ICC Task Force on the ICN - Sub-Group on Unilateral Conduct

POTENTIAL ANTI-COMPETITIVE EFFECTS OF PRESUMING DOMINANCE OR SUBSTANTIAL MARKET POWER BASED ON MARKET SHARES

This paper addresses the question, put by certain ICN members, as to what empirical evidence exists to support our view, that presumptions of dominance or substantial market power based on market shares can actually harm consumer welfare by discouraging potentially pro-competitive behavior by companies wrongly presumed to have market power[1]

The Problem

Our Sub-Group believes that market share is a crude and - more importantly - often misleading indicia of market power. As a result, it can lead to "false positives", ascribing monopoly power or dominance to firms that in fact do not possess such power. This, in turn, can lead to the punishment or deterrence of competitively neutral or even pro-competitive conduct.

Single firm conduct is often ambiguous and distinguishing between pro- and anti-competitive conduct depends on a variety of factors - one of which is whether the firm in question enjoys a monopoly or market dominating position. Presuming such market power from market share alone may thus skew the whole analysis and lead to the condemnation of conduct that is neutral or pro-competitive, in part because it is being undertaken by a firm with no real market power. Worse yet, it may lead to self-regulation by such firms, causing them to avoid behavior that is competitively neutral or beneficial to consumers.

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1 The paper is submitted by the Sub-Group on Unilateral Conduct of the International Chamber of Commerce (ICC) Task Force on the International Competition Network (ICN). A list of the members of the Sub-Group is attached as Appendix A.

We believe that the likelihood of such anti-competitive self-regulation is intuitively obvious, and accords with general experience and common sense. However, we have been asked if we can substantiate that belief with empirical evidence drawn from the business experience of actual companies.

Assembling such evidence presents some obvious problems: First of all, by their nature, examples of such behavior can only be drawn from the handful of jurisdictions which in fact apply market share-based presumptions of market power. Second, companies in such jurisdictions are likely to be cautious about taking public positions opposed to the legal norms and enforcement policies of their domestic antitrust authorities. And finally, any company is likely to be reluctant to draw attention to itself as "presumptively dominant" or to admit that it has refrained, or is refraining, from pro-competitive behavior.

Nevertheless, as set forth below, even the brief investigation that we have been able to undertake during the past several weeks has uncovered a number of examples of the kind of anti-competitive behavior that market share-based presumptions of market power can bring about.

The Evidence

Israel

One jurisdiction which currently utilizes market-share based presumptions of market power is Israel. Under Israeli antitrust law, any company with a market share exceeding 50% is, by definition, a "monopoly"; and, when such a company engages in certain practices, such as determining an "unfair" buying or selling price, reducing or increasing the scope of assets or

services it offers, or offering different contractual conditions for similar transactions, it creates an *irrebutable presumption* of abuse of a dominant position. [2]

A significant consequence of this situation is that it exposes companies whose market share exceeds 50% to frequent individual and class action claims. Plaintiffs exploit this legal environment to assert claims, without evidence of market power or harm to competition, merely on the basis of market share and an allegation that a certain practice falls within the proscribed list. This, by itself, may be sufficient to shift the burden of proof to the defendant, which is then presumed to abuse its "dominant position".

As the case law in Israel regarding monopolies is relatively new, it is difficult to identify specific cases in which this legal situation has given rise to anti-competitive outcomes. However, based on the experience of one noted practitioner [3], a number of situations have arisen where companies with more than a 50% market share have been prevented (or, as a matter of precaution, have prevented themselves) from using certain commercial practices, even when the same or substantially the same practices are used by their rivals, have no effect (or a positive effect) on competition, are part of a normal business relationship or have no anti-competitive purpose. For example:

> A certain firm preferred not to establish certain rebates plans or differentiated bonus plans, even when its rivals used such practices and even for a limited period of time.
>
> A certain firm refrained from using below-cost prices for products, even for a limited period of time and as part of a brand-strengthening campaign.

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[2] At 2/96 The Restrictive Trade Practices Commissioner v. Yediot Ahronot.

[3] Gal Rozent, Herzog, Fox and Neeman, Tel Aviv.

A certain firm chose not to seek better terms from a dominant supplier, or to threaten to discontinue their relationship, even though the supplier offered the firm much less attractive terms than it offered to its rival, without any economical basis for the differentiation.

In some cases, the virtually unlimited power of the Israeli authorities to investigate – with the unfavorable publicity such investigations engender – has been sufficient to chill potentially pro-competitive behavior by firms with high market share.

South Africa

Under South African antitrust law, a market share of 45% is sufficient to create a conclusive presumption of market power. While a company may still seek to avoid liability by defending the legality of its conduct, this presumption of market power is sometimes sufficient to deter potentially pro-competitive behavior that would have otherwise redounded to the benefit of consumers. One noted practitioner [4] cites the following examples:

Certain service companies with high market shares have been deterred from offering a variety of services at a single, lower "bundled" price. They have also refrained from offering other promotional lower prices, or higher prices justified by market conditions.

Certain consumer products companies have likewise been deterred from offering rebates and incentives or other price promotions, or charging higher prices in response to market conditions.

In general, due to current rigorous enforcement of competition laws in South Africa, many businesses view the penalties imposed very seriously and therefore seek to align their business conduct in a manner that would not result in complaints of abuse of dominance. Competitors and other complainants are increasingly choosing to complain to the South African Authorities about anticompetitive conduct where a 'dominant" firm is involved. In certain cases such complaints are without merit. Some firms have however taken the view that rather than be the subject of and be drawn into an investigation which includes adverse press coverage, management time and disruption to their businesses, they have decided not to engage in business conduct in certain areas which they regard as "high risk". Such risk areas include the conduct of

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4 Vani Chetty, Johannesburg

granting discounts, rebates and price discrimination (selling to similar customers at different prices).

The use of market-share-based presumptions is apparently viewed by some enforcers as necessary to facilitate prosecution of former state monopolies ("parastatals") which do in fact still possess market power and allegedly engage in abusive conduct. However, in the view of some private practitioners, in most cases, the market power of such companies ought to be provable based on evidence available from market sources, without resort to economically unreliable presumptions.

Ukraine

Under the competition laws of Ukraine a company is deemed to hold a monopolistic position if either: (i) it has a market share of over 35% and cannot prove the existence of sufficient competition in the market or (ii) it has a market share of 35% or less but does not face sufficient competition because the other market players have significantly smaller shares.[5] In other words, a company having a market share of over 35% is presumed to be monopolistic, unless it proves otherwise. Morever several companies are deemed to have collective dominance in the market where either: (i) the total market share of three or fewer market players exceeds 50% or (ii) the total market share of five or fewer market players exceeds 70%. This presumption applies unless those companies prove that there is competition within the group of market players and that they all face sufficient competition from other market players. If a

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[5] Law of Ukraine "On Protection of Economic Competition," dated January 11, 2001. Information on the Ukraine has been provided by Mariya Nizhnik of Vasil Kisil & Partners, Kiev.

company deemed to hold a monopolistic position (individual or collective dominance) engages in any of certain enumerated actions, it is presumed to have abused its monopolistic position unless the company proves otherwise, i.e. the company bears the burden of proof.

One example of how these presumptions can deter conduct that is arguably beneficial for consumers is the decision by the Ukrainian agency, to prevent a TV-cable operator with a significant market share from replacing older systems for analog television by newer, slightly more expensive digital systems with improved functionality.[6] The basis for the prohibition was the presumed abuse of a monopolistic position by the company in that it refused to continue to sell the older analog systems where insufficient sources of supply for those systems were available. However, the apparent result was to prevent an upgrading of the system that would appear to have benefitted consumers.

Canada

Interestingly, even though Canada does not apply market share-based presumptions of market power, the Canadian experience nevertheless provides some instructive examples of how fear of investigation can deter companies from engaging even in perfectly legal, pro-competitive conduct.[7]

The first example involves a company with a significant market share that decided not to pursue a rebate program. The company's concern was not with the legal consequences of

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6 See http://www.amc.gov.ua/amc/control/uk/publish/article?art_id=44432&cat_id=64108

7 These examples were provided by Navin Joneja of Blake, Cassels & Graydon LLP, in Toronto.

possibly being found to have violated Canadian antitrust law (i.e., penalties or injunctive relief); rather, the company's concern was that it might trigger an investigation by the Canadian Competition Bureau into the company's affairs, which would have likely entailed responding to broad, sweeping subpoenas. This is a good reminder that when we speak of a potential "chill" resulting from laws, or even guidelines, regarding abuse of dominance, part of the chill factor is concern over an investigation by public enforcement authorities which can take a significant toll on a company's operations and management.

The second example relates to a multinational company. A practice related to Canada was suspended, not because of a concern over compliance with Canadian abuse of dominance laws but, rather, that company might violate some foreign competition laws. Because the company's operations were global in nature, the practice in Canada was affected by the laws regarding unilateral conduct in another jurisdiction. This brings up another important point: If one jurisdiction adopts a more rigid test for dominance, and therefore makes a firm susceptible to increased antitrust scrutiny, it can have ramifications not just in that jurisdiction but in several other jurisdictions. This is particularly true for industries that are less local and more regional/global in nature (e.g., technology industries) and/or where a company's business model is to implement the same or similar practices (e.g., with respect to rebates, bundling, etc.) wherever it operates. If these practices are indeed pro-competitive in nature, the pro-competitive benefits are lost in not only the jurisdiction with the stricter antitrust standards but in several other jurisdictions because of this "lowest common denominator" effect.

Conclusion

While we will continue with our investigation and hopefully be in a position to provide a more complete report at a later time, we are submitting this preliminary – and admittedly incomplete -- report now, in view of the short time remaining before the ICN meeting in Kyoto.

International Chamber of Commerce
The world business organization

Department of Policy and Business Practices

Commission on Competition

Task Force on International Competition Network

Sub-Group on ICN Unilateral Conduct project

List of volunteers

Co-Chairs

Mr Michael D. Blechman
Partner
Kaye Scholer
425 Park Avenue
New York, NY 10022-3598, United States
Tel: +1-212 836 83 53
Fax: +1-212 836 71 53
mblechman@kayescholer.com

Mr Paul Lugard
Vice President, Senior Legal Counsel, Corporate Legal Department
Philips International B.V.
Building VO-1, P.O. Box 218
5600 MD Eindhoven, Netherlands
Tel: 31-40 278 47 82
Fax: 31-40 278 28 85
paul.lugard@philips.com

Volunteers

José Gabriel Assis de Almeida, J.G. Assis de Almeida & Associados (Brazil)
Ruy Santacruz, J.G. Assis de Almeida & Associados (Brazil)
Barbara Rosenberg, Barbosa Müssnich & Aragão (Brazil)
Pierre Luc Hebert, Bell Canada (Canada)
Chris Hersh, Cassels Brock (Canada)
Navin Joneja, Blake, Cassels & Graydon (Canada)
Mark Nicholson, Cassels Brock (Canada)
Amit Kapur, J. Sagar Associates (India)
Gal Rozent, Herzog, Fox and Neeman (Israel)
Hoil Yoon, Yoon Yang Kim Shin & Yu (Korea)
Youngjin Yung, Yulchon (Korea)
Alfonso Camacho Gómez, Camacho y Casillas (Mexico)
Vanni Chetty, (South Africa)
Christoph Leibenath, Nestlé (Switzerland)

Gabriel McGann, Coca Cola Beverages Ltd. (US)
Bill Kolasky, Wilmer (US)

Brazil

Pr José Gabriel Assis de Almeida
Attorney-at-Law
J.G. Assis de Almeida & Associados
Av. Rio Branco, 109, 21° andar
20.040-004 - Rio de Janeiro - RJ - Brazil
Tel: +55-21 22 42 10 77
Fax: +55-21 22 52 31 17
jgaa@aaalaw.com.br

Ms Barbara Rosenberg
Partner
Barbosa Müssnich & Aragão
Av Pres Juscelino Kubitschek
50 -4th Floor -Itaim Bibi
São Paulo, 04543-000
Tel: +55-11 33654600
Fax: +55-11 3365 5322
brr@bmalaw.com.br

Pr Ruy Santacruz
Off Counsel
J.G. Assis de Almeida & Associados
Av. Rio Branco, 109, 21° andar
20.040-004 - Rio de Janeiro
Tel: +55-21/22 42 10 77
Fax: +55-21/22 52 31 17
ruy@ruysantacruz.com.br

Canada

Mr Pierre-Luc Hebert
Senior Counsel, Regulatory Law
Bell Canada
110 O'Connor, 14th floor
Ottawa, ON, Canada
K1P 1H1
1-613-785-6363
p.l.hebert@bell.ca

Mr Chris Hersch
Lawyer
Cassels, Brock and Blackwell
40 King Street
Suite 2100, Scotia Plaza
Toronto, ON   M5H 3C2
Tel : +1- 416 869 5387

chersh@casselsbrock.com
Mr Navin Joneja
Blake, Cassels & Graydon
199 Bay Street
Suite 2800, Commerce Court West
Toronto, ON M5L 1A9
Tel: 1+416 863-2352 (Ass. : +1-416 863-2794)
Fax (416) 863-2653
navin.joneja@blakes.com

Mr Mark Nicholson
Partner
Cassels, Brock and Blackwell
40 King Street
Suite 2100, Scotia Plaza
Toronto, ON M5H 3C2
Tel: +1-416 860 6513
Fax: +1-416 360 8877
mnicholson@casselbrock.com

India

Mr Amit Kapur
Partner, Head - Projects, Regulatory & Policy Practice
J.Sagar Associates
84-E, C-6 Lane (off Central Avenue)
Sainik Farms
New Delhi - 110 062
Tel: + 91-11 29552714-16 - Extn: 248
Mob: + 91-9810743725
Fax: +91-11 29552717, 29552980
amit@jsalaw.com

Israel

Mr Gal Rozent
Partner
Herzog, Fox & Neeman
Asia House
4 Weizmann St
Tel-Aviv 64239
Tel: 972-3 692 20 91
Fax: 972-3 696 64 64
rozentg@hfn.co.il
Tel-Aviv

Korea

Mr Hoil Yoon

Yoon Yang Kim Shin & Yu
ASEM Tower, 23nd Floor
159-1 Samsung-dong
Gangnam-gu
Seoul 135-798
Tel : +82-2 6003 70 00/75 01
Fax : +82-2 6003 78 00
yoon.hoil@yoonyang.com

Dr Youngjin Yung
Partner
Yulchon
Textile Center, 12 F
944-31 Daechi-3-Dong, Gangnam6gu
Seoul 135-713
Tel : +82-2 528 52 11
Fax : +82-2 528 52 28
yjjung@yulchon.com

Netherlands

(Mr Paul Lugard, co-Chair)

Mexico

Mr Alfonso Camacho Gómez
Camacho y Casillas, Abogados
Málaga 19
Insurgentes Mixcoac
Delegación Benito Juárez,
03920, Ciudad de México
Tel: +52-55 55 98 12 72
Fax: +52-55 55 98 12 72
acamacho@ccabogados.com.mx

South Africa

Ms Vani Chetty
Vani Chetty Competition Law (pty) Ltd.
Ground Floor, Cradock Heights
21 Cradock Avenue
Rosebank-Johannesburg 2196
Tel: + 27-11 530 8965
Fax: +27-11 447 5865
vani@vanichetty.co.za

Switzerland

Mr Christoph Leibenath
EU Counsel
Nestlé SA
Avenue Nestlé 55
1800 Vevey
Tel +41 21 924 26 04
Christoph.Leibenath@nestle.com

United States

(Mr Michael D. Blechman, co-Chair)

Mr Gabriel McGann
Senior International Competition Counsel
Coca Cola Beverage Services Ltd.
1 Queen Caroline Street
London W6 9HQ
Tel: +44-20 8237 38 75
Mobile: +44 7768 251936
Fax: +44-20 823 73 720
gmcgann@eur.ko.com

Mr William Kolasky
Partner
WilmerHale
2445 M Street NW
Washington, DC 20037
Tel: +1 202 663 6357
Fax + 1 202 669 6363
william.kolasky@wilmerhale.com