is a *necessary* first step. *See, e.g.*, Jonathan Baker & Steven Salop, *Should Concentration be Dropped from the Merger Guidelines?*, 33 UNIV. OF WEST LOS ANGELES L. REV. 3 (2001); Gregory Werden, *Simulating the Effects of Differentiated Products Mergers: A Practical Alternative to Structural Merger Policy*, 5 GEO. MASON L. REV. 363 (1997); Carl Shapiro, *Mergers with Differentiated Products*, ANTITRUST, Spring 1996; John Vickers, Competition Economics and Policy: A Speech on the Occasion of the Launch of the New Social Sciences Building at Oxford University 10, 12 (Oct. 3, 2002), https://webarchive.nationalarchives.gov.uk/ukgwa/20131101192141/http://www.oft.gov.uk/news-and-updates/speeches/2002/0702 ("The core purpose of market definition, then, is to help assess questions about market power, or in the case of mergers, changes in market power.") ("Pitfalls of market definition occur if its purpose is forgotten. Then substantive conclusions can turn hazardously on definitions.") ("How people define the market has no effect on the competitive reality, just as whether or not they wear glasses has no effect on the weather."). *See also* AUSTL. COMPETITION & CONS. COMM'N, GUIDELINES ON CONCERTED PRACTICES ¶ 4.10 (Aug. 2018), https://www.accc.gov.au/system/files/Updated%20Guidelines%20on%20Concerted%20Practices.pdf (citing ACCC v Flight Centre [2016] HCA 49 at [69]); AUSTL. COMPETITION & CONS. COMM'N, MERGER GUIDELINES ¶¶ 4.2-4.3 (Nov. 2017), https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF.

27. By way of further practical guidance, economists have considered several different set of criteria that might help in identifying markets that are likely candidates for enforcement action.[16] The most important of these criteria—and the most consistently cited—is that the industry in question must be subject to significant and non-transitory barriers to entry and expansion, such that high prices or exclusionary conduct in the industry in question are not likely to be counteracted by new investment and entry. The motivation is that enforcement of abuse cases is only likely to be appropriate where the dynamic competitive process cannot be expected to produce new entrants and/or expansion. It is only in such instances that the enforcement of abuse cases is less likely to interfere with the normal competitive process of demand growth, capacity constraints, and new investment.

28. This condition does not merely require the existence of barriers to entry that are "high" in monetary terms and could therefore be expected to delay entry by a few years, since such entry would still constitute the normal competitive process. Instead, the barriers to entry must be of a non-transient or structural nature, such that there are no foreseeable prospects for new entry or expansion. If this condition is not met, even where barriers to entry are high in monetary terms, enforcement may well delay or prevent efficient entry that otherwise would have taken place, thereby subjecting consumers to lower investment, higher prices, lower quality and less variety in perpetuity.[17]

29. In summary, when considering which situations might be suitable candidates for abuse of dominance cases, the most important criteria—and the one that is most consistently cited—is the durability of market power. This involves two threshold factors: (1) dominance, in the sense of substantial and persistent market power, testing market dynamics beyond the mere assessment of a market share threshold; and (2) high and non-transitory barriers to entry and expansion, such that high prices are not likely to constitute efficient signals for new investment and entry. Of course, neither of these factors indicates an abuse, but both are necessary preconditions to a finding of durable market power.

5. A Realistic Benchmark

30. As noted above, the effects of the enforcement of abuse provisions are not confined to the actual cases that are investigated but have a knock-on effect to other firms considering their own conduct outside of the scope of an active investigation. Accordingly, and consistent with the principles of transparency and efficiency, abuse cases should be considered against a realistic benchmark of what could have reasonably been understood by the firm in question, and expected, aggressive competitive conduct by that firm.

[16] *See also* ROBERT O'DONOGHUE & A. JORGE PADILLA, THE LAW AND ECONOMICS OF ARTICLE 82 EC (2006); Lars-Hendrik Röller, *Exploitative Abuses*, *in* EUROPEAN COMPETITION LAW ANNUAL 2007: A REFORMED APPROACH TO ARTICLE 82 EC (Bloomsbury 2007); David S Evans & A. Jorge Padilla, *Excessive Prices: Using Economics to Define Administrative Legal Rules*, 1 J. OF COMPETITION L. & ECON. 97 (2005); Patrick Rey et al, Report by the EAGCP: "An Economic Approach to Article 82" (July 2005), https://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf.

[17] *See, e.g.*, Massimo Motta & Alexandre De Streel, *Excessive Pricing in Competition Law: Never Say Never?*, *in* THE PROS AND CONS OF HIGH PRICES 14 (Swedish Competition Authority 2007) (regarding exploitative abuse); Amelia Fletcher & Alina Jardine, *Towards an Appropriate Policy for Excessive Pricing*, *in* EUROPEAN COMPETITION LAW ANNUAL 2007: A REFORMED APPROACH TO ARTICLE 82 EC (Bloomsbury 2007).

31. Especially in abuse cases, a given type of conduct can be entirely pro-competitive in some contexts, while potentially harmful to competition in other contexts. Firms should be able to establish not only whether they are dominant or not, but also clearly understand in which contexts a given type of conduct may be harmful to competition.

32. BIAC submits that a firm's conduct can only reasonably be assessed based on the information available to that firm at the time. This has three immediate applications.

- First, by way of recent example, while some of the effects of the pandemic may appear clear in hindsight, it is unreasonable to expect firms to have intelligently adapted their conduct in January 2020, in a way that would now, ex post, seem reasonable.
- Second, a firm cannot be expected to adjust its business conduct to favour another less efficient firm, whether that other firm is a supplier, a rival, or a customer.
- Third, a reasonable firm, undertaking prudent self-assessment cannot be expected to have conducted an assessment that is as detailed as one might expect in a full retrospective investigation. Even dominant companies will necessarily apply rules of thumb and simplified analyses since business decisions need to be taken quickly.

33. BIAC submits that a further implication of these observations is that a firm's conduct can only reasonably be assessed against a standard of what that firm would have done if it were acting on the basis of normal competition on the merits, such as short term profit maximisation, and the pursuits of its own short term self-interest, on the basis of information that would reasonably have been known to it in the relevant timeframes.

6. The Role of Public Interest Considerations in Competition Analysis

34. In several jurisdictions, "public interest" or "non-competition" factors have assumed a more substantial role, in particular over the past decade, in part motivated by earlier financial crises, the unique socio-economic circumstances facing each country, and more recently by the global pandemic.[18] These public interest factors may include a range of broader policy objectives such as "fairness," "privacy," "inequality," "media-plurality," "environmental protections," "financial stability," "employment," and "preferential treatment of domestic firms." While some of these considerations may be well-intentioned, BIAC suggests that these factors are not in and of themselves primarily a function of competition. As broader policy goals, BIAC submits that specialist laws and regulators are best placed to address these than competition policy itself.[19]

[18] *See* Elisa Braun, Thibault Larger & Simon van Dorpe, *EU Big Four Press Vestager to Clear Path For Champions*, POLITICO (Feb. 6, 2020), https://www.politico.eu/article/eu-big-four-france-germany-italy-poland-press-executive-vice-president-margrethe-vestager-to-clear-path-for-champions.

[19] It does, however, necessitate greater collaboration between competition agencies and other regulators to ensure alignment and avoid issues arising from agencies having concurrent jurisdiction. *See* OECD, Independent Sector Regulators—Summaries of Contributions, DAF/COMP/WP2/WD(2019)24 (Nov. 28, 2019), https://one.oecd.org/document/DAF/COMP/WP2/WD(2019)24/en/pdf. Specifically, South Africa's contribution highlights, "The cooperation of the Commission with independent sector regulators in South Africa has proven to be an effective tool to promote and foster joint positions on competition policy and strengthen enforcement through the exchange of confidential information, the sharing of resources, as well as the participation by one regulator in investigations, proceedings or policy making processes of another." *Id*. at 22.

35. BIAC notes that there is an increasing tendency in certain jurisdictions to increase the scope of industrial policy in competition law to support a particular industry or categories of competitors within a sector.[20] Competition agencies should be mindful of their capacity and skill set in order to appropriately balance what are often different competing interests in a manner which does not undermine their primary responsibility—which is to promote competition and enhance consumer welfare.[21]

36. The application of these non-competition factors risks distortion of competition enforcement and the use of economic tests that should serve as a precondition for any abuse case. The application of non-competition factors risks significant distortion of competition principles and sends signals to the business community that the application of competition law is not based on economic factors, but rather based on political, industrial, or other policy goals. It also necessarily introduces an arbitrary factor into the application of the competition laws which undermines the rule of law and is highly likely to chill investments by other firms.

37. While BIAC is concerned that the role of public interest factors may undermine the efficacy and predictability of abuse provisions and discourage investment, to the extent these non-competition factors are going to be considered there should be clear legislative guidance on how these factors will be considered and weighted particularly where there might be inherent tensions between competition and non-competition factors (or indeed tension between different non-competition factors).[22]

[20] South Africa has recently amended its Competition Act (1998) to increase the scope of industrial policy in competition law so as not only to support small and medium sized enterprises as well as historically disadvantaged persons, but also place additional obligations on other private firms. *See* § 8(4) on buyer power which prohibits a dominant firm from requiring from or imposing on a supplier that is a small and medium business or a firm controlled by historically disadvantaged persons unfair prices or other trading conditions. *See also* §§ 9 and 12A which deals with price discrimination and the consideration of mergers respectively. *See also* Karl Aiginger & Dani Rodrik, *Rebirth of Industrial Policy and an Agenda for the Twenty-First Century*, 20 J. INDUS., COMPETITION & TRADE 189, 190, 191, 194-95 (2020) (discussing industrial policy approaches in various jurisdictions around the world).

[21] OECD, Industrial Policy and Promotion of Domestic Industry—Background Note, DAF/COMP/LACF(2018)5, ¶ 66 (Aug. 22, 2018), https://one.oecd.org/document/DAF/COMP/LACF(2018)5/en/pdf .

[22] *See also* OECD Competition Policy Response to COVID-19 (Apr. 27, 2020), https://read.oecd-ilibrary.org/view/?ref=130_130807-eqxgniyo7u&title=OECD-competition-policy-responses-to-COVID-19, at 8.