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## Abuse of dominance

Report by the UNCTAD secretariat\*

### *Executive summary*

This report considers some of the problems faced by competition authorities, especially in developing countries, when dealing with cases of abuse of dominance. It is based on the responses to a questionnaire prepared by the UNCTAD secretariat and returned by member States. The report makes a comparative assessment of abuse of dominance in different jurisdictions by giving an insight of definitions applied to concepts, illustrations of situations deemed to constitute abuse, and the application of the various tests. The report concurs with earlier studies on this topic suggesting that the provisions on abuse of dominance have continued to be a formidable weapon for competition authorities in fighting anticompetitive practices in their respective markets. The report reveals that, as a result of competition law enforcement, dominant firms are behaving with greater caution, as transgressions of their respective competition laws may have very serious consequences. However, the report also reveals that, due to weak economic and underdeveloped infrastructure found in developing countries, some multinationals may end up as monopolies simply by virtue of their superior efficiency. Given the public interest concerns, this may not be applauded by the competition authorities.

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\* This document was submitted on the above-mentioned date as a result of processing delays.

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## I. Background

1. At its eighth session, the Intergovernmental Group of Experts on Competition Law and Policy requested the UNCTAD secretariat to prepare a report on abuse of dominance. The objective of this report is to highlight recent developments in approaches and jurisprudence related to the control of conduct by enterprises enjoying monopoly power by competition agencies worldwide, and to analyse the implications for developing countries. The study is based on responses to a questionnaire prepared by the secretariat aimed at capturing the critical factors which are taken into consideration by competition agencies in assessing abuse of dominant position.<sup>1</sup>

## II. Introduction

2. Abuse of dominance is a difficult area of competition law and policy. Analysing the effects of conduct can be difficult and time-consuming, largely because the same form of conduct can either aid or hinder progress towards competition objectives, depending on the circumstances. It is difficult for enterprises to predict which conduct might prompt intervention by competition authorities. Excessive or unpredictable intervention can discourage enterprises from engaging in the competition that helps them attain competition policy objectives.

3. In developing countries, abuse of dominance, along with cartels, can seriously harm consumers and businesses. Services and goods that are necessities are subject to anticompetitive practices that block market access and/or raise prices. This reduces market dynamism and the economic mobility of people and businesses. Intervention against abuse of dominance can help to achieve development objectives by making access to products easier and promoting more efficient functioning of businesses, including small and medium-sized enterprises (SMEs). Intervention can also help to achieve specific objectives such as reducing poverty, increasing access to health services and boosting economies. Each country has different political-economic realities in terms of level of development and individual market structures, which may imply somewhat different approaches.

4. Different countries have differences in competition law objectives, definitions and ways of assessing dominance, ideas of what constitutes abusive practices, and the market sectors that are excluded or exempted from the application of the law. Nevertheless, some objectives are common, and definitions of dominance and of abuse can be grouped into a handful of fairly similar groups.

5. Objectives for the application of dominance abuse prohibitions for which there is broad consensus include ensuring a competitive process and promoting consumer welfare and dynamic efficiency (“technological development” or “promotion of economic development”). Objectives that enjoy varying degrees of support include protecting economic freedom, ensuring a level playing field for SMEs, and ensuring market integration.

6. Competition authorities use similar tools to determine whether an economic actor is dominant in a market. They typically use market share only as a starting point. They then use barriers to entry, exit and expansion, relative market position of competitors, buyer power and other factors to identify the constraints on a firm’s

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<sup>1</sup> A copy of the questionnaire and the answers provided by member States are available at [www.unctad.org/competition](http://www.unctad.org/competition). UNCTAD is grateful to the competition authorities that have responded to the questionnaire, namely those of Albania, Bhutan, the Bolivarian Republic of Venezuela, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Colombia, the Czech Republic, Denmark, France, India, Indonesia, Italy, Jamaica, Japan, Pakistan, Panama, Peru, the Russian Federation, Singapore, Slovakia, Switzerland, Tunisia, Uruguay, Viet Nam and Zimbabwe.

exercise of market power. The approach is typically holistic, not a cookbook approach.

7. Authorities use more heterogeneous approaches to assess conduct. This heterogeneity may reflect the difficulty of distinguishing abusive from competitive conduct. But it may also reflect different choices, with some authorities basing their approach more on the form of the conduct and others more on economic effects.

8. Policy towards abuse of dominance is evolving. Commentators have pointed out the vacuousness of terms such as “normal competition”, “competition on the merits” and “level playing field”. Indeed, lawful ways of competing are called, rather tautologically, “competition on the merits”. Competition authorities are generating discussion. The Organization for Economic Cooperation and Development (OECD) Competition Committee held a discussion in mid-2005. The European Commission authored a discussion paper on exclusionary abuses in 2005 and held a public hearing in 2006. The United States competition authorities held public hearings in 2006 and 2007. And the International Competition Network (ICN) produced a paper on dominance and State-created monopolies in 2007. Discussion continues.

9. These discussions can be characterized as trying to incorporate more economics reasoning into legal reasoning. At the same time, decision-making should yield few errors and be relatively efficient, timely and predictable, and be seen to be objective and transparent. Authorities and commentators are discussing the objectives of abuse of dominance prohibitions and are identifying or fashioning broader principles for decision-making. There is a trend towards applying “effects tests” to identify the economic effects of conduct. There is a move away from per se rules applied to particular forms of conduct. The borders between when per se rules apply and when a case-by-case approach applies are still fluid, with some commentators arguing for “safe harbours” related to dominance and market foreclosure.

10. Chapter III considers dominance and abusive conduct. Firstly, it discusses the definition of dominance, both in the law and in practice. Secondly, it discusses the form and economic effects of conduct that may be abusive. The penultimate subsection discusses remedies and sanctions, followed by the relationship between dominance abuse enforcement and economic development. Chapter IV addresses special issues of abuse of dominance relevant to developing and transition economies. Chapter V consists of conclusions.

### **III. The assessment of abuse of dominance in different countries**

11. No respondent to the UNCTAD survey prohibits dominance itself. Dominance per se is not prohibited because a company can legitimately attain a situation of dominance. Dominant positions may also result from government actions and, if the Government complies with the law, these too are lawfully attained.

12. Dominance abuse analysis generally consists of three parts: (a) Delineation of one or more relevant markets;<sup>2</sup> (b) determination of whether the firm is dominant in a relevant market; and (c) determination of whether its conduct constitutes abuse. While these three parts are distinct, they may be carried out simultaneously and evidence used in one part may also be used in other parts. Market definition and dominance are typically integrated analyses, but abuse analysis is carried out separately. “If there is abuse, the company must be dominant” is an invalid, circular

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<sup>2</sup> Market definition takes into account the dominant firm’s influence on prevailing prices. Both this point and joint dominance are beyond the scope of this paper.

argument because the economic effect of the same form of conduct varies, depending on the firm's market power.

## A. Dominance

### 1. The legal definition of dominance

13. Dominance is defined in law and in leading judicial decisions. Guidelines (which often incorporate judicial decisions) and scholarly discussions add some flesh to the bones. The legal definition may use either structural or behavioural indicia or both, though behavioural is more common. Jurisdictions may use a different approach to assess dominance in practice. More recently, the terms "substantial market power" and "not subject to effective competitive constraints" are used interchangeably with the term "dominance". Substantial market power describes the ability to keep prices above the competitive level for a significant period of time.

14. The UNCTAD Model Law on Competition defines dominance in chapter IV-I (i) as a situation "...where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control a relevant market for a particular good or service, or groups of goods or services".

15. Behavioural definitions focus on a firm's "appreciable freedom from competitive constraints or ability to act in ways that a competitively constrained firm could not" (ICN, 2007:41). Perhaps the most influential behavioural definition is from the European Court of Justice's 1976 *United Brands* decision: "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers".<sup>3</sup> While no firm can be literally independent of its competitors or customers, the sense is that a dominant firm has some freedom of action as regards price, quantity, quality, innovation and the like that is denied to non-dominant firms. As the European Commission clarified in its 2005 discussion paper, a dominant firm is "not... subject to effective competitive constraints. In other words, it... must have substantial market power" (European Commission, 2005: para. 23). In *United Brands*, the dominant firm had made substantial investments that allowed it to weather risk from various sources in a way that its smaller rivals could not. In the subsequent *Hoffman-La Roche* decision, the court said, "The existence of a dominant position may derive from several factors which taken separately are not necessarily determinative but among these factors a highly important one is the existence of very large market shares." In that case, the dominant firm's market shares were 47 per cent, 64 per cent and up to 95 per cent. In the market with a 47 per cent share, the court placed less weight on market share and more on the difference between that firm's market share and those of its rivals, and on the firm's wide technological lead. (Goyder, 2003:268–270).

16. The definitions of dominance in most responses from member States indicate inspiration from European case law. In Slovakia, "a dominant position in the relevant market is held by an undertaking or several undertakings that are not subject to substantial competition or can act independently as a result of their economic power". In Peru, dominance is a situation where "one or several companies... can act independently regardless of their competitors, buyers, clients or suppliers because of such factors as a significant market share in the corresponding markets, the characteristics of supply and demand of products or services, the technological development and involved services, competitors' access

<sup>3</sup> Case 27/76, *United Brands*, paragraph 65; and case 85/76, *Hoffmann-La Roche*, paragraph 38.

to sources of funds or supply as well as distribution systems”. The Competition Act of South Africa defines market power as “the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers”. The Columbian legislation is slightly different. It defines dominance as the “capacity of a firm to determine directly or indirectly the conditions of a specific market”. In the Zimbabwean Competition Act, a “monopoly situation” describes “a situation in which a single person exercises... substantial market control over any commodity or service”. Substantial market control is the power to “profitably... raise or maintain the price of the commodity or service above competitive levels for a substantial period of time...”

17. By contrast, some countries define dominance only using structural indicia. In Indonesia, a firm is regarded as dominant if it has a market share over 50 per cent.

18. Several competition laws combine structure and behaviour in the definition of dominance. In Egypt, “dominance in a relevant market is the ability of a person, holding a market share exceeding 25 per cent of the aforementioned market, to have an effective impact on prices or on the volume of supply on it, without his competitors having the ability to limit it”.<sup>4</sup> Both Bosnia and Herzegovina and Croatia define dominance using behaviour but use a structural presumption: an undertaking with a market share over 40 per cent is presumed dominant. The Bulgarian law is similar, but uses a 35 per cent market share presumption. In the Russian Federation, an undertaking with a market share exceeding 50 per cent is presumed dominant, and under 35 per cent cannot be found to be dominant; behavioural criteria are applied between those limits.

19. The competition law of Viet Nam also combines structure and behaviour, but as alternatives. In this law, “Enterprises shall be considered to hold the dominant position on the market if they have market shares of 30 per cent or more on the relevant market or are capable of restricting competition considerably.”<sup>5</sup>

20. Behavioural and structural approaches are both used in the legal definitions of dominance, sometimes in combination, though the former is more popular. The influence of the European Court of Justice’s 1976 *United Brands* and *Hoffmann-La Roche* decisions on legislation worldwide cannot be underestimated. Next, the practice of determining dominance is described.

## **2. The dominance test in practice**

21. Competition authorities typically apply a holistic approach, not a cookbook approach, to determining whether a firm is dominant. Market definition and market share computation are only a starting point. A one-sided filter based on market share is often used. In this process, firms having market shares below a predetermined level are deemed not to be dominant. For firms that are not screened into the “safe harbour”, a variety of factors are considered. These include barriers to entry, exit and expansion, relative market position of competitors, buyer power and any other factor that sheds light on whether a firm is dominant. These factors can be viewed as a structured examination of who or what might constrain the firm’s significant exercise of market power: actual competitors, potential competitors, or customers.

22. Several authorities use a market share filter as a starting point, according to the UNCTAD questionnaire. The Jamaican law uses a behavioural definition of

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<sup>4</sup> Article 4, law No. 3 of 2005 Promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices, unofficial English translation available at [www.globalcompetitionforum.org](http://www.globalcompetitionforum.org).

<sup>5</sup> Article 11, para. 1, order No. 23/2004/L-CTN of 14 December 2004 on the Promulgation of Law, unofficial English translation available at

[www.adb.org/Documents/Others/OGC-Toolkits/Competition-Law/documents/VN\\_Order\\_23\\_2004.pdf](http://www.adb.org/Documents/Others/OGC-Toolkits/Competition-Law/documents/VN_Order_23_2004.pdf).

dominance: an enterprise is dominant in a market if it “occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors”. In practice, the commission uses a market share of 50 per cent as the “benchmark” for dominance, though an enterprise with a smaller share could be found to be dominant. In Zimbabwe, also, the legal definition is behavioural but the practice is to set a safe harbour at market shares up to 25 per cent. In Sweden, with a behavioural legal definition, a market share of 40–50 per cent is a “clear indication” of a dominant position, while a market share above 65 per cent is a “virtually conclusive” presumption of dominance.<sup>6</sup> In the United States, the safe harbour is thought to be a 50 per cent market share and a market share over 70 per cent supports a rebuttable inference of dominance (American Bar Association (ABA), 1997:235–6).

23. Dominance assessment becomes multifaceted beyond the market share screen. The idea is to identify who or what is constraining the firm’s significant exercise of market power. Factors to consider include barriers to entry and expansion (including structural, strategic and legal barriers),<sup>7</sup> the market power of competitors, financial strength, buyer power and vertical integration.

24. These factors are used with an economic model in mind. For example, if barriers to entry are very low, then dominance is unlikely. A potential entrant would enter if prices (or other product characteristics) were raised (or lowered) substantially. Some factors can cancel each other. For example, if buyers have significant switching costs, then the exercise of buyer power might not be profitable and the ability of competitors to expand may be irrelevant.

25. Barriers to entry were reported to be taken into account in the assessment of dominance by 20 of 32 respondents to the questionnaire.<sup>8</sup> Other factors were mentioned by 5 or more respondents: (a) competitors’ market position (7 respondents); (b) financial power (6 respondents); (c) vertical integration, which includes access to distribution and to inputs (6 respondents); and (d) countervailing power, which includes buyer power (5 respondents).

26. Some factors mentioned by few respondents seemed relatively more important in developing or transition economies. India includes dominant position acquired by statute or by virtue of being a government company, public sector undertaking or otherwise. Tunisia lists preferential access to inputs or financial sources.

27. In the ICN survey, the factors that were almost universally used in assessing dominance were: market share of the firm and its competitors, market position and market behaviour of competitors, barriers to entry or expansion, economies of scale and scope or network effects, buyer power, access to upstream markets or vertical integration, durability of market power, market maturity or vitality, and access to essential facilities. Less popular but not unpopular factors were financial resources of the firm and its competitors, high prices, and profits (ICN, 2007:90–91).

28. The European Commission’s discussion paper describes practice in Europe. The paper notes that “it is relevant to consider in particular the market position of the allegedly dominant undertaking, the market position of competitors, barriers to expansion and entry, and the market position of buyers” (European Commission,

<sup>6</sup> Sweden questionnaire response (2007), available at:

[www.internationalcompetitionnetwork.org/media/library/unilateral\\_conduct/questionnaire/SwedenQuestionnaireResponse.pdf](http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/questionnaire/SwedenQuestionnaireResponse.pdf).

<sup>7</sup> Entry possibilities are evaluated as to whether they are “timely, likely and sufficient to remove concerns about possible anticompetitive effects in a given case” (OECD, 2007).

<sup>8</sup> These countries are Albania, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Columbia, Costa Rica, the Czech Republic, Denmark, India, Italy, Jamaica, Japan, Latvia, Peru, Singapore, Slovakia, Switzerland, Tunisia, Uruguay and Viet Nam. Countries were included if they used terminology that is closely linked to entry barriers.

2005:para. 28). Market shares are a starting point,<sup>9</sup> but are only a proxy for the decisive factor, market power. Where products are differentiated, market shares are less informative. Barriers to entry and barriers to expansion are considered, but it must be borne in mind that entry in the event of the exercise of substantial market power must be likely, timely and of sufficient scale and scope. The countervailing power of large buyers is viewed in terms of promoting entry or expansion, which would help both large and small buyers, not in terms of being able to negotiate a better deal for themselves.

29. In summary, while different countries have different legal definitions of dominance, they tend to either follow a behavioural definition or combine a behavioural definition with a market share-based, rebuttable presumption of dominance. Many authorities, in practice, have a market share-based “safe harbour”, i.e. a level below which a firm cannot be found dominant. Authorities examine a variety of factors, most commonly entry barriers, to determine whether firms outside of the safe harbour are indeed dominant.

## **B. Abusive practices**

30. Abusive practices are conventionally divided into exclusionary and exploitative abuses. Exclusionary abuses drive competitors out of markets or keep them out, or discipline competitors to keep competition “soft” or to not expand. Exclusionary abuses can be difficult to distinguish from “tough” competition because they look similar in the short term. To illustrate, in the short term, predatory pricing is good for consumers and looks like “tough” competition: more goods at lower prices! But in the long run, competitors are excluded and the predator can raise prices and reduce quality.

31. Exploitative abuses are those where the dominant firm raises prices or lowers quality or variety, or otherwise acts in a way that enriches itself in a way it could not in a competitive market. Different competition authorities approach exploitative abuses differently: some are more willing to intervene, whereas others believe that intervention via the competition law will, on balance, be harmful.

32. Abusive practices are divisible into non-pricing and pricing practices. Some anticompetitive effects can be achieved by either price or non-price practices, e.g. by tying refusal to supply to requiring – and bundling prices to induce – customers to buy two products together. Nevertheless, member States’ examples of abusive conduct are discussed below using these categories, after an overview on effects analysis.

### **1. Forum verses effects**

33. The analysis of abusive conduct is changing. Increasing dissatisfaction with terms such as “normal competition”, “competition on the merits” and “level playing field” prompted attempts to improve analysis and enforcement. These discussions can be characterized as trying to incorporate more economics reasoning into legal reasoning. Simultaneously, decision-making should yield few errors and be relatively efficient, timely and predictable. Authorities are identifying or fashioning broader principles for decision-making.

34. Competition authorities differ in the degree to which they analyse conduct on the basis of its form as compared to its economic effect. Form-based analysis is seen as providing greater legal certainty and faster resolution. However, the same

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<sup>9</sup> For the European Commission, a market share over 50 per cent, provided rivals have much smaller share and the share has been held for some time, very likely indicates a dominant position. Firms with market share below 25 per cent are unlikely to be dominant (European Commission, 2005: para. 31).



conduct can be either “normal competition” or “abuse”, depending on the circumstances. There is a move away from per se rules applied to particular forms of conduct. Effects-based analysis is more time- and resource-consuming, but may result in fewer errors. There is a move towards analysis of the economic effects of conduct, including identifying which “effects tests” are appropriate to use in which circumstances.

35. Several economic effects tests have been developed to try to separate pro- from anti-competitive conduct.<sup>10</sup> No single test is appropriate in all cases. These tests include:

- (a) The profit sacrifice test;
- (b) The no economic sense test;
- (c) The equally efficient firm test; and
- (d) Various consumer welfare balancing tests.

36. The profit sacrifice test asks, “Would this sacrifice of short-run profit be rational if the conduct did not tend to eliminate or reduce competition?” This test is useful for predatory pricing cases but in other types of cases – such as exclusionary conduct that does not use pricing below cost – it does not give reliable results, e.g. neither “raising rivals’ costs” nor cheap exclusion would be caught. (Cheap exclusion means exclusionary action that is cheap for the firm engaging in it. It includes falsely disparaging a rival’s product or participating in a standards setting body in a way that ultimately excludes competitors.) Also, it catches conduct that both increases welfare and excludes competitors, conduct which is desirable under some countries’ laws.

37. The no economic sense test asks, “Would this conduct make economic sense if it did not tend to eliminate or reduce competition?” A profit sacrifice is neither necessary nor sufficient. The test catches conduct that tends to eliminate competition when the sole economic benefit to the firm is due to that tendency. But the test does not capture conduct that makes economic sense because it both increases efficiency and reduces competition. And it captures conduct which is desirable under some countries’ laws.

38. The equally efficient firm test asks, “Would this conduct likely exclude a rival that is at least as efficient as the dominant firm?” Opponents argue that this test allows an incumbent to exclude entrants that may ultimately be as efficient as the incumbent, and that less efficient rivals may increase welfare. Proponents argue that entry by inefficient rivals is wasteful and long-term damage is done if dominant firms cannot eliminate rivals through superior efficiency. A cost benchmark used in predatory pricing cases, average variable cost (AVC), is an application of this test: a dominant firm pricing above AVC cannot exclude an equally efficient firm.

39. The consumer welfare tests ask, “Does this conduct tend to reduce consumer welfare by raising prices or reducing output?” The tests are difficult to apply if the conduct is likely both to reduce consumer welfare and increase the firm’s efficiency. Proponents argue for balancing the effects in such situations, but where adjudicators have to make rough estimates (probably the most common situation), then subjective impressions will reduce predictability. It is difficult “to be confident that the balancing tests can be done accurately, objectively and consistently” (OECD, 2005:11).

<sup>10</sup> This discussion follows closely OECD (2005).

40. A test devised by Professor Einer Elhauge, yet to be applied by courts or authorities, asks whether rivals are excluded because the dominant firm is improving its own efficiency or because it is impairing rivals' efficiency.

## 2. Non-pricing practices

41. Refusals to deal or supply are potentially anti-competitive. Of course, companies are free to choose their own business partners but, in particular circumstances, this can anticompetitively exclude or discriminate against other business actors.<sup>11</sup>

42. An investigation in Zimbabwe was opened in response to allegations concerning the market for textile fabric off-cuts. Kadoma Textiles was found to have abused its dominant position by discriminating between its customers in terms of quantity, quality and price in order to favour a company that was owned by the wife of the Managing Director of Kadoma Textiles. This was considered to be in breach of the competition legislation.

43. The *Fetransa* case, decided by the Tribunal of Defence of Competition in Peru, involved refusal to supply resulting in discrimination. Fetransa was accused of refusing to deal with the complainant, Fersimsac. Fetransa held the concession of the south-west Peruvian railways as well as the State-owned locomotives and rolling stock. Fersimsac wanted to rent rolling stock from Fetransa. Fetransa refused, alleging that it was all rented to another company, Perurail. Fetransa thus blocked Fersimsac's entry into the market. Perurail was a subsidiary of Fetransa. While the initial decision found Fetransa's refusal justified, the decision was reversed on appeal. Fetransa was ordered to end its discrimination and comply with the non-discrimination clause in the concession contract.

44. A producer and distributor of fuel in Peru, Petroperú was alleged to discriminate among distributors by refusing to rent storage capacity for liquefied petroleum gas to firms that were part of an association. Instead, it rented the capacity to another firm, Llamagas, which was not part of this association, in order to prevent imports and protect its domestic sales. The companies were found guilty of discrimination.

45. A 2007 Czech case concerned refusal to deal by the dominant natural gas supplier, RWE Transgas. RWE was the monopoly provider of gas in the country. It controlled six of the country's eight major regional gas distributors and had significant stakes in the other two. It was found to have abused its dominance by refusing to contract with independent distributors unless those contracts contained terms (specifying prices and terms of trade) that prevented the independent distributors from competing effectively against the daughter companies. Furthermore, RWE Transgas refused to supply gas to "eligible customers" (large gas customers who were legally permitted to buy gas from anyone) outside of the zone of the regional gas distributor to which the customers "belonged". This was found to exclude competitors and to limit customer choice.

46. The essential facilities doctrine is directly related to refusal to supply. It specifies when a company can be required to grant access to a facility. An essential facility can be a product such as raw material, but also harbours, airports,

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<sup>11</sup> Cases-6/73 and 7/73, *Commercial Solvents v. Commission*, where the dominant company gave preference to one of its subsidiaries, and Case-22/78, *Hugin Kassaregister v. Commission*, where the company demonstrated its intention to operate in the downstream markets as well by servicing its own machines, thereby excluding competitors in this market that requested spare parts.

distribution systems or networks, as well as intellectual property rights.<sup>12</sup> The European Commission's discussion paper sets out five conditions for an essential facility: (a) the behaviour can be characterized as refusal to supply; (b) the company is dominant; (c) the input is indispensable; (d) the refusal is likely to have a negative effect on competition; and (e) there is an absence of objective justification. However, there is considerable debate about the breadth (and in some jurisdictions, the existence) of the essential facilities doctrine. Some commentators note the importance of providing incentives to private companies to make investments, and that broad application of an essential facilities doctrine discourages such investment. Others note that active regulation of access conditions by sectoral regulators can obviate the need for an essential facilities doctrine in those sectors.

47. Denial of use of a bus station, including the information system, was investigated in the Czech Republic. CSAD Liberec provided bus transport on the route between Prague and Liberec, and operated the only bus station at Liberec. CSAD Liberec denied the complainant, the competitor Student Agency, the use of the bus station in Liberec and the information system provided there. The result was that passengers were not given information about Student Agency's departure times, and Student Agency could not use the bus station, creating discomfort for their passengers. CSAD Liberec was found to have abused its dominant position.

48. Intellectual property rights (IPRs) can constitute a legal entry barrier. IPRs temporarily confer exclusive rights. They encourage firms to make investment and bear risk, thus they encourage dynamic competition. An IPR does not necessarily create a monopoly, however, since often competitors do not need access to the IPR to compete in the same market. Since IPRs and competition law have similar policy objectives, they are usually viewed as complementary policies, not conflicting policies.

49. Due to the importance of innovation rivalry to economic development, compulsory licensing of IPRs is very rare. In a relatively recent decision, the European Court of Justice required compulsory licensing. In the *IMS* case (case C-418/01 ECR I-5039), the court required not only the conditions required to order a firm to supply (see essential facilities above), but also an additional condition, that the undertaking requesting the license intends to really produce new goods or services for which there is potential consumer demand (para. 49) (OECD, 2006:207). No questionnaire responses addressed compulsory licensing, but see the South African example below.

50. Exclusive dealing arrangements are potentially abusive. Here the customer is obliged to buy the products only from the dominant company. This can be complemented by "English clauses" that oblige the customers to report any better offers and in some cases also to name the offeror. Contract terms that have an exclusive effect may be found to be abusive, even if they do not outright require exclusivity.<sup>13</sup>

51. In a 2007 Croatian case in the telecommunications sector, the competition authority established an abuse of dominance by Hrvatske Telekomunikacije (HT) and T-Mobile Hrvatska. HT and its connected company T-Mobile Hrvatska imposed on 23 "key" customers a framework contract with provisions that raised entry

<sup>12</sup> *Commercial Solvents*. Also Van Bael I and Bellis J-F (2005). *Competition Law of the European Community*. 4<sup>th</sup> ed. Kluwer Law International: 955.

<sup>13</sup> Commission Decision in *Van den Bergh Foods Ltd* (98/531), 11.3.98, OJ L246, page 1, paragraph 265. The company had provided the retailer with a freezer for its own ice cream and prohibited the retailer from using it for competing ice cream brands. The commission stated that "the effect of a freezer-cabinet agreement subject to the condition of exclusivity is ... the same as that of any other measure taken by a dominant supplier which excludes its competitors from dealing with that retailer".

barriers. These provisions required the customers to report competitors' new offerings to HT and T-Mobile. The customers also had to accept HT and T-Mobile's offers if they were equal to or lower priced or higher quality than the same products offered by competitors. The authority found the provisions to be abusive and ordered their removal or modification.

52. A case in France involved exclusive agreements in Hertzian terrestrial analogue broadcasting of television services. These long-term (seven-year) agreements were signed just weeks before the sector opened up to competition. Three major public television channels agreed to use only TDF's infrastructure for broadcasting, with very minor exceptions. Most of the network will be reused to broadcast digital terrestrial television. The Competition Council found that the agreements foreclosed the market for broadcasting of analogue television and deterred entry into that market. It accepted commitments from TDF to modify the contracts to remove the exclusivity.

53. Tying can be abusive. Here, a company dominant in the "tying" product conditions the sale of the tying product on sale of the "tied" product. This practice can be considered abusive if it is used to evade price regulation or if it excludes competitors in the tied market. A test for tying developed in European case law is: "(a) the tying and tied goods are two separate products; (b) the undertaking concerned is dominant in the tying product market; (c) the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; and (d) tying forecloses competition".<sup>14</sup> Complex economic questions surround element (d).

### **3. Examples of competition law enforcement contributing to development**

54. All respondents to the UNCTAD questionnaire considered that abuses of dominance constrained or prevented economic development in their countries.

55. In a South Africa case concerning limited access to HIV/AIDS medicines, competition law was seen as a public policy tool to help preserve life.

56. Intervention by the competition agency may increase access to vital local services, which in turn promotes economic development. Both Bulgaria and the Czech Republic provided, in their respective responses to the questionnaire, examples of cases involving inter-city bus transport.

57. Competition agencies also frequently intervene in public services such as electricity, telecommunications, gas and water. The Czech Republic case involving RWE Transgas, described above, is one example. Interventions in these sectors, particularly where the sectoral regulators are nonexistent or inactive, can promote economic development. However, they can also require significant technical capacity which small or new competition authorities may lack. Competition advocacy with sectoral regulators, if they exist, may be more effective. Albania provided an example, described above.

58. To summarize, competition authorities frequently intervene to prevent abuses of dominance in sectors that support economic development. These can range from bus terminals to life-saving pharmaceuticals. However, advocating with sectoral regulators may sometimes be more effective than repeated enforcement actions.

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<sup>14</sup> Case COMP/C-3/37.792, *Microsoft v. Commission*, Commission Decision 24.03.2004, para. 794.

## **IV. Challenges faced by developing countries and transition economies**

### **A. The development objective according to the United Nations Set**

59. The United Nations Set<sup>15</sup> encourages developing countries to adopt and enforce competition laws that fit their economic conditions and their specific needs. Section C (iii) states: “in order to ensure the equitable application of the Set of Principles and Rules, States, particularly developed countries, should take into account in their control of restrictive business practices the development, financial and trade needs of developing countries, in particular of the least developed countries (LDCs), for the purposes especially of developing countries in: (a) promoting the establishment or development of domestic industries and the economic development of other sectors of the economy, and (b) encouraging their economic development through regional or global arrangements among developing countries”.

### **B. Special issues of abuse of dominance in developing countries and transition economies**

60. Statistical evidence on abuse of dominance is not available to support broad statements about its prevalence. Anecdotal evidence, including the UNCTAD survey responses, supports the notion that competition is less vigorous in developing and transition economies than in developed economies. This chapter reviews some statistical studies and anecdotal evidence.

61. A few studies on competition in developing and developed countries are cited in a 2002 UNCTAD working paper (Singh, 2002). One study using persistence of profits and another study using firm turnover (entry and exit) indicate that the level of competition in developing and transition economies is about the same as in developed economies. A review of manufacturers in developing countries “did not support the notion that LDC manufacturers are relatively stagnant and inefficient”, again undermining the idea that competition is less intense in developing countries (Singh, 2002:3–6, referencing Tybout, 2000).

62. The 2007 *Global Competitiveness Report* pointed out that nations’ prosperity increases with their productivity. The report contained indicators that were correlated with per capita gross domestic product (GDP). In summary, for low-income countries, mobile phones, high-quality electricity supply, Internet access, trade barriers, other infrastructure and local competition affect per capita GDP. For middle-income countries, these factors plus patents, the absence of market dominance by business groups, and the effectiveness of antitrust policy affect per capita GDP (World Economic Forum, 2007).

63. “Developing and transition economies may have structural weaknesses that make them particularly vulnerable to private anticompetitive conduct. The following factors, where they are found, are likely to have a negative impact on competitive pressure:

- (a) Greater proportion of local markets insulated from trade liberalization measures;
- (b) Limited access to essential inputs;
- (c) More limited distribution channels;

<sup>15</sup> The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practice is resolution 35/63 adopted by the General Assembly of the United Nations in December 1980.

- (d) More dependence on import (basic industrial inputs) and/or exports (for growth);
- (e) Greater incidence of administrative/institutional barriers to imports;
- (f) Weak capital market.” (OECD, 2003: para. 19).

64. Transition from State monopoly to competition may generate further scope for exclusionary abuses of dominance. “A former monopolist being challenged by new entrants may have ‘inherited’ advantages from the former position, like a strong financial position, control of certain network facilities, connections and political support, or established relations to suppliers and customers. Such a dominant firm or ‘incumbent operator’ may find many ways to make life difficult for new entrants and in the end exclude competitors effectively. In many countries that have liberalized markets, the competition law enforcer finds itself inundated by endless cases of alleged abuse of dominance resulting from the imbalance between a former monopolist and new entrants” (OECD, 2003: para. 20). The Indian competition law, article 19 (4)(g) indicates awareness of this issue, a factor that may be considered in determining whether an enterprise that enjoys a dominant position is “monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise”.

65. South Africa provides two examples where incumbents tried to weather economic transition by engaging in exclusionary practices:

“The South African agricultural sector has long been dominated by producer cooperatives and statutory single-channel marketing arrangements. With the lowering of international trade barriers and the introduction of market disciplines into the agricultural sector, many of these cooperative and marketing boards were converted into privately owned corporations that sought nevertheless to maintain the exclusivity in the provision of key distribution and other services to their erstwhile members, the farmers and exporters of agricultural producers. This has inhibited the entry of new service providers into the agricultural sector. In two important cases involving, respectively, the markets for raisins and citrus fruit, the tribunal has struck down anticompetitive arrangements in the articles of association governing the new corporate entities. This has assisted in developing a market for the provision of key services – for example, the provision of key agricultural inputs and export marketing services. This outcome has permitted new entry into a number of important markets to the considerable benefit of both these new entrants and the consumers of their services, namely the farmers previously denied the right to seek the best price and best quality service” (Competition Tribunal of South Africa and the Competition Commission of South Africa, 2004: para. 14).

66. Competition authorities in developing and transition countries possibly address exploitative abuses more frequently than do those in developed countries. Regulatory authorities to constrain the conduct of enterprises in markets that are naturally monopolistic (electricity distribution, water distribution, etc.) are more likely to be missing, and therefore competition law enforcement is more likely to be relied on.

67. Developing countries may have a disproportionate number of dominant firms simply by virtue of the small size of their economies. A paper submitted on behalf of Malta (Briguglio and Buttigieg, 2003) argues eloquently that underlying economic facts make competition law application different for small economies:

- (a) Natural monopolies may be more prevalent because demand is lower in smaller or poorer economies and some products are not traded;
- (b) Barriers to entry may be higher. The scale of entry is more likely to be large compared with the total demand. Alternatively, Government may create entry barriers to enable incumbents to operate at minimum efficient scale;
- (c) High prices might simply reflect the higher cost of smaller-scale operations or a risk premium for importing into a small economy; and
- (d) Imports may be a larger fraction of GDP and there may be few import substitutes. This often leads to the firms which dominate import channels to also dominate the corresponding domestic market.

68. Dutz (2002) argues that competition authorities in developing and transition countries should focus their anti-abuse of dominance efforts on abuses that foreclose access to services that are essential to business. The idea is to reduce barriers to new entrepreneurs and SMEs. Examples of local essential inputs are “real estate, banking, transport, distribution warehouses, communications and professional business services”.

69. Fox (2007:116) states that, “Anticompetitive practices are rife in areas of physical and business necessity, such as milk, soft drinks, beer, chicken, sugar, cotton, paper, aluminium, steel, chemicals (for fertilizer), telecommunications including mobile services, cement and other construction materials, transportation including trucking, shipping, and port access, industrial gases, banking, insurance, coal and electricity. Many of the practices are local, many are facilitated by the Government, and many others are offshore, resulting in inbound restraints.” She argues that intervention against entry-blocking or discriminatory conduct by State-owned or State-privileged enterprises may have more benefits and fewer costs than anti-abuse intervention in developed countries (Fox, 2007:119).

70. Economic reform in many countries includes the introduction of competition into markets with former government monopolies. There is a temptation to transform public monopolies into private ones. An important function of the competition agency is to advocate for competitive structures and competition-enhancing regulation. It is far easier to impose structural change – such as vertical separation and horizontal splits to create competitors – before privatization than afterwards. Private property owners will resist value-destroying structural change. Thus, starting the reform process with structural change is key.

## V. Conclusion

71. Competition agencies may pursue public interest goals by concentrating on those areas which have important impacts on society as a whole. Competition in markets for physical and business necessities, as well as commodities, which are often important exports for developing countries, can be decisive for the achievement of development goals. Pursuing these goals effectively may involve both advocacy – against privatizing monopolies, towards removing special regimes that protect dominant firms from competition – and intervention against abuses of dominance. Protecting consumers and ensuring the freedom of businesses, including SMEs and micro-entrepreneurs, to engage in economic conduct free from abuse by dominant firms promote economic development.

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