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Economic analysis and evidence in abuse cases

- Contribution from Slovenia –

1. The following 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.

1. Role of economists in abuse of dominance cases

2. The Agency is organized within two main organizational units; the Department of restrictive practices (and minor offences) and the Department of concentrations and economic analysis. Economists (economics staff) are formally assigned to the Department of concentrations and economic analysis and their work assignments are mainly related to the assessment of concentrations (mergers and acquisitions). Cases related to abuse of dominance (monopolization) cases are managed by the case handlers - staff from the Department of restrictive practices, and economic analysis is carried out by economics staff from Department of concentrations and economic analysis.

3. The Agency carries out two separate procedures, namely, the administrative procedure and the minor offence procedure (which typically follows the administrative procedure in which the imposition of fine takes place). It is important to note that economist might play a role in both of them, although to a different extent.

4. The Agency's management (Director and Heads of both Departments) decides which case is to be prioritized in each instance, basing its decision on the findings of the initial investigations, specific circumstances of each case and budgetary constraints. The management decides also on the staff to be involved in each case, considering several factors, including previous case experiences and potential sector specific knowledge of each individual staff, on-going merger cases each member of the team is already involved in etc.

5. Due to stricter time limitations, economics staff's priorities lie generally in the merger cases. Nevertheless, the economics department is actively involved in antitrust cases as well, its main role being assistance of the case handler teams in tasks related to the assessment of the relevant market, market power and anticompetitive effects.

6. Moreover, economists play an important role during *dawn raids*, as they are in many instances able to evaluate and filter out the relevant economic data with an important evidential value already on the spot. In addition, their economic insights are typically also required when selecting the appropriate remedy, commitments and interim measurements, together with assessing the corresponding anticipated effect of those. To that end, in instances in which *a cease-and-desist order* can effectively remedy the issue, economist typically do not play any particular role. The opposite is true, when the remedy is proactive in nature, meaning it amounts to imposing positive obligations on undertakings (be it in the form of a behavioral or structural sanction). In this case, the economics department role encompasses different tasks, including the design, implementation and monitoring of the obligations, respectively.

7. The role of economic analysis and evidence in abuse cases is described in details below.

2. Theories of harm

8. Abuse of dominance is unilateral conduct using dominant market power to damage market competition and ultimately welfare. Article 9(1) of the Prevention of the restriction of competition act[1] (hereinafter: CA) contains, similar to Article 102 TFEU2, a general prohibition on abuse of a dominant position, while paragraph 4 of the same article sets out - in a non-exhaustive manner - what abuse may, in particular, consist in:

- directly or indirectly imposing unfair purchase or selling prices, or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- making the conclusion of 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 their contracts.

3. Assessment of market power/dominance

9. According to article 9(2) CA, an undertaking or several undertakings are deemed to have a dominant position on a particular market, if they are capable, to a significant extent, to act independently of competitors, clients or consumers. When assessing the degree of undertaking's market power and determining whether that market power places the respective undertaking in a dominant position, the Agency will typically consider a variety of economic indicators.

10. In the first step, the Agency establishes the relevant product and geographic market. When assessing the former, the Agency relies primarily on the quantitative test (i.e. the SSNIP test) rather than on qualitative methods (i.e. market characteristics, price and intended use). Regarding the latter, the Agency typically conducts an analysis of factors related to the product in question, such as transport costs, marketing infrastructure, consumer preferences, national or local regulation etc. In addition, in certain sectors, e.g. telecommunications, the Agency frequently relies on market definitions established by the national regulator.

11. With regard to the question of dominance, a market share analysis generally acts as a starting point of any market power assessment. Article 9(5) CA contains a rebuttable presumption which deems an undertaking to be in a dominant position if its market share exceeds the 40 percent threshold. Similarly, two or more undertakings are deemed to be dominant if their market shares exceed 60 percent.

[1] See: http://www.varstvo-konkurence.si/fileadmin/varstvo-konkurence.si/pageuploads/ZPOmK-1-consolidated_version.pdf.

[2] Treaty on the functioning of the European Union.

12. Besides the market share, the Agency also takes into consideration other indicators, in particular, undertaking's funding options, legal or actual entry barriers, access to suppliers or the market, and existing or potential competition.

4. Particularly helpful evidence

13. When the Agency is conducting assessments in abuse of dominance cases, it generally relies on information of public[3] and private nature. In order to gain access to the latter, the CA affords the Agency extensive fact-finding powers which enable the Agency to conduct, *inter alia*, sector inquires[4], surveys[5], requests for information[6], or dawn raids[7]. In the investigation stage of the fact-finding procedure, economists in practice typically resort to RFIs in order to acquire from the undertaking(-s) under investigation, and/or other market participants, their internal commercial data[8], or carry out surveys addressed to third parties (e.g. consumer associations, associations of undertakings, chamber of commerce etc.) for a more general market intel[9]. Although such approach is primarily used with respect to information relevant for the assessment of relevant markets and market power (e.g. product interchangeability, market share calculations, actual/potential competition estimations, statements regarding barriers to entry etc.), RFIs have also proven to be an efficient tool when establishing certain anticompetitive effects (e.g. documents relating to pricing strategies and/or price-cost structures can be particularly helpful in cases dealing with pricing abuses), even though they tend to be harder to acquire, due to the fact that the undertakings themselves are responsible for providing such information, and that the Agency is not always certain about the type and the amount of the data in undertaking's possession. Nevertheless, the CA allows for the imposition of fines for not providing the relevant information, which has proven to be relatively efficient in practice.

14. Finally, other additional types of evidence may be valuable as well, depending on the type of abuse being examined, and on the conditions forming the requisite legal test of the respective abuse (e.g. evidence showing the intention of the dominant undertaking to exclude a competitor in predatory pricing cases).

5. Third-party data and data limitations

15. The described approach has thus far proven to be a relatively sufficient mechanism for collecting the needed information, even when dealing with data limitations. As already mentioned, the Agency tends to acquire third-party data on a regular basis – primarily by sending out RFIs and surveys to the competitors of the undertaking under investigation, various interest groups (e.g. trade associations, consumer associations etc.) etc. or by conducting investigations.

[3] e.g. online platforms, for example, Caselex.

[4] Art. 26 CA.

[5] *Ibidem.*

[6] Art. 27 CA.

[7] Art. 29 CA.

[8] RFIs therefore normally include i) questionnairs and ii) requests to enclose additional internal documents (e.g. pricing lists, price-cost structures etc.).

[9] e.g. data regarding product interchangeability.

16. If, in a particular case, the process of collecting evidence is deemed to be too resource intensive, the Agency may, provided the budgetary resources allow for it, commission an external expert to provide it with the needed market data analysis. The Agency has done so, for example, in a recent case commissioning a market research company to conduct a survey on consumer preferences regarding the TV and broadcasting content which, in the end, constituted the basis for the Agency's final decision.

17. It should be noted, however, that based on Agency's previous experience it is crucial to opt for the appropriate method in a cautious manner in order to avoid any potential issues with potential data limitations.

18. The Agency would like to draw attention to one of its former predatory pricing case, in which the Agency did not opt for an investigation and confiscation of the internal commercial strategic documents of a dominant undertaking, but instead relied on its own price-cost calculations. The latter was subsequently seen as insufficient by the competent court[10] which consequently dismissed the Agency's decision and returned the case back to the Agency for reconsideration. The Supreme Court's judgement effectively meant, that the Agency would need to conduct an investigation in order to collect the missing evidence. However, due to the long time period that had passed between the day on which the alleged abuse was brought to an end and the start of the reconsideration proceedings, the Agency could not obtain a court's order to search the premises of the said undertaking, as the court was of the view that finding the relevant evidence was not probable, effectively forcing Agency to end its proceedings.

6. Analytical techniques

19. In general, the analytical techniques employed seek to establish the relationship between the practice under consideration and its potential effects on the position of competitors, costumers and/or consumers of the dominant undertaking as well as on the market structure as such, taking into account all the specific circumstances of the case at hand. Besides establishing actual or potential effects, the Agency must also show that the latter are attributable to the practice in consideration and that the practice was objectively not necessary to achieve a pro-competitive aim, a claim typically put forward by the undertaking under investigation (e.g. legitimate reasons for below-cost prices, meeting competition defense etc.).

20. In broad terms, the Agency differentiates between exploitative and exclusionary practices on the one hand and abusive pricing and non-pricing practices on the other.

21. That said, it is worth noting that in certain cases it can be a rather challenging task to pinpoint exactly whether an abuse is exploitative, exclusionary or both. Nevertheless, it is imperative to do so, as the need to quantify the harm suffered by the consumers (i.e. *consumer harm*) will typically depend on such a classification, thereby making it a relevant factor to consider in the Agency's assessment.

22. Namely, in a case concerning, *inter alia*, a tying practice on the wholesale market for broadband bit-stream access, the Slovenian Administrative court deemed the Slovenian telecom incumbent's practice of granting access to its physical network infrastructure only on condition that the customer also purchases a PSTN or ISDN telephone connector as an exploitative abuse (even though the Agency qualified it as an element of a wider refusal to

[10] Judgement of the Slovenian Supreme Court of 6 December 2013, G 9/2012-28, par. 31.

supply abuse and thereby as exclusionary), and as such as an abuse which requires exact quantification of the consumer harm.[11]

23. The reasoning of the Court stated that an exploitative abuse is typically directed towards consumers, while exclusionary practices rather towards competitors, and thereby only indirectly towards consumers, which justifies the requirement of showing the concrete amount of harm suffered by the consumers in the former, yet not in the latter case[12].

24. Exclusionary practices are, therefore, deemed to present an immediate threat to competitors and to the market structure as such rather than to consumers. As a result, it suffices to establish (likely) exclusionary effects (the required extent of the foreclosure effect may vary: with respect to a refusal to supply abuse, for example, it suffices to show that a conduct is likely to exclude all *effective* competition[13]) and *indirect harm* to consumers - for example, in the form of probable reduction of the competitive pricing pressure, choice, quality, limitation of technical progress etc.[14]

25. Depending on the aforementioned types of abuse, the Agency employs different analytical techniques when assessing anticompetitive effects. More specifically, the methods applied are generally contingent on the conditions forming the requisite legal test of the respective abuse, as there is no single legal test under Art. 9 CA (similarly to Art. 102 TFEU). Consequently, depending on the concrete abuse, the degree of resource intensity varies accordingly. In any event, anticompetitive effects assessments are generally, indeed, seen as particularly resource-intensive, as they are typically immensely time consuming and complex, and, as a result, associated with high expenditures (i.e. when conducted by external experts - the Agency is of the opinion that such *outsourcing* could be required in certain particularly burdensome instances, e.g. employment of the AEC test), requiring significant personnel. The lack of available resources, whether financial or personnel, may therefore pose a potential risk, which, in the worst case, can result in insufficient appraisal of the relevant facts.

7. Conclusion

26. 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.

[11] Judgment of the Slovenian Administrative Court of 9.1.2018, I U 423/2015-48, par. 121 (123).

[12] *Ibidem*, par. 133.

[13] *Ibidem*, see par. 156: the Administrative court leaning on the judgment of the ECJ of 17 September 2007, Microsoft vs. Commission, T-201/04.

[14] *Ibidem*, par. 137.