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Main methodological conclusions from the Section of the Report of the ICN Unilateral Conduct Working Group dedicated to the assessment of dominant position (substantial market power)

Materials for discussion at the Panel Meeting "Dominance and natural monopolies"

Ladies and Gentlemen!

Let me as a co-chairman of the Sub-group on the assessment of dominant position (substantial market power) to make some main conclusions o the basis of the prepared by this Sub-group Section of Report of the ICN Unilateral Conduct Working Group. This Section is dedicated to the assessment of dominant position (substantial market power). It is based on materials on the question given by 34 competition authorities - members of ICN and 13 expert firms not forming part of governmental bodies. On the whole it is based on the data defining 35 jurisdictions. Materials were presented by competition authorities and independent experts according to the questionnaire enclosed to the Section.

The concept of dominance on a market (substantial market power) is considering in the context of application of antimonopoly laws in respect to ***the unilateral conduct*** of economic entities, so say using the dominant position of a company on the unilateral basis (in contrast to concerted practices and mergers of two and more companies).

Among competition authorities of different countries is tracing the substantial rapprochement of positions (so called convergence) in the question of the assessment of dominant position. First of all it is becoming apparent in the point that they ***considering as illegal certain types of the unilateral conduct of dominant firms, but not the fact of having market power it self***. It is significant that no one of the jurisdictions investigated consider the fact of having market power as an infringement. So, the establishment of the fact of possession of market power logically is previous to the analysis of the dominant economic entity behavior on the market. Thus serves, how it's pointed in the Report, as a "filter": passing through it dropping out entities that cause of their position on a market cannot restrict competition and exploit consumers by monopolistically setting too high prices.

It is necessary to note, that in this Report it is reviewed only the ***individual*** dominance on a market of one firm and ***not the collective dominance*** of several firms.

While analyzing materials received from competition authorities – ICN members there were revealed two types of definition of the dominant position: ***behavioral*** and ***structural***.

The most important elements of the behavioral definition are: (1) ***ability*** of a company to pursue its market policy in conditions of (2) ***independence of*** disciplining its influence from the part of ***competitors. Structural*** definition proceeds from the companies' market ***share***. It doesn't mean that share indices are not applied by competition authorities using behavioral definition of dominance. However, they consider market share as ***one of criteria*** of market power (even tough the most important), but ***not as an element of the definition*** of dominance. So, ***the difference between behavioral and structural definitions of market power is not of principle***: jurisdictions applying the behavioral definition of dominant position using structural indices as its criteria and vise versa – jurisdictions proceeding from the structural definition using as criteria behavioral aspects, for example, setting prices higher than competition level. As a result, ***the adherence to one of two definitions doesn't create insuperable disagreements between jurisdictions in questions of assessment of dominant position and doesn't serve as a real obstacle for convergence between them on the question***. The majority – 28 – of jurisdictions reviewed holding the behavioral definition, and 5 – the structural. Some jurisdictions examine the possibility to introduce appropriate alterations to their competition legislation, turning from the structural definition to the behavioral one. It relates with the point that share indices even very important they are, but not the only factors defining the dominant position; and jurisdictions prefer to refer the market share to criteria of dominance, but not to include it to the definition.

The behavioral definition of market power seems to be more preferable compare to the structural one, because it permits to conduct more multilateral analysis of factors defining the dominant position, first of all, barriers of entrance.

Some jurisdictions also include to the definition of dominant position ***the factor of time***, defining ***the stability*** of market power. Moreover, the concrete period of time, as a rule, is not pointed and to take this factor into account wording like "significant" and "considerable" period of time need to be used.

Assessing dominant position (substantial market power) the majority of jurisdictions reviewed underlining the need of ***comprehensive consideration of factors*** – criteria of existence of market power. Analyzing the materials given by jurisdictions there was revealed 20 of such factors in whole. As the most important of them there were called the following:

- Market share of the firm and its competitors
- Market position and market behavior of competitors
- Barriers to entry or expansion
- Buyer power
- Economies of scale and scope/network effects
- Access to upstream markets/vertical integration
- Durability of market power
- Market maturity/vitality
- Access to essential facilities

- Financial resources of the firm and its competitors
- High prices (at absolute or comparative level)
- Profits of the firm

It is important to note, that use of share indices by the majority of jurisdictions reviewed (19 out of 35) is accompanied by application of their ***thresholds***: if the share of a company is less than the lowest threshold, then it is presumed as not dominant (so called "safe harbor"); if the share is more than the highest threshold dominance is presumed. Use of thresholds is accompanied by introduction of rules in respect to ***rebuttable dominance presumption*** and distribution of ***burden of proof*** of market power between competition authority and the company in question. As a hypothetical example, however, approaching by the level of thresholds to the real ones used by jurisdictions, it could be given the following: the company's market share is less than 20% - "safe harbor", 33-50% - burden of proof of dominance is laid upon competition authority; more than 50% - dominance presumed, but it is a rebuttable dominance presumption, so the company has a right to prove that it doesn't have market power; more than 70% - dominance presumed and it can't be rebutted.Various jurisdictions applying different thresholds. For example, in South Africa there is a rebuttable dominance presumption at 35% and a non- rebuttable - at 45%. In Korea there is a "safe harbor" at 10% and so on. Only two jurisdictions using a non- rebuttable dominance presumption and the majority - a rebuttable one.

So, the market share of a company as itself is considering even as an important, but not the only index of existence of market power. The majority of jurisdictions carefully analyzing other indices listed above while establishing dominance, and first of all – barriers to entry, access to essential facilities, situation on vertical integrated markets, competitors behavior and so on and it's described in details in the Report.

As a separate question the assessment of dominant position (substantial market power) of companies in ***small and isolated economies*** is reviewed. The question is whether the small size of the economy and its openness to trade affect on assessment of dominant position of companies acting there? Alternatively, is the dominance (substantial market power) assessment altered by the openness of an economy via free trade agreements? 16 of 18 jurisdictions responded - asserted that these factors don't affect on tools of the assessment of dominant position. At the same time, most of jurisdictions agreed that they can heavily influence the ultimate outcome of the dominance assessment. This influence stems from the relative isolation or openness of the economy and the corresponding effect on barriers to entry.

Also a very important question is about the stage at which the competition authority can intervene: when the undertaking already has a position of dominance or when the company is only aiming for it. All responding jurisdictions allow for intervention against anti-competitive unilateral conduct when the undertaking already has a position of dominance. Besides, in 14 of 35 jurisdictions reviewed, and in particular in several larger jurisdictions, intervention is also possible against an undertaking's allegedly anti-competitive unilateral conduct taken in a market in which it does not hold a pre-existing dominant position.

Jurisdictions that limit enforcement to the allegedly anti-competitive conduct of undertakings with dominance cited following reasons for doing so:

- Below levels of dominance, these jurisdictions consider it unlikely that a certain unilateral conduct harms competition.

- It is generally difficult to distinguish between competition on the merits and anticompetitive conduct, and making this distinction may be even more difficult if the alleged abuse has been exercised by a company without substantial market power.

- Limiting the law's application to the actions of dominant firms thus helps to avoid over-enforcement.

- Limiting enforcement to positions of dominance may reinforce the legal certainty of market share-based "safe harbors".

- Some types of anticompetitive behavior are covered by the administrative and other laws.

Also, other provisions of competition law, such as prohibitions against anti-competitive agreements and merger control, already address many scenarios of acquisition or creation of dominance.

Jurisdictions that allow enforcement before the company gets market power cited following reasons for doing so:

- It is necessary to stop attempts to acquire a dominant position through anticompetitive actions and so to stop monopoly at the stage of its conception.

- It is necessary to stop exploitation of weaker economic entities and to create conditions for participation on the market for small and medium enterprises.

In ***conclusion*** there's a summary of main observations made by analyzing materials from jurisdictions reviewed and so is forming the ***basis for further analysis and distribution of best practices – the plan for the next year work.*** Materials of the Report are epy good basis for further work of Unilateral Conduct Group on exposure and distribution of best practices in the question of the assessment of dominant position.