INTERNATIONAL COMPETITION NETWORK

Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies

Prepared by

The Unilateral Conduct Working Group

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Executive Summary[*]

This report was prepared by the ICN Unilateral Conduct Working Group (UCWG)[1] for the 6th Annual Conference of the ICN in May 2007 in Moscow. The report consists of three chapters, which address: 1) the Objectives of Unilateral Conduct Laws; 2) the Assessment of Dominance/Substantial Market Power; and 3) State-Created Monopolies. The report describes the approaches of competition agencies around the world to these issues, and distills themes that may assist in promoting convergence in these areas. The report is based on the responses of thirty-five ICN Members[2] and fourteen non-governmental advisors (NGAs)[3] to a questionnaire[4] developed by the working group. We appreciate the time and effort that the respondents dedicated in support of this project. Key findings from each report chapter are outlined below.

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[*] Special thanks go to the Reports' authors for their time, energy, dedication and patience. For the Objectives chapter, the drafting team included Dina Kallay, Elizabeth Kraus, and Anna Chehtova from the U.S. FTC, Ernesto Estrada, Monica Zegarra, and Elisa Mariscal from the Mexican FCC, Professor Andreas Reindl of Fordham Law School, Gianluca Sepe from the Italian Competition Agency, and Josée Villeneuve of the Canadian Competition Bureau. For the Assessment of Dominance/Substantial Market Power chapter, the drafting team included Arno Rasek from Germany's Bundeskartellamt, Vladimir Kachalin from the Russia Federal Antimonopoly Service, Geraldine Emberger from the European Commission's Competition Directorate General, and Charles Webb from Jersey's Competition Regulatory Authority. For the State-Created Monopolies chapter, the drafting team included Lerzan Kayihan Ünal and Yüksel Kaya, with valuable comments and contributions from Yaşar Tekdemir, Burak Büyükkuşoğlu, and Adnan Akgün, all from the Turkish Competition Authority.

[1] The Working Group includes competition agencies from: Australia, Austria, Brazil, Bulgaria, Canada, Chile, Czech Republic, European Union, Finland, France, Germany, Hungary, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Jersey, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Romania, Russia, Slovak Republic, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States.

[2] Australia, Brazil, Bulgaria, Canada, Chile, Czech Republic, European Union, France, Germany, Hungary, Ireland, Israel, Italy, Jamaica, Japan, Jersey, Korea, Latvia, Mexico, Netherlands, New Zealand, Pakistan, Romania, Russia, Serbia, Singapore, Slovak Republic, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, and United States. The responses are available at http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/unilateral-conduct/unilateral-conduct-working-group-questionnaire-and-responses.

[3] Non-governmental advisor responses were received from: CUTS (Consumer Unity and Trust Society) (India), Professor Josef Drexl (Germany), Professor Eleanor Fox (U.S.), Franz Hoffet, Marcel Meindhardt and Silvio Venturi (Switzerland), the International Chamber of Commerce (ICC) – Kei Amemiya (Japan), ICC – James Rill, John Taladay and Thomas Dilickrath (U.S.), ICC – Kornelia Nagy Koppány and Dániela Dozsa (Hungary), ICC – Anthony Norton, John Oxenham and Anton Roets (South Africa), ICC – David Tadmor and David Gideoni (Israel), ICC – UK Member (U.K.); Paul Lugard (Netherlands), Alberto Pera (Italy), John Ratliff, Frédéric Louis, Antonio Capobianco and Cormac O'Daly (European Union), and Christiana Stoica (Romania).

[4] The questionnaire is available at: http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/questionnaire/ICN_UCWG_Questionnaire.pdf.

Objectives of Unilateral Conduct Laws

Respondents identified ten different objectives of unilateral conduct laws, regulations, and policies, with all but one member agency identifying more than one objective as relevant to their unilateral conduct regimes. As detailed in Annex A to the Report, these objectives (listed in order of the number of times cited by respondents) include: ensuring an effective competitive process; promoting consumer welfare; maximizing efficiency; ensuring economic freedom; ensuring a level playing field for small and medium size enterprises; promoting fairness and equality; promoting consumer choice; achieving market integration; facilitating privatization and market liberalization; and promoting competitiveness in international markets.

Notably, virtually all responding agencies cited ensuring an effective competitive process as an objective in its own right, a means to achieve other desirable goals such as consumer welfare, economic freedom or efficiency, or both an objective and a means to achieve such goals. Of the nine other objectives that respondents identify as objectives in and of themselves,[5] a significant number of respondents relied on the economic concepts of the promotion of consumer welfare and maximizing efficiency. The result of the survey suggests important similarities as to these three central objectives of unilateral conduct rules. Although the other objectives noted in Annex A were cited by a smaller number of respondents, they were often considered important by these respondents.

Respondents characterized an effective competitive process as a dynamic, self-initiating market phenomenon that calls for competition agency intervention only when the process is obstructed. In addressing the issue of complementarity of unilateral conduct objectives and intellectual property goals, most respondents viewed these goals as consistent. Various respondents expressed concern about under- and/or over-deterrence, but did not suggest a direct relation between their choice of objectives and their desire to optimize the level of deterrence. Finally, the report notes that respondents referred to the importance of transparency of unilateral conduct laws, predictability in their enforcement, and competition agency independence in achieving the objectives of unilateral conduct rules.

Assessment of Dominance/Substantial Market Power

Unilateral conduct laws address anticompetitive conduct undertaken by an individual firm. All responding agencies allow for intervention against anticompetitive unilateral conduct

[5] Germany and Japan referred to these "objectives" as benefits or intended effects of their primary goals. Most respondents, however, did not differentiate their objectives or goals in this manner.

when the firm already has a position of dominance/substantial market power ("SMP"). This serves as a filter for intervention against specific anticompetitive conduct.

Respondents cited two basic legal definitions of single-firm dominance/substantial market power -- structural and behavioral. The structural definition identifies dominance/SMP by an established market share threshold that may allow for possible situation-specific deviations. Behavioral definitions broadly focus on a firm's appreciable freedom from competitive constraints or ability to act in ways that a competitively-constrained firm could not. The vast majority (80%) of respondents use the behavioral definition.

The main section of this chapter discusses how responding agencies assess single-firm dominance/SMP in practice, including assessing constraints stemming from actual competition, market entrants, potential competitors, and/or customers, and the use of presumptions and safe harbors, and market power assessment methods in small and isolated economies. With respect to the latter, most jurisdictions agreed that while an economy's relative size or openness to trade does not affect the criteria used to assess market power, these factors can influence the outcome of the dominance assessment.

All respondents use a comprehensive set of criteria to assess dominance/SMP. Even if the relative importance of these criteria varies from case to case, jurisdictions generally consider market share and barriers to entry or expansion and durability of market power as the most important criteria. Market shares are used as an initial indicator or starting point for the market power analysis. Over half of the agency respondents note that their jurisdictions use market share thresholds as a rebuttable presumption of dominance/SMP and/or a safe harbor.[6]

Respondents identified barriers to entry, exit, or expansion and durability of market power as very important factors in the assessment of dominance/substantial market power. Entry analysis provides information on the significance of potential competitors for competition in the market concerned and thus about the durability of market power. In practice, agencies assess not only whether entry is theoretically possible but also whether entry will be likely, timely, and sufficient to pose a credible competitive constraint on the incumbent.

All responding jurisdictions consider market position and market behavior of competitors as well as buyer power in their market power analysis. Moreover, the responding jurisdictions consider a wide range of other factors that may be relevant to the dominance/SMP assessment in

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[6] Of the fifteen jurisdictions that use market share-based presumptions, one applies a threshold of 20%, two of 33%, two of 35%, two of 40%, one of 45%, five of 50%, one of 70%, and one of 80%. Of the jurisdictions that use a market share-based safe harbor, one applies a threshold of 10%, five of 20%, two of 35%, three of 40%, and one of 50%. For further information, see the discussion on the "Use of market share thresholds as dominance presumptions and safe harbors" in Chapter Two, Section II.2.B (p. 47), the conclusion of the Chapter Two (Dominance/SMP) (pp. 62-63), and Annex D.

a specific case. Additionally, in 15 of 35 (40%) jurisdictions covered by questionnaire responses, 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.

State-Created Monopolies Project

In view of concerns of agencies from jurisdictions with transition economies, the working group examined the special issues raised by the application of unilateral conduct rules to state-created monopolies. In identifying firms that possess dominance/SMP due to state-imposed restraints of competition (apart from those involving network access or price-cap regulation implemented by a sector specific-regulator), most respondents cited firms that are or were owned by the state and with which private competitors were prohibited from competing in whole or in part. Most respondents mention postal services and lotteries as their main public monopoly sectors, followed by airports/airport infrastructure, commodities, ports, and insurance.[7]

The reasons provided for the creation of state-owned enterprises varied according to the jurisdiction's economy and the nature of the sector. Respondents often indicated that a fully competitive market was unable to fulfill the execution of a public service mission. Safety and health considerations, e.g. in the alcoholic beverages and tobacco sectors, were also cited as justifications for state intervention.

While some jurisdictions subject state-created monopolies that engage in commercial activities to the same antitrust rules as private enterprises, others exempt conduct pursuant to government regulation under a state action doctrine. Among the former group, most respondents indicate that their dominance/SMP analysis is identical regardless of the ownership of the undertakings.

With respect to privatization, some jurisdictions applied the same privatization laws to all privatization cases, while others used sector-specific laws or even particular legislation to privatize specific assets. While the objectives behind liberalization and privatization vary among jurisdictions, the most commonly cited objectives were related to economic efficiency and the introduction and promotion of competition. The chapter also reviews the responses to suggest that competition authorities can play an effective role in the liberalization/privatization process, through binding decisions, involvement in preparatory work leading to the liberalization, and advocacy to other government agencies.

[7] In view of previous ICN work, this project excluded the telecommunications, energy, water, and railway sectors.

Chapter One: Objectives of Unilateral Conduct Laws

Introduction

This chapter aims to describe the objectives of unilateral conduct rules as identified by questionnaire respondents, thirty-three ICN members[8] and fourteen non-governmental advisors, in an effort to distill themes that may assist in promoting convergence in this area.[9] As highlighted in the following discussion (and summarized in Annex A), the various responses identified a total of ten different objectives of unilateral conduct rules, with all but one member agency identifying more than one objective as relevant to their unilateral conduct regimes.

Part I of this chapter addresses *ensuring an effective competitive process*, which was cited by virtually all responding agencies. This objective is addressed separately because it is regarded by respondents: as an objective in its own right; as a means to achieve other desirable goals, such as consumer welfare or economic efficiency; and/or as both an objective and a means to achieve such goals.

Part II describes the nine other most commonly cited objectives that respondents identified as being promoted by their unilateral conduct rules as objectives in and of themselves. Two of these nine objectives – the *promotion of consumer welfare and the maximization of efficiency* – were identified by the vast majority of ICN member respondents. Some jurisdictions, *i.e.,* Germany and Japan, referred to these "objectives" as benefits or intended effects of their primary goals. Most respondents, however, did not differentiate their objectives or goals in this manner. Accordingly, the report relies on the terminology of "goals" or

[8] Thirty-three of the thirty-five ICN member agency respondents replied to part A of the questionnaire on objectives. The responses are available at: http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/unilateral-conduct/unilateral-conduct-working-group-questionnaire-and-responses.

[9] This report focuses on objectives as they relate to the unilateral conduct policy. It should be noted that the majority of questionnaire respondents indicated that their jurisdiction's unilateral conduct objectives are not specific to unilateral conduct policy, but rather are common to the competition regime as a whole (e.g., Australia, Brazil, Bulgaria, Canada, Chile, Czech Republic, European Union, France, Germany, Hungary, Israel, Ireland, Italy, Jamaica, Japan, Jersey, Latvia, Mexico, New Zealand, Pakistan, Romania, Russia, Singapore, South Africa, Switzerland, Turkey, Ukraine, and United States). In addition, some respondents indicated that the general objectives of their competition rules are expressly set out in the constitution or other legislative acts (Australia, Brazil, Bulgaria, Canada, Czech Republic, European Union, Jersey, Korea, Latvia, Mexico, New Zealand, Pakistan, Romania, Russia, Singapore, the Slovak Republic, Switzerland, Turkey, and Ukraine). However, other respondents noted that the purpose of their competition rules must be extracted from such legislative sources (including legislative history) through judicial and/or competition agency interpretation (Chile, France, Germany, Israel, Italy, Jamaica, Netherlands, United Kingdom, and United States).

"objectives" throughout the text, unless specifically stated in the responses otherwise, understanding that some jurisdictions rely on the concept of intended effects.

Part III explores the relations among the objectives cited, highlights the complementarity identified between these objectives and the goals of intellectual property protection, and addresses the interplay of these objectives with the exemptions and exceptions to unilateral conduct rules identified by respondents. Parts IV and V distill and examine key features underlying these objectives, and complement the preceding sections. Part IV focuses on the dynamic and self-initiating nature of an effective competitive process, as identified in the responses, whereas Part V summarizes other factors underlying the objectives, including the role of non-competition objectives, the principle of independent decision making, the relation of these objectives to avoiding over- and under-deterrence, and the importance of transparency and predictability.

I. Ensuring an Effective Competitive Process as a Goal and a Means

Thirty-two of thirty-three agencies cited ensuring an effective competitive process,[10] as a goal of their unilateral conduct rules and/or as a means to achieve other goals.[11] Nine agencies suggested that this is the primary objective, and four provided that this is one of a number of objectives of their unilateral conduct rules. In addition, fifteen agencies tended to view ensuring an effective competitive process as both a goal and a vehicle by which to achieve other goals or benefits.[12] Four agencies address ensuring an effective competitive process exclusively as a means by which to achieve other goals.[13] These characterizations are described below, and

[10] This report addresses the objectives of unilateral conduct rules. Phrases such as "ensuring an effective competitive process" are used to categorize the types of objectives, and are not intended to reflect preferences as to the types of conduct to be addressed. The Working Group expects to study conduct issues as part of its future work.

[11] Eleven respondents underscored that ensuring a vigorous competitive process relates to the competitive process itself, rather than specific competitor(s): Australia, Canada, Czech Republic, Germany, Ireland, Italy, Mexico, New Zealand, Turkey, United Kingdom, and United States.

[12] The questionnaire requested information on objectives, and did not explicitly address the means to achieve these objectives. Nevertheless, a number of agency respondents identified enhancing an effective competitive process as a means or vehicle by which to achieve benefits or goals. Of the fifteen agencies identified below in n. 16, five did not clearly identify whether they viewed this factor as both a means and a goal or solely a means. Given that respondents often addressed this factor in the response section concerning objectives, we infer that these jurisdictions rely on this factor as a goal and include these six jurisdictions within the category considering the objective as both a goal and a means.

[13] The report cites only the four agency responses that explicitly identified ensuring an effective competitive process as solely a means to achieve other benefits, and (as indicated in the preceding footnote) does not address the five jurisdictions that did not clearly articulate whether they consider this factor solely a means or both a goal and a means, in this category.

Section III.1 of this chapter addresses how, if at all, the other goals identified in the following section are aligned with the objective of ensuring an effective competitive process.

Nine agency responses[14] characterize ensuring an effective competitive process as the fundamental or primary objective of their competition and/or unilateral conduct rules. For example, the Turkish agency stated that "the fundamental objective of the Competition Act in Turkey and naturally that of unilateral conduct rules is the protection of competition itself and therefore the competitive process." The Czech response states that "[t]he fundamental interest is the existence of competition as such" and that its agency "protects competition as a social phenomenon [the] existence [of which] is desirable for the society," and, the Russian response states that "protecting the competitive process is considered to be the primary goal of the competition legislation." In Germany, the goal of competition law is to protect free competition as an institution and pursuing this goal is intended to have beneficial effects such as creating efficiencies, safeguarding consumer protection or jobs, and limiting strong market power.

Four agencies[15] explicitly note this objective as one among a number of objectives of their jurisdiction's unilateral conduct rules. For example, the French agencies' response notes that its legislation "pursues several objectives" and "not only … aim[s] to protect the competitive process." In addition, Brazil's response lists "open competition" as one of its law's objectives.

Fifteen agencies appear to view ensuring an effective competitive process as both a goal and a vehicle for achieving other goals.[16] For example, the Dutch response noted that its competition legislation does not expressly identify its unilateral conduct objectives, but that the Netherlands Competition Authority considers its objective to be the protection of the competitive process as a means to protect consumers. The Korea Fair Trade Commission ("KFTC") response notes that the direct goal of the competition law is to promote free and fair competition and ultimately to encourage creativity in business activities, protect consumers and achieve balanced development of the national economy. The Swedish response also notes that the overall mission of its competition act is to promote effective competition to the benefit of consumer welfare. The Canadian Competition Bureau's ("CCB") response notes that the purpose of its act is it to maintain and encourage competition as the most effective means to achieve efficiency, international competitiveness, fairness to small and medium-sized enterprises

[14] Those of Chile, Czech Republic, Germany, Japan, Mexico, Russia, Switzerland, Turkey, and Ukraine.
[15] Those of Brazil, Bulgaria, France, and Israel.
[16] See n. 12. Those of Canada, European Union, Hungary, Ireland, Italy, Jersey, Korea, Latvia, Netherlands, New Zealand, Romania, Slovak Republic, South Africa, Sweden, and United States.

("SMEs") and consumer benefits. Thus, twenty-eight of thirty-two respondents tend to view ensuring an effective competitive process as goal in whole or in part.

Finally, four agencies[17] explicitly identified ensuring an effective competitive process only as a means to achieve other goals. The agencies of Australia and the United Kingdom, identified their principal objectives to protect the interests of consumers, providing that competition is a means to that end but not an end in itself, whereas the Singapore Competition Agency ("CCS") noted that ensuring an effective competitive process is a means to their principal objective of maximizing efficiency.

In most responses, ensuring an effective competitive process is stated in broad terms that leave substantial leeway for the legislature, judiciary and competition agencies to develop and interpret competition policy in light of changing circumstances and economic learning.[18] For example, the CCB's Abuse of Dominance Enforcement Guidelines "state that the objective of the abuse provision is to promote effective competition where all firms have an opportunity to either succeed or fail on the basis of their ability to compete." The Chilean Competition Tribunal's response is also interesting, stating that while the only objective of competition policy is to promote and protect competition, one of the main difficulties is to define legally what "free competition means," or to articulate why competition itself should be protected. In 2004, when the Act was amended, the executive and legislative powers discussed whether "free competition" should be defined more narrowly as a right to participate in economic activities, a means of promoting economic efficiency, or a means of enhancing consumer welfare. The legislators decided that the meaning of "free competition," that is, an effective competitive process, should be left to the Tribunal's interpretation, on a case-by-case basis.

Even given these differences in approach to the concept of ensuring an effective competitive process, it is clear that a significant number of ICN members consider this to be the, or a, fundamental objective of their unilateral conduct rules. The following section broadly classifies the other goals respondents identified as objectives of unilateral conduct policy.

[17] See note 13. Those of Australia, Jamaica, Singapore, and United Kingdom.
[18] See Drexl, *supra* note 3, and Chile's response noting that, to retain flexibility, the Chilean Senate purposely refrained from adopting a clear definition of the term "free competition."

II. Unilateral Conduct Rules as a Means to Achieving Various Goals

In addition to citing ensuring an effective competitive process, as a goal and/or a means, respondents identified nine other goals of their unilateral conduct rules that were addressed as goals in and of themselves. Among these nine goals, two – promoting consumer welfare and maximizing efficiency – were cited most frequently.

Some respondents suggest that their jurisdiction's objectives are particular to the historical context in which their competition legislation was adopted.[19] Nevertheless, even given such historical specificities, respondents commonly cited certain objectives. This part of the report reviews the objectives identified in multiple responses, from promoting consumer welfare and maximizing efficiency, ensuring economic freedom, ensuring a level playing field for SMEs, promoting fairness and equality, promoting consumer choice, achieving market integration, facilitating privatization and market liberalization, and promoting competitiveness in international markets.

1. Promote consumer welfare

Thirty of the thirty-three respondents that addressed the questions on objectives state that their unilateral conduct rules aim to promote consumer welfare. Most respondents do not specifically define consumer welfare and appear to have different economic understandings of the term. Thus, some agencies focus on short-term consumer surplus, while others apply a longer-term welfare concept that also accounts for productivity and innovation (for example, the Netherlands response states that "competition law should not solely concentrate on short term price/output issues but should also [maintain] a dynamic perspective taking due account of innovation.)"

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[19] For example, the Brazilian competition law was enacted with the expectation that it could combat hyperinflation. In Turkey, the adoption of the competition regime was deemed to have important benefits in lowering inflation and promoting integrity in the marketplace. In the 1950s, when the European Community competition rules were introduced, the EC Treaty required that competition policy support rules establishing the internal market, while defending the "four freedoms," *i.e.*, freedom of movement of goods, services, persons (workers and establishments), and capital. In South Africa, the promotion of competition is viewed as a means of promoting employment and advancing the social and economic welfare of South Africans, as well as increasing the ownership stakes of historically disadvantaged persons.

Seven agencies[20] identified competition law and/or unilateral conduct provisions that expressly cite consumer welfare as a goal. The competition laws of Australia and New Zealand, for example, specify consumer welfare as their ultimate goal.[21] Their courts have concluded that the purpose of their unilateral conduct rules is not to protect individual competitors, but to promote the competitive process as a means to protect consumer welfare.[22] The Slovak response provides that the objective of its unilateral conduct rules is to promote economic development for the benefit of consumers, which is achieved by preventing restrictions of competition and creating conditions for its further development.

Similarly, the Jersey agency states that the overall objective of its competition law is to make markets work well for consumers, and that the abuse of dominance prohibition is based on a consumer welfare standard. The competition law of Ukraine includes, as one of the main objectives of its unilateral conduct rules, the "protection from … infringement of the interests of …consumers, which would [have been] impossible in case of the existence of substantial competition in the market." Finally, for Jamaica's Fair Trading Commission, the ultimate goal of encouraging competition is to provide consumers with competitive prices and product choices.

The competition agencies of Israel, Mexico, France, Romania, and Turkey state that the objective of consumer welfare is implicit in their unilateral conduct rules. In Mexico, before determining whether a unilateral practice is anticompetitive, the authority must evaluate the efficiency gains demonstrated by the company under investigation and the net effect of the practice on consumer welfare. In France, Competition Council decisions provide that "abuse of [a] dominant position … could lead to reduced consumer welfare," although they do not address how "consumers' interest should be taken into account to assess the existence of efficient competition on the market." The response of the Romanian Competition Council, as well as Stoica (NGA Romania), indicates that Romania's prohibition of unilateral anticompetitive practices is intended to protect economic activity and the welfare of consumers. Thus, in promoting competition, the assessment of unilateral conduct is driven by the goal of protecting consumer welfare. Similarly, the Turkish agency states that the competition regime is intended

[20] Those of Australia, Canada, European Union, Jamaica, Jersey, New Zealand, and Ukraine.

[21] Australia's Trade Practices Act 1974 (TPA) states that its purpose is "… to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection." In New Zealand, the objective of the Commerce Act 1986 is "… to promote competition in markets for the long-term benefit of consumers within New Zealand."

[22] See the Australian cases of Queensland Wire Industries Pty Ltd. v. Broken Hill Pty Co, Melway Publishing Pty Ltd v. Robert Hicks Pty Ltd, and Boral Besser Masonry v. Australian Competition and Consumer Commission; and the New Zealand Carter Holt Harvey case.

to lead to increased welfare of all consumers, and society by enabling the purchase of better quality goods and services at lower prices.

The competition agencies of Brazil, Ireland, and Switzerland state that the goal of consumer welfare is derived from the general constitution or competition law. The Brazilian agencies provide that the objective of the competition law is to reinforce constitutional principles that include the social role of property and consumer protection. The Administrative Council of Economic Law ("CADE") asserts that the great majority of its decisions are based on a "pro-consumer" premise and that it generally "prioritize[s] consumer welfare [over] total welfare." In Ireland, the Competition Act 2002 sets forth the "common good" as its objective, which the competition authority interpreted as the "interests of Irish consumers," by "adopting a prevention of consumer harm standard." In Switzerland, the preamble of the Federal Law on Cartels and Other Restrictions of Competition refers to article 97 of the Constitution, which mentions the protection of consumers.[23]

Some competition agencies underscore the protection of consumer welfare as an important or primary objective. For example, the Netherlands competition authority considers its objective to be the protection of the competitive process as a means to protect consumers. The UK agencies' response notes that the Office of Fair Trade ("OFT") also focuses on consumer welfare; in prioritizing its investigations, likely consumer detriment from the alleged infringement is an important factor. The Israel Antitrust Authority states that its "objectives are, in a nutshell … protecting public and consumer welfare," and cites the *IAA v. Dubek Corp.* case that identified "maint[enance] of consumer welfare" as a proper purpose of Israel's unilateral conduct rules. The U.S. antitrust agencies state that "the objective of antitrust laws in general, and Section 2 of the Sherman Act in particular, is the protection of competition and consumer welfare." The European Commission stresses that it assesses possible violations of unilateral conduct rules (Article 82) on the basis of effects in the market. Hence, it targets its enforcement at behavior that has actual or likely restrictive effects on the market and harms consumers.

Among the NGA responses, the ICC-Rill, Taladay and Dillickrath response states that promoting consumer welfare and the organization of a free market economy are considered central competition-specific concerns of U.S. antitrust law,[24] and that this is reflected in the

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[23] Hoffet, Meinhardt, and Venturi (NGAs Switzerland) note that certain restrictions were included in the Swiss competition act, and apply to unilateral conduct, to protect Swiss consumers from being overcharged compared with consumers in adjacent markets.

[24] Citing "Antitrust Enforcement at the Federal Trade Commission: In a Word – Continuity," Remarks of Timothy J. Muris, Chairman, Federal Trade Commission, Before the American Bar Association Antitrust Section Annual Meeting, Chicago, Ill., Aug. 7, 2001, available at http://www.ftc.gov/speeches/muris/murisaba.htm.

consumer welfare standard, which addresses protecting consumers, promoting efficiency, and protecting the competitive process. The response of Pera (NGA Italy) considers that the purpose of Italian unilateral conduct rules is the protection of competition as a means to achieve consumer welfare, as indicated in Italian Competition Authority's reports, speeches, and jurisprudence, and supported by court decisions.

2. Enhance efficiency

Twenty member agency respondents referred to enhancing efficiency as one of the ultimate objectives or benefits/effects of their unilateral conduct rules.[25] Efficiency is a broad economic term that may refer to allocative efficiency (allocation of resources to their most efficient use), productive efficiency (production in the least costly way), or dynamic efficiency (rate of introduction of new products or improvements of products and production techniques).[26] The following describes the efficiency objectives that the agencies identified, although many responses do not define them precisely.

Some agencies explicitly referred to the economic concept of "allocative efficiency" as an objective of their jurisdiction's unilateral conduct rules. These include the responses from the Russian agency ("maximizing … efficiency of allocation and use of national resources" and "competition…assumed as a basic prerequisite for efficient wealth allocation"); the UK agencies' response citing the OFT Chairman's endorsement of unilateral conduct rules "as a means of… ensuring an efficient allocation of resources;" the South African agency, citing the *Competition Commission v. South African Airways* case that referred to "allocative inefficiencies" as harming consumers and, the CCB response, citing the *Nielsen* Case and the explanatory guide in support of the legislation, providing that "[a]nti-competitive behaviour on the part of dominant firms imposes artificial restraints on the competitive process, impeding the market from efficiently allocating resources." From the NGA responses, the ICC – Tadmor & Gideoni response notes that the court has acknowledged the objectives of "promotion of efficiency and efficient allocation of resources" as goals of Israel's competition law.

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[25] Those of Australia, Brazil, Canada, European Union, France, Germany, Hungary, Jamaica, Jersey, Mexico, New Zealand, Pakistan, Russia, Singapore, South Africa, Switzerland, Turkey, Ukraine, United Kingdom, and United States.

[26] See generally Luís M.B. Cabral, Introduction to Industrial Organization 26-29 (MIT Press, 2000).

Other respondents identified the goal of promoting economic efficiency, but were less precise with respect to how this was defined. For example, the Hungarian agency identifies "ensuring economic efficiency" as one of the goals that its Competition Act was enacted to achieve. Jamaica's Fair Trading Commission states that the application of its competition law is in line with achieving "improved economic efficiency," and that this objective has permeated the Jamaican unilateral conduct rules, such that all assessments include the "evaluation of efficiency gains." The Jersey Guidelines on Abuse of a Dominant Position state that "[c]onduct that stems from the superior efficiency of an undertaking is not an abuse – the purpose of competition policy is to encourage, not penalise, efficiency." Similarly, the Brazilian response states that its law implicitly pursues an efficiency goal, stressing that the achievement of a significant position on the market, as a result of competitive efficiency, does not entail an illicit act. The European Commission response briefly cites "efficiency" as one of its objectives for its unilateral conduct rules. It also notes that "[t]he Commission adopted a Discussion Paper in December 2005 …[which] suggests that the Commission will adopt a <u>more economic approach</u> to Article 82" (underscored in the original).

According to the Mexican agency's response, the Mexican Federal Law of Economic Competition states that "… its object is to protect the process of competition by eliminating monopolies, monopolistic practices and other restrictions to the efficient functioning of markets." With respect to South Africa, Section 2 of the Competition Act states that ensuring an effective competitive process is a means of promoting "efficiency, adaptability and development of the economy." In addition, the Antimonopoly Committee of Ukraine states that the Law on the Protection of Economic Competition is directed towards ensuring the efficient functioning of the economy of Ukraine through the development of competition. The Turkish agency's response seems to refer to all three economic types of efficiency, in noting that the "reasoning of" the Turkish Competition Act provides that a sound competitive regime leads to, *inter alia,* "a more efficient production and operation, use of less resources, production at a lower cost, [and the] emergence of technological innovations and developments."

Judicial interpretation has also identified efficiency maximization as an objective of certain competition and unilateral conduct rules. For example, the New Zealand Commerce Commission stated that, the courts have interpreted the purpose of the competition legislation "… to promote competition in markets for the long-term benefit of consumers…", observing that this purpose is "…based on the premise that society's resources are best allocated in a competitive market where rivalry between firms ensures maximum efficiency in the use of resources."[27] The U.S. agencies' response, citing *U.S. v. Aluminum Corporation of America,* states that its unilateral conduct rules "preserve[] incentives for engaging in efficiency enhancing conduct," and cites the *U.S. v. Microsoft* case for the proposition that efficiency enhancement serves as a "procompetitive justification."

Finally, the CCS stated that "the key objective of competition law in Singapore is economic efficiency, [and] the CCS is particularly mindful of the risks associated with deterring efficient conduct." The risk of false positives, to which the CCS refers, is discussed in more detail in Section V.3.A, *supra*.

3. Ensure economic freedom

Thirteen agency respondents referred to the objective of freedom to participate in the market (sometimes referred to as "economic freedom") as a fundamental individual right that influences competition legislation in general, and unilateral conduct rules in particular. These responses suggest that this objective is often derived from broader constitutional principles, and is therefore not unique to competition rules or unilateral conduct rules. As described below, respondents generally referred to the freedom of individuals to participate in the market, although a number also note that economic freedom incorporates the freedom of dominant firms to conduct their business in the manner they believe most effective. These freedoms are not necessarily clearly defined in the responses, nor is the challenge of balancing them, perhaps due to the breadth afforded the term freedom as a constitutional concept in many jurisdictions. Further treatment of the concept of economic freedom follows later in chapter two of this report which deals with Assessment of Dominance section.

The Brazilian agencies characterize their competition law's objective as establishing "antitrust measures in keeping with such constitutional principles as free enterprise and open competition." The Bulgarian Commission for Protection of Competition ("BCPC") states that the objective of the Bulgarian Law for Protection of Competition is to "ensur[e] protection and conditions for promotion of … free initiative in the economy," and cites the *Ecopack* case, which characterized a limitation on "producers [and] importers' freedom to choose their contracting party" as anticompetitive. Similarly, the French competition agency's response states that "freedom of undertaking [pursuit of economic activity] is a general legal principle with

[27] See judgment delivered by Richardson, J. in Tru Tone Limited v. Festival Records Marketing Limited [1988] 2 NZRL 352, (p 358).

constitutional value" that is reflected in the French Competition Law (as codified in Book IV of France's Commercial Code).

The Israel Antitrust Authority response cites the *IAA v. Tnuva* case for the premise that "free competition is a basic pillar of any democratic regime, being a prominent characteristic of the individual's freedom to implement his autonomy" and that "[i]t is impossible to separate between the freedom of competition and freedom of occupation." By comparison, the Italian agency's response notes that "[c]ompetition rules are deemed essential in order to safeguard and foster the freedom of private economic initiative, so they are considered the natural expression of the commitment of Italy to the principles of a free market economy."

According to the KFTC, the Korean Monopoly Regulation and Fair Trade Act are based on the constitutional principles of "respect for the freedom and creative initiative of enterprises and individuals in economic affairs." The Mexican agency's response notes the explicit objective of the country's Federal Law of Economic Competition is to "protect…free market access" and that Art. 28 of the Mexican Constitution generally prohibits the prevention of "free market access." In addition, the Russian agency states that Russia's new competition law declares the protection of "freedom of economic activity" as one of its explicit objectives.

Some responses derive the objective of protecting the freedom to participate in the market from broader constitutional sources. For example, the Czech agency's reply highlights the country's Charter of Fundamental Rights and Freedoms, which establishes "every person's right to engage in free enterprise and commercial and economic activities" and the right to a "free pursuit of economic activities;" the German Bundeskartellamt's (BKartA) response highlights the relevance of the guiding principle of "economic freedom for … market participants" as well as "safeguard[ing] the freedom of action of economic actors, which derives from guaranteed constitutional rights and freedoms and the principle of equality laid down in the German Constitution;" and the Swiss Competition Commission cites the Swiss Constitution pursuant to which "economic freedom is guaranteed."

Among the NGA responses, Hoffet, Meinhardt, & Venturi's (NGAs Switzerland) response states that the Swiss constitution warrants "economic freedom as a fundamental right," which "probably means that economic freedom must be taken into consideration when interpreting [the Swiss Law on Cartels and Other Restrictions on Competition]." Professor Fox's (NGA United States) response notes, in part, that in the United States, "[a] notion of freedom – of either the dominant firm or of powerless firms – is implicit in many decisions" as "[t]he United States antitrust law also reflects an objective to preserve freedom of firms, as contrasted with government regulation of firms." The ICC – Amemiya response, notes "the objectives of the rule prohibiting 'unfair trade practices' [include] …. protect[ing] freedom in business decisions;" and CUTS (an NGA organization from India) refers to an objective of India's law as "freedom of trade carried on by other participants in the market."

Apart from the objective of ensuring independence for non-dominant market players to enter or engage in the market process, some respondents noted that the notion of economic freedom also embraces the freedom of incumbent(s) (dominant and non-dominant market players), and identified the need to balance these interests. For example, the Czech agency cites the Czech Commercial Code for the proposition that "both natural and legal persons have the right to freely engage in competitive activities for economic gain, and associate with others individuals to do so. In doing so, however, they must observe the legally binding rules of economic competition and must not abuse their participation in the competition." The Israel agency's response cites the *IAA v. Dubek* case in which the court acknowledged the monopolist's freedom of occupation and noted that a monopolist "has a right to conduct its business in a profitable manner." The U.S. agencies also state that economic freedom (the freedom to contract) is itself, "the best antidote to monopoly" and promotes effective competition. In this regard, the U.S. agencies cite the *U.S. v. Standard Oil* case to underscore that the "freedom of the individual right to contract, 'when not unduly or improperly exercised,' is the most efficient way to prevent monopolistic conditions." Two responses also referred to the economic freedom of intellectual property right holders as a "licensing freedom" (Bulgaria's BCPC response and the UK agencies' response describing the *Oscar Bronner* case[28] as limiting the agency's willingness to interfere in refusal-to-license decisions to "exceptional circumstances"). These responses demonstrate that economic freedom is not limited to the freedom of potential market entrants described earlier in this subsection, and highlights the challenge of balancing the economic freedoms of different market participants.

[28] Judgement of the ECJ of 26 November 1998 in case C-7/97; *Oscar Bronner;* see in particular par. 27 and 40.

4. Ensure a level playing field for small and medium-sized enterprises (SMEs)

Seven agencies identified this as either an explicit or implicit objective of their unilateral conduct rules. Creating a level playing field for SMEs is identified in the competition legislation or unilateral conduct rules of Canada, South Africa, and Switzerland.[29] Canada's Competition Act states that the promotion of competition requires ensuring that small and medium-sized enterprises have an equitable opportunity to participate in the economy. The South African Tribunal states that the protection of competition, in Section 2 of the Competition Act, is viewed as a means of ensuring that SMEs have an equitable opportunity to participate in the economy. Further, in *Nationwide Poles CC and Sasol Oil (Pty) Ltd*, the Tribunal held that "The Competition Act is, itself, punctuated with references to the legislature's desire that the statute should promote market access and equality of opportunity particularly, in this field, where small enterprise is concerned." The Swiss agency's response provides that a 2004 revision to the Swiss Federal Act on Cartels and Other Restraints of Competition "aim[s]…to provide improved protection to small and medium-sized enterprises as compared to larger companies capable of abusing their market power." The KFTC response references regulations aimed at "creating a foundation on which parties to transactions who have different economic power can compete freely and fairly on a level playing field."

The Turkish, Australian and German competition agencies consider this objective to be an implicit goal of their unilateral conduct rules. The Turkish Competition Authority states, *inter alia,* that the elimination of barriers to entry promotes small enterprise. The Australian Competition and Consumer Commission ("ACCC") considers that Australia's competition legislation achieves the purpose of promoting competition by protecting SMEs from larger rival firms that engage in anticompetitive conduct. In Germany, the legislator has included sections aimed at protecting SMEs in the Act Against Restraints of Competition. The BKartA's response explains that "such protection serves to maintain (or create) a diversity of enterprises on the supply side and thus prevents anti-competitive concentration processes at an early stage." Noting a shift in the U.S. with respect to this objective, Professor Fox (NGA United States) states that until the 1980s, U.S. unilateral conduct objectives included: "protecting firms without power from being fenced out of market segments by dominant firms' leverage and (other) unjustified exclusionary acts. In practice, the enforcement of this objective meant that

[29] In the case of Brazil, although the competition law and guidelines provide no special treatment for small firms, Article 170 of the Constitution specifies that a principle guiding the economic order shall be "due regard" for the "preferential treatment [of] small enterprises organized under Brazilian laws and having their head-office and management in Brazil."

sometimes firms were protected from efficient merit-based competition, leading to a change of perspective." Accordingly, this objective is no longer viewed as an objective of the U.S. unilateral conduct rules.

5. Promote fairness and equality

Six agencies referred to fairness and equality (and variations thereof) that are related to the concepts discussed in the two preceding subsections. This subsection summarizes the notions of fairness and equality as discussed in the responses, recognizing that the respondents did not always define these terms, and that agencies may have used these terms with different concepts in mind. In addition, some respondents suggest that these notions are not necessarily unique to unilateral conduct or even to competition policy, e.g., the BCPC notes that the Bulgarian constitution "provides for equal legal conditions for economic activity to all citizens and corporate entities by preventing any abuse of a monopoly position and unfair competition."

Jamaica's Fair Trading Commission aims to "ensure that all legitimate business enterprises have an equal opportunity to participate in the Jamaican economy." The South African agency's response refers to a "broader range of considerations including the promotion of a more equitable spread of ownership as well as the 'interests' of workers" and to the Competition Act's aim to "provide all South Africans equal opportunity to participate fairly in the national economy." The Japan Fair Trade Commission ("JFTC") response cites the objective of "promot[ing] free and fair competition," reflected in Japan's prohibition of "unfair trade practices" (by which various practices are characterized as "unjust" in under Art. 2(9) of Japan's Antimonopoly Act). The French agencies cite France's commercial code, which addresses "the development of unfair commercial practices and … help[s] to maintain a level playing field in [France's] highly concentrated retail distribution sector,"[30] as informing their competition enforcement.

[30] Both Japan's prohibition of "unfair trade practices" and the French section referred to in the text are not limited to market players possessing a dominant position.

6. Promote consumer choice

Closely related to the consumer welfare objective referred to by most agencies (see Section II.1 *supra*), five agencies specifically refer to consumer choice as a separate but related objective of their competition or unilateral conduct rules. The Irish agency's response notes that "[competitive] markets can increase consumer welfare and consumer choice." The CCB highlights a goal of "provid[ing] consumers with competitive prices and product choice." The Jamaican Fair Trade Commission aims to "provide consumers with…a wide range of choices at the best possible prices." The Latvian agency's response speaks of "providing [a] broader choice for consumers." The South African agency's response refers to "provid[ing] consumers with competitive prices and product choices." The responses do not further examine or define this objective.

Four of the five responses mention this objective in proximity to the concept of a "competitive," "efficient," or "best possible" price, which may suggest that their consumer choice notion is related to competitive pricing, and hence to the consumer welfare objective discussed in subsection II.1 *supra.* Nonetheless, by noting these elements separately, these responses clarify that consumer choice is an element distinct from pricing.

7. Achieve market integration

Achieving regional or national market integration is associated with competition legislation in Australia and New Zealand, the European Union, and Russia. According to the competition agencies of Australia and New Zealand, competition legislation in these jurisdictions is seen as an instrument to facilitate trade between these two countries, replacing trade-related anti-dumping remedies with a generic competition law prohibition and remedies. The objectives of competition policy implemented by the European Commission arose from the need to achieve market integration in the European Community. EC competition policy is seen as a means to ensure that the accomplishment of an internal market through the abolition of trade barriers is not nullified by the erection of private barriers to trade in the form of abusive conduct. Moreover, the EC response explains that the *Deringer* Report (1961) stressed that to avoid thwarting the benefits from the internal market, both private and public measures with effects that restrict or distort competition must be tackled in an equally determined manner and by applying the same principles. In Russia, the objectives of the competition law include ensuring a common economic area and free movement of goods.

8. Facilitate privatization and market liberalization

The competition agencies of Russia and New Zealand refer to the objective of facilitating privatization and market liberalization. The Russian agency notes the important role of unilateral conduct rules as "a basic prerequisite for liberalization or privatization of regulated and or government-control[led] sectors," and explains that "structural separation of liberalized companies into potentially competing entities should precede a liberalization or privatization process." New Zealand's Commerce Commission explains that New Zealand has been engaged in an extensive process of corporatization and/or privatization of its state trading activities during the 1980s and 1990s, with little associated regulation. Instead, New Zealand relied on the competition act to manage anticompetitive conduct based on the principle of competitive neutrality. Further elaboration on privatization and liberalization processes is provided in Chapter Three of this report, on State-Created Monopolies.

9. Promote competitiveness in international markets

The goal of promoting competitiveness in international markets is associated with competition legislation in Canada and South Africa. According to the CCB, the Canadian Competition Act states that one of its objectives is to encourage competition in Canada in order to expand opportunities for Canadian participation in world markets. Similarly, the South African Tribunal states that the promotion of competition under Section 2 of South Africa's Competition Act is viewed as a means of "expand[ing] opportunities for South African participation in world markets and recogniz[ing] the role of foreign competition in the Republic."

III. Relations Among These Objectives and Their Interplay With Exemptions and Exceptions

This section addresses the interrelations among the various goals identified in the preceding sections, noting that many agencies view their various objectives as coherent and mutually compatible. The section goes on to describe the complementarity of unilateral conduct objectives and the goals of intellectual property, and concludes with a review of exceptions and exemptions to unilateral conduct rules, and their relation to unilateral conduct objectives.

1. Co-existence and interrelations among the unilateral conduct objectives

Respondent agencies tend to find that their objectives, as identified above, are generally compatible. Some agencies responded that their multiple objectives are consistent with one another. For example, the ACCC notes that its objective of protecting smaller and more vulnerable firms from larger rival firms that engage in conduct designed to lessen competition helps to achieve another goal of promoting competition. Some agencies provide that their jurisdiction's unilateral conduct objectives are consistent with one another and do not need to be balanced or reconciled primarily because a single approach, ensuring an effective competitive process, takes primacy. For example, the Turkish Competition Authority notes that the fundamental objective of its unilateral conduct rules is the protection of competition itself, and therefore the protection of the competitive process. According to this agency, a sound competitive process is expected to generate the following complementary objectives: enhance efficiency (both allocative and dynamic); increase consumer welfare by improving quality and reducing prices of goods; and protect small enterprises by eliminating barriers to entry. The Turkish Competition Authority considers that these complementary objectives involve no serious contradictions among themselves. Similarly, the Antimonopoly Committee of Ukraine recognizes benefits for the efficient functioning of the economy, undertakings, and consumers deriving from the existence of substantial competition, stating that its legislation does not contain multiple objectives.

According to the German BKartA, the protection of competition as an institution prevails as a direct goal, which has various intended effects (which may be portrayed as indirect goals), including the promotion of consumer welfare. The rationale behind this approach is that keeping markets open and enhancing consumer welfare are consistent with each other, as the former leads to the latter in the long run. The Romanian Competition Council considers that the two explicit objectives of its unilateral conduct rules, namely promoting the competitive principle and protecting consumer welfare, "are linked and interdependent concepts" so that, in promoting the competitive principle, the assessment of unilateral conduct is driven by the protection of consumers' welfare. The Hungarian Competition Authority provides that one of the main difficulties in addressing the objectives of competition and unilateral conduct rules is not so much in interpreting the doctrines, but rather in establishing a direct connection between the various statutory objectives and the relevant case details when assessing the case.

Certain jurisdictions, however, identify the need to reconcile multiple objectives of their unilateral conduct rules. The Canadian Federal Court of Appeal, for example, states that the Competition Act's multiple stated objectives cannot always "be served at the same time, nor are all necessarily consistent," and that the statute must be looked at as a whole to determine whether one objective is to be preferred over another.[31] The Bulgarian BCPC, a recently liberalized economy, identifies the practical complexity involved in applying unilateral conduct objectives with regard to conduct occurring in regulated sectors, which are subject to ex ante regulation. A similar concern is echoed by the South African Tribunal, which states that among the greatest difficulties competition authorities face is contending with abuse of dominance provisions and the jurisdictional uncertainty that arises in regulated sectors: "the optimal solution of this problem is to amend the statutes governing the regulated sectors so as to unambiguously locate jurisdiction over anti-competitive conduct with the competition authorities."

2. The complementarity of unilateral conduct objectives and intellectual property goals

Whereas the questionnaire referred to intellectual property rights within the context of exceptions and exemptions, addressed below in Section III.3 of this chapter, ten agency respondents[32] addressed the relationship between the goals of intellectual property and unilateral conduct objectives more generally, with five[33] suggesting that antitrust and intellectual property rules promote consistent goals (such as consumer welfare and efficiency) and are

[31] Superior Propane, Federal Court of Appeal, Canada (2001).
[32] Those of Bulgaria, Canada, Israel, Italy, Korea, Japan, Mexico, New Zealand, United Kingdom, and United States.
[33] Those of Israel, Italy, Mexico, New Zealand, and United States.

complementary. Respondents reflecting the view that competition law and intellectual property should not conflict include Israel, which stated that "competition law and intellectual property law are complementary regimes that are not inherently in conflict." The U.S. antitrust agencies provide that "antitrust and intellectual property are properly perceived as complementary bodies of law that work together to bring innovation to consumers." Similarly, New Zealand's agency states that the "protection of intellectual property rights is generally consistent with the goals of competition in encouraging rivalry in innovation." Moreover, the Italian agency provides that the "tension between IPR and antitrust provisions, however, is only apparent."[34] While emphasizing the importance of providing incentives for investment and innovation through competition and intellectual property rights, the EC also tends to balance these advantages against the risk of possible long-term harm in the event of market foreclosure, which can be the case, e.g., when intellectual property laws are applied improperly.

Professor Drexl's (NGA Germany) response described the general idea, expressed by both the EU and U.S. antitrust agencies, that "competition policy and IP laws share the common goal of promoting dynamic competition (so-called theory of complementarity)." The Canadian and Japanese agencies further explore the relationship between intellectual property and the competitive process. Canada's CCB considers "both IP law and competition law to be necessary for a market to function efficiently," thus suggesting that intellectual property rights are an essential element for the flow of the competitive process. And the JFTC's response similarly provides that the "proper protection of intellectual property rights encourages innovation through more investment on research and development and thus promotes competition in a market, which is consistent with the objective of the AMA."

The ICC – Rill, Taladay and Dillickrath (NGA) response goes beyond complementarity, citing U.S. agency statements, in support of an integrated view of single-firm antitrust enforcement and the innovation fostered by intellectual property. "[S]trong intellectual property protection is not separate from competition principles, but rather, is an integral part of antitrust policy as a whole. Intellectual property rights should not be viewed as protecting their owners *from* competition; rather, IP rights should be seen as encouraging firms to engage *in* competition, particularly competition that involves risk and long-term investment. Properly applied, strong intellectual property protection creates the competitive environment necessary to permit firms to

[34] A few responses noted the lack of sufficient rules and law that directly address the relationship between competition law and intellectual property. See Germany Bundeskartellamt's response "no statutory provision that defines the relation between the exercise of IPRs and unilateral conduct rules;" The CCB response noting that although the matter is addressed under specific enforcement guidelines as well as S. 79(5) of Canada's Competition Act, there is an "absence of meaningful jurisprudence dealing with the interface between competition law and intellectual property."

profit from their inventions, which encourages innovation effort and improves dynamic efficiency" [italics in original];" and "antitrust standards that govern unilateral conduct must not deter competition, efficiency, or innovation."[35]

Other respondents commented on the relationship between competition and innovation. For example, the Turkish agency notes that a competitive regime is deemed to lead to an "emergence of technological innovations and developments," and the UK agencies' response cites a Department of Trade and Industry White Paper,[36] which recognizes that "strong competition regimes…encourage innovation," and its Market Power Guidelines, which recognize that slowing innovation is one of the ways to harm the competitive process. The U.S. agencies note that "[i]n today's dynamic marketplace, new technological improvements are constantly replacing those that came before, as competitors are driven to improve their existing products or introduce new products in order to maintain their market share." The Bulgarian agency discusses long-term and short-term innovation considerations as part of the competitive analysis.

3. A review of exemptions and exceptions in relation to these objectives

Twenty five agencies[37] identified exemptions from the application of competition rules governing unilateral conduct. This section does not provide a detailed description of all situations in which the applicability of unilateral conduct rules is subject to limitations, but rather, explores the relation, if any, between the rationales underpinning such limitations and the objectives pursued through competition law, by focusing on the most commonly cited categories of exemptions and exceptions – those concerning services of general economic interest, regulated sectors, public interest concerns, and, intellectual property rights.[38]

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[35] Thomas O. Barnett, Assistant Attorney General for Antitrust, Interoperability Between Antitrust and Intellectual Property, Presentation to the George Mason University School of Law Symposium: Managing Issues in a Global Marketplace (Sept. 13, 2006), available at http://www.usdoj.gov/atr/public/speeches/218316.pdf at 3-4; Deborah Platt Majoras, Chairman, Federal Trade Commission, The Consumer Reigns: Using Section 2 to Ensure a 'Competitive Kingdom'; Remarks at the Opening Session of the FTC/DOJ Hearings on Section 2 of the Sherman Act (June 20, 2006) available at http://www.usdoj.gov/atr/public/hearings/single_firm/docs/219108.htm.

[36] Productivity and Enterprise: A World Class Competition Regime. Cm 5233 (2001).

[37] Those of Australia, Bulgaria, Canada, Czech Republic, European Union, France, Israel, Ireland, Italy, Jamaica, Japan, Jersey, Korea, Mexico, the Netherlands, New Zealand, Pakistan, Romania, Russia, Singapore, Slovak Republic, South Africa, Switzerland, United Kingdom, and United States.

[38] Within federal or supra-national contexts, some limits to the applicability of competition law (including its rules on unilateral conduct) may stem from the separation of powers between the state and federal levels. Such exceptions, however, are not absolute, and appear to include certain limiting factors. For example, in the United States, private conduct can be exempted from federal antitrust law under the state action doctrine, if undertaken

Seven agency respondents[39] identify an exemption from unilateral conduct rules for undertakings operating services of general economic interest. For example, the Italian agency underscores that "[t]he provisions of the [Competition Act] "do not apply to undertakings which, by law are entrusted with the operation of services of general economic interest or operate in the market in a monopoly situation…in so far as this [exemption] is indispensable to perform the specific task assigned to them."

Such exemptions are deemed absolute in two jurisdictions: Singapore's CCS states that "[t]he prohibition of section 47 does not apply, where…the conduct relates to services of general economic interest;" and the Swiss agency response, notes that exemptions such as in certain "provisions…entrust[ing].., enterprises with the performance of public interest tasks" simply "take precedence over the provisions of this Act." However, in most cases, this type of exemption from unilateral conduct rules is available only to the extent that the application of the competition rules would jeopardize the performance of the specific task(s) at issue. For example, the European Commission response notes that "Art. 86(2) [of the] EC Treaty contains a limited exemption from competition rules for "undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly." This exemption applies only to the extent that application of Article 82 would "obstruct the performance, in law or in fact, of the particular tasks assigned [to these undertakings]" and "the development of trade must not be affected to such an extent as would be contrary to the interests of the Community." The European Commission and European courts have narrowly interpreted this exemption.

Eight agency respondents[40] also noted that sectoral legislation may be accompanied by rules that set out general or specific derogations from the application of competition law. Thus, in some jurisdictions, e.g., Singapore, Pakistan and the Slovak Republic, entire sectors are not formally subject to the application of unilateral conduct rules. The Jamaican agency's response states that courts have identified the primacy of sector-specific regulation over the more general competition law. In addition, the Romanian agency states that financial and security markets are exempt from competition rules to the extent that competition in these markets is subject to special regulation. In these cases, however, sectoral regulators are often required to consider competition concerns in applying the sectoral regulation. In other instances, sectoral regulation may dictate or forbid a specific behavior of the dominant undertaking or firm with substantial

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pursuant to a clearly expressed State policy and actively supervised by the State; in Australia, State or Territory legislation restricting competition is subject to a strict efficiency and indispensability test.

[39] Those of Bulgaria, European Union, Italy, Singapore, Switzerland, Slovak Republic, and United Kingdom.

[40] Those of Italy, Jamaica, New Zealand, Pakistan, Romania, Singapore, Slovak Republic, and United Kingdom.

market power, beyond that which may be required under competition law. For example, in the United Kingdom, regulated companies may be prevented from demonstrating undue preference for or discriminating against any class of persons.

In the foregoing instances, the public interest in promoting a competitive market interacts with broader – seemingly discrete - public interests promoted by sectoral regulation (e.g., responses refer to security of supply, promotion of investment, environmental protection, consumer protection, and other social concerns). The extent to which the objectives pursued by particular regulatory regimes could be pursued (or are indeed pursued in other jurisdictions) through the application of competition rules, is unclear. Some respondents suggest that a balance of interests, enshrined in the sectoral legislation, could also be accomplished through the application of general unilateral conduct rules by the competition agency. For example, in Italy, energy sector regulations allow firms investing in new liquid natural gas facilities or merchant lines to apply for an authorization of exclusive use for a substantial part of the newly generated capacity for a specified period of time. The Italian agency says that the same result could have been achieved through an effects-based application of unilateral conduct rules, with a view to ensuring the proper remuneration of investment in the infrastructure. The New Zealand agency also describes specific markets, such as the markets for telecommunication services, raw milk, and shipping services, in which the goals of industry-specific regulation are consistent with the promotion of competition and/or efficiency. However, the existence of a separate regulatory regime or even the mere provision of a specific enforcement process may also suggest that public interests other than competition are taken into consideration in these sectors.

Nine agency respondents[41] also identified public policy concerns underpinning exemptions that do not correspond to competition law or unilateral conduct objectives. The New Zealand agency, for example, cites exemptions from competition rules granted to the State pharmaceutical purchasing body, as well as to the State's tertiary education oversight body. The Czech agency notes that competition law does not apply to firms producing or trading agricultural products**.** In addition, the Israel Antitrust Authority response states that the Minister of Trade and Industry may exempt unilateral conduct from the application of competition rules, to the extent justified by foreign affairs or homeland security considerations. The Mexican agency provides that, under Mexico's constitution, certain economic activities in strategic areas such as postal services, nuclear energy, petroleum, and electric power are reserved to the State, and therefore exempt from unilateral conduct rules. According to the UK agencies' response, the

[41] Those of Australia, Czech Republic, Israel, Jamaica, Jersey, Mexico, New Zealand, Singapore, and United Kingdom.

Competition Act provides for an exceptional exclusion from its general application to the extent deemed necessary for compelling reasons of public policy, subject to an order by the Secretary of State. Section 88 of Australia's Trade Practices Act permits the ACCC to authorize anti-competitive conduct on public interest grounds.[42] The objectives underlying these public policy concerns do not appear to correspond with those identified above as guiding unilateral conduct rules.

Seven agencies[43] identified the exercise of intellectual property rights as, under certain circumstances, formally excluded from the application of competition law in general and unilateral conduct rules in particular, in order to promote innovation.[44] Several respondents noted that their jurisdictions' exemption of intellectual property rights from competition rules, is either partial or has been narrowly interpreted. Thus, the Bulgarian agency response notes that competition rules do not apply to intellectual property rights insofar as these rights are not used to restrict or distort competition. In Japan, although any conduct recognizable as an exercise of intellectual property rights is not subject to competition rules, the exemption is not considered available if the conduct is deemed to constitute an unreasonable restraint of trade.

This analysis suggests that, in some jurisdictions, the objectives underlying some of the exemptions and exceptions from unilateral conduct rules may not conflict directly with the unilateral conduct rules themselves, and therefore may not be antithetical to the goals of competition law. In other cases, the exemptions reflect public policy objectives that cannot easily be reconciled with the promotion of competition. In these cases, the promotion of competition may be balanced against competing public interests. This raises the question, noted by the Bulgarian and South African agencies in Section III.1 of this chapter, as to which public body is better suited to the task of balancing such interests, and what is the likely impact on competition policy in general and unilateral conduct in particular.

[42] In these cases, however, the possible interplay with the objectives pursued through unilateral conduct rules are assessed with reference to the specific instances when such power is actually exercised.
[43] Those of Australia, Bulgaria, Canada, Jamaica, Japan, Korea, and Russia.
[44] See section III.2 of this Chapter for a discussion of the relationship among these factors.

IV. The Characteristics of an Effective Competitive Process within the Context of Unilateral Conduct Rules

The review and analysis provided in Section I revealed that all respondents identified ensuring an effective competitive process as a crucial element of their unilateral conduct rules. In describing the concept of ensuring an effective competitive process, some respondents identified two critical characteristics of this concept: that the process is dynamic and self-initiating. Since these characteristics were not directly addressed in the questionnaire, respondents did not all assess these concepts in the same manner. Nonetheless, given the degree to which respondents referred to these factors, either explicitly or implicitly, the following discussion describes the dynamic and self-initiating characteristics mentioned in the responses.

1. The competitive process as dynamic in nature

Of the thirty-two respondent agencies that deem ensuring an effective competitive process to be a significant factor of their unilateral conduct rules, ten[45] focus on fostering a competitive *process* that is dynamic in nature. Pursuant to this dynamic approach, unilateral conduct rules and their enforcement aim to ensure an effective competitive process rather than ensure a particular market outcome.

In this regard, certain responses refer to a competitive *process* rather than a static competitive market organization. For example, the New Zealand agency notes that "competition is a process rather than a situation."[46] The BKartA response notes that "protecting competition as an institution means keeping market processes open" and that "[c]ase examination focuses on the competitive process as such." Similarly, the PERA (NGA Italy) response states that the "Italian competition law system is founded on the sole objective to protect the competitive process." The ICC – Tadmor and Gideoni response states that it is clear from Israel's competition law the "protection of competition and the competitive process" is a central objective thereof.

Other responses provide specific references to a "dynamic" process. The Netherlands agency's response states that "[c]ompetition policy should not solely concentrate on short term

[45] Those of Bulgaria, Canada, Chile, Germany, Mexico, Netherlands, Singapore, Turkey, United Kingdom, and United States.

[46] Citing Clear Communications Ltd. v. Sky Network Television (1997) (which cites Queensland Co-operative Milling Association Limited: Re Defiance Holdings Limited (1976).

price/output issues but should also be carried out with a dynamic perspective taking due account of innovation." The CCB's response, in citing the Canadian *Nielsen* case and the explanatory guide in support of the legislation, notes that "[i]n a healthy, dynamic economy, goods and services are supplied by the firms which can produce them most efficiently and adapt to the ever-changing demands of the marketplace." The UK agencies' response notes that "strong competition regimes encourage open dynamic markets." The Turkish authority's response describes the Turkish Constitution's aim to ensure the "functioning of the markets," and highlights the need for a "dynamic competitive process [to] exist[] between competing undertakings."

A complementary discussion of these dynamic notions follows, in Chapter Two of the report, which addresses the assessment of dominance.

2. The competitive process as a self-initiating process

Four agency respondents[47] can be interpreted as characterizing the competitive process as a self-initiating process that, barring impediments, evolves on its own accord. This premise is identified by agency respondents in two ways: first, through their acknowledged reticence to intervene in the market through competition law enforcement unless clear anticompetitive effects are recognized and, second, by their underscoring of the difference between antitrust enforcement and market regulation.

The European Commission's response, reflects this first group, stating that "only abuses of a dominant position with serious effects are investigated through to a final Commission decision" and that the "exercise of market power must be assessed essentially on the basis of its effects in the market." The Hungarian agency's response describes the risk of disturbing spontaneous market processes as justifying a reluctance to intervene in instances in which it is not entirely clear whether the investigated conduct is anticompetitive. These responses suggest that competition agency intervention is called for only in cases in which the competitive process is obstructed, implying that in all other instances, the competitive process is to evolve on its own initiative.

Other responses that reflect the self-initiating perception of the competitive process are those suggesting that competition agencies engage in a process that is different from market regulation.

[47] Those of European Union, Germany, Hungary, Ireland, and United States.

From this recognized difference between unilateral conduct enforcement and regulation, one may infer that unilateral conduct enforcement does not seek an ongoing regulation of competition, but rather aims at limited interventions in cases in which the spontaneously-occurring competitive process falters as a result of anti-competitive unilateral conduct. For example, the Irish agency's response provides that "promoting competition is also defined as an objective in the statute of a number of the sectoral regulators … However, while [the] sectoral regulator is responsible for the ex-ante implementation of applicable regulatory measures, the Competition Authority is presently the sole agency in the State with powers to enforce competition law in respect of, inter alia, alleged abuse of dominance." The PERA (NGA Italy) response notes that the Italian competition agency "is required to hear the consultative [opinion]…of the competent regulatory agencies. Such non binding advice, however, is only intended to provide the Italian Competition Authority with an assessment of highly technical issues that are relevant for the interpretation of the market behavior of the investigated firm. Hence such opinion does not actually represent an obstacle or a restriction [of] the Italian Competition Authority's ability to pursue its policy objectives with respect to unilateral conducts."

V. Other Commonly Identified Factors Underlying these Objectives and their Application

Part A of the questionnaire requested information on the role, if any, of non-competition influences on unilateral conduct objectives,[48] and on institutional features that affect an agency's ability to achieve the objectives of its jurisdiction's unilateral conduct rules.[49] It also inquired about the balancing of over and under-deterrence risks within the context of the objectives of unilateral conduct rules.[50] This section distills common themes from the responses on these issues, and draws on the responses to highlight the perceived need for transparency and predictability in unilateral conduct review.

[48] Question 2: "Are non-competition influences (such as promotion of industrial policy or distributive welfare) incorporated in these objectives? Please describe any such influences."

[49] Question 8: "Are there institutional features (e.g., the possibility for a ministry to overrule competition agency decisions or the requirement the competition agency consult with other governmental agencies) that affect your agency's ability to achieve the objectives of the unilateral conduct rules? If so, please explain."

[50] Question 4: "How has your jurisdiction balanced the risks associated with over-deterrence (deterring efficient, pro-competitive conduct as a result of excessive intervention) with the risks associated with under-deterrence (permitting anti-competitive conduct as a result of too little enforcement) in choosing its objectives for unilateral conduct rules? Is this choice affected by the nature of your economy?"

1. The role of non-competition objectives

This section summarizes the responses to the question addressing the role of non-competition objectives in unilateral conduct rules. As reflected by the broad range of goals of unilateral conduct provisions identified in Sections I and II of this chapter, respondents hold different views on whether, and to what extent, non-competition objectives play a role in unilateral conduct policy.

Thirteen member agencies[51] state that their unilateral conduct provisions are not intended to pursue non-competition goals (*i.e.*, they view the objectives of unilateral conduct rules as independent from non-competition goals). For example, the U.S. agencies' response explains that promotion of consumer welfare and the organization of the free market economy are the only goals of its antitrust laws, including their unilateral conduct provisions, with other economic or social objectives better pursued by other instruments. In some jurisdictions the competition statute might refer to a broader set of goals, but in practice, agency unilateral conduct decisions focus on competition goals. For example, the Brazilian agencies explain that the competition statute's objectives include the principle of free enterprise and the "social role of property," but that that in the great majority of cases a consumer-interest standard will be used to decide cases. Consistent with this approach, there appears to be no support for the notion that industrial policy should be taken into account as part of unilateral conduct analysis. As the European Commission's response explains, while competition can ultimately foster competitiveness and economic growth, it should not be used to protect or support specific firms or industries.

Eight agencies,[52] however, explain that certain non-competition goals may be taken into account in deciding unilateral conduct cases. Many such cases are considered exceptional, and there appears to be a public-interest test that can be applied in these cases. For example, in Switzerland, the Federal Council (Swiss Government) exceptionally authorizes practices of dominant firms on public interest grounds after the competition authority has found that the practices are anticompetitive. In Australia, the ACCC can authorize conduct when the benefits to the public outweigh its anti-competitive detriment, and non-competition influences may be considered in deciding whether or not to grant an authorization. In addition, the Israel and UK

[51] Those of Brazil, Bulgaria, Canada, Chile, Germany, Italy, Japan, Mexico, Russia, Slovak Republic, Ukraine, United Kingdom, and United States. As discussed below, however, there may not be a complete agreement among these respondents as to the definition of competition and non-competition goals.

[52] Those of Australia, France, Israel, Jamaica, Korea, Pakistan, South Africa, and Switzerland.

agency responses provide that public interest concerns may, in exceptional circumstances, influence the outcome of unilateral conduct cases. The French agencies also report that non-competition objectives, including enhancing the competitiveness of SMEs, may be taken into account in unilateral conduct cases although they emphasize that competition-related goals generally prevail in practice.

Divergence on this matter may be partially attributable to the lack of consensus among respondents on the distinguishing line between competition goals and non-competition goals. The U.S. agencies' response cites Areeda & Hovenkamp for the proposition that only welfare and efficiency concerns should be considered competition goals -- "[t]oday it seems clear that the general goal of the antitrust laws is to promote 'competition' as the economist understands that term. Thus we say that the principal objective of antitrust policy is to maximize consumer welfare … while … permitting [firms] to take advantage of every available economy that comes from…production efficiencies, or from innovation." But there are different views as to whether the notion of "competition goals" should encompass, in particular, the goals of protecting fair competition and of protecting small firms. For example, the protection of small firms was mentioned by the agencies of Germany (explicitly) and Australia (implicitly) as a competition goal that unilateral conduct provisions are designed to protect. Whereas, the JFTC considers that its antitrust laws pursue competition goals, which include the promotion of fair competition. Conversely, the Mexican agency, which also confirms that its antitrust laws pursue only competition objectives, emphasizes that "fair competition" is a non-competition goal and therefore is not part of its unilateral conduct provisions.

2. Independent decision making

In assessing institutional factors that were considered to affect the agency's ability to achieve its unilateral conduct objectives,[53] respondents addressed the issue of independent decision making, namely, the independence of the competition agency to achieve the objectives of its jurisdiction's unilateral conduct rules. Within the context of unilateral conduct rules, the concept of independent decision-making received broad support, with nineteen agencies identifying it as an important aspect of their review process.[54] While decisions are subject to judicial review, there is virtually no interference from other government institutions in the process that leads to the adoption of a decision by the competition authority. There are very few exceptions to this general rule, and these typically involve situations in which a government official can, under exceptional circumstances, intervene on public interest, or similar non-competition, grounds. The UK agencies' response, for example, describes a situation in which the Secretary of State and Industry may intervene in market investigations on public interest grounds, while emphasizing the exceptional nature of such interventions. Similarly, Israel's agency explains that, theoretically, the Minister of Trade and Industry may, following consultations with a parliamentary committee, exempt conduct from antitrust enforcement on foreign policy or security grounds.[55] Thus, whereas only a limited number of respondents acknowledge a role for non-competition influences on unilateral conduct objectives, a significant number of respondents regard independent decision making as important to evaluating the objectives of their jurisdiction's unilateral conduct rules.

3. Preliminary practical implications of the responses on objectives

The last sub-section of this chapter takes up specific aspects in ICN member replies that considered how the pursuit of the unilateral conduct objectives can also create challenges to enforcement practice. Many replies explored these issues in light of the policy goals of promoting consumer welfare and enhancing efficiency; how the pursuit of these goals requires a careful balance of the risks of over-deterrence and under-deterrence; how these risks can be

[53] See n.49 above.
[54] This includes agencies from: Australia, Bulgaria, Canada, Czech Republic, European Commission, France, Germany, Hungary, Ireland, Italy, Japan, Jersey, Korea, Latvia, New Zealand, Russia, Slovak Republic, Sweden and Turkey.
[55] This authority has never been exercised.

affected by a case-by-case approach; and how, in turn, such an approach places a premium on creating transparent and predictable enforcement standards.

This section goes beyond a mere description of policy goals to start a preliminary discussion of how policy goals and enforcement practice can be interrelated. This is only an initial illustration of this relationship, based on valuable information provided by the respondents.

A. Avoiding over-deterrence and under-deterrence

In assessing whether jurisdictions balance the risks associated with over- and under-deterrence in choosing the objectives of their unilateral conduct rules,[56] most agencies addressed over- and under-deterrence with respect to enforcement of these rules, as either discouraging firms from pursing pro-competitive conduct or failing to prevent them from engaging in conduct that harms consumers, respectively. None of the respondents suggested that the objectives themselves should be adjusted to better balance these risks. Five agency respondents[57] noted that objectives are not expressly considered when balancing the risks associated with over and under deterrence.

Most respondents[58] identified the risk of over- or under-deterrence in terms of agency intervention, noting that erroneous interventions as well as erroneous non-interventions will impose costs on society. For example, the U.S. agencies provide that "it is often difficult to distinguish illicit conduct from legitimate competition, and that a mistake can result in costs that extend far beyond the particular case by chilling the legitimate conduct of other firms."

A number of respondents[59] address the balance between over- and under-deterrence. For example, the ACCC indicates that "[i]n formulating section 46 of the TPA, an attempt has been made to balance the risks associated with over-deterrence against the risks associated with under-deterrence." Similarly, the JFTC states that it has undertaken efforts "to avoid the risks associated with both over-deterrence and under-deterrence when enforcing unilateral conduct rules, and will continue to try to strike a balance in order to avoid both of the problems." In addition, the UK agencies' response notes that the OFT "seeks to optimize its level of

[56] For example, the Romanian agency states that " … the over-deterring or under-deterring effects cannot be brought about by the objectives set." The CCB response states that "general objectives in the Act have little application to the possibility of over- or under-deterrence".
[57] From Canada, European Union, Hungary, Romania, and Netherlands.
[58] From Bulgaria, Czech Republic, European Union, France, Germany, Hungary, Jamaica, Japan, Jersey, Korea, Mexico, New Zealand, Pakistan, Russia, Singapore, Slovak Republic, Switzerland, Turkey, Ukraine, United Kingdom, and United States.
[59] From Australia, Japan, Russia, Turkey and United Kingdom.

intervention … recognizing that there are costs associated with both inappropriate interventions and non-interventions."

Some agency respondents[60] expanded on their view as to how to best serve the purpose of avoiding over- and under-deterrence. This is expressed, for example, in the European Commission's reply, which states that "[e]nforcement should focus on real competition problems, that is, behaviour that has actual or likely restrictive effects on the market, and harms consumers."[61] The UK agencies' response notes that one of the reasons for which the OFT "favours an effects-based approach is that the need to establish a plausible case that the alleged abuse is likely to result (or has resulted in) consumer harm serves as a check against inappropriate interventions (and the costs associated with deterring welfare-enhancing business practices)." Similarly, the Irish competition authority explains that its decision to adopt an effects-based approach to the analysis of competition issues in general, and unilateral conduct in particular, is "influenced considerably by recognition of the danger that a form-based/presumptions approach could discourage pro-competitive and pro-consumer conduct by firms." In contrast, the BKartA holds that enforcement may be compromised if the actual effects of the abusive behavior must be proved, highlighting that the survival of efficient competitors on the market may demand quick enforcement action that would be impeded by the necessity of proving such effects. Five of these agencies[62] also emphasized that a robust assessment of whether a firm has significant market power can be an important analytical step that may reduce the risk of over-deterrence. For example, the New Zealand agency explains that one step to reduce false positives in the enforcement of unilateral conduct rules is to apply them only "to persons that hold the requisite substantial degree of market power."[63]

The Hungarian Competition Authority explains that it is more concerned with possible over-deterrence, and therefore that it "would rather risk considering the behaviour in a borderline case competitive (even if it is anticompetitive), than to risk considering it anticompetitive (even if it is competitive), to avoid unnecessary interventions in the market processes." It adds a qualification by explaining that its approach to unilateral conduct depends on the extent to which the competitive state of a particular industry is the result of market developments rather than of regulatory or other state intervention. This response highlights that, in recently liberalized markets, it can be important to take a "more activist" role in dealing with an incumbent firm's

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[60] Those of Brazil, Canada, Chile, France, European Union, Ireland, Italy, Jamaica, Jersey, Latvia, Mexico, Romania, Singapore, South Africa, Turkey, United Kingdom, and United States.

[61] The European Union agency response notes that, while the majority of its unilateral conduct cases involve exclusionary practices, it also addresses exploitative practices.

[62] From the European Union, Latvia, Mexico, New Zealand and Ukraine.

[63] This is addressed in more detail, in the following chapter on the assessment of dominance.

potentially anti-competitive behavior. Bulgaria, also addressed under- and over-deterrence in relation to liberalized sectors, noting that the concurrent application of sectoral regulation and unilateral conduct rules raises a concern of over-deterrence. "When tackling with such issues the CPC considers the objectives of the unilateral conduct rules and whether the unilateral conduct at hand may have detrimental effect on competition. It is only under these circumstances that [the] CPC is obliged to intervene and redress competition in the market."

Some contributions highlighted concerns about the risk of under-deterrence.[64] Germany's BKartA, for example, states that "there is a risk of under-deterrence because competition authorities can only investigate a limited number of cases" and that this risk is a result of the "factual complexity that is imm[i]nent to such cases and the high requirements for establishing a violation of unilateral conduct rules." A similar concern, that a detailed review in every case may result in under-deterrence, is raised in the Russian agency's reply, which explains that the Russian competition law relies on several *per se* prohibitions in unilateral conduct cases as a means to avoid under-deterrence.

B. The importance of transparency and predictability in unilateral conduct cases

The New Zealand agency's reply to the issue of over- and under-deterrence highlighted that good enforcement norms should balance not only the risks of over- an under-deterrence, but also the need to avoid high transactions costs and uncertainty in compliance and enforcement. A similar idea is expressed in the Italian agency's reply, which states that "[e]conomic analysis is becoming more and more sophisticated, but at the same time companies need simple rules in order to be able to follow them ex-ante. We believe that this is the most difficult trade off to solve." As these contributions suggest, sound unilateral conduct rules and enforcement norms should strive to minimize error costs, both from over-deterrence as well as under-deterrence, as well as the costs of compliance and enforcement. Agencies should thus be concerned not only about correct outcomes that are consistent with applicable policy goals, but also, and even equally, by rules that are transparent and outcomes that are predictable.

Creating an enforcement environment with a high degree of transparency and predictability appears particularly important for jurisdictions that pursue multiple policy goals as part of their unilateral conduct provisions. As discussed in greater detail in Section III.1 of this

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[64] From Germany, Mexico, Pakistan, and Russia.

chapter, some jurisdictions find that the diverse policy goals they consider in unilateral conduct cases are not necessarily incompatible. However, rules designed to protect SMEs, to protect individual freedom to participate in markets, or to promote fairness, for example, could sometimes lead to different outcomes in unilateral conduct cases than rules that focus only on consumer welfare and efficiency goals. In these circumstances, trade-offs and balancing between policy goals will be required, which will tend to cause the decision-making process and enforcement standards to be less predictable. This, in turn, puts a premium on efforts by a competition authority to enhance transparency and predictability by providing appropriate guidance as to the relative importance of various policy goals, including which policy goal takes priority in case of inconsistencies, and the point at which various policy goals are to be taken into consideration in the decision-making process.

Enhancing predictability and transparency is considered important not only in jurisdictions that pursue a multiplicity of goals, but also in enforcement regimes that rely on an effects-based, case-by-case approach in unilateral conduct cases. The above statement by Italy about the trade-off between more economic analysis and predictability expresses this point. The views of Australia and New Zealand (discussed in Section II.1 of this chapter) that liability in unilateral conduct cases should be based on the purpose of the conduct, rather than its effects, also illustrate the concern about the predictability of effects-based rules.

The differences in policy goals among ICN member jurisdictions also call for greater transparency and predictability of agency enforcement practices, including with respect to the balancing of objectives. Firms with significant market power that are engaged in international activities find that policy goals that prevail in one jurisdiction are not necessarily equally important in other jurisdictions. Predictable and transparent policy objectives and enforcement standards in a large number of jurisdictions will enable firms to better anticipate the rules to which they are subject and adjust their conduct accordingly. Greater transparency will, in turn, also enable jurisdictions to learn from each other's ideas and experiences, thus preparing the ground for greater convergence in the area of unilateral conduct rules and objectives.

Conclusion

Thirty-two of thirty-three responses identified ensuring an effective competitive process (characterized as an objective in its own right, a means to achieve other desirable goals, or both an objective and a means to achieve such goals) as fundamental to their unilateral conduct rules. Among the other nine objectives that respondents identified as goals in and of themselves, the economically-based principles of promoting consumer welfare and enhancing efficiency were the most commonly-cited, with thirty of the thirty-three agency respondents citing the former, and twenty the latter. Nineteen agencies named both the promotion of consumer welfare and of efficiency as objectives of their unilateral conduct rules. Other objectives were cited by a smaller numbers of respondents, although often considered important by these respondents.

Virtually all respondents cited more than one objective. Other objectives cited included: ensuring economic freedom; ensuring a level playing field for small and medium-sized enterprises; promoting fairness and equality; promoting consumer choice; achieving market integration; facilitating privatization and market liberalization; and, promoting competitiveness in international markets.

An effective competitive process was generally seen as a dynamic, self-initiating market phenomenon that requires competition agency intervention only when obstructed. The objectives of intellectual property and unilateral conduct rules were viewed as consistent by most respondents. Approximately three quarters of respondents identified exemptions from their unilateral conduct rules, based on public policy considerations that may or may not be reconcilable with the promotion of competition. The responses also highlighted the need to avoid over and under deterrence, the need for antitrust agencies to make decisions independently, and the importance of transparency and predictability in unilateral conduct review.

Overall, the responses indicate that ensuring an effective competitive process is a core concept embraced by virtually all jurisdictions. In addition, a significant number of respondents relied on the economic concepts of consumer welfare and enhancing efficiency. This suggests important similarities as to the central objectives of their unilateral conduct rules.

Chapter Two: Assessment of Dominance/Substantial Market Power

Introduction

This section of the report addresses the concept of dominance/substantial market power ('dominance/SMP' hereafter) in the context of unilateral conduct laws.[65] The Working Group decided to address this topic in its first year of operation due to the great importance of market power analysis for unilateral conduct law enforcement. The section is based on the responses to part B of the working group's questionnaire provided by 34 ICN member agencies and 13 non-governmental advisors and organizations. These responses cover a total of 35 jurisdictions.

Unilateral conduct laws address anticompetitive conduct entered into by an individual firm. Making dominance/SMP a prerequisite for intervention under unilateral conduct laws serves as a filter for intervention against specific anti-competitive conduct. Part I of this chapter of the report discusses the various legal definitions of single-firm dominance/SMP found across jurisdictions. Part II comprises the main body of this section and discusses how the responding agencies assess single-firm dominance/SMP in practice, including assessing constraints stemming from actual competitors, market entrants/potential competitors and/or customers as well as the use of presumptions and safe harbors and peculiarities of market power assessment in small and isolated economies. Part III provides a brief overview of unilateral conduct laws in some jurisdictions in which intervention is also possible in a market without a pre-existing dominant position. The section concludes with some key insights that can be drawn from the questionnaire responses.

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[65] Throughout the report, the terms "dominance" and "substantial market power" are used interchangeably.

I. Legal definition of single-firm dominance/substantial market power

Unilateral conduct laws address anticompetitive conduct of firms with a dominant market position or substantial market power. It is the specific anti-competitive conduct that is condemned by the competition law, not the possession of substantial market power as such. Indeed, no responding jurisdiction indicated that its unilateral conduct laws prohibit the mere possession of dominance/SMP or its creation through competition on the merits. Making dominance/SMP a prerequisite for intervention under competition law thus serves as a "filter": it is presumed that the same conduct either cannot be entered into by a non-dominant firm, or would not harm competition if exercised by such a firm.[66]

Unilateral conduct laws, case law or competition authority policy statements define the terms "dominant market position", "substantial market power" or the like. These definitions are referred to as "legal definition" in the context of this report.[67] In most jurisdictions this definition also applies to several companies possessing market power jointly ("collective dominance"). The present report, however, only deals with single-firm dominance. Each jurisdiction has chosen its own specific wording for the legal definition. Despite the great diversity in phrasing, the definitions used in jurisdictions that are covered by questionnaire responses revealed two basic types of definitions: behavioral and structural. To put this "classification" into perspective, it should be noted, however, that the legal definition of dominance/SMP does not necessarily determine a certain dominance/SMP assessment approach or method. A jurisdiction that has a behavioral definition in its law may, in practice, treat market shares as determinative, and vice-versa.

1. Behavioral definition

Twenty-eight of the jurisdictions covered by questionnaire responses have definitions for dominance/substantial market power that can be considered to fall within a category of 'behavioral definitions'. In its broadest sense, behavioral definitions share a focus on a firm's

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[66] It should be noted that in some jurisdictions intervention is possible either at an earlier stage (when substantial market power is created) or generally below the dominance/SMP threshold. For more details see Section 3 of this Chapter, below.

[67] It should be noted that agency policy statements typically have a very different legal status than the statute and case law have. The term "legal definition" is used here to highlight the distinction between dominance/SMP definition and dominance/SMP assessment.

appreciable freedom from competitive constraints or ability to act in ways that a competitively constrained firm could not. While the general focus is similar, there are some differences in the specific language used.

Very often – mostly throughout Europe - the concept of relative freedom from competitive pressures/constraints is expressed by "independence" from such constraints. For example, in Jersey "the essence of dominance is the power to behave independently of competitive pressures." In France, a dominant position is defined as "the ability for a firm to behave to an appreciable extent independently of its competitors and customers." The European Court has defined dominance under Article 82 EC as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers."[68]

Other behavioral definitions refer more directly to the (price-raising) effects of market power without using the term "independence." For example, in Canada, market power is "the ability to profitably set prices above competitive levels for a considerable period of time". The United States agencies' response defines substantial market power as the "ability to profitably raise prices substantially above the competitive level and to persist in doing so for a significant period of time without erosion by new entry or expansion" of incumbents.[69] In Japan, to restrain competition substantially means to "bring about a state in which competition itself has significantly decreased and a situation has been created in which a specific firm or a group of firms can control the market by determining price, quality, volume, and various other conditions with some latitude of its or their own volition."[70] Yet in other jurisdictions, for example in the Australian case law[71], the definition includes - among other elements - also the ability to engage in exclusionary practices.

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[68] See case 27/76 United Brands v European Commission [1978] ECR 207.

[69] AD/SAT v. Associated Press, 181 F.3d 216, 227 (2d Cir. 1999).

[70] Toho and Shin-Toho Co., Ltd. Case, decision by Tokyo High Court on December 9, 1953

[71] In *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* it was held that market power "may be manifested by practices directed at excluding competition such as exclusive dealing, tying arrangements, predatory pricing or refusing to deal. […] The ability to engage persistently in these practices may be as indicative of market power as the ability to influence prices." Similarly, in South Africa, market power is defined as "the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customer or suppliers".

2. Structural definition

Pursuant to the "structural definition", dominance/SMP is identified primarily or exclusively by an established market share threshold that may allow for possible situation-specific deviations. The structural definition can be found in 5 jurisdictions covered by questionnaire responses.[72] For example, in Israel, a firm possessing more than 50% market share is deemed to be a monopoly, and thus subject to both substantive and procedural rules concerning monopolies, regardless of its *de facto* market power. This type of definition may be called mainly structural, since market shares (of the market leader or several market leading firms) are emphasized as the core characteristic of dominance/substantial market power and are used for defining it.

Whereas there are some examples that can easily be identified as either behavioral or structural, there are also several examples that include both aspects in the definition, with varying emphasis. The new Russian antitrust legislation can serve as an example of a behavioral definition which includes also structural aspects. Though dominance is defined as a market position of a company enabling it "to have decisive impact on the general conditions of commodity circulation in the relevant commodity market and (or) to remove other economic entities from this commodity market and (or) to impede access to this commodity market for the other economic entities," the legal definition is also specified in terms of market share. A structural definition which includes also behavioral elements can be found in South Africa, where a firm is deemed to be dominant in a market if it has at least 45% of that market, or if it has the power "to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customer or suppliers".

3. Durability of market power

Seven of the jurisdictions[73] covered by questionnaire responses include some notion of durability of market power in their definition. For example, in Canada, the courts have defined market power as the ability to profitably set prices above competitive levels for a considerable period of time. In its guidelines, the Canadian Competition Bureau interprets "a considerable period of time" to represent one year. Similarly, the U.S. and EC definitions refer to a

[72] These are: Brazil, Israel, Latvia, South Africa, Ukraine.
[73] These are: Canada, European Commission, Ireland, Latvia, Netherlands, New Zealand, USA.

"significant period of time" without quantifying it. In Latvia, the dominance definition refers – *inter alia* - to the ability of the firm to "restrict or distort competition in any relevant market for a sufficient length of time".

4. Trends and convergence

Among the jurisdictions covered by responses the behavioral type of definition prevails and tends to be adopted by more jurisdictions. The responses from Latvia and Ukraine indicate that they are transitioning from a structural to a behavioral definition. A key advantage of the behavioral definition is that it better reflects dominance/SMP assessment being a multi-facetted analysis that reaches well beyond market shares. While the use of behavioral and structural definitions imply different breadth and detail of analysis, the definition used does not appear to necessarily affect the assessment practice of specific jurisdictions directly.

II. Assessing single-firm dominance/substantial market power

1. The need for a comprehensive consideration of factors

In all jurisdictions covered by questionnaire responses a comprehensive set of criteria is used to assess dominance/SMP. More than 20 specific factors used in individual jurisdictions have been mentioned in the questionnaire responses.[74] In particular, the vast majority confirmed the use the criteria specifically listed in the questionnaire (see Annex B for details):

Which of the following criteria do you use?	Yes	No
- Market share of the firm and its competitors	32	0
- Market position and market behavior of competitors	32	0
- Barriers to entry or expansion	32	0
- Buyer power	32	0
- Economies of scale and scope/network effects	32	0
- Access to upstream markets/vertical integration	32	0
- Durability of market power	30	2
- Market maturity/vitality	30	2

[74] See section II.6 of this Chapter for more details.

- Access to essential facilities	29	3
- Financial resources of the firm and its competitors	23	9
- High prices (at absolute or comparative level)	23	9
- Profits of the firm	17	15

In an open-ended question, respondents were also asked which criteria they view as the most important criteria to assess single-firm dominance/substantial market power. The following criteria were mentioned in respect of more than two jurisdictions (see Annex C for details):

	Mentions
- Market share of the firm and its competitors	27
- Barriers to entry or expansion	24
- Market position and market behavior of competitors	11
- Buyer power	5
- Durability of market power	4

Many respondents noted that the relative importance varies case-by-case, and agencies from three jurisdictions therefore did not specify "most important" criteria.[75]

Most responses noted that the assessment of market power generally starts with defining the relevant antitrust markets.[76] The exercise of defining markets provides a useful and normally indispensable analytical framework in which to organize the assessment of competitive constraints. Accordingly, almost all jurisdictions covered by questionnaire responses require the market to be defined in order to find dominance/SMP. Only in Chile and Hungary competition law does not specifically require a definition of the relevant market, but even in those jurisdictions the relevant market is always defined in practice. Market definition is closely linked to market power analysis in that both analytical steps typically make use to some extent of the same facts and methods. Despite these links, market definition is not dealt with in the context of this report.[77]

After the market has been defined, it is possible to compile market shares. Market shares are used as an initial indicator or starting point for the market power analysis. However, the analysis does not stop at market shares and instead considers all factors that may be relevant for the assessment of dominance/substantial market power. A mainstream approach to structure the

[75] Agencies from Australia, Japan and UK.

[76] However, this sequence universally found in agency or court decisions is normally not strictly mirrored by the investigation's sequence. During the course of an investigation, market definition and market power assessment is typically an integrated and iterative process.

[77] Market definition in the context of merger control has been addressed to some extent in the ICN Merger Guidelines Workbook (2006), though care must be taken in applying these principles in the unilateral conduct area.

analysis of market power is to look at the different factors that may constrain the exercise of market power. Such constraints typically stem from actual competitors (see Sections III.2. and III.3.), market entrants/potential competitors (III.4.) and/or customers (III.5.) of this chapter, respectively). Those questionnaire responses that provided relevant details as well as agencies' market power guidelines revealed striking commonalities on how the constraints are assessed by competition authorities in practice.

2. Current and past market shares of the firm and its competitors

A. Calculation and analysis of current and past market shares

Absolute and relative market shares are generally used as the starting point for assessing market power. Market shares provide information about the firm's past market success in relation to its competitors. Market shares provide useful first indications of the market structure and of the competitive importance of various undertakings active on the market. In most markets, an enterprise's absolute market share is an important factor that allows for initial indications about its market power. However, market shares alone do not determine whether an undertaking is dominant or has substantial market power. Therefore, these initial indications are put in perspective by other factors when making an overall assessment of the market power of the firm under investigation.

As the UK Office of Fair Trading (UK OFT) market power guidelines and the Bundeskartellamt response explain, in practice, market share, in particular for heterogeneous products, is most often defined in value terms, expressed by turnover. In certain circumstances, however, other methods of calculation such as quantities, production capacities, volume of orders, etc. can provide more or additional information or compensate for difficulties in determining the turnover. An example used by the UK OFT supposes an undertaking operating in a market where all undertakings have limited capacity (e.g. are at, or close to, full capacity and so are unable to increase output substantially). In this case, the undertaking under review could be in a stronger position than in a market where its competitors were not close to full capacity. For homogeneous products (commodities) production capacities or reserves normally represent a better indication of competitive strength than turnover data. The two agencies also provided that in markets in which products or services (e.g. durable capital goods) are purchased infrequently on the basis of long-term contracts (typically through bidding processes), the evidentiary value of past market shares is generally limited. Instead, the volume of orders and the credibility of alternative suppliers are typically more informative indicators for the current scope of action and future market success. In-house production for own use is normally not included in the calculations of market shares by these agencies. However, as part of the overall assessment, in particular of barriers to entry, in-house production may be of substantial significance as a form of potential competition.

Many responses emphasized that market share assessment is more informative if, in addition to the absolute and relative market share structure, the market share developments over a period of several years are determined and considered as well. Thus, the development of the market shares in the relevant market can be analyzed over a period of several years. This approach recognizes that competition is a dynamic process consisting of initial moves by one competitor and reactions by others to catch up with the first. The European Commission (EC) response held that if market shares have fluctuated significantly over time due to rivalry, this may be indicative of effective competition. Similarly, the French submission pointed out that significant erosion of market shares of the company under investigation may be indicative of the absence of a dominant position. Conversely, the Bulgarian Commission for Protection of Competition, for example, noted that if the market leader has been able to sustain or increase its high market shares over a sufficiently long period of time, this is an indication that it has a dominant position.

As the UK OFT market power guidelines assert, market power is generally more likely to exist if an undertaking has a persistently high market share. A high market share may suggest that the ability of the opposite side of the market to switch to other undertakings is limited and that the enterprise concerned has a relatively independent scope of action. The Czech and other responses mentioned that the difference in the size of the market share of the leading undertaking and those of its closest competitors is also relevant. The Canadian Competition Bureau noted that a firm with a high market share may be more able to exercise market power when it faces a disparate group of small rivals compared to a single larger competitor. Where dominance is found, different market share levels may reflect different degrees of dominance. For example, the Italian Autorità Garante della Concorrenza e del Mercato stated that, everything else being equal, there is a difference, in terms of market power actually exercised, between dominance established at a market share say of 40% and dominance established at say 95%.

B. Use of market share thresholds as dominance presumptions and safe harbors

Many jurisdictions use market share thresholds in order to trigger a presumption of dominance/substantial market power and/or a safe harbor. 19 of the 35 jurisdictions that were covered by questionnaire responses do so: 9 use both thresholds, another 6 use only a dominance presumption and another 4 only a safe harbor. Reasons to use such thresholds include in particular increasing enforcement efficiency by reducing investigative burden and increasing legal certainty for businesses. The main reason not to use such thresholds, cited e.g. by the Spanish Competition Tribunal, is to avoid assigning excessive weight to the market share criterion.

Both thresholds are in most jurisdictions set through the statute or through enforcement guidelines. Those responding jurisdictions which have done so have generally set their dominance/SMP presumption in the range of 33%-50% (except for Brazil which uses 20%), and their safe harbor in the range of 20%-40% (except for Korea which uses 10%). Several jurisdictions noted in their questionnaire responses that even though they did not have a dominance/SMP presumption set through the statute or guidelines, they had case law which eases the agencies' burden of proof if high market shares are present. For example, the case law of the European Courts which is also binding for the EU member states' courts and agencies as far as Article 82 EC is applied could be interpreted as setting a rebuttable dominance presumption at 50% market share.[78] Similarly, U.S. case law could be interpreted as establishing a prima facie case of monopoly power as well as safe harbours.[79]

Some jurisdictions employ several thresholds for single-firm dominance presumptions/safe harbors.[80] For example, in South Africa there is a non-rebuttable dominance presumption threshold at 45% as well as a rebuttable dominance presumption at 35%. Similarly, in Korea, there are two safe harbors. A company whose market share is 10% or less is presumed not to be a market dominant company. Alternatively, a company with annual turnover in a

[78] Judgments Hoffmann La Roche, AKZO and Wanadoo. For more details, see also responses of European NGAs and agencies.

[79] Single-firm conduct in the United States is governed by section 2 of the Sherman Act, which prohibits the acquisition or maintenance of monopoly power through the use of exclusionary conduct. The U.S. agencies' response cites a leading treatise summarizing U.S. case law: "A market share in excess of 70 percent establishes a prima facie case of monopoly power, at least with evidence of substantial barriers to entry and evidence that existing competitors could not expand output. In contrast, courts virtually never find monopoly power when market share is less than about 50 percent."

[80] Also, many jurisdictions have a presumption for collective dominance which refers to the sum of the market shares of several companies. Please note that collective dominance is outside the scope of this report.

particular business less than 1 billion Won is presumed not to be dominant. A company that satisfies either of the two requirements falls under the safe harbor.

The practical effect of the dominance/SMP presumption is to provide some form of relief of the agency's or the plaintiff's burden of proof. The extent to which the burden of proof is relieved may differ across jurisdictions and may also depend on the specific market share level at hand. For example, in the Ukraine a company with a market share in excess of 35% is considered to be dominant unless it proves that it is exposed to substantial competition. In Sweden a market share of between 40% and 50% is regarded as being a clear indication of a dominant position. If the market share exceeds 65%, the presumption of a dominant position is virtually conclusive. Under French competition law very large market shares, *i.e.*, well above 50%, may also be sufficient to establish the existence of a dominant position. However, under German competition law, the dominance presumption does not amount to a reversal of the burden of proof in agency proceedings and the presumption is only decisive if a conclusive investigation establishes neither the presence nor the absence of a dominant position.

In almost all responding jurisdictions that have a dominance presumption, the dominance presumption is rebuttable. This is consistent with market share being an important although insufficient factor in assessing dominance/substantial market power. Only in Israel (more than 50%) and South Africa (more than 45%) the dominance presumption is not rebuttable. In South Africa, this determination arose from concerns that abuse cases might be under-enforced. However, South African law provides for the possibility of an exemption to be accorded by the Competition Commission with regard to unilateral conduct. In Israel, the legal status of being a "monopoly" – a firm with more than 50% market share - does not necessarily equate to the existence of substantial market power. When the Israel Antitrust Authority issues instructions to a monopoly as to its behavior, it must be reasonably convinced that competition or public welfare were prejudiced by the "monopoly", which would not be the case if there is no substantial market power.

In 9 of 13 responding jurisdictions, the safe harbors the agencies use are not absolute, *i.e.*, the threshold does not provide absolute legal certainty but rather creates a rebuttable presumption of absence of dominance/SMP. This rebuttable presumption may be described as a "soft" safe harbor as opposed to a "hard" safe harbor in which the presumption is not rebuttable. Hard safe harbors are only found in 4 jurisdictions: Bulgaria uses a hard safe harbor of 20% market share and Russia a 10%-20% market share, depending on whether the market is at least nation-wide (10%) or covers several local markets (20%). In Latvia the safe harbor is set at 40%, but the

Latvian authority noted that this threshold will probably soon be abolished. South Africa relies on a turnover-based threshold (R5 million) for its safe harbour.

3. Relative market position of competitors

The market shares of competitors in the relevant market are only one indicator of the competitive constraint arising from existing competitors. Analyzing these constraints on the company under investigation – the relative market position of competitors - involves several additional aspects. Whereas the agencies universally indicated that they review vertical integration, many agencies (23 of 32) consider also financial resources for determining the extent to which competitors constrain the market leader. Product differentiation - though not specifically addressed in the survey – was discussed by several agencies.

The Bundeskartellamt response elaborated that the factor of vertical integration may become especially relevant if the market leader is vertically integrated while its competitors are not or are unable to be. In such a situation the vertically integrated firm may be able to make access to up- or downstream markets or to "essential" input factors difficult or even impossible for its rivals on account of its own superior access, in particular if it occupies powerful positions in both upstream and downstream markets. The market shares of individual suppliers in the market concerned are thus placed in perspective if their supply of the relevant products or services depends on supplies from other competitors (*i.e.*, the market leader).

Another factor regarded as important by several agencies is the degree of product differentiation in the market. Products may differ in the eyes of customers for instance due to brand image, product features, product quality, a full line of goods or services, complete systems, level of service, or the location of the seller. In such a situation, the products – even though they belong to the same relevant market - are not fully substitutable in the eyes of the customers. In assessing the competitive constraint imposed by rivals, the degree of substitutability of their products with those offered by the allegedly dominant undertaking is taken into account by these agencies. The EC response illustrated this point with an example: It may be that a rival with 10% market share imposes a greater competitive constraint on an undertaking with 50% market share than another rival supplying 20% of the market. This may for instance be the case where the undertaking with the lower market share and the allegedly dominant undertaking both sell premium branded products whereas the rival with the larger market share sells a bargain brand. The UK response provided more generally that firms with relatively low market shares might have a degree of market power because other products in the market are not very close substitutes. Conversely, especially where the market is defined rather narrowly, the scope of powerful firms may be limited to a certain extent by firms supplying imperfect substitute goods or services that may replace those of the relevant product market to a limited extent or under certain circumstances. In such situations competitive constraints arising from these "neighboring" or "adjacent" products or "imperfect substitutes" may need to be taken into account.[81]

A majority (23 of 32) of the responding jurisdictions also consider the relative financial strength and other resources of the undertakings active in the relevant market in order to assess the relative position of competitors. Nine responding jurisdictions indicated that they do not use this criterion or at least have not used it in past cases. The Bundeskartellamt response stated that superior financial strength may provide a firm with a broader scope of action, in particular as regards the use of competition parameters such as price, capacity, research and development and advertising. It also noted that the same may apply, for example, to a comprehensive production programme or range of products, or technological resources. For example, the Korea Fair Trade Commission's response stated that such superior resources may be a contributing factor to a dominant market position/substantial market power. The Bundeskartellamt response suggested that this may be the case if they limit the alternatives available to buyers or if they have discouraging and deterrent effects on competitors. Such effects may manifest themselves in existing competitors refraining from engaging in active competition and potential competitors refraining from entering the market. However, competitors are only likely to be discouraged and deterred if they believe that the dominant firm would benefit from deploying its superior resources and that it is therefore likely to do so. The U.S. agencies caution that financial strength alone – the mere "deep pockets" of a firm – should not lead to a finding of dominance.

[81] For more details on product market definition in the merger context, see the ICN's Merger Guidelines Workbook, though care must be taken in applying these principles in the unilateral conduct area.

4. Barriers to entry, exit or expansion and durability of market power

A. Role of entry analysis in dominance assessment

Barriers to entry, exit or expansion[82] and the durability of market power have been identified as very important factors in the assessment of dominance/market power in the questionnaire responses. All responding jurisdictions consider these factors in their market power analysis. Just as market share assessment provides useful indications of the market structure and the competitive importance of the various undertakings active on the market, entry analysis provides information on the significance of potential competitors for competition in the market concerned and thus about the durability of market power.

As the German NGA response from Drexl and the EC response explained, if entry barriers faced by (potential) rivals are low, the fact that one undertaking has a high market share may not be indicative of durable significant market power/single-firm dominance. By contrast, substantial entry barriers faced by (potential) rivals may reduce or remove competitive constraints on the allegedly dominant firm. Substantial entry barriers can thus shield existing competitors from competition and may foster market power. In Canada and other jurisdictions, dominance/substantial market power is likely to be found in situations where high market shares are coupled with high entry barriers.

While several jurisdictions have published guidance on how they assess barriers to entry, a generally accepted definition of entry barriers has so far not evolved, neither in the practice of agencies nor in the debate among economists. In broad terms, "entry barrier" means an impediment that makes it impossible/more difficult for a firm to enter a market.[83]

[82] Analysis of “entry”, “entry barriers” and “barriers to entry, exit or expansion” are used largely coterminously throughout this section, and most often only the term “entry barriers” is used as a shortcut.

[83] Some scholars argued that entry barriers should only be those obstacles that are faced by entrants but are not borne by incumbents (Stigler), others held the view that an entry barrier is anything which permits incumbents to earn above-normal profits without attracting entry (Bain), or which hinders entry when it would be socially beneficial (Fisher).

B. Most common types/categories of entry barriers

Several responses provided examples for specific types of entry barriers. According to a classification provided in the Bundeskartellamt's response, these can be grouped into structural, regulatory and strategic barriers. Not all jurisdictions consider all examples listed below to constitute entry barriers.

Structural barriers to market entry may, according to this classification, arise from certain industry characteristics (e.g. cost advantages for the incumbent[84], supplier-customer relationships/customer loyalty, switching costs[85], sunk costs[86], economies of scale and scope, network effects[87], customer preferences, etc.), but may also lie in the requirements for success in the market (e.g. minimum entry scale, reputation[88], vertical integration[89], technological know-how, etc.).

Statutory/legal or regulatory barriers to entry are, according to this classification, those set up by the state in the form of laws, regulations and administrative practice (e.g. tariff and non-tariff trade barriers, planning laws, environmental regulations, health regulations, other safety regulations, exclusive concessions and rights to operate in a certain market such as national monopolies or restrictions of the number of licenses available for operating in a market, or the need to obtain an administrative authorisation, "grandfathering" legislation, etc.). Many jurisdictions indicated that intellectual property rights (IPRs), such as patents, trademarks, design or copyrights, may constitute a barrier to entry.[90] They indicated that the extent to which IPRs may constitute an entry barrier hinges on the ability of other undertakings to compete in the market concerned without making use of the protected creation.[91] More generally, nearly all

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[84] Absolute cost advantages for incumbents which make entry unprofitable; grandfathering clauses, etc.

[85] Switching may be costly due to e.g. long-term supply contracts or if customers face high search costs or risks when looking for new suppliers.

[86] Cost which cannot be recovered at market exit (*i.e.*, investments to start the business such as marketing, training, promotional offers, etc).

[87] E.g. if consumers benefit more from a product/service the more people are using it; or if customers derive benefits from belonging to a network, which cannot easily be replicated by the entrant.

[88] To reduce search costs consumers may find it useful to rely on a company's reputation: accordingly, new firms may find it more difficult to make customers switch.

[89] Advantages incumbents draw from vertical integration may e.g. consist in easier access to raw material or distribution.

[90] According to the Bundeskartellamt IPRs might be identified as a form of legal barrier to entry. In some cases they can also be viewed as strategic barriers.

[91] For some examples as well as a classification of the contestability of IPRs, see the response by Drexl.

respondents take into account the competitive significance of IPRs in assessing dominance. Most responses stated that IPRs do not as such or in themselves create a dominant position/SMP and are only one of several aspects that may eventually lead to the conclusion that a dominant position/SMP exists.

Strategic barriers to entry are, according to this classification, barriers set up by incumbents in a market that may, in certain circumstances, have the effect of deterring entry (e.g. long-term supply contracts, exclusivity contracts, proprietary interfaces or standards, over-investment in production capacity or advertising, product differentiation, exclusive dealing, tying, extensive patent portfolios; vertical integration, brand proliferation, etc.).[92]

C. Entry analysis

According to several responses and market power guidelines, entry barriers/conditions are usually analysed from a dynamic perspective and in close connection with other assessment criteria (e.g. market concentration levels, intensity of competition). Generally a qualitative assessment of entry barriers is carried out, and where possible these agencies try to quantify entry barriers. In practice, these agencies assess not only whether entry is theoretically possible but also whether entry will be likely, timely and sufficient to pose a credible competitive constraint to the incumbent. The focus of assessment is thus on the impact of the barriers.

Assessing the likelihood of entry is an important part of the entry analysis. Entry is likely to occur if it would be profitable. In this assessment usually the cumulative impact of all barriers to entry which exist in a given market are considered. Depending on the circumstances of the particular case, the different kinds of barriers can reduce incentives for potential competitors to enter the market. Responses from e.g. the EC, the UK agencies and the Bundeskartellamt illustrate in which circumstances this may be the case, e.g. government regulation may induce switching costs for customers, or limit the number of entrants (e.g. restricted number of licences). The need to enter at a significantly large scale may also reduce incentives of entrants, if the latter cannot reasonably expect a large enough reward for their investment. The profitability and thus likelihood of entry decreases in situations where entry would only be possible at a large scale that would result in depressed price levels post entry. Also, large sunk

[92] While such actions may have the potential to inhibit entry, they may well be pursued for legitimate reasons. Even if they are pursued with the intent to deter entry, the behaviour may not in itself necessarily constitute an infringement of competition law.

costs may discourage new entrants. The EC's response noted that it considers whether the entrant can expect to make profits taking into account reactions from incumbents. Thus, in its view, strategic behaviour by an incumbent may also act as an effective deterrent for new entrants: for example if the incumbent has committed to large excess capacity, the new entrant may not find entry profitable at post-entry or expansion prices.

The scope of entry is also an important consideration. The scope of entry must be large enough in order to constrain the allegedly dominant company to a sufficient extent. If entry happens only locally, at a small scale or in niche markets, this may not be the case.

Finally, it is typically assessed by agencies whether entry would occur within a certain time frame[93] (not just "eventually") to exert an appreciable effect on the incumbent's conduct. If there are barriers which substantially delay entry, the incumbent would not currently be constrained by entry.

The assessment of the above factors (the nature and cumulative impact of the different entry barriers, the likelihood, scope and timeliness of entry) may sometimes deliver ambiguous results. For example, low prices set by the incumbent may be a result of vigorous competition and at the same time make entry unprofitable. In order to assess the actual effects of entry barriers it may be helpful to also include the history of entry and/or exit in a given market in the entry analysis. As the Romanian CC explained, frequent and successful examples of entry may reflect a lack of barriers to entry. On the other hand, if previous attempts to expand in or enter into the market have been unsuccessful, then expansion and entry would seem less likely to have constituted an effective constraint. However, the history of entry needs to be put into perspective because a lack of entry may also be due to e.g. the market being very competitive, or past entry does not necessarily mean that entry is easy for other companies as well.

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[93] What constitutes an appropriate time frame will depend on the characteristics and dynamics of the market and the capabilities of the potential entrants.

5. Buyer power

All responses identified buyer power as a factor that may be considered, as appropriate, during the determination of dominance/substantial market power. Five agencies mentioned this factor among the most important assessment factors.

An undertaking may be constrained not only by actual and potential competitors but also by its customers. In such a situation, the benefits brought by effective competition – for example incentives to lower prices or to make technical progress – may also be promoted through buyer power, e.g. if there are competitors with adequate capacities to meet demand, a buyer's threat to switch to another supplier may have a considerable disciplinary effect on a supplier that sells a major part of its production to a single buyer.

The EC's response elaborated on its treatment of buyer power issues. It laid out that the market position of buyers provides an indication of the extent to which they are likely to constrain the allegedly dominant undertaking. However, a high level of concentration of firms on the buyer side of the market is not in itself sufficient evidence to disprove the market dominance of a supplier. For buyer power to be effective, it must be profitable for the buyer to award its contracts according to market-strategic considerations, so as not to become dependent on a dominant supplier. Thus a buyer might be in a position to trigger or 'sponsor' new entry or expansion by another supplier (e.g. through a long-term contract) without incurring excessive switching costs. An illustrative example provided in the UK agencies' response is that a rival representing 5% of sales may be an effective constraint if customers are able to sponsor its rapid expansion and have exercised this constraint in the past. The UK OFT's market power guidelines note that buyer power is more likely to be found in industries characterized by large infrequent orders and bidding and/or bargaining processes. Such markets are often labeled "bidding markets". Depending on the specific circumstances of the case,[94] the buyer may be able to intensify competition among suppliers if it can govern the rules of a procurement auction.

The Bundeskartellamt response adds that in order to possess and successfully exercise buyer power, the buyer typically needs comprehensive knowledge about the market concerned, *i.e.*, the buyer is well informed about alternative supply. An indication that this is the case is e.g. own internal production. Another crucial factor it considers is the extent to which the buyer faces switching costs. High switching costs may make the exercise of buyer power unprofitable, even

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[94] *I.e.*, degree of product differentiation, capacity constraints, firms' relative costs, frequency of interaction, the relative size of individual orders, uncertainty, information asymmetries, barriers-to-entry, etc.

though the buyer would in principle be able to take such action. Also other market-specific aspects may limit the significance of buyer power. For example, market-strategic purchasing behavior may be impossible when the payer does not decide on the purchase of the products concerned itself and thus has only a limited purchasing policy of its own (this may e.g. be the case in so-called "two-sided markets").

The EC's response emphasized that as dominance/substantial market power is assessed in relation to a market, it is not sufficient that certain strong buyers may be able to extract more favorable conditions from the allegedly dominant undertaking than their weaker competitors. It noted that the presence of strong buyers only serves to counter a finding of dominance/substantial market power if it is likely that in response to market power being exercised, the buyers in question would pave the way for effective new entry or lead existing suppliers in the market to significantly expand their output so as to defeat the exercise of market power not only to its own benefit, but also to the benefit of other buyers and consumers.

6. Other factors

Just over half of jurisdictions covered by questionnaire responses consider profit levels (17 of 32 jurisdictions) and 23 of 32 consider price levels as possible factors used in assessment of single-firm dominance/substantial market power. Other jurisdictions reject the use of these criteria, or the use of evidence on potentially abusive behavior. Some jurisdictions caution about potential errors in using price and profit levels to establish dominance/substantial market power.[95] The U.S. agencies observe that determining the competitive price or profit level can be extraordinarily difficult.

A few respondents explained how these factors are employed in their jurisdictions. For example, according to the UK OFT's market power guidelines, depending on other available evidence it may be reasonable to infer that an undertaking possesses market power if it has set prices consistently above an appropriate measure of costs, or persistently earned an excessive rate of profit. However, high prices or profits alone are not sufficient proof that an undertaking has market power because they may represent a return on previous innovation, or result from changing demand conditions and thus may be consistent with a competitive market. If there is no other reasonable explanation for persistent significantly high returns or prices, relative to

[95] E.g., responses from the U.S. agencies, UK OFT, and Czech Office for the Protection of Competition.

those which would prevail in a competitive market of similar risk, they may suggest that market power does exist. For example, the Canadian Competition Tribunal has accepted a high profit margin as an indicator of dominance in one case. However, the inverse does often not hold true. Monopoly prices may not result in high profits because durable monopolies may be characterized by productive inefficiency and monopoly rents may be shared with employees and/or suppliers.

Some jurisdictions also use other behavioral aspects in assessing market power. For example in a French case, it was held that contractual terms with distributors, such as limiting their margin to the annual rebate that the firm pays out at the end of the year, may be indicative of a dominant position. In an Australian case, it was held that if a firm cannot successfully raise prices to supra-competitive levels after deterring or damaging competition by price-cutting, then the irresistible conclusion would be that it did not have substantial market power at the time it engaged in the price-cutting.

Other jurisdictions (e.g. the EC) do not use evidence about potentially abusive behavior in the market power assessment because such analysis would blur the borderline between the analysis of market power and the analysis of the abusive conduct. As the Spanish Competition Court explained, it prefers to establish dominance in the first place and to assess the alleged abuse in the second place. Another reservation is that such evidence normally only serves to establish the presence of dominance/substantial market power, but not to establish the contrary.

In addition to the factors outlined above, over 20 specific aspects that have been analyzed in assessing dominance/market power were mentioned in the questionnaire responses.[96]

[96] Most of the factors that the respondents classified as being additional criteria seem to be already captured by the details provided above. Factors specifically mentioned as "additional" include: Ability of the firm to recoup predatory pricing losses, Ability to hinder competition in the relevant market, Agent's recent behavior, Bidding markets, Conduct of the firm, Development of market shares over time, Dynamics of the industry, Exclusive/superior access to imports or limited resources, e.g. raw materials, Extent of product differentiation, Independency from competitors, suppliers or purchasers, Intellectual property rights, Legal or de facto monopoly, Market transparency, Own distribution network, Portfolio/conglomerate effects, Potential competition, Process of the acquisition of the (possibly) dominant position, Production capacities (*i.e.*, excess capacity), R&D capacities / superior technological capabilities, Regulatory environment, Relationships/interlocks with other undertakings, Sunk costs, Switching costs, Transport costs, Whether a persistently high market share is due to persistent successful innovation and/or efficiency.

7. Dominance/substantial market power assessment in small and isolated economies

Another area of inquiry that jurisdictions were asked to address was whether the size of the economy in question, and its openness to trade, affect the assessment of dominance or substantial market power. That is, should the fact that an economy may be small or isolated have an impact on the assessment of dominance? Alternatively, is the dominance assessment altered by the openness of an economy via free trade agreements? Such issues may be relevant for the assessment of dominance in both smaller jurisdictions and in small and isolated geographic markets contained within larger jurisdictions.

Nearly all jurisdictions that responded to this question (16 of 18) asserted that the basic framework used to assess dominance or substantial market power is not altered by an economy's relative size or openness to trade. This view was expressed by representatives from jurisdictions both large (French authorities, for example: "the analytical framework used to assess dominance does obviously not differ according to the size of the market concerned.") and small (Jamaican Fair Trading Commission, for example: "In assessing dominance, the Jamaican FTC uses the same set of criteria used by larger jurisdictions.").

Most jurisdictions agreed, however, that while such factors do not change the criteria used to assess dominance, 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. As Section II.4 of this chapter, *supra*, noted above, the analysis of barriers to entry is widely viewed as one of the most important criteria used in the assessment of dominance/substantial market power. There was a general consensus among the respondents that if an economy is small and isolated from external trade, this may result in higher barriers to entry which could facilitate a finding of dominance or substantial market power. On the other hand, the presence of free trade agreements can be seen as lowering an economy's entry barriers to new or potential competition, and thus making the exercise of market power in the economy's markets less likely. The German Bundeskartellamt aptly summarized this view: "When assessing barriers to entry an important aspect is whether the market at hand is isolated or not. Therefore, trade agreements do not alter the method of assessing dominance, but may be of relevance for the assessment of barriers to entry (which is an important factor in the assessment of dominance.)" This view also is consistent with prior analysis undertaken by the OECD's Global Forum on Competition concerning the enforcement of competition law generally in small economies.[97]

Jurisdictions also were asked whether in circumstances where an economy is small and isolated, might dominance be presumed at lower (or higher) levels of market share? This notion has received some support in academic literature.[98] There was a mixed response to this issue. The Latvian Competition Council and the South African Competition Tribunal both expressed the view that higher entry barriers could make a small economy more vulnerable to anti-competitive unilateral conduct, thus warranting lower market share thresholds for dominance. On the other hand, the German Bundeskartellamt, the Swedish Competition Authority and the Spanish Competition Court expressed the view that an economy's relative size does not change the market share indications of dominance. Finally, the Singapore Competition Commission responded that being a small open economy inevitably results in a higher degree of market concentration in non-traded goods and services markets than in larger economies. As competition law is new in Singapore, a higher indicative threshold is used (60%) to target more likely harmful effects and to ensure, after the costs of intervention are taken into account, that there are net economic benefits from any intervention. Singapore's comparatively higher market share threshold may also be indicative of the fact that its economy, while small, also is generally open, resulting in lower barriers to entry and the corresponding effect on the dominance assessment suggested above.

III. Stages at which the competition authority can intervene

All responding jurisdictions allow for intervention against anti-competitive unilateral conduct when the undertaking already has a position of dominance/SMP. Additionally, in some jurisdictions (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.

[97] See OECD Global Forum on Competition, Competition Policy and Small Economies – Note by the Secretariat ¶ 13 (7 Feb. 2003) ("Various contributions state that like other market-related factors, small economy considerations may influence whether a particular practice will have anticompetitive effects, but that they do not require a different approach.").

[98] Dr Michal Gal argues that when jurisdictions use market shares as a prima facie indicator of market power, in smaller economies lower levels of market share can imply stronger levels of market power, all else being equal, compared to larger economies. This is because smaller economies generally are typified by higher barriers to entry compared to larger economies, resulting in a lower elasticity of supply. See Gal, Competition Policy for Small Market Economies at 63-64 (2003).

Jurisdictions that limit enforcement to the allegedly anti-competitive unilateral conduct of undertakings with dominance/SMP cited several 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 anti-competitive 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. 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/SMP. Finally, limiting enforcement to positions of dominance/SMP may reinforce the legal certainty of market share-based safe harbours observed in some jurisdictions, as described above.

However, 15 of the 35 jurisdictions covered by questionnaire responses allow for potential enforcement action without the need to find a pre-existing dominant position. These jurisdictions allow for enforcement either at an undertaking's creation of a dominant position through unilateral conduct (10 of 35), based on its attempts to acquire a dominant position (6 of 35), and/or based on the allegedly anti-competitive conduct of a non-dominant undertaking (11 of 35). It should be noted that in some jurisdictions such laws are not viewed as pertaining to competition law and that they may have similar provisions in e.g. "fair trade" laws.

1. Laws that address unilateral conduct by non-dominant firms

Competition laws in Brazil and Chile both prohibit restrictive trade practices generally. Thus, enforcement is possible if anti-competitive effects (real or potential) arising from the unilateral conduct can be demonstrated, even if the undertaking in question does not presently hold a position of dominance or SMP.

In France, competition law potentially sanctions abuses of economic dependence, under which no prior determination of dominance is necessary. This prevents an undertaking from abusing a position of economic dependency over its suppliers and/or customers. Dependence may be established on the basis of reputation (*i.e.*, must carry brand), lack of access to essential facilities, or the structure of the business relationship. In France, enforcement action is also possible against a non-dominant undertaking charging prices that are excessively low compared to marginal costs, when the price charged demonstrates an incentive to exclude competing products or services from the market; although this prohibition has been invoked rarely in recent years.

Under competition law in Germany, an undertaking may not hinder another undertaking without an objective justification, if it possesses superior market power in relation to other undertakings. In a vertical context, this means that, similar to France, an undertaking may not abuse a position of economic dependency with respect to its suppliers and/or customers. In a horizontal context, an undertaking must not unfairly abuse a position of "superior" market power in relation to other undertakings. In this circumstance, market power is not defined with respect to the market as a whole but rather relative to one or several smaller competitors.

The general competition law in Japan includes a prohibition against unfair trade practices. This prohibition potentially applies to conduct such as unjust refusals to deal, exclusive dealing, restrictive dealing, tie-ins, or charging unjustly low or discriminatory prices. A finding of dominance is not required, but whether an undertaking is "influential in the market" will be considered. This is based on factors such as market share (10% or more) and market position (among the top three competitors). If an unfair trade practice by an influential firm does not lead to the result of reducing the competitors' business opportunities and making it difficult for them to find alternative trading partners, the conduct would not be considered illegal.

A similar prohibition is contained in South Korea's competition law. The Korea Fair Trade Commission has the authority to take measures against non-dominant companies for their unfair business practices, *i.e.*, refusal to deal, discriminatory dealing, exclusion of competitors, unfair customer solicitation, coercion in dealing, transactions on conditional terms or obstruction of competitors' businesses.

2. Intervention before a firm obtains substantial market power

In the United States, the Sherman Act prohibits both "attempts to monopolize" and "monopolization". An "attempt to monopolize" entails anticompetitive conduct with the "specific intent" to acquire a dominant market position and with the "dangerous probability" of doing so. Attempt cases involve allegations that the undertaking's conduct was likely to lead to dominance, rather than that dominance has already been established. The "monopolization" offense is the use of anticompetitive conduct either to acquire a dominant market position or to maintain a dominant position. Thus, a pre-existing dominant market position is not required for the attempt offense or for the first form of the monopolization offense. Furthermore, Section 5 of the Federal Trade Commission Act prohibits unfair methods of competition. Even though Section 5 of the FTC Act may in theory apply also to non-dominant undertakings, this provision has been applied to unilateral conduct in a manner generally consistent with the parameters of Section 2 of the Sherman Act.

3. Reasons for such laws

There are two main reasons why jurisdictions allow for intervention against unilateral conduct in the absence of pre-existing dominance or SMP. The reason most commonly cited is to prohibit the creation of dominance/SMP through anti-competitive practices and thereby preventing monopolization at an incipient level. Some jurisdictions also seek to prohibit undertakings from exploiting positions of economic dependency or economic disparity and thus seek to create a "level playing field" for small and medium enterprises.[99]

Conclusion

Among the responding jurisdictions the behavioral type of definition prevails (28 of 35 jurisdictions covered by questionnaire responses) and tends to be adopted by more jurisdictions. In its broadest sense, behavioral definitions share a focus on a firm's appreciable freedom from competitive constraints or ability to act in ways that a competitively constrained firm could not. A key advantage of the behavioral definition is that it better reflects dominance/SMP assessment being a multi-facetted analysis that reaches well beyond market shares.

In all jurisdictions covered by questionnaire responses a comprehensive set of criteria is used to assess dominance/SMP. Even if the relative importance of the criteria used to assess single-firm dominance/SMP varies on a case-by-case basis, the responding jurisdictions generally viewed market share and barriers to entry or expansion/durability of market power as the two most important criteria.

Market shares are used as an initial indicator or starting point for the market power analysis. 19 of the 35 jurisdictions use market share thresholds in order to trigger a presumption of dominance/SMP and/or a safe harbor. 12 of the 15 jurisdictions that use a dominance presumption have set it between 33%-50% (except for Brazil 20%, USA 70% and Canada 80%).

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[99] See Chapter One, Section II.4 for more details on this objective.

10 of the 13 jurisdictions that use a safe harbor have set it between 20%-40% (except for South Africa, Korea 10% and USA 50%).[100]

Barriers to entry, exit or expansion and the durability of market power have been identified as very important factors in the assessment of dominance/market power in the questionnaire responses. Entry analysis provides information on the significance of potential competitors for competition in the market concerned and thus about the durability of market power. In practice, agencies assess not only whether entry is theoretically possible but also whether entry will be likely, timely and sufficient to pose a credible competitive constraint to the incumbent.

Furthermore, all responding jurisdictions consider market position and market behavior of competitors as well as buyer power in their market power analysis. These factors also have been mentioned several times as among the most important criteria (market position and market behavior of competitors: 10 mentions; buyer power: 5 mentions). In addition, the responding jurisdictions consider a wide range of other factors that may be relevant for the dominance/SMP assessment in a specific case. With regard to dominance/SMP assessment in small and isolated economies, most jurisdictions agreed that while an economy's relative size or openness to trade do not change the criteria used to assess market power, they can heavily influence the ultimate outcome of the dominance assessment.

All responding jurisdictions allow for intervention against anti-competitive unilateral conduct when the undertaking already has a position of dominance/SMP. Additionally, in 15 of 35 jurisdictions covered by questionnaire responses, 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.

[100] See discussion *supra* note 79 for clarification of the U.S. approach in this area.

Chapter Three: State-Created Monopolies Project

Introduction

The ICN Unilateral Conduct Working Group (UCGW) which was established in May 2006, at the Fifth Annual ICN Conference consists of two subgroups – the Objectives subgroup and the Assessment of Dominance/Market Power subgroup. The primary objectives of the UCGW are to examine the challenges involved in addressing anticompetitive unilateral conduct of dominant firms and firms with market power, and to promote greater convergence and sound enforcement of laws governing unilateral conduct. In this regard, the UCGW also addresses the state-created monopolies and recently-privatized firms as a project under the Dominance subgroup. As mentioned in its mandate, UCGW attaches particular importance to responding to the interests and needs of agencies from developing and transition economies. State created monopolies project is a tool in this regard.

Throughout this chapter, the term "state-created monopolies" refers to firms that are dominant or that have market power due to state-imposed restraints of competition. In most cases, these firms were (or are still) owned by the state and the state did not (or still does not) allow for any private competitor. In an effort to avoid duplication with the ICN's previous work, this project does not address the interface with network access or price-cap regulation implemented by a sector-specific regulator. Accordingly, the focus is not on sectors that are/were regarded as "natural monopolies" and that are now subject to such regulation. Therefore, the report will discuss this subject by excluding references to the telecoms, energy, water, and railways sectors.

State-created monopolies project constitutes the last part (part C) of the UCGW Questionnaire. In total, 35 ICN member agencies[101] sent their replies to the questionnaire. 30[102] out of these 35 jurisdictions responded part C of the questionnaire. For various reasons, some

[101] Throughout this chapter, in general the term "competition agency/authority" is used for the administrative, law enforcement or judicial bodies responsible for the implementation of competition law and policy of different jurisdictions for the sake of simplicity.

[102] Australia, Brazil, Bulgaria, Canada, Chile, Czech Republic, European Commission, France, Germany, Hungary, Ireland, Italy, Jamaica, Japan, Jersey, Korea, Latvia, Mexico, New Zealand, Pakistan, Russia, Serbia, Singapore, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States.

jurisdictions did not respond while relevant information is received from NGAs in some of those countries[103].

I. Main Sectors in which State-Created Monopolies Exist

As understood from the answers to part C of the questionnaire, most of the jurisdictions indicate postal services and lottery as the main sectors where state-created monopolies exist including whether these monopolies are state-owned[104], state-controlled[105], state-enabled or facilitated[106], recently privatized and/or liberalized, regional monopolies,[107] etc. As a further example in this regard, some countries mention state-created monopolies active in commodity sectors such as wheat (Australia, Canada) or opium (Turkey), while some others possess state-created monopolies in social insurance (Germany). Moreover, due to strategic reasons, countries might prefer to have state-created monopolies in air, naval and space navigation services, as well as satellite steering and relevant facilities (Russia) since the jurisdiction may value the maintenance of traffic security over competition considerations in these sectors. Therefore, it is a very difficult task to introduce the notion of competition in these sectors although it might be considered possible technically in some cases.

In most of the jurisdictions, afore-mentioned services were/are provided by the state-owned undertakings with exclusive rights for the realization of a given service. Following the opening up of these markets to competition, consumers would be able to choose from a number of alternative service providers and products.

Opening up these markets to competition will also allow consumers to benefit from lower prices and new services that are usually more efficient and consumer-friendly. Thus, this directs economies to be more competitive.

Below is the non-exhaustive list of the sectors that is prepared on the basis of the responses provided either by the member agencies or their respective NGAs. Postal services and lottery are

[103] Israel, Netherlands, Romania, South Africa, and Ukraine did not provide any response to part C of the questionnaire, while NGA responses from Israel, Netherlands, and Romania are used for the development of this section.
[104] Those undertakings that are 100% owned by the State.
[105] The control belongs to the State, without taking into consideration the amount of the % of the State share.
[106] E.g. where a monopoly exists due to exclusive rights granted by the state or due to state-imposed restraints of competition.
[107] Includes public/private undertakings that are granted exclusive rights within a certain region.

the main common sectors among the jurisdictions followed by airports/airport infrastructure, commodities, ports and insurance where state created monopolies *existed* or *still exist.*

TABLE I (non-exhaustive list)

Postal services	Australia, Brazil, Bulgaria, Canada, Czech Republic, Germany, Hungary, Italy, Jamaica, Japan, Jersey, Korea, New Zealand, Slovak Republic, Spain, Switzerland, Turkey, UK, US
Lottery	Brazil, France, Germany, Hungary, New Zealand, Slovak Republic, Spain, Sweden, Turkey
Airports/Airport Infrastructure	Australia, Canada, Czech Republic, Jersey, Spain, UK
Commodity Rice, wheat, sugar, barley	Australia (rice, wheat, sugar, barley), Canada (wheat), Pakistan (rice), Turkey (opium)
Ports	Jamaica, Jersey, Israel, Pakistan, Spain, UK, Turkey
Insurance	France (insurance companies in social services), Germany (social insurances), New Zealand (accident), Pakistan
Airlines	Jamaica, Israel, Pakistan, Spain, Turkey
Public transport	Australia, Chile, France, Jamaica
Highways	Brazil, France, Russia
Tobacco	France (retail trade), Spain, Turkey
Mining	Chile, Serbia, Turkey
Alcohol retailing	Sweden
Alcohol Products	Turkey
Hospitals	Germany
Pharmaceuticals	Sweden
TV/Radio Centers	Russia
Motor Industry/Automobile Production	Serbia

1. General objectives of states in creating/maintaining state-created monopolies

Objectives determined behind the creation and/or the continuity of the state-created monopolies vary due to the economy of the country and the nature of the sector in which state-created monopolies exist. As mentioned in the contribution prepared by France, the generally accepted rationale behind the creation of the monopolies by the public authorities is that a fully competitive market is not able to fulfill the execution of a public service mission. In addition to that some other countries, such as Brazil and Turkey, followed an economic policy based on the substitution of imports for a long time, and instead of importing, they preferred to manufacture the goods within the country to meet domestic demand.

As in the Turkish case, newly established industrial branches were protected for long periods of time by customs tariffs and other taxes equally effective. In addition to that, capital investment by the private sector was rather limited due to the economic conditions of the country. Furthermore, safety and health conditions lead to intervention of the State in specific sectors, which was the case for alcohol/alcoholic beverages and tobacco sectors.

Below is the non-exhaustive list of the main objectives behind the creation of state-created monopolies stated by different jurisdictions and NGAs:

- Public service obligations- ensuring citizens to have access to important/essential services (Australia, Czech Republic, France, Germany, Hungary, Japan, Korea, Serbia, UK, US)
- The state made necessary investments on infrastructure and important sectors as part of previous economic policy based on import substitution (Brazil, Turkey)
- Safety standards (Switzerland)
- In order to align with the recommendations of the European Commission (Czech Republic)
- Prevent illegal gambling and excessive gaming incentives and exclude commercial profit making purposes (Germany, Hungary)
- Marketing in an orderly manner grain grown and leveraging the size to obtain the highest price (Canada)
- Operation of state liquor monopolies in order to prevent over consumption by limiting economic incentives for liquor sales (US)
- Public safety in taxi cab monopolies (US)
- Public interest: government intervention is warranted if the private sector fails to produce the desired outcome (Netherlands)
- Insuring traffic security in air, space, naval transportation; meteorological service, including its satellite component (Russia)

2. Enforcement against state-created monopolies

From the responses provided, it appeared that the enforcement of competition act against state-created monopolies differs from one jurisdiction to another. For instance, it can be seen that in some jurisdictions state-created monopolies that participate into commercial activities are subject to competition acts just like private enterprises do. While in other jurisdictions, an exemption might be foreseen for state-created monopolies. The answers provided by the EU member states will be elaborated initially in the interest of consistency among the EU members. Then, the answers given by other jurisdictions will be listed to complete the spectrum.

For the EU, rather than a general response, the answers provided by the Member States are taken into consideration individually to show the similarities and differences in such regional entity. Nevertheless, in general, it can be said that apart from the natural monopolies -which are not the main subjects of this study-, certain postal services are existed as state-controlled monopolies in many EU countries. Moreover, other activities, such as sale of alcohol, operation of taxi services, running the lottery are regulated in certain Member States via licensing requirements. The Treaty establishing the European Community refers to State monopolies under Article 31. In Article 31 of the EC Treaty, Member States are obliged to adjust any state monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States. The responses of some EU members are summarized below:

- In France, the French legislation takes into account the specificity of the cases in which undertakings hold a monopoly conferred by the state authorities. Any anticompetitive practice of an operator in charge of the execution of a public service is in principle subject to the general provisions of antitrust rules enforced by the French competition agencies. However, if the anticompetitive practice can be deemed to result from an administrative act or measure, French law provides that the control of such practice will be performed by the French administrative courts. Regardless of the type of such behaviour, any state created operator, enjoying a privilege of an exclusive right or a monopoly, is thus subject to competition rules.
- In Germany, the European Union general competition law takes precedence over anti-competitive regulation just like other EU member states. Thus, the scope of a possible "state action defence" is quite narrow in Germany. It could only apply where a conduct does not affect trade between EU member states. In two recent cases, state action defence was rejected. In one of them, Bundeskartellamt prohibits anti-competitive behaviour by lottery companies, whereas in the latter Bundeskartellamt takes action against Deutsche Post for abusive market hindrance. In August 2006, the Bundeskartellamt prohibited the regional lottery companies and the German Lotto and Toto Block from violating German and European competition law in several instances. According to the German constitution, the legislative power to regulate lotteries lies with the German *Länder* (the 16 German states). Each of the 16 German *Länder* has its own lottery company. The *Länder* also operate the lotteries themselves and have traditionally not granted any lottery licences to private operators. After years of diverse regulations by

a different *Länder* and triggered by court decisions enlarging the scope for private lottery operators, the *Länder* decided in 2001 to conclude a State Lottery Treaty which has the status of a law. According to this treaty, private providers may only operate a lottery if they have a licence to do so. However, a license may not be granted if (inter alia) the operator is pursuing business goals which go beyond a mere advertising campaign. The Bundeskartellamt prohibited the companies from hindering commercial lottery agents from establishing stationary lottery collection points, e.g. in supermarkets and petrol stations, agreeing on dividing up the market geographically between the 16 *Länder* lottery companies and registering the stakes collected through commercial lottery agent with the aim of distributing them in a competitively neutral manner among the German *Länder*. The Bundeskartellamt did not address the issue of whether the state monopoly on lotteries and betting was justified vis-à-vis private providers. The authority's investigation exclusively concerned the sale and distribution of the lottery companies' "state" products as well as geographic market sharing among these companies.

- In Austria, government activities that are not conducted in the course of a business are immune from the application of competition legislation (crown immunity). Moreover, private party entering into a contract with a government authority having crown authority is not subject to competition legislation.

- In Italy, public enterprises and state-controlled firms are fully subject to the Italian Competition Act's basic prohibitions. Pursuant to a provision that parallels the EU treaty, those prohibitions do not apply to firms that by law provide "services of general economic interest" or operate in a monopoly situation, to the extent that such exemption is "indispensable" to perform their specific, assigned tasks. A grant of a statutory monopoly does not prevent other firms from engaging in internal production for their own use, except for telecommunications services or for services for which the basis for the monopoly is public order, public safety, or national defence.

- In Ireland, competition law applies to all industries including regulated ones and it is applied by the competition authority and the courts. The Competition Authority has concluded a number of cooperation agreements with various statutory bodies to facilitate co-operation, avoid duplication, and ensure consistency between the actions of the Competition Authority and the bodies concerned. The only exemption provided by the Competition Act in abuse of dominance cases relating to a defence is available in instances where "the act or acts concerned was or were done pursuant to a determination made or a direction given by a statutory body."[108] That is, a dominant undertaking engaged in abusive conduct is only exempt from liability under the Act where it was obliged by some legislative provision to engage in the alleged abusive conduct. To date the Competition Authority has encountered no such instances.

- In Sweden, national competition rules do not override another national regulation and this general rule is not specific for State monopolies or private firms with public tasks.
- In Hungary, the Competition Act applies to all firms except where otherwise regulated by statute. In that sense, the nature of the firm's ownership does not matter, so the law applies to publicly owned firms as well as private ones. The aim of this practice is the application of same competition rules against public and private ownership.
- In Slovak Republic, there is an exemption from the Competition Act with regard to undertakings providing services in the public interest (for example postal services).
- In Romania, there are not any state-created monopolies at the moment.

Apart from the EU member states, the responses provided by other jurisdictions are elaborated below. In general, state-created monopolies are also subject to main prohibitions of their respective competition acts. In this regard for instance, there is no exemption for state-created monopolies in Brazil competition act. In other words, there is no "state action defense". In Korea, for instance, competition act applies to privatization transactions just like other transactions. Nevertheless, in some of the jurisdictions indicated below (such as Canada, Turkey, Jamaica, Israel, New Zealand, Switzerland and India), provisions found in a specific legislation excluding certain markets might take precedence over the Competition Act. In this regard, in US for instance, state action doctrine has been applied with regard to energy and other state-created public service monopolies. Having said that, it is also appropriate to mention the responses of Chile, Czech Republic, Japan, Jersey, Romania, Russia, Singapore, and UK, which indicate that they experienced no legal or practical restrictions in their jurisdictions so far.

- In Canada, state-created monopolies are subject to the Competition Act to the extent they are engaged in commercial operations. With respect to potential anti-competitive conduct, the Competition Act is applied unless more specific federal law prevails. Where a particular activity is regulated by a provincial law, the Bureau will consider whether the Competition Act takes precedence through federal paramountcy or whether the regulated

[108] Section 7(2) of the 2002 Competition Act of Ireland.

conduct defence applies, depending on whether the provincial law authorizes or requires the conduct in question. The Bureau will not refrain from pursuing regulated conduct simply because the provincial law may be interpreted as authorizing the conduct or is more specific than the Act, given that the Bureau's mandate is to enforce the law as directed by Parliament, not a provincial legislature or its delegate.

- In Turkey, there is the general application of competition law against state-created enterprises and private enterprises. However, sometimes there is the difficulty arising from the application of general and private laws. Under the Turkish legal system, private laws have precedence over general laws. In that sense, there could be a difficulty, *i.e.*, if the so-called state created/owned enterprises/monopolies might act with a power arising from their specific law. Then the Agency could have the difficulty in intervening in such sectors.

- In Jamaica, there is no "state action defense" or any special exemptions for state-created monopolies included in the Fair Competition Act (FCA). Section 54 of the FCA states "Subject to any provision to the contrary in or under this or any other Act, this Act binds the Crown." This Section is taken to mean that, unless stated in the FCA or some other legislation, the provisions of the competition law apply to state-created entities. While the FCA, in general, applies to state-created entities there is usually a resistance by these entities to corporate with the competition agency.

- In Israel, generally there is no special exemption for state-created monopolies and the prohibitions of the Antitrust Law apply. The Antitrust Court had determined that even when the monopoly is the result of a statutory arrangement or is owned by the government, it is still subject to the Antitrust Law and to the unilateral conduct rules, since the threats posed by monopolies in general are also present in these situations. Nevertheless, it is still not clear whether monopolies that are part of the legal entity of the government, or that have been formed by specific designated laws (such as the airport authority), are subject in full to the monopoly provisions of the antitrust court.

- In New Zealand, the prohibitions arising from the application of competition act would not apply to firms that hold power sourced from statute. In addition, any conduct specifically authorised by a statute is exempt from the prohibition.

- In Switzerland, the Competition Act applies to private and public undertakings that are party to cartels or to other agreements affecting competition, have market power or take part in concentration of enterprises. However, provisions excluding certain markets take precedence over the Competition Act. This comprises provisions establishing an official market or price system or provisions entrusting certain enterprises with the performance of public interest tasks by granting them special rights.

- In India, the competition authority would have no basis to take any action, if the government issues some orders to state-created monopolies and thinks that the issue concerns a “matter of policy”.
- In the U.S., the application of federal antitrust law to a federal “state-created” monopoly is determined by statute. If a “state-created” monopoly is regulated by a state law, the court-created doctrine of “state action” may apply. It grants immunity from federal antitrust liability for certain private or state actors for certain conduct that would otherwise violate the national antitrust laws. So long as that decision is made at the highest levels of state government and implemented by state actors or by private actors “actively supervised” by the state, then federal antitrust law will not preempt that state law.
- In Mexico, legal restrictions exist in so far as these monopolies belong to the “strategic sectors” described by Constitutional article 28, in which case, according to the law they are exempted from the monopoly prohibition.
- In Pakistan, the sectors regulated by sector specific regulators and the government entities are exempted from the Competition Act.
- In Serbia, the Competition Act applies to government bodies, institutions for regional autonomy and local self government bodies when directly or indirectly engaged in the trade of goods and services.

3. Dominance assessment with respect to state-created monopolies

From the answers provided by most of the agencies (such as Australia, Brazil, Canada, Czech Republic, Germany, Jamaica, Japan, Jersey, Mexico, Russia, Slovakia, Spain, Switzerland, Turkey), it is clear that the assessment of substantial market power/dominance in relation to state-created monopolies does not differ from the assessment of substantial market power/dominance in other cases. In other words, standard analysis applies to determine dominance regardless of the ownership of the undertakings.[109]

In this regard in Chile, for instance, there is no difference on the assessment of a dominance position. Nevertheless, there will be a difference on the measures that Competition Tribunal should adopt to correct the situation vis-à-vis other undertakings. In the case of a state-created monopoly, it would not be enough to order the divestiture of the company, rather there is the necessity to recommend the amendment of the corresponding law.

In France again, the Competition Council's practice shows that there are no substantial differences in the assessment of dominance of state-created monopolies in comparison with other dominance cases. However, the existence of the exclusive rights conferred upon an undertaking by the State authorities constitutes a strong presumption of dominance in the relevant market. The Competition Council decided indeed that "while a private undertaking benefits from a legal monopoly in the exercise of a given economic activity and this activity coincides with the production of a good or service which supplies alone a relevant market, it is legitimate to deduce from this very monopoly the existence of a dominant position since, on the one hand, the undertaking does not face a de facto competitor in the relevant market and, on the other hand, the legal monopoly protects the undertaking from a potential competition".

In Hungary, similarly, there is no difference in the assessment of state-created monopolies compared to other dominance cases. According to them, the assessment could be even less difficult due to the fact that it is a monopoly since proving the actual abuse could be naturally less straightforward compared to the assessment of dominance as there are various regulations that accompany these monopolies.

[109] See Chapter One, Section II "Assessing single firm dominance/substantial market power," *supra*, for more detailed information.

II. Privatization and Liberalization

In many developing and transition countries, the various sectors of their economies were or (to some extent) are still under the control of their respective governments. In general liberalization refers to a relaxation of government restrictions, usually in areas of social or economic policy, *i.e.*, "opening up of their economies to global economy". There are many countries that opened up their economies in the last decade(s). In many of these jurisdictions, opening up of their state-created monopolies into private sector is called privatization. Privatization and liberalization do not necessarily happen simultaneously, sometimes they happen sequentially. This section will comment on whether countries (especially transition and developing ones) have specific and/or general privatization laws, the applicability of competition laws to privatization transactions and the advocacy roles of the competition agencies.

1. Privatization and liberalization process of state-created monopolies (Competition priorities vs. other government priorities)

In order to categorize the applications of different jurisdictions, initially the legislative approach to privatization and liberalization should be provided. From the answers provided to part C.II.5[110] of the questionnaire, jurisdictions that carry out privatizations can generally be grouped into two for the legal framework that they use: jurisdictions with a specific privatization law and those that do not have such a law.

Here, it should be clarified that a specific privatization law indicates a law that is generally applicable in all privatization cases and will be used to mean so as from now. Within this context, jurisdictions with a specific privatization law include Brazil, Bulgaria, France, Hungary, Israel[111], Korea, Latvia, Mexico, Pakistan, Romania, Russia, Serbia and Turkey. Countries such as Australia, Canada, Chile, Germany, India, Italy, Japan, Jersey, Switzerland, New Zealand, Singapore, UK, and USA represent those without such a law.

Some countries that do not have a specific privatization law mention that they carry out privatization by means of particular state acts for the privatization of a certain company, such as

[110] Please briefly describe the ongoing or past privatization and liberalization process in your country. Is there a specific legal framework for the privatization in your country (e.g. a specific privatization law)?
[111] In Israel, it should be mentioned that legal framework for privatization has been inserted as a chapter into the Government Companies Act.

Germany and Italy which also realize liberalization via sector specific acts. Similarly, Japan also handles privatization of its postal services by a particular privatization law applicable to these services. In Brazil, in addition to a specific privatization law, there are also decrees for the privatization of each undertaking. In France, during various stages of privatization wave, privatization laws have sometimes been adopted for each of certain companies. Jersey also indicates that liberalization is done via sector-specific laws which we believe is the case in many other jurisdictions.

As to objectives behind liberalization/privatization, jurisdictions usually provide responses on objectives most of which are closely related to each other. Many jurisdictions mention efficiency considerations among objectives behind liberalization/privatization (Australia, Canada, Chile, India, Czech Republic, EC, Jamaica, Israel, Korea, Mexico, Italy, Russia, Serbia, Singapore, Turkey). In this regard, improving the quality of the services and their provision in a more efficient manner and at cheaper, competitive prices, as well as enabling consumers to have wider choice are cited among other objectives (Brazil, France, Germany, Japan, Italy). It can generally be presumed that competition and efficiency considerations would yield these results and consumer welfare (EC, France, Switzerland, Mexico, Turkey) -being another and maybe the ultimate objective- would be achieved.

In addition, introducing or promoting competition has been cited by many jurisdictions as one of the primary objectives sought via privatization/liberalization (Australia, Bulgaria, Canada, Czech Republic, France, Germany, Israel, Italy, Mexico, Russia, Serbia, Singapore, Switzerland, Turkey, United States).

Reducing state's participation and share in the economy (Brazil, Hungary, Italy, Latvia, Turkey), eliminating burden on the budget resulting from state's presence (Germany, Jamaica, Italy), generating revenues (Germany, Hungary, Japan, Israel, Russia, Serbia, Turkey) are also cited among important objectives that are taken into account.

It is also expected that privatization/liberalization would ensure innovation (France), access to (Jamaica) and introduction of technology (Mexico).

Some other objectives that are cited by the jurisdictions represent a wide range and can be granted as follows:

- Realising robust economy and society (Japan)
- Favouring the dynamic enhancement of productive sectors (Mexico),

- Creating conditions for transparent, prompt and economically effective privatization on equal footing, providing guarantee for economic growth and competition ability in favour of the privatized undertakings (Bulgaria),
- Providing for a fair and transparent process of privatization (Pakistan),
- Making privatization of state-owned entities and assets an integral part of the general structural change, with a mid and long term view (Mexico),
- Prompt ownership transformation (Serbia),
- Widening the ownership base and direct equity participation in the economy (Jamaica),
- Favouring diversified and plural participation of private parties in the capital of divested enterprises in order to foster investment while preventing monopolistic concentration (Mexico),
- Securing enhanced access to foreign markets and capital (Jamaica),
- Development of the capital markets (Turkey),
- Bringing stagnant savings into the economy (Turkey),
- Streamlining business operations (Japan),
- Promoting private entrepreneurship (Latvia),
- Generating permanent, productive jobs (Mexico),
- Supporting competition policies in the economic sectors under privatization, by eliminating or preventing barriers to entry of new participants (Mexico),
- Ensuring an adequate distribution of benefits, costs and risks among the public, private and social sectors, avoiding the generation of liabilities for the state and subsidies for the acquirers (Mexico),
- Seeking decentralization in regional rooting of firms, insofar as compatible with their efficient operation (Mexico),
- Ensuring transparency in divestment procedures (Mexico),
- Limiting political influence and intervention in key economic sectors (Italy),
- Completing the internal market (EC),
- Optimizing the use of government's management resources (Jamaica).

2. Advocacy role of competition agencies during the liberalization and privatization of state-created monopolies

The report prepared by Advocacy Working Group and submitted to the ICN Conference in Naples in 2002 provides the following definition: “Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition.”

There is no doubt that advocacy role of the competition authorities towards liberalization and privatization is very important to ensure a competitive environment. In line with this basic premise, one of the most important duties of the competition agencies should be related to liberalization and privatization process that provides an important opportunity to shape the competitive conditions in the markets undergoing liberalization and privatization. This section will try to analyze the advocacy role of the competition agencies during liberalization and privatization to understand role, powers and instruments as well as the extent and timing of the involvement of the competition authorities to deal with the relevant matters followed by some successful advocacy examples from various jurisdictions.

When the responses are taken into account it can be seen that role, powers and instruments of competition authorities used in liberalization and privatization differ to a great extent in various jurisdictions.

To begin with, Brazil overtly states that its competition authorities have no role in the planning stage of privatization in which any intervention might be possible such as determining relevant assets to be privatized and applicable procedure, although it might be possible to promote pro-competitive tender rules and avoid existence of private monopolies at this stage.[112]

Australia and New Zealand are among other countries whose competition authorities do not have any advocacy role in privatization and liberalization of state-created monopolies.

Unlike Brazil, Australia and New Zealand, it is possible for Mexican competition agency to involve in privatization process before the privatization transaction. In Mexico, firstly, the competition agency can prepare opinions regarding the design of the structural scheme for privatization of a public undertaking or the grant of a concession or permit to run public services. The opinion of the competition authority is non-binding in the sense that the sector regulator that proposes the scheme bears the responsibility on the final scheme. In the second phase, the competition authority delivers its opinions and recommendations while the legislative framework, which may concern regulatory provisions, tender rules, particular contracts, is being prepared. Finally, competition authority carries out the assessments and delivers its opinions on

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[112] However, like Brazil, responses on advocacy role indicate that all jurisdictions, who answered the relevant question in the questionnaire, enable competition authorities to implement merger control rules in case of privatization of state-created monopolies. Such jurisdictions are Australia, Brazil, Bulgaria, Canada, India (when the law comes into force), EC, France, Germany, Hungary, Japan, Jersey, Israel, Italy, Latvia, Mexico, New Zealand, Netherlands, Pakistan, Romania, Russia, Serbia, Singapore, Slovak Republic, Switzerland, Sweden, Turkey, and USA. However, it should be clarified that in some jurisdictions such merger control rules may not apply if competition in certain markets is not allowed by legislation that trumps the provisions of the competition act. This is the case in Switzerland and the Swiss cartel law includes a provision that overtly provides for the precedence of rules establishing an official market or price system, entrusting certain enterprises with the performance of public interest tasks by granting them special rights. Similarly, Japanese response provides that privatization transactions are subject to competition rules in the absence of particular restrictions without detail as to type of such restrictions.

possible bidders for concessions or permits. Its opinions may be in the affirmative or negative as well as conditioned to alleviate any worries on competition. Moreover, the powers of the competition authority have recently been strengthened in the sense that the competition authority now has definite powers to set the necessary measures to ensure more competitive privatization process, and tenders for concessions and permits. Moreover, it is important to mention that relevant entity is required to get the agreement of the competition authority as to the basis for the tender proceedings. In addition, economic players have to get a favourable opinion to take part in a concession or a licence according to certain sectoral laws.

In Turkey, competition authority is empowered to provide its views before tender is announced to the public, in case the entity to be privatized exceeds certain market share or turnover thresholds or possesses a legal monopoly or enjoys statutory or de facto privileges not accorded to private firms. The aim is to enable to present its opinion concerning competition issues as the basis during the preparation of tender conditions document about the proper method of structuring sale of the privatization assets. However, it should be emphasised that, although this looks like the planning stage as the Spanish competition authority names, one should not think that Turkish competition authority has any direct authority to advocate a better auction design or recommend a certain auction design, for instance, in privatization tenders for which the privatization agency is responsible. The views by the competition authority at this stage are non-binding on the privatization administration, although it is not unusual that the privatization agency takes them into account as otherwise the transfer of the relevant entity to the successful bidder following the tender may not be authorized by the competition authority under its merger control rules.

In Bulgaria, competition authority is another agency that is entitled to send its opinion regarding plans for restructuring and privatization of state-controlled undertakings, if competition law is likely to be violated.

Some competition authorities like that of Canada may act as a counsel to the government. Within this context, it makes submissions and advocates competition before various governmental agencies including but not limited to the cabinet, parliamentary bodies, regulatory boards on competition matters via its powers arising from the competition act. Similarly, Singapore's competition authority submits to the government or statutory bodies its advice elaborating on competition related needs and policies although competition act does not apply to conduct by the government and statutory bodies. In the same regard, Korean competition authority has participated as a member in the "Commission on privatization of state-owned companies" to present its opinions as to the privatization process of state-owned companies.

Sometimes, governmental authorities as well as private undertakings may prefer to consult the competition authorities in order to benefit from favourable clauses in their respective competition acts. Such cases can be a good opportunity for the competition authority to advocate for competition. For instance, in Chile, as the competition act removes any responsibility for the acts or contracts parallel to the decisions of the competition authority, the governmental agencies and private parties prefer to secure the favourable opinion of the competition authority though it is not compulsory.

Although seeking opinion of the competition agencies regarding liberalization or privatization process is not mandatory in most instances, competition authorities may still employ their consultative role by preparing opinions as is the case in France. Even though no government entity is required to get either approval or a consultative opinion in these matters, the Competition Council issues its opinion for a proposed privatization transaction. Likewise, in Jamaica where it is not obligatory for the government to consult with the competition authority for privatization and liberalization and therefore the government does not seek its opinion in a regular manner, the government may sometimes prefer to do the contrary. This might be seen as an indication of the rising awareness of the importance of the concept of competition worldwide. Of course, the views granted by the competition authority may be taken into account depending on the discretion of the government in many jurisdictions as in Jersey. Pakistan is another jurisdiction where competition act provides for consultation that can be sought by the governmental agencies as well as the parties concerned, albeit non-binding.

Although some competition authorities only have an advisory role during privatization process, prompt timing of their involvement may make their advocacy activities a success. In Hungary, for instance where the competition authority is a permanent participant in the meetings of the privatization body and its timely involvement proves to be successful in advocating competition. Similar to the participation of the competition agency in the meetings of the privatization body in Hungary, participation of Czech competition authority's officials into the responsible bodies of the strategic companies to be privatized was effective as it enabled the competition authority to provide its views at early planning stages of restructuring and privatization. Similarly, in Israel, the participation of the Antitrust Commissioner to privatization and liberalization of state-owned monopolies quite a long time before the finalization of the privatization and its role during the entire process are considered as effective elements. Because they enable the competition authority to determine the conditions to be satisfied by the market players in order to be eligible to bid for the relevant asset. In Romania, the competition authority verifies all features of the privatization process effecting competition and its approval can not be taken if relevant provisions of the competition legislation are not taken into account.

Slovak Republic's competition authority can also take part at a very early stage of liberalization and privatization by providing its comments like any other governmental body as a response to intent for liberalization and privatization by the relevant governmental office (interoffice comment proceeding). Such comments are non-binding and in case of disagreement among the governmental agencies, another opportunity arises in the next stage named the government session. Again the opinion of the competition authority is non-binding at this stage and it is no more than a recommendation.

The Russian competition authority has been successful in its advocacy related to privatization. Russian competition authority has played an important role during widespread privatization transactions in the 90's. The requirement on the ministries and relevant agencies to secure the approval of the competition authority regarding their recommendations on privatization, the ability to rule on the possibility of privatizations following applications by the government, participation of competition authority officials in privatization commissions were the main instruments to safeguard competition and ensure a competitive market structure in those years. Russian competition authority also manages splitting the relevant entity to be privatized into competitive companies and avoids privatization of a monopolist without it being regulated previously. Moreover, the Russian competition authority can insert wording into relevant governmental documents, decrees, orders and programmes as part of its advocacy role such as the one inserted in Transport Strategy of the Russian Federation Till 2020 requiring separation of services and infrastructure in air transport before privatization to ensure non-discriminatory access.

Sometimes competition authorities may use what may be called softer instruments as part of advocacy efforts. In Germany, for instance, competition advocacy is carried out via reports prepared by the Monopolies Commission, or by expert opinions upon its own initiative or upon request of the federal government. Such methods have been used extensively in favour of market liberalization. Likewise, Japanese competition authority may prepare reports and submit opinions to relevant governmental authorities as part of its advocacy efforts aiming privatization of state-created monopolies and market liberalization. In Spain, the competition authority can undertake research projects and studies on competition matters as part of its consultative functions. Swedish competition authority also uses statements and reports including proposals to further competition. Such reports are prepared either on its own initiative or upon request of the government and their exact impact is hard to verify as there are many elements that might shape the final outcome.

A. Advocacy matters regarding drafting legislation

In the context of privatization and liberalization section, the advocacy role of some of the competition authorities on draft legislative texts or those texts that have already been enacted with some anti-competitive provisions deserves to be analyzed in detail under a separate heading.

From the responses it appears that some of the most extensive powers regarding liberalization seem to be vested with the European Commission. Within the context of liberalization, its legislative acts are binding and member states' non-obedience with them may be brought before Community courts by the Commission under various articles of the Rome Treaty. A similar effective instrument lies with the Romanian competition authority whose necessary approval is to be secured for draft laws distorting competition and which proposes modifications to the relevant draft law.

In Brazil, a bill waiting to be approved in Congress will require the regulators to consult the competition authorities before enacting legislation that may raise competition concerns. This is expected to give a strong hand to Brazil in carrying out its advocacy work.

Bulgarian competition authority already has the powers to forward its opinion to draft laws concerning competition matters in general or conduct of monopolies or dominant firms in particular. Within this context, the competition authority cooperates with other governmental and non-governmental bodies in various ways such as jointly drafting laws. Moreover, it submits its proposals to relevant authorities whose acts violate competition law. A very important tool used by the Bulgarian competition authority is to bring the acts and decisions of the administrative bodies conflicting with competition legislation before courts. This last tool might be very effective in convincing the relevant authorities to follow the opinions of the Bulgarian competition authority.

Chilean competition authority's powers include submitting proposals to the attention of the head of the State for the change or repeal of the relevant legislation whenever it thinks competition could be improved in this way.

Being aware of the importance of advocacy for a better legislative environment during regulatory or deregulatory process, Czech competition authority attaches importance to advocacy activities and it provides its views for draft regulations and privatization. A very important element in this process is Czech competition agency's assured access to the relevant draft texts and privatization plans at earlier stages which prove to be crucial as it makes possible to insert the necessary competitive elements in a timely manner. This is especially important when exemptions or exclusions to application of competition legislation are proposed.

In France, not only public bodies such as the parliament and the government but also private entities can request consultation of the Competition Council regarding draft legislation.

An important point may be to emphasize that it is not always necessary to have relevant legal powers to submit opinions as part of advocacy work on legislative issues as the German case proves. Moreover, the German case also proves that governmental agencies need not always be obliged by legislation to consult the competition authority. As a result, despite the absence of legal requirement to ask the opinion of Bundeskartellamt, ministries often try to get its opinion in an informal manner and ask the Bundeskartellamt to comment on competition aspects of legislative processes. Furthermore in its general public relations work, the Bundeskartellamt regularly comments on general competition issues supporting liberalization.

According to the framework for competition advocacy in the Italian competition legislation, the competition authority may report existing or proposed anti-competitive legislation to the relevant governmental authority. Moreover, it can make public its views including recommendations to preempt or remove any distortion of competition. Furthermore, the Prime Minister can ask the opinion of the competition authority concerning legislation including grant of exclusive rights, introducing quantitative restrictions, establishing pricing practices etc. Parliamentary committees can also seek consultation with the competition authority during formal hearings. Italian competition authority admits success of its advocacy work is more likely when EU backing is obtained via EU's different instruments such as directives, judicial decisions whereas success of its advocacy work may be less likely for domestic competition issues. Despite this, the competition authority thinks that a recent governmental decree (known as Bersani decree) that removed some anti-competitive restraints in various sectors is a sign that its previous advocacy work on sectoral legal framework has not been in vain.

Italian competition authority once more draws attention to the importance of timing of advocacy. Possibility to get involved earlier is crucial for the success of the advocacy. In addition to the timing, another important element is to establish close relations with the relevant regulators. Moreover, Italian competition authority believes that making the advocacy reports public surely enhances their effectiveness as this will enable the interested parties to bolster activities of the competition authority. Another important clue given by the Italian competition authority is to focus on sectors that are subject to extensive liberalization to obtain the maximum impact rather than scattering efforts by dealing with trivial issues that has no connection with an important issue.

Japanese competition authority, like its Italian counterpart, also publicizes its recommendations as a result of its researches and studies on regulations issued by the government with an aim to support regulatory reform. An important mission expected from the Japanese competition authority is to ensure that entry to monopolistic and oligopolistic markets is not prevented by cooperating with the relevant governmental authorities. While carrying out its mission, although there is no legal requirement to seek the opinion of the competition authority, it uses its powers to request from the relevant governmental agency information and explanation on the matter in question and delivers its opinion to the relevant governmental agency.

Korean competition authority can also provide its views to other government agencies so that those agencies can take into consideration the competition considerations while they attempt to enact or revise relevant regulations.

Spanish competition authority can submit a proposal to the government regarding anti-competitive regulations. It may ask the government to accept the proposal or ask the relevant governmental authority to take the necessary action to alleviate the competition problem caused by legal regulations. In addition, the competition authority can bring to the attention of the government the bills or draft laws that challenge the implementation of the competition act. Moreover, various governmental and non-governmental bodies may seek consultation with the competition authority.

Swedish competition authority also prepares proposals including necessary changes that should be done in legislation and other measures that have established barriers against competition. Similarly, Swiss competition authority also forwards its proposals to the relevant authorities that they can take into account while drafting and enforcing laws dealing with economic matters. It also reviews draft legislation to establish whether they have unnecessary restrictions on competition and grants expert advice to the relevant authorities.

Finally, Turkish competition authority is empowered to prepare its opinions regarding decisions on competition policy and the relevant legislation. Similarly, Irish competition authority can not only advise the government on the likely effects of legislative proposals on competition in the markets but also provide its observations whenever it considers competition in the market is constrained by legislation enacted or decisions taken.

B. Successful advocacy cases

Some successful advocacy work of various competition authorities can be granted as follows:

- The European Commission is involved in liberalization of certain sectors such as electronic communications, post, energy and transport that have produced outstanding gains. For instance, with respect to postal sector, the relevant directive adopted has foreseen completion of internal market for postal services following a progressive schedule. According to the directive, the member states are obliged to narrow monopoly over certain postal services in 2003 and 2006 depending on weight and fee to be charged and liberalize some others such as outgoing cross border mail as from 2003.
- In France, when the Competition Council was consulted by the French Association for the 'Maintaining Competition on the Motorway Network' regarding possible anti-competitive issues in motorway maintenance markets likely to arise as a result of privatization of mixed-economy motorway operators, the Competition Council basically stressed the importance that companies having a private monopoly should be regulated and the option to revise the terms of the regulation should be reserved. The opinion by the Competition Council was taken into account in the concession contract and this was clearly cited in the decision of the Ministry. In another instance, Competition Council imposed interim measures on TDF that missed the deadline to implement the relevant Community directive foreseeing removal of monopoly over broadcasting of public radio programmes and allowing competition. The Council condemned TDF's inaction as abusive conduct, thereby using its sanctions as a support for liberalization. This example is important as it indicates that competition authorities may complement their advocacy role in liberalization process by enforcement powers as well.
- Italian competition authority's advocacy efforts that have had an impact on legislative reforms such as the one by Bersani decree enable over-the-counter sale of pharmaceutical

items through large retailers and removal of several restrictions over new licenses for taxis.

- Jamaica's competition authority involved in Parliament discussions and as a result of its stance against the provision in a Bill enabling Jamaica Dairy Development Board to determine the price of farm gate milk, the provision was deleted.

- Mexico's competition authority successfully challenged privatization of an insurance company with an exclusive right to sell policies to state officials through payroll deductions in 2000. Its intervention led to a decrease in the duration of the exclusive right to two years. Moreover, other successful advocacy work of the Mexican competition authority can be cited as:

  - Involving in grouping 34 federally-operated airports into three regional packages,
  - Setting the criterion disallowing transfer of more than one port on the same coastline to the same company,
  - Imposing on a company holding access rights to a railroad the condition to divest a seaport grain terminal if it becomes the successful bidder to acquire an inland grain storage facility,
  - Recommending that the purchasing publisher should meet the demands for newsprint by rival publishers without discrimination following privatization of the only newsprint manufacturing facility in Mexico.

- Due to Pakistani competition authority's view that transfer of a state owned fertilizer unit to a certain company would lead to a monopoly, that certain company was eliminated in the prequalification stage.

- Russian competition authority cancelled privatization of two airline companies in the absence of legal separation of relevant airports and air carriers.

- Slovak Republic's competition authority's initiative proved to be successful in removal of state monopolies in tobacco, salt and alcohol in the 90's.

Finally, it can be said that Turkish competition authority played a role to remove entry barriers against private airlines in domestic routes. More specifically, before 2003, there used to be a decision by the Directorate General of Civil Aviation which permitted private airlines to operate in domestic routes only where the incumbent Turkish Airlines did not operate at all, on days when Turkish Airlines had no flights on routes where it operated, or on days when Turkish Airlines had flights but could not satisfy the demand.

This decision effectively prevented entry of private airlines to operate in domestic routes. During the liberalization of the industry, Turkish competition authority actively defended the removal of the above-mentioned restraints from the decision by forwarding its opinion and the resulting state of the industry following amendment in the decision enabled entry and operation of private airlines in domestic routes. Although it cannot be claimed definitely as to whether the opinion of the competition authority on the removal of the entry barriers was the decisive factor due to the fact that there is quite a long time in between the date the Turkish Competition Authority provided its opinion in 2000 and the removal of the entry barriers at the end of 2003, still it was a very positive progress for the sector in question and it can be considered as a successful advocacy attempt.

Conclusion

As indicated above, most of the jurisdictions mention postal services and lottery as the main sectors where state-created monopolies exist. Those sectors are followed by airports/airport infrastructure, commodities, ports, and insurance. In those jurisdictions that provided answers to part C of the questionnaire, afore-mentioned services were/are provided by the state-owned undertakings with exclusive rights for the realization of a given service.

The responses show that objectives behind the creation of state-created enterprises differ according to the economy of the country and the nature of the sector in which these state-created monopolies exist. In general, those monopolies are created due to the perception that a fully competitive market is not able to fulfill the execution of a public service mission. Furthermore, due to pursuit of an economic policy based on the substitution of imports for a long time, some countries preferred to manufacture the goods within the country to meet domestic demand instead of importing.

Again, the responses indicate that the enforcement of competition act against public monopolies differs from one jurisdiction to another. For instance, it can be seen that in some jurisdictions state-created monopolies that participate into commercial activities are subject to competition acts just like private enterprises do. While in other jurisdictions, a state action defense is applied arising from other governmental regulations.

Most of the responding agencies indicated that standard analysis applies to determine dominance/substantial market power regardless of the ownership of the undertakings and the assessment of dominance/substantial market power in relation to state-created monopolies does not differ from the assessment used in other cases.

The responses exposed that jurisdictions basically have two different legislative approaches to privatization. Some carry out privatization via privatization laws that are generally applicable to all privatization cases, whereas some other countries have particular laws to privatize the asset in question. In the latter, the liberalization is generally carried out via sector specific laws.

The objectives behind liberalization and privatization differ to a great extent among jurisdictions. Nevertheless, in addition to competition efficiency considerations, introduction and promotion of competition have been among the most cited objectives.

Some important conclusions can be drawn with respect to the nature and extent of advocacy activities of the competition authorities as well. First of all, it seems to be a general consensus that competition authorities should have advocacy role during the liberalization and privatization process to promote a competitive environment as well as to avoid complicated post-liberalization/privatization competition problems that could drain great time and effort of the competition authorities in the absence of their previous involvement. In this regard, possession of effective instruments by competition authorities to carry out successful advocacy work is quite important. Those instruments may vary according to legal environment in which competition authority is operating. At this juncture, the extent to which the governmental agencies are obliged to seek the opinion of the competition authority and whether the opinions of the competition authorities are binding on the entity play an important role.

However, it should be mentioned that lack of binding instruments, as is the case in many jurisdictions, should not discourage the competition authorities, as there are times when the relevant governmental agencies may voluntarily prefer to ask the opinion of the competition authority and abide by it.

Another issue, which might be decisive in some occasions, is the timing of the participation. As overtly mentioned by some competition authorities the earlier the participation is the more effective the impact of the competition authority could be. Similarly, timely access to the drafts of liberalization/privatization plans or draft legislation is of crucial importance in this regard.

Generally, a role for the competition authority in the liberalization/privatization process might be among the most effective instruments to insert the pro-competitive elements into the relevant process. Even in those jurisdictions where competition authorities do not have official advocacy role in the preparatory stages of the privatization and liberalization process, familiarity with a competition authority's advocacy and enforcement roles (for instance, merger control powers requiring authorization for the transfer of assets subject to privatization) may prompt the relevant authorities to insert competitive elements into the relevant process. This can also be the case where competition authorities have a role at preparatory stages but lack instruments binding on the relevant governmental agency at that stage. The effectiveness of the competition authority's advocacy is also closely linked to the timing of the advocacy in some jurisdictions.

Moreover, in some jurisdictions, the ability to bring legislative instruments and administrative decisions before the courts might produce a very deterrent impact and may persuade the relevant body to think in a detailed way before issuing an anti-competitive instrument.

Last but not least, publication of, for instance, the opinions of the competition agencies may lend support to pro-competitive arguments for privatization or liberalization efforts. Thus, relevant governmental agencies in charge of such processes may also feel obliged to bring counter opinion and explanation to that of the competition agencies if they would ignore their opinions. This would promote more transparency not only on the part of antitrust agencies but also on the other governmental agencies involved.

Annex A:

Annex A: Objectives of Unilateral Conduct Laws Identified in Agency Responses*

	Countries Objectives	Ensuring an effective competitive process as a goal and/or a means	Promote consumer welfare	Maximize efficiency	Ensure economic freedom	Ensure a level playing field for SMEs	Promote fairness and equality	Promote consumer choice	Achieve market integration	Facilitate privatization and market liberalization	Promote competitive-ness in international markets
1	Australia	X[c]	X	X		X			X		
2	Brazil	X[a]	X	X	X						
3	Bulgaria	X[a]	X		X		X				
4	Canada	X[b]	X	X		X		X			X
5	Chile	X[a]									
6	Czech Republic	X[a]			X						
7	European Union	X[b]	X	X					X		
8	France	X[a]	X	X	X		X				
9	Germany	X[a]	X	X	X	X					
10	Hungary	X[b]	X	X							
11	Ireland	X[b]	X					X			
12	Israel	X[a]	X		X						
13	Italy	X[b]	X		X						
14	Jamaica	X[c]	X	X			X	X			
15	Japan	X[a]	X				X				
16	Jersey	X[b]	X	X	X						
17	Korea	X[b]	X		X	X	X				
18	Latvia	X[b]	X					X			
19	Mexico	X[a]	X	X	X						
20	Netherlands	X[b]	X								
21	New Zealand	X[b]	X	X					X	X	
22	Pakistan		X	X	X						
23	Romania	X[b]	X								
24	Russia	X[a]	X	X	X				X	X	
25	Singapore	X[c]		X							
26	Slovak Republic	X[b]	X								
27	South Africa	X[b]	X	X		X	X	X			X
28	Sweden	X[b]	X								
29	Switzerland	X[a]	X	X	X	X					
30	Turkey	X[a]	X	X		X					
31	Ukraine	X[a]	X	X							
32	United Kingdom	X[c]	X	X							
33	United States	X[b]	X	X							
	Total	32	30	20	13	7	6	5	4	2	2

* 33 agencies answered Part A of the Questionnaire relevant to Objectives.

a. 13 agencies cite ensuring an effective competitive process as a goal.
b. 15 agencies cite ensuring an effective competitive process as both a goal and a means. As noted in Section I of the report, this includes the 5 agencies that can be inferred to fall within this category.

c. 4 agencies cite ensuring an effective competitive process exclusively as a means to achieve other goals.

Annex B[113]

Which of the following criteria do you use for the assessment of single-firm dominance/substantial market power?

1=Yes, 0=No

	Market share of the firm and its compe-titors	Market position and market behavior of compe-titors	Barriers to entry or expansion	Econo-mies of scale and scope / network effects	Buyer power	Access to upstream markets / vertical integra-tion	Durability of market power	Market maturity / vitality	Access to essential facilities	Financial resources of the firm and its compe-titors	High prices (at abso-lute or compara-tive level)	Profits of the firm
Australia	1	1	1	1	1	1	1	1	1	0	1	0
Brazil	1	1	1	1	1	1	1	1	1	1	1	0
Bulgaria	1	1	1	1	1	1	1	1	1	1	1	1
Canada	1	1	1	1	1	1	1	1	0	1	1	1
Chile	1	1	1	1	1	1	1	1	1	0	1	0
Czech Republic	1	1	1	1	1	1	0	0	1	1	0	0
European Com.	1	1	1	1	1	1	1	1	1	1	1	1
France	1	1	1	1	1	1	1	1	1	1	1	1
Germany	1	1	1	1	1	1	1	1	1	1	0	0
Hungary	1	1	1	1	1	1	1	1	1	1	1	0
India	1	1	1	1	1	1	1	1	0	1	0	0
Ireland	1	1	1	1	1	1	1	1	1	0	0	0
Italy	1	1	1	1	1	1	1	1	1	0	0	0
Israel	1	1	1	1	1	1	1	1	1	0	1	0
Jamaica	1	1	1	1	1	1	1	1	1	0	0	0
Japan	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Jersey	1	1	1	1	1	1	1	1	1	0	1	1
Korea	1	1	1	1	1	1	1	1	1	1	1	1
Latvia	1	1	1	1	1	1	1	1	1	1	1	1
Mexico	1	1	1	1	1	1	0	0	1	1	1	1
Netherlands	1	1	1	1	1	1	1	1	1	0	1	1
New Zealand	1	1	1	1	1	1	1	1	1	1	1	1
Pakistan	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Romania	1	1	1	1	1	1	1	1	1	1	1	1
Russia	1	1	1	1	1	1	1	1	1	1	1	1
Singapore	1	1	1	1	1	1	1	1	1	1	0	0
Slovakia	1	1	1	1	1	1	1	1	0	0	1	1
South Africa	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Spain	1	1	1	1	1	1	1	1	1	1	0	0
Sweden	1	1	1	1	1	1	1	1	1	1	1	1
Switzerland	1	1	1	1	1	1	1	1	1	1	1	1

[113] The charts in this Annex are an abridged summary of the questionnaire responses, but the questionnaire responses themselves, which are posted on ICN's website, should be referenced for more detailed information. These simplified chart entries cannot fully reflect the complexity of each agency's approach or adequately capture the differences between jurisdictions in the way they apply each criterion.

Turkey	1	1	1	1	1	1	1	1	1	1	1	0
United Kingdom	1	1	1	1	1	1	1	1	1	1	1	1
Ukraine	1	1	1	1	1	1	1	1	1	1	1	1
United States	1	1	1	1	1	1	1	1	1	1	0	0
TOTAL	**32**	**32**	**32**	**32**	**32**	**32**	**30**	**30**	**29**	**23**	**23**	**17**

Annex C:

Of the criteria that you use to assess single-firm dominance/substantial market power, which are the most important criteria?

	Market share of the firm and its competitors	Barriers to entry or expansion	Market position and behavior of competitors	Buyer power	Durability of market power
Australia					
Brazil	1	1	1		
Bulgaria	1	1			
Canada	1	1			
Chile		1			
Czech Republic	1				
European Com.	1	1	1	1	
France	1	1	1		
Germany	1	1	1		
Hungary	1	1	1		
India	1		1		
Ireland	1	1	1	1	1
Italy	1				
Israel	1	1			
Jamaica	1	1	1		1
Japan					
Jersey					
Korea	1				
Latvia	1	1			
Mexico	1	1	1		
Netherlands	1	1			1
New Zealand		1	1		
Pakistan	1				
Romania	1	1		1	
Russia	1	1			1
Singapore	1	1		1	
Slovakia	1	1			
South Africa	1				
Spain	1	1			
Sweden	1	1			
Switzerland	1	1	1	1	
Turkey	1	1			
United Kingdom					
Ukraine		1			
United States					
TOTAL	**27**	**24**	**11**	**5**	**4**

Other:

Bulgaria:	Financial resources; economic relations with other undertakings; independency from competitors, suppliers or purchasers; ability to hinder competition in the relevant market.
India:	Financial resources
Israel:	Economies of scale and scope/network effects
Jersey:	The ability to successfully increase price, or decrease quality or output, without an effective response from competitors, customers or sellers
Mexico:	The ability to unilaterally set prices or restrict supply; access to inputs or imports; the agent’s recent behaviour; switching costs; transportation costs
Russia:	Access to upstream markets/vertical integration; access to essential facilities; market maturity/vitality
Switzerland:	Market maturity/vitality
United States:	The power to control prices or exclude competition

Annex D
Dominance/SMP presumptions and safe harbour presumptions

	Dominance/SMP presumptions			Safe harbours		
	Market share level	**Is it rebuttable?**	**Legal basis**	**Market share level**	**Is it absolute?**	**Legal basis**
Australia						
Brazil	20%	Yes	Statute	20%	No	Statute
Bulgaria	35%	Yes	Statute	20%	Yes	Guidelines
Canada	80%	Yes	Case law	35%	No	Guidelines
Chile						
Czech Republic				40%	No	Statute
European Com.						
France						
Germany	33%	Yes	Statute			
Hungary				20%	No	Guidelines
India						
Ireland						
Italy						
Israel	50%	No	Statute			
Jamaica	50%	Yes	Guidelines			
Japan						
Jersey	50%	Yes	Guidelines	40%	No	Guidelines
Korea	50%	Yes	Statute	10%	No	Statute
Latvia				40%	Yes	Statute
Mexico						
Netherlands						
New Zealand				20%	No	Guidelines
Pakistan	33%	Yes	Statute			
Romania	40%	Yes	Guidelines			
Russia	50%	Yes	Statute	20%	Yes	Statute
Singapore						
Slovakia						
South Africa	45%	No	Statute	n.a.	Yes	Statute
Spain						
Sweden	40%	Yes				
Switzerland						
Turkey						
United Kingdom						
Ukraine	35%	Yes	Statute	35%	No	Statute
United States	Durable 70%, with substantial entry barriers and evidence that existing competitors could not increase output	Yes	Case law	Courts virtually never find monopoly power below 50%	No	Case law

Annex E

Stages at which the competition authority can intervene

1=Yes, 0=No

	Under your general competition law governing unilateral conduct, at which stage(s) can your competition agency intervene against potentially abusive unilateral conduct?			Does your competition law enable the competition agency to intervene against unilateral conduct at a level below the dominance / SMP threshold?
	If dominance / SMP is present	Acquisition or creation of dominance / SMP	Attempt to acquire or create dominance / SMP	
Australia	1	0	0	0
Brazil	1	1	1	1
Bulgaria	1	0	0	0
Canada	1	0	0	0
Chile	1	1	1	1
Czech Republic	1	0	0	0
European Com.	1	0	0	0
France	1	0	0	1
Germany	1	0	0	1
Hungary	1	0	0	0
India	1	1	1	0
Ireland	1	0	0	0
Italy	1	0	0	0
Israel	1	0	0	1
Jamaica	1	0	0	1
Japan	n.a.	n.a.	n.a.	1
Jersey	1	1	0	0
Korea	1	1	1	1
Latvia	1	0	0	0
Mexico	1	0	0	0
Netherlands	1	0	0	0
New Zealand	1	0	0	0
Pakistan	1	1	0	1
Romania	1	0	0	0
Russia	1	1	1	1
Singapore	1	0	0	0
Slovakia	1	0	0	0
South Africa	1	0	0	0
Spain	1	0	0	1
Sweden	1	1	0	0
Switzerland	1	0	0	0
Turkey	1	0	0	0
United Kingdom	1	0	0	0
Ukraine	1	0	0	0
United States	1	1	1	0