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Use of Economic Evidence in Cartel Cases – Contribution from Albania

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

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Use of Economic Evidence in Cartel Cases

- Contribution from Albania -

1. This paper describes shortly the Albanian experience in the use of economic analysis, during prohibited agreement cases and challenges during hearing sessions and court proceedings.

1. Legal framework and Procedure

2. Albanian law no. 9121/2003 “On competition protection”, as amended, is fully aligned with *articles 101 and 102 of TFEU*. *Article 4* “Prohibited agreements” foresees that the following shall be prohibited: Agreements which have as their object or effect the prevention, restriction or distortion of competition shall be prohibited, and in particular those which: a) directly or indirectly fix purchase or selling prices, or any other trading conditions; b) limit or control production, markets, technical development, or investment; c) share markets or sources of supply; ç) Apply dissimilar conditions to equivalent transactions to other trading parties, thereby placing them at a competitive disadvantage; d) make 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 such contracts.

3. ACA performs preliminary and in-depth investigations in cartel cases. The investigative powers of the ACA are based both on law no. 9121/2003 and sublegal acts. Procedures during investigations include dawn raids, data collection and access to file, as foreseen in the regulation in force. When detecting cartels *ex-officio*, the ACA considers both direct and indirect evidences. Nowadays finding direct cartel evidences has become more and more difficult when conducting dawn raids.

4. Besides the prohibited agreements can be in the form of bid-rigging cases, and the ACA have the power to punish bid rigging. The undertaking engaging in bid-rigging’s schemes are forbidden to participate in future bids for maximum of 3 years, by the Agency of Public Procurement.

2. Methodology and data analysis

5. The ACA uses the industrial economics principles and Structure-Conduct-Performance Paradigm to evaluate the conducts of undertakings when they compete: the market structure: monopoly; 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.

6. 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. Especially in prosecution of cartels without direct evidence, the ACA assesses elements based on the OECD methodology “Prosecuting cartels without

direct evidence”¹ such as market structure in terms of stability of market shares over the years in the relevant market, high market concentration, high barriers to entry, high level of vertical integration and homogeneous products; and evidences of the undertakings’ conduct in terms of high profits, equal selling prices and repeated conduct of competition infringement.

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

8. The data collected both from public institutions and from down raids to the undertakings, 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 data analysis includes gathering, administering, organizing, compiling statistics and indices, and reporting the results. 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. Then the evaluation is done in terms 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.

9. Depending on the supposed infringement other analysis on prices and costs are performed. Moreover, analysis on financial and economic data is performed. When it is suspected that undertakings have some identical or approximated prices, we perform the analysis of the “parallel prices” where we compare prices for the same homogenies product and count the times undertaking₁ and undertaking₂ have determined the same price, and calculate the amount of turnover they gained with these prices. Then we compare the other competitor’s price and quantity and conclude if the economic logic leads to price fixing, quantity fixing, market sharing, parallel pricing or bid rigging. Other calculations are performed in case of bid rigging especially when bids are very close to the highest level of limit fund.

10. The findings of the economic analysis are included in the investigation report. After the investigation report is submitted to the Competition Commission, where they in a meeting evaluate the report and the statement of objections related by the Secretary General.

3. Hearing sessions and court proceedings

11. After the meeting, before concluding the case with a Decision, the Competition Commission based on article 39 “the right to be heard” of the competition law no. 9121/2003 organizes oral hearings with the parties under investigation, while previously to the parties a statement of objections has been send.

12. During the hearing sessions exposing the data analysis and the use of economic data is very difficult to be understood by the parties under investigations in each case. Mutual discussions between economist from the authority and economists from the parties are included in order to clarify the findings of the investigations.

¹ <https://www.oecd.org/daf/competition/prosecutionandlawenforcement/37391162.pdf>

13. After the Competition Commission express themselves through a decision, the decision is subject to court appeal.

14. Furthermore, during the court proceedings economist case handlers needs to be appointed to the team of defendant in order to clarify any questions from the judge. The Court itself has the power to appoint an outsourced economist expert in order to check the findings of the Competition Commission Decision and provide insights for the case.

15. Absorbing the economic logistic during the court proceedings its an essential and curtail topic for ACA's lawyers to win the case.

16. Nowadays is more and more difficult to prove tacit collusion and bid-rigging with indirect evidences 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 trainings and software are needed.

4. Final Remarks

17. Finding cartels with indirect evidences cases is very time consuming and difficult. It requires in-depth insights from all market operators as well as long-term data from the competitors.

18. Competition authorities have to be proactive in cooperation with public regulators in data sharing and retrieving data during investigations. Special algorithmic models and IT software should be compiled to identify same pricing in price fixing cartels, and in bid rigging cases as well.