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**COMPILATION OF THE RESPONSES TO THE UNCTAD
QUESTIONNAIRE**

**Part III: The Importance of Economic Analysis in Competition Cases
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Albania

Section A

1. *Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis:*

Albanian competition authority has a total number 32, with 10 lawyers and 18 economics. Generally economic specialists are graduated in economics and we already have a number of completed cases where we had used complex economic analysis.

2. *How frequently does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited:*

We used case by case economic analysis and especially in merger(AMRA-ARMO case) and abusing of dominant position(Vodafone Albania-AMC case). At the same time, we find useful economic analysis in cartels case when we had not find and direct evidences (fuel market case).

3. *Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to: market definition, vertical restraints, horizontal restraints, abuse of dominance, mergers, and what problems/challenges were encountered?*

- a) market definition-yes
- b) vertical restraints - yes
- c) horizontal restraints-yes
- d) abuse of dominance-yes
- e) mergers -yes

We challenged a discussion related to market definition in mobile telephony case because we had to choose between whole sale and retail market. We took the indication from retails market where the tariffs are highest in overall Europe and so we opened the investigation for abuses of dominance in wholesale (termination, transition) market.

4. *What is your experience with the use of empirical techniques: a) regression analysis, b) concentration models, c) price simulations and Monte Carlo models, d) score and probit models and e) other empirical tools?*

We had some experiences in using the regression analysis (banking sector) and concentration models (banking sector and mergers cases).

5. *What difficulties are encountered in communicating economic reasoning and empirical evidence to: a) various parties involved in competition cases; and b) the Courts. And what strategies are employed to overcome them?*

We had used economic reason of anticompetitive behaviour in deferent cases and we challenged some difficulties with parties involved to prove that a cartel case can be charge without direct evidence but using *inter alias* economic analysis such as:

- durability of market shares;
- increased the process at the same spread;
- Cost and prices analyses etc.

We had not yet any problems with courts till now because courts mainly deal with procedural aspects and did not involved so much in economic analysis.

Section B

1. *What type of system do you have for the resolution/review of competition cases (inquisitorial/adversarial, administrative/judicial)?*

The review of competition cases is done by the administrative section of the Court of Tirana. The nature of the Albanian Civil Proceedings is Adversarial and not inquisitorial.

2. *Is economic evidence a significant and an important component in the proceedings of competition cases before the courts and the determining of sanctions?*

Based on the current experience of the Albanian Competition Law with the Courts on Competition Law cases, arguments of the Plaintiffs have been more focused on procedural aspects.

3. *For which class of anticompetitive practices (vertical restraints, horizontal restraints, abuse of dominance, and mergers) have you found economic analysis particularly necessary, useful and convincing?*

So far before of the Court only Abuse of Dominance cases have been reviewed and mainly procedural issues have been raised before the court.

4. *What difficulties are encountered by the courts with accepting economic reasoning and empirical evidence and what strategies are employed by the courts to overcome them? Do these strategies include the possibility for the courts to make use of independent experts?*

In accordance to Albanian Civil Procedure Code the Court may use independent experts.

5. *How have the economists been incorporated to the primary judicial forums to adjudicate competition law cases?*

The team that has been authorised from the Albanian Competition Authority to Follow the Court proceedings has been composed from lawyers and economists.

Algeria

Section A

A.1. Administration centrale du commerce :

Il existe au Ministère du Commerce (administration centrale), une Direction de la Concurrence et une Direction du Contrôle des Pratiques Anticoncurrentielles et Commerciales.

La Direction de la Concurrence est composée de quatre (04) Sous-Directions ci-après :

- Sous-Direction de l'Observation des Marchés ;
- Sous-Direction des Marchés des Utilités Publiques ;
- Sous-Direction de la Promotion du Droit de la Concurrence ;
- Sous-Direction du Contentieux et des Relations avec le Conseil de la Concurrence.

La Direction du Contrôle des Pratiques Anticoncurrentielles et Commerciales est composée des deux (02) Sous-Directions suivantes :

- Sous-Direction du Contrôle des Pratiques Anticoncurrentielles ;
- Sous-Direction du Contrôle des Pratiques Commerciales.

Les deux structures sont composées d'une douzaine de cadres (économistes, juristes et financiers).

A.2. Administrations régionale et locale du commerce :

L'Administration centrale a des services décentralisés aux niveaux régional et wilayal (départemental) qui ont des attributions en matière de concurrence (suivi du marché et enquête). Il existe environ 1.700 agents de contrôle habilités dans le domaine de la concurrence.

A.3. Capacités d'analyse :

D'une façon générale, la capacité d'analyse des cadres est appréciable mais ceux-ci nécessitent, toutefois, une action de mise à niveau. En effet, notre administration ne dispose pas de personnels pleinement spécialisés dans le domaine de la concurrence.

A.4. Types d'analyse :

Les modèles d'analyse sont tirés principalement des expériences française et canadienne. Les affaires traitées se rapportent :

- à l'abus de position dominante ;
- aux ententes ;
- aux concentrations ;

A.5. Difficultés rencontrées :

Les principales difficultés objectives rencontrées sont liées au fait que :

- le Ministère du Commerce ne compte pas encore d'effectifs (cadres, analystes et enquêteurs) véritablement spécialisés en matière de droit de la concurrence (théorie et pratique) ;
- le Conseil de la Concurrence n'est pas totalement opérationnel ;
- et les tribunaux ne sont pas spécialisés dans le droit de la concurrence.

Section B : Avis concernant l'utilisation de l'analyse économique :

Cette partie concerne le Ministère chargé de la Justice.

Section B

II. POINT DE SITUATION RELATIF A L'ASSISTANCE TECHNIQUE :

Les besoins essentiels et prioritaires en matière d'assistance technique dans le domaine de la concurrence, de l'administration algérienne du commerce et de ses services locaux chargés de la concurrence, peuvent être présentés comme suit :

A. Formation et perfectionnement :

Les actions de formation souhaitées sont destinées en priorité aux cadres chargés de la concurrence (économistes, juristes et enquêteurs notamment) et peuvent être présentés comme suit :

- formations spécifiques à la carte ;
- formations de courte et moyenne durées (01 à 03 semaines) ;
- formation de formateurs pour garantir la pérennité et l'amortissement des actions à engager dans ce cadre.

B. Conférences et ateliers de travail :

- Participation aux conférences et ateliers de travail sur des thèmes spécifiques animés par des experts qualifiés pour déboucher sur des enseignements concrets permettant de promouvoir efficacement les règles de la concurrence et de les consacrer dans la pratique (ex. les concentrations, les exclusivités, les ententes et les abus de position dominante, les aides d'Etat, la régulation du marché, ...)

C. Études et expertises :

- Conception de toutes études et expertises en matière de concurrence en fonction des besoins (à la carte).

Les principaux thèmes sur lesquels doivent porter les actions de formation, les ateliers et séminaires ainsi que les études et expertises peuvent être exposés comme suit :

- Politique et stratégie de la concurrence ;
- Régulation efficiente du marché dans une économie concurrentielle ;
- Modalités de mise en œuvre et d'analyse du droit de la concurrence ;
- Mécanismes d'observation et de surveillance des marchés ;

- Méthodologie de contrôle du marché et de réalisation des enquêtes en matière de concurrence et de marchés publics ;
- Mode opératoire de gestion du contentieux des pratiques anticoncurrentielles ;
- Outils de promotion et de vulgarisation du droit de la concurrence ;
- Autorités sectorielles de régulation (marchés des utilités publiques) ;
- Analyse de la problématique des concentrations, ententes et abus de position dominante ;
- Problématique des exclusivités en matière d'exercice des activités par rapport aux impératifs de concurrence loyale ;
- Marchés publics et concurrence ;
- Système des prix des produits et services stratégiques dans une économie concurrentielle ;
- Problématique des services publics ;
- Contrats et réseaux de distribution (ex. franchise, discount...) ;
- Concurrence déloyale ;
- Concurrence, marché informel et contrefaçon ;
- Propriété intellectuelle et concurrence ;
- Aides et subventions de l'Etat et concurrence.

D. Visites d'études dans les pays membres de l'Union Européenne :

Afin de permettre aux cadres chargés de la concurrence de l'administration algérienne du commerce, de bénéficier de l'expérience et de la pratique des pays de l'Union Européenne, il est souhaité l'organisation à leur profit, de visites d'études au niveau des pays de l'Union Européenne qui disposent d'un système institutionnel et juridique proche ou similaire de celui de l'Algérie (cas de la France et de la Belgique).

E. Aide à la mise en place d'instruments et d'outils techniques normalisés :

- mise en place d'un outil opérationnel et dynamique de régulation du marché ;
- initiation d'outils opérationnels informatisés d'observation, de surveillance et d'analyse des marchés et des pratiques anticoncurrentielles ;
- formalisation des instruments méthodologiques d'encadrement et de promotion de la concurrence ;
- élaboration d'une méthodologie de traitement, de gestion et de suivi du contentieux des pratiques anticoncurrentielles ;
- conception d'instruments pédagogiques de vulgarisation du droit de la concurrence.

Argentina

Sección A

1. *Sírvanse proporcionar un desglose de la plantilla de economistas y juristas empleados por el organismo encargado de la competencia, e informar sobre la capacidad de esos funcionarios para realizar análisis económicos complejos.*

El total a Enero de 2009 es de 82 agentes incluyendo al Presidente de la CNDC, hay 31 abogados, 16 economistas, 26 administrativos, 6 de otras profesiones y 4 pasantes.

A nivel procedimental, las tareas de análisis de casos (fusiones) y conductas se organizan por equipos en los cuales participan abogados y economistas que realizan los estudios pertinentes con el nivel de complejidad requerido en cada una de las carpetas y actúan inter-disciplinariamente.

2. *¿Con qué frecuencia recurre el organismo encargado de la competencia al análisis económico en el examen de casos de competencia? ¿Para qué clases de prácticas anticompetitivas se ha determinado que el análisis económico es más necesario y útil? ¿Se considera que el análisis económico es necesario y útil para evaluar la eficiencia dinámica en comparación con la eficiencia estática? Sírvanse dar ejemplos concretos de todos los casos mencionados.*

En general, esta Comisión recurre al análisis económico para definir los mercados relevantes afectados por las conductas o concentraciones y/o estimar los efectos de las presuntas conductas anticompetitivas sobre el bienestar económico general.

Todo dictamen de esta Comisión contiene un análisis económico, salvo aquellos casos en los que es notorio que la conducta denunciada no puede ser encuadrada como una práctica anticompetitiva. Lo que puede variar es el alcance y finalidad de dicho análisis.

Por ejemplo, en el caso de las fusiones horizontales, el análisis económico se orienta a la definición de los mercados relevantes afectados, ello teniendo en cuenta que tanto las normas y lineamientos como la jurisprudencia de esta Comisión establecen que en la medida en que una operación restrinja la competencia o genere una alta concentración en los mercados afectados, y en tanto haya barreras a la entrada significativas en dicho mercado, se asume que la misma implicará un perjuicio al interés económico general.

De igual manera, en los casos en los que se ha demostrado la existencia de un cartel cuyos participantes involucran una participación significativa del mercado, esta Comisión asume que al restringir la competencia, esta conducta resultará en un perjuicio al interés económico general, aun cuando los carteles no sean una conducta *per se* en nuestra legislación. En efecto, en la investigación realizada contra cuatro proveedores de oxígeno líquido, <http://www.cndc.gov.ar/oxigeno.pdf>, y en la

investigación del cartel del cemento, <http://www.cndc.gov.ar/archivos/cemento.pdf>, esta Comisión consideró que la existencia misma del cartel importaba la existencia de un perjuicio al interés económico general.

En el resto de las conductas, el análisis económico que avala tanto la definición de los mercados relevantes afectados como los efectos sobre el interés económico general, constituyen la parte central de los fundamentos de los dictámenes que emite la Comisión.

Específicamente podemos afirmar que ciertos modelos que explican el funcionamiento de los mercados oligopólicos han resultado sumamente útiles en el examen de conductas de abuso de posición dominante. Esto se advierte en el caso de abuso de posición dominante iniciado por esta Comisión contra la firma YPF S.A. en el mercado de gas licuado de petróleo.

http://www.cndc.gov.ar/conductas/dictamen_ypf.pdf

También han resultado útiles los modelos que explican el probable comportamiento de un hipotético monopolista, para definir mercados relevantes en los casos de concentraciones, tal es el caso de

<http://www.cndc.gov.ar/download/cndc/dictamenes/dictamen376final.pdf>

En el análisis de fusiones que involucran a mercados con gran incidencia de la tecnología, como por ejemplo: telecomunicaciones, productos farmacéuticos y agroquímicos, esta comisión incorporado informes de terceros o realizado análisis internos que indagaban acerca de los futuros escenarios competitivos en dichos mercado tomando en cuenta elementos tales como los ciclos del producto, la convergencia de tecnologías y la vigencia de los derechos de propiedad intelectual, y muchos de estos análisis han sido decisivos a la hora de resolver la concentración.

3. *Sírvanse indicar qué teorías o modelos económicos han servido de base para determinar la existencia de conductas anticompetitivas con respecto a lo siguiente: a) definición de mercado, b) restricciones verticales, c) restricciones horizontales, d) abuso de posición de dominio, e) fusiones*

Para la definición de mercados relevantes, nuestros lineamientos para el control de concentraciones incorporan el test SSNIP (Small but Significant and Nontransitory Increase in Price). Este test se utiliza con frecuencia como modelo conceptual. Para este fin, especialmente también se han utilizado estudios e investigaciones de mercado tales como, análisis de convivencia, de elección del consumidor, encuestas a consumidores, audiencias testimoniales con competidores, clientes y proveedores de las empresas notificantes. Por su parte en los casos de conductas anticompetitivas se suele recurrir, además, de a los elementos indicados a prueba documental mediante oficios y, eventualmente, allanamientos, y pericias económico contables.

Para los análisis de los efectos de concentraciones recientemente se utilizó un modelo de simulación de precios en función de la estructura del mercado. Esta herramienta fue considerada junto con otra evidencia directa para resolver el caso.

Los problemas que pueden surgir son de diversa índole, entre otros, el lograr la autorización judicial correspondiente para llevar adelante allanamientos en casos de

posibles violaciones a la Ley que requieran de prueba directa (podría ser el caso de ciertos carteles), la integración de criterios contable y económicos en la realización de pericias, el identificar testigos que puedan proveer buena calidad de información para resolver un caso o una concentración, las bajas de recursos profesionales calificados para llevar adelante los análisis económicos que no resultan fácilmente reemplazables.

4. *Sírvase indicar qué ha observado en el uso las siguientes técnicas empíricas: a) análisis de regresión; b) modelos de concentración; c) simulaciones de precios y modelos de Monte Carlo; d) modelos de puntuación (score) y de probit; y e) otras herramientas empíricas.*

Los modelos de elasticidad crítica que nos han sido presentados por las partes notificantes presentan algunos problemas a la hora de ser utilizados como prueba para avalar una definición de mercados relevante. En primer lugar hemos observado que tanto los supuestos de los modelos como la parametrización de los mismos resultaban metodológicamente cuestionables, tal como se observa en el caso BIMBO-FARGO. <http://www.cndc.gov.ar/download/cndc/dictámenes/final2.pdf> En segundo lugar, hemos observado que contrastando los modelos presentados con otros desarrollados internamente, era posible llegar a resultados diametralmente opuestos, aun cuando los nuevos modelos fueran tan defendibles como los primeros.

Por todo ello, en diversos dictámenes en los que existen análisis econométricos incorporados a la investigación se ha indicado que estos análisis no son una prueba concluyente, y serán meritados conjuntamente con el resto de la evidencia colectada en el curso de la investigación.

Los modelos de Monte Carlo y de store no han sido utilizados hasta el presente.

5. *Sírvanse indicar qué elementos dificultan la transmisión de razonamientos de tipo económico y pruebas empíricas a los siguientes destinatarios: a) Las partes involucradas en los casos de competencia; b) Los tribunales. Sírvanse indicar las estrategias utilizadas para sortear esas dificultades.*

En el caso de las partes involucradas en casos de competencia cabe hacer una distinción entre empresas que son representadas por asesores económicos con conocimientos específicos en la materia y otras que no han recurrido a tales profesionales. En el primer caso los problemas de transmisión del razonamiento antitrust prácticamente no existen. En el segundo hay principios generales que se respetan en el análisis económico de todos los dictámenes, los cuales morigeran en buena medida estos problemas. Los principales criterios en este sentido son los siguientes.

Realidad económica: Es una pauta que surge del artículo 3° de la Ley de Defensa de la Competencia (segundo párrafo) y que a los efectos prácticos consiste en que los aspectos conceptuales y teóricos, más allá de su consistencia lógica interna, deben reflejar lo sustancial de la realidad económica del mercado en que concretamente se está analizando una concentración económica o posible conducta anticompetitivas.

Consistencia: Las múltiples fuentes de información y análisis consultados tales como modelos teóricos, métodos cuantitativos, jurisprudencia propia, jurisprudencia internacional, encuestas, estudios sectoriales, aspectos técnicos de los procesos productivos, pericias económico contables, prueba directa obtenida mediante allanamientos, etc. deben ser ponderados y evaluados en función de la consistencia que guardan entre sí para explicar la realidad económica a la que se aplican. Este criterio disminuye los riesgos de errores u omisiones en el análisis.

Rigurosidad y sencillez. Hace referencia a que un dictamen debe observar un delicado equilibrio entre la rigurosidad de la argumentación volcada, en el sentido de ser consistente con principios microeconómicos y antitrust básicos (por ejemplo el test SNNIP para definir un mercado relevante) y al mismo tiempo que el análisis y la evidencia que sustentan dicha argumentación puedan resultar intuitivamente comprensibles para un lector no profesional en temas de competencia. Un concepto vinculado a los de este punto es que el dictamen debiera ser elaborado, entre otros aspectos, con un criterio didáctico.

Autosuficiencia. El análisis económico desarrollado en un dictamen debería ser lo más completo posible, explicitando todos los elementos de juicio y aproximaciones relevantes para definir el caso de que se trate y dejando en la menor medida posible cuestiones implícitas que debieran ser deducidas o inferidas por el lector.

Dentro de los dictámenes de la Comisión Nacional de Defensa de la Competencia el citado caso de la sanción a YPF constituye un destacado ejemplo de apego a los criterios enunciados.

Con respecto a la transmisión de conocimientos económicos y pruebas en el ámbito judicial los criterios que se acaban de ilustrar son totalmente aplicables a esta esfera, no sólo mediante dictámenes sino también a través contestaciones a los traslados que realizan los tribunales de alzada (Cámaras Federales del Poder Judicial) originados en apelaciones interpuestas por las partes afectadas por decisiones de la autoridad de aplicación de la Ley de Defensa de la Competencia (actualmente en Argentina es la Secretaría de Comercio Interior con fundamento en las recomendaciones – dictámenes- de la Comisión Nacional de Defensa de la Competencia). Por ejemplo apelaciones de una sanción por violación a la Ley o la prohibición de una concentración económica.

Sección B

1. *¿Qué tipo de sistema se utiliza para resolver y examinar los casos relativos a cuestiones de competencia (procedimiento inquisitivo o acusatorio, administrativo o judicial)?*

N/A

2. *¿Las conclusiones económicas son un componente significativo e importante tanto de los procesos judiciales sobre la competencia como de la imposición de sanciones?*

N/A

3. *¿Para qué clase de prácticas anticompetitivas (restricciones verticales u horizontales, abuso de posición de dominio y fusiones) se ha determinado que el análisis económico resulta más necesario, útil y convincente?*

N/A

4. *¿Qué problemas se les plantean a los tribunales cuando se trata de aceptar los razonamientos de tipo económico y las pruebas empíricas, y qué estrategias emplean para solucionarlos? ¿Se contempla en esas estrategias la posibilidad de que los tribunales recurran a expertos independientes?*

N/A

5. *¿En qué medida se ha permitido a los economistas participar en los foros judiciales más importantes para emitir sentencia en los casos relacionados con el derecho de la competencia?*

Dado que el mes de enero en Argentina es un período de feria judicial no ha sido posible dar cumplimiento a este bloque de preguntas debido a no disponer del tiempo suficiente.

Brazil

Section A

1. *Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis.*

The Brazilian Competition Policy System (BCPS) is composed of three agencies - namely, the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE), the Secretariat of Economic Law of the Ministry of Justice (SDE), and the Administrative Council for Economic Defense (CADE). SDE is the chief investigative body in matters related to anticompetitive practices and it also issues non-binding opinions in merger cases. SEAE issues non-binding economic opinion in merger review and it may also issue non-binding opinions related to anticompetitive practices. CADE is the administrative tribunal, composed of seven Commissioners, which makes the final rulings in connection with anticompetitive practices and merger review.

The SDE has 4 economists, 19 lawyers and 4 other professionals (engineer, business administration) on its Antitrust Division.

The SEAE has 16 economists, 1 lawyer and 5 other (engineer, business administration) on its Competition policy unit.

The CADE has 11 economists, 32 lawyers and 18 other professionals.

Overall, the staff's capacity to undertake complex economic analysis is somewhat limited. Most of the staff has a sound knowledge on economics which makes them capable to undertake qualitative analysis based on industry and event studies, as well as to read private economic analysis presented during the investigation. However, their knowledge regarding advanced industrial organization models and econometric tools is limited.

2. *How frequently does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited.*

The use of appropriate advanced economic concepts and tools to assess competition cases has been considered crucial by the Brazilian Competition Policy System (BCPS) for the last four years. However, in most cases the use of economic analysis is limited to basic aspects, such as case selection and market definition; the remaining analysis is qualitative, based on formal surveys, as well as event studies and documents to link industry "facts" to relevant economic theory and the case "story". Exception is made on the most important merger reviews, where economic and econometric tools are more intensively used to define the market, to access vertical or horizontal constraints, and efficiency.

3. *Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to:*

- f) market definition
SNIP test, critical loss, elasticity estimation, price correlation, event studies (entry/exit and market share)
- g) vertical restraints
pass through analysis, elasticity estimation, entry/exit event studies, residual demand analysis
- h) horizontal restraints
pass through analysis, elasticity estimation, entry/exit event studies, residual demand analysis
- i) abuse of dominance
HHI/concentration index calculations, price/cost margin, entry/exit event studies
- j) mergers
HHI/concentration index, SNIP test, critical loss, elasticity based merger simulation, cross-sectional reduced form (price or margin) analysis of competitive effects, entry/exit event studies, residual demand analysis

and what problems/challenges were encountered?

The first and foremost problem is the limited staff specifically trained to undertake advanced economic analysis when assessing anticompetitive practices and merger cases. Besides that, the main problems and challenges are linked to the reliability of the data. For instance, the Brazilian Competition Policy System (BCPS) usually relies on data collected by the parties involved which, in many cases, are not complete and/or accurate. Furthermore, the BCPS has limited capacity to hire academic experts to work along its own staff.

4. *What is your experience with the use of empirical techniques: a) regression analysis, b) concentration models, c) price simulations and Monte Carlo models, d) score and probit models and e) other empirical tools?*

Aside a couple of the BCPS's staff with experience to implement empirical techniques listed above, most of the staff is only capable to read these kind of analysis as it is made internally or provided by the parties.

5. *What difficulties are encountered in communicating economic reasoning and empirical evidence to:*

- a) various parties involved in competition cases; and
Again, the main difficulty is the lack of trained staff to discuss the economic and empirical techniques. To overcome this constraint, BCPS has allowed each conflicting party to comment on other parties' analysis - this is done after a thoughtful confidentiality assessment.
- b) the Courts
It does not apply.

and what strategies are employed to overcome them?

The BCPS has in place an ambitious training program in economic and econometric analysis based on in house courses to its staff. The main focus is to give to non-economists specific tools to navigate and analyse and replicate advanced applied economic/econometric work presented by the parties been investigated.

Section B

1. What type of system do you have for the resolution/review of competition cases (inquisitorial/adversarial, administrative/judicial)?

In Brazil there is an administrative system for the review of competition cases, which might be followed by a judicial review in case of appeal by the parties. A brief description of the Brazilian Competition Policy System (BCPS) is found in item III.A.1 above.

CADE's decisions are subject to judicial review. CADE's Attorney General Office is responsible for providing legal counsel and representing CADE in judicial proceedings. Petitions by private parties for review of government agency actions are heard by the federal courts of first instance. By law, challenges to actions of the three BCPS agencies must be filed before the court located in Brasilia. Appeals by the private party or the agency from a decision by a first instance judge lie in the Court of Appeals for the geographic region in which the initial judicial decision was rendered. Appeals from the regional courts of appeal go to the Superior Court of Justice (STJ), while cases involving claims of unconstitutional statutory application may be appealed to the Supreme Federal Court (STF).

On what comes to the limits to which such judicial review is conducted, even though there is no clear legal provisions regarding this matter, the STF has been deciding that the Judiciary does not have the competence to provide a new judgment on the merits of the discretionary act, once this is the competence of the Executive Branch. That supposedly limits such review to the formal aspects of administrative decisions.

2. *Is economic evidence a significant and an important component in the proceedings of competition cases before the courts and the determining of sanctions?*

Economic evidence is not a significant/important component in competition cases brought before Brazilian courts. The economic evidence is submitted to courts by CADE, as a result of its analysis in support to its administrative decisions.

CADE is a well-recognized and respected agency and it is estimated that around 58% of its decisions are upheld by the Judiciary. Nevertheless, courts do not build their decisions in economic analysis and usually avoid dealing with it directly. In most of the cases Brazilian courts limit themselves to evaluating legal aspects and

the Judiciary avoids interfering on the grounds of actions issued by the public administration, as mentioned above. The argument raised by CADE and accepted by several courts is that CADE's decisions are administrative acts and, due to prevalence of the constitutional principle of separation of powers, CADE would be responsible for deciding the grounds of action while the Judiciary should primarily focus on the analysis of constitutional offences and illegalities.

3. *For which class of anticompetitive practices (vertical restraints, horizontal restraints, abuse of dominance, and mergers) have you found economic analysis particularly necessary, useful and convincing?*

Considering that economic analysis has not been carried out so far in the judicial review of CADE's decisions, there are no evident classes of anticompetitive practices that have found economic analysis particularly necessary. There is, however, a leading case, namely the "steel cartel case", where CADE's decision on the imposition of sanctions has been ultimately supported by economic evidence and was partially upheld by the Brazilian federal courts.

In this case, CADE confirmed, through the application of economic theory, that the parallel conduct of the parties suspected of participating in the cartel could find no rational explanation from the economic perspective; based on this analysis, as well as on a meeting between the parties before a parallel increase in steel prices, CADE was able to prove the existence of a cartel and determined the imposition of sanctions. Therefore, the administrative decision had a major economic reasoning in support to the legal basis for condemnation.

The federal court acknowledged the existence of an infringement to the economic order and sustained, in part, the legal basis and sanctions established by CADE in support to its decision.

4. *What difficulties are encountered by the courts with accepting economic reasoning and empirical evidence and what strategies are employed by the courts to overcome them? Do these strategies include the possibility for the courts to make use of independent experts?*

Courts do not have the necessary expertise to carry out economic analysis in competition cases, as judges usually do not have an economic background. Although in the majority of the cases courts take into account CADE's economic analysis and limit themselves to the scrutiny of legal aspects for reaching a decision, there have been cases where courts have chosen to nominate independent economic experts for carrying out economic analysis.

An example is the "Gemini case", where CADE has approved a joint venture upon the imposition of remedies. When assessing the appeal submitted by the implicated undertakings, the federal court decided to nominate an independent expert to evaluate the causes that have led CADE to impose a remedy and to assess whether the latter was justifiable. CADE has appealed from this decision, claiming that the facts and effects in the case had already been subject to a throughout economic and

legal competition analysis by the seven members of the Plenary of CADE. It has alleged that the nomination of an expert by the court was not necessary as the facts and effects had already been scrutinized by seven well-recognized experts of CADE. CADE considers that its decisions are expert reports and that courts should support their legal analysis on the facts and technical conclusions presented therein.

Otherwise it would be preferable to simply annul the case and send it back for CADE for a throughout review, as there is no other tribunal better suited for the assessment of technical aspects in competition cases.

Furthermore, markets and the economy itself are dynamic and in constant change. This means that a new technical evaluation of the case by courts would naturally lead to a different conclusion from the technical opinion issued by CADE, as the time period between both technical assessments (by CADE and by the courts) would amount to approximately five years.

In other few (two or three) cases the federal courts have also chosen to nominate an independent expert, and CADE has appealed from such decisions on the same basis. All appeals are still under scrutiny by the Judiciary and so far no independent technical opinion has been implemented.

5. *How have the economists been incorporated to the primary judicial forums to adjudicate competition law cases?*

As previously explained, some courts have nominated economists as independent experts and have requested them to issue technical opinions in judicial cases. So far, however, no technical opinions have been issued by experts nominated by courts, as the legality of this initiative was contested by CADE and is currently subject to appellate review.

Another approach for the incorporation of economists to judicial forums has been the submission, by undertakings, of technical opinions to support their allegations in judicial cases.

Bulgaria

Section A

1. *Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis:*

The administration of the CPC consists of 130 full time employees, including the members of the Commission. 28 of them work in the “Public Procurement and Concessions” Directorate, since the CPC also performs the function of National Public Procurement and Concessions Review Body. The overwhelming majority of CPC staff holds university degrees in law or economics. 54% of the employees have a degree in Law, 25% - in Economics, 6% - in Engineering, 9% - in Social Sciences, and 6% have secondary vocational education. The CPC experts have been participating in numerous seminars and workshops to improve their qualification in regards to economic analyses.

2. *How frequently does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited:*

In its practice, the CPC uses a special Methodology on investigation and definition of the undertakings’ market position in the relevant market. The Methodology is adopted in compliance of the Law on the Protection of Competition and is applied to:

- agreements, decisions and concerted practices;
- monopolistic and dominant position on the market;
- concentration of economic activities;
- other acts that might result in the prevention, restriction or distortion of competition.

With this Methodology, the Commission seeks to make public and transparent its studies and investigations, as well as its understanding of how the criteria and procedures in respect to identifying the relevant market shall be applied.

In the process of identifying the relevant market, the CPC estimates the following main parameters on a case- by-case basis:

- a) Product market. Demand and supply substitution;
Different quantitative tests are used to differentiate (determine) product markets. For this purpose a variety of statistical and econometric approaches are applied, such as evaluation of elasticities and cross-price elasticities for the demand of a product; dynamics of prices in different geographical areas and the reasons for that, similar price movements over a period of time, etc;

b) Geographical market;

Here the CPC determines and analyzes the existence of barriers which isolate the undertakings in a specific geographical territory from the competitive constraint of undertakings located outside that territory;

- Potential competition. Barriers to entry – structural, strategic; legal and administrative barriers;

c) Any markets of the “supplier-producer-distributor” vertical line, which might be affected;

d) Participants in the relevant market;

- Market shares of the participants and undertakings which participate in the markets of the vertical “supplier-producer-distributor” line;

- The CPC also uses several indicators on the structure of the relevant market – the Herfindahl-Hirschman (H) Index, Relative share of the largest participants in the market (CR - Concentration Ratio), the Lind index.

Analysis of the financial standing of the participants in the relevant market is often used. The indicators are usually applied in order to cover the following three areas: profitability; liquidity; financial autonomy.

For the purposes of its specific analyses, the CPC receives information, collected and processed by the National Statistical Institute, by other public institutions and private companies offering market research services.

In respect to concentrations, priority is given to the economic analysis in cases of horizontal concentrations. The CPC practice shows that this kind of concentrations may create or facilitate coordination between competitors on the market which may eventually lead to changes in the market structure.

The analysis accent falls on the accumulated market power of the parties of the concentration. The CPC researches whether the outcome of the transaction would lead to creation or strengthening of a dominant position.

The CPC uses economic analysis also in cases of vertical or conglomerate transactions when anticompetitive effects are suspected. The CPC assesses whether there could be possible strengthening of the market power on the upstream and downstream markets and consequent price increase or diminish the chance to compete.

In its practice the CPC has never encountered cases requiring economic analysis of efficiency (dynamic or static) and its consumer benefit.

3. *Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to: market definition, vertical restraints, horizontal restraints, abuse of dominance, mergers, and what problems/challenges were encountered?*

The CPC experts who carry out economic analyses are familiar with the economic theories and models for assessment of anticompetitive behaviour. Some of these theories and indexes are: the Cournot model, the Bernard model, the Lerner index, the Beins coefficient, the Tobins coefficient, SSNIP test etc. However, due to their

specifics and the necessity of complex calculations, as well as to the lack of sufficient information, the application of these theories/models is limited in practice. As it has been mentioned above, the economic analyses are based on a Methodology on investigation and definition of the undertakings' market position. The Methodology has been developed by the CPC.

Regarding concentrations in particular, the CPC applies the dominance test. The practical aspects of this analysis refer to:

- Identification of the relevant product and geographical market on which the undertakings operate. The CPC focuses on markets with horizontal overlap, vertical relations between the parties in the concentration or closely related markets.
- Analysis of the structure of the relevant markets; players, relevant market share. When analyzing the structure of the relevant market, the CPC uses a variety of tools such as indexes and indicators (HHI, CR, the Lind index).
- Evaluation of the market position of undertakings before and after the concentration, their economic and financial power. In order to determine the financial capabilities of the undertakings on the relevant market the CPC uses a variety of indicators and coefficients for profitability, liquidity, capital structure etc.
- Price analysis of the relevant products (goods and/or services), supply and demand trends etc.

Based on the results of the economic analyses and in line with the applicable legal requirements, the Commission authorises concentrations which do not lead to creation or strengthening of a dominant position, as a result of which effective competition in the relevant market would be significantly impeded. In a limited number of cases the CPC has authorized concentrations which, while creating or strengthening a dominant position, aim at modernisation of the relevant economic activity, improvement of the market structures, better protection of the consumers' interests, and overall the positive effect outweighs the negative impact on competition.

The common problems which CPC encounters in the assessment of anticompetitive behaviour are:

- incomplete and inaccurate information submitted by the parties regarding the share of the analyzed market, as well as other relevant information;
- lack of reliable sources of information for specific economic activities, as well as reliable and current research by specialized institutions.

4. *What is your experience with the use of empirical techniques: a) regression analysis, b) concentration models, c) price simulations and Monte Carlo models, d) score and probit models and e) other empirical tools?*

In its practice CPC has not encountered cases that required the use of empirical techniques. Nevertheless, taking into account the improving experience of the EC and other competition authorities in the use of basic economic models and econometric techniques, the CPC's experts are getting familiar with them for future application.

5. *What difficulties are encountered in communicating economic reasoning and empirical evidence to: a) various parties involved in competition cases; and b) the Courts. And what strategies are employed to overcome them?*

The economic evidence and furthermore the analysis of the CPC are incorporated in the final decision. One of the major difficulties when introducing the economic evidence in court is the complexity of the analysis. Apart from that, the complainant usually demands the opinion of an external expert in order to challenge and compromise the economic evidence gathered by the CPC. In this respect, the legal representatives are doing their best to explain the source and nature of the economic evidence (financial reports, accounting and stock data etc.), so that the court is more likely to reject the challenge of the evidence.

Section B

1. *What type of system do you have for the resolution/review of competition cases (inquisitorial/adversarial, administrative/judicial)?*

Bulgaria has an inquisitorial system. The Bulgarian CPC is an administrative body. Its decisions and rulings are appealable before the Supreme Administrative Court. Furthermore, Art. 51 of the LPC states that inspections conducted by the CPC should be authorized by a judge from the Administrative Court – Sofia.

2. *Is economic evidence a significant and an important component in the proceedings of competition cases before the courts and the determining of sanctions?*

Yes. Economic analysis, such as financial and accounting data collected by the CPC during the investigation is a basic evidence of violation of the Competition law. The CPC may also use experts' opinions and reports in order to make economic evidence indisputable. The financial reports of the companies under investigation are also an essential part of the economic evidence used to determine the sanctions.

3. *For which class of anticompetitive practices (vertical restraints, horizontal restraints, abuse of dominance, and mergers) have you found economic analysis particularly necessary, useful and convincing?*

The CPC performs economic analysis in most investigations of this kind. Therefore such evidence, e.g. analysis, is necessary in all investigations concerning mergers and restraints, especially when price-fixing is involved.

4. *What difficulties are encountered by the courts with accepting economic reasoning and empirical evidence and what strategies are employed by*

the courts to overcome them? Do these strategies include the possibility for the courts to make use of independent experts?

The most common difficulties are listed above (Question 5 b). The judicial body usually finds it hard to understand the more complex financial and market analysis (for example cost price analysis). Therefore the court often uses independent experts, which make their own economic opinion. This practice is often unnecessary, because in most cases the report is based on the same data, used by the CPC, or the expert's conclusion confirms the CPC's analysis. Nevertheless, it is the court's practice to use economic expertise in order to widen the evidence in the case. Independent expertise is frequently not in conformity with the competition market analysis because the external experts are not familiar with competition law.

5. *How have the economists been incorporated to the primary judicial forums to adjudicate competition law cases?*

See question 4.

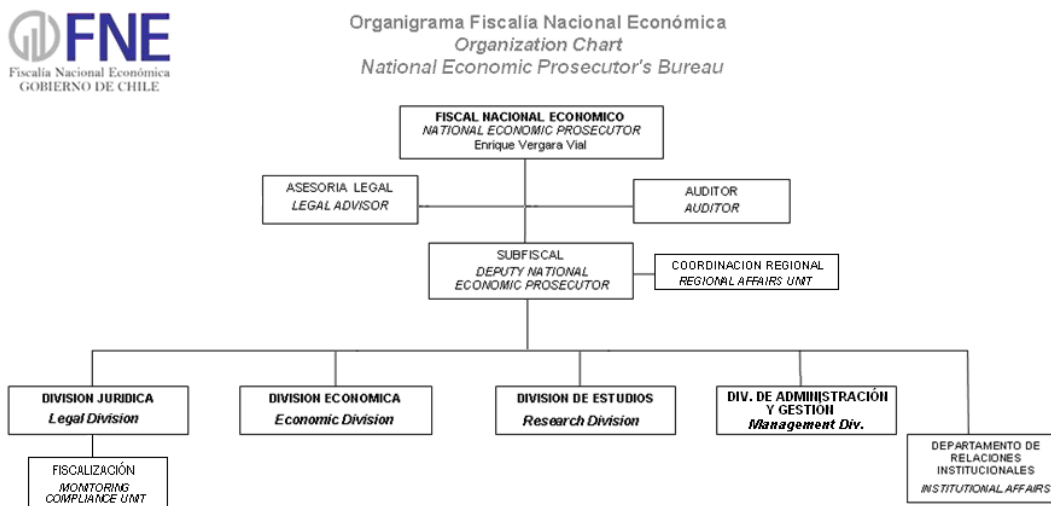
Chile

Sección A

1. *Sírvanse proporcionar un desglose de la plantilla de economistas y juristas empleados por el organismo encargado de la competencia, e informar sobre la capacidad de esos funcionarios para realizar análisis económicos complejos.*

En la actualidad, la FNE –la agencia de competencia en Chile, en conformidad a lo establecido por el DL 211 /1973 y sus posteriores modificaciones- cuenta con una dotación de 80 profesionales, organizados por una Dirección que encabeza el Servicio (formada por el Fiscal Nacional Económico y el Subfiscal Nacional), cuatro divisiones profesionales –dos divisiones de línea (Jurídica y Económica) y dos de staff (División de Estudios y División de Administración y Gestión)-, un departamento (Relaciones Institucionales) y un conjunto de unidades (Contraloría Interna, Auditoría Interna y Coordinación Regional), tal como muestra su organigrama en la figura siguiente:

Figura N°1
Organigrama Fiscalía Nacional Económica, 2008



La composición de la dotación de personal de la FNE según área de desempeño se presenta en el siguiente cuadro:

Cuadro 2
Composición de la dotación de funcionarios de la FNE, según área y formación

Área	Dotación por área	Según formación			Administrativos y técnicos
		Profesional			
		Abogados	Economistas	Otros	
<i>Dirección</i>	5	3	-		2
<i>Depto. Relaciones Institucionales</i>	2	1	-	1	-
<i>Contraloría interna</i>	3	3	-	-	-
<i>Auditoría</i>	2	-	-	2	-
<i>División Jurídica</i>	18	14	-	-	4
<i>División Económica</i>	16	-	11	4 *	1
<i>División Estudios</i>	11	4	5	1	1
<i>División Administración y Gestión</i>	24	-	-	11	13
Total	81	25	16	19	21

* Del área de la ingeniería.

Del cuadro anterior, se puede apreciar que el 52,5% de la dotación total del Servicio corresponde a profesionales de formación abogados y economistas. No obstante lo anterior, al revisar la incidencia de dotación de personal según área, se aprecia que el 42% de ésta corresponde a personal que desempeña funciones en las divisiones de línea u operativas, esto es, aquellas que están concentradas en desarrollar las investigaciones de conductas anticompetitivas y en llevar a cabo las presentaciones judiciales asociadas, cuando corresponde. Finalmente, si se excluye el personal administrativo y técnico de este análisis, se tiene que el 75% de los profesionales del Servicio tiene en su formación las áreas de leyes y economía y otras relacionadas (ingeniería).

En relación a las competencias y capacidades de los profesionales de la Fiscalía en materia de análisis económico, el Cuadro 3 presenta un resumen del grado académico de los profesionales economistas de la FNE. Aunque esta información –grado académico obtenido- no necesariamente tiene correlación directa con las competencias y habilidades de los profesionales para abordar un tema, sí es una *proxy* adecuada de la capacidad de éstos para abordar análisis económicos complejos, toda vez que el grado académico entrega una buena señal sobre la base teórica que manejan estos profesionales.

Cuadro 3

Grado académico de los profesionales economistas de la FNE

Área	Grado académico y otros estudios relevantes					
	Dotación total	Doctor en Economía	Maestría en Política de Competencia	Maestría en Economía	Diplomas en temas relacionados	Bachiller / Licenciatura
<i>División Económica</i>						
Economistas	11	1	1	6	2	3
Otras profesiones /*	4			2	2	2
<i>División Estudios</i>						
Economistas	5	1	-	4	-	-
Total	20	2	1	12	4	5

* Del área de la ingeniería.

Así, se aprecia que de los 20 profesionales economistas e ingenieros de la FNE, el 75% tiene estos de postgrado (maestrías de formación general en economía, con especialización en política de competencia o con grado de doctor en economía). Adicionalmente, es frecuente que como parte del proceso de capacitación de personal, estos profesionales tomen cursos especializados de tipo académico en áreas como microeconometría aplicada o economía de la regulación, o participen en talleres y foros internacionales especializados, como los Workshops de la *International Competition Network*. De esta forma, se concluye que los profesionales del área predominantemente cuentan con una elevada capacidad analítica para temas económicos complejos.

Finalmente, y complementando lo anterior, en determinados casos la FNE contrata estudios externos, realizados por economistas de la plaza, que vienen a complementar sus posiciones durante litigios en materia de competencia. Estos estudios, que pasan a ser de conocimiento público una vez que la Fiscalía los presenta como antecedentes relevantes al expediente de la causa abierta en el H. TDLC, son financiados con recursos propios de la operación del Servicio, y tienen como contraparte institucional a sus profesionales.¹

2. *¿Con qué frecuencia recurre el organismo encargado de la competencia al análisis económico en el examen de casos de competencia? ¿Para qué clases de prácticas anticompetitivas se ha determinado que el análisis económico es más necesario y útil? ¿Se considera que el análisis económico es necesario y útil para evaluar la eficiencia dinámica en comparación con la eficiencia estática? Sírvanse dar ejemplos concretos de todos los casos mencionados.*

¹ Ejemplos de lo anterior son los estudios de los economistas de la Universidad de Chile, Aldo González – “Efectos Competitivos del Aumento en la Concentración en el Mercado de la Venta de Alimentos al Detalle: Un Análisis Conceptual”– y A. González y A. Gómez-Lobo –“La relación entre los precios de los alimentos y la concentración de los supermercados en Chile: Evidencia de un modelo dinámico de panel y análisis de los impactos de las fusiones propuestas en la industria”–, presentados en la causa contenciosa entre la FNE y supermercados D&S y Cencosud S.A., que derivó en la Sentencia N° 65 de mayo de 2008.

- a. ¿Con qué frecuencia recurre el organismo encargado de la competencia al análisis económico en el examen de casos de competencia?

En términos generales, los criterios para evaluar las faltas anticompetitivas son de dos tipos, la regla per se y regla de la razón. En aquellas legislaciones para las que, como en el caso de la chilena, no existan conductas que per se constituyan ilícito anticompetitivo, siempre es necesario la participación de economistas en el examen de casos de competencia, toda vez que en todos los casos es necesario probar los efectos de dichas conductas potencialmente anticompetitivas sobre los mercados, a la vez que se precisa, en primer lugar, de una correcta definición de los mercados involucrados y otra serie de definiciones económicas.

De este forma, en el caso de la FNE, todos los casos de competencia abordados –tanto conductas unilaterales como prácticas concertadas y operaciones de concentración- son analizados por un equipo mixto, conformado a lo menos por un abogado y un economista, quienes como elementos bases de la investigación consideran: (i) la definición del mercado relevante de producto y geográfico, (ii) una caracterización de el o los mercados afectados que considera tanto los niveles de concentración existentes² como las condiciones y barreras a la entrada que pudieran presentarse.

Lo anterior se aprecia en el diagrama de flujo de la página a continuación, que muestra el proceso de una investigación en la FNE. Se aprecia que, una vez que una situación es admisible a investigar, siempre se realiza un análisis económico y jurídico de los antecedentes relevantes de la causa.

- b. ¿Para qué clases de prácticas anticompetitivas se ha determinado que el análisis económico es más necesario y útil?

Como se ha mencionado anteriormente (literal (a) anterior), todos los casos en que la agencia de competencia analiza conductas con efectos potencialmente anticompetitivos son abordadas empleando análisis económico.

- c. ¿Se considera que el análisis económico es necesario y útil para evaluar la eficiencia dinámica en comparación con la eficiencia estática?

Sí. El análisis de eficiencia estática y dinámica se tiene presente en todas las investigaciones, pero se desarrolla de una manera mas detallada en aquellas referidas a las operaciones de concentración en mercados que presentan un importante grado de dinamismo, en particular en aquellos donde es necesario considerar la evolución tecnológica como una de las bases de dicho dinamismo –lo que ocurre especialmente en el sector de telecomunicaciones. A modo de ejemplo en este sentido, se puede mencionar el análisis de eficiencia dinámica y estática realizado para el análisis de la posible fusión de empresas de TV Cable (VTR – Metrópolis),³ en donde se estimó que si bien estáticamente la fusión llevaría al surgimiento de una empresa con poder de dominio en el mercado de la TV Cable, en forma dinámica se estaría fomentando la competencia en el

² A mayor abundamiento, para la legislación chilena en materia de competencia, para que una conducta llevada a cabo por una o más firmas sea considerada anticompetitiva se precisa que dicha o dichas firmas tengan poder de mercado, individual o conjunto, según corresponda. De esta forma, aunque sólo fuere para acreditar la existencia de poder de mercado por parte de la potencial infractora, se hace indispensable que la agencia emplee herramientas propias del análisis económico.

³ Resolución 01/2004 TDLC de octubre de 2004, sobre la Consulta de Liberty Comunicaciones de Chile Uno Ltda., y Cristal Chile Comunicaciones S.A., sobre eventual fusión de Metrópolis Intercom y VTR S.A. [<http://www.tdlc.cl/DocumentosMúltiples/Resolución-1-2004.pdf>]

mercado de telecomunicaciones en general. De modo similar, el análisis desarrollado para en el caso de la fusión de empresas de telefonía móvil, Bellsouth - Movistar⁴, en donde como parte del análisis de eficiencia dinámica se considero la aparición de tecnologías alternativas como 3G o WiMAX

Por otro lado, el análisis de eficiencia estática y dinámica también se observa en los informes que la FNE –en su rol de informante experto- evacua a solicitud del TDLC, en orden a determinar si las condiciones de mercado son o no las suficientes para establecer un régimen de libertad tarifaria en los servicios públicos de telefonía local y larga distancia (en conformidad a lo establecido por el Art. 29 de la Ley General de Telecomunicaciones, LGT). Un ejemplo de esto puede consultarse en el informe evacuado a estos efectos en enero del año en curso, y que se publica en el sitio Web de la FNE.⁵

Finalmente, un análisis similar (estático / dinámico) también se observa en las consultas a las bases de concesión de puertos en donde, adicional a la evolución tecnológica tanto de grúas como de la zona de respaldo del puerto, se considera la evolución de la competencia tanto intra como inter portuaria en la zona de influencia de los mismos.⁶

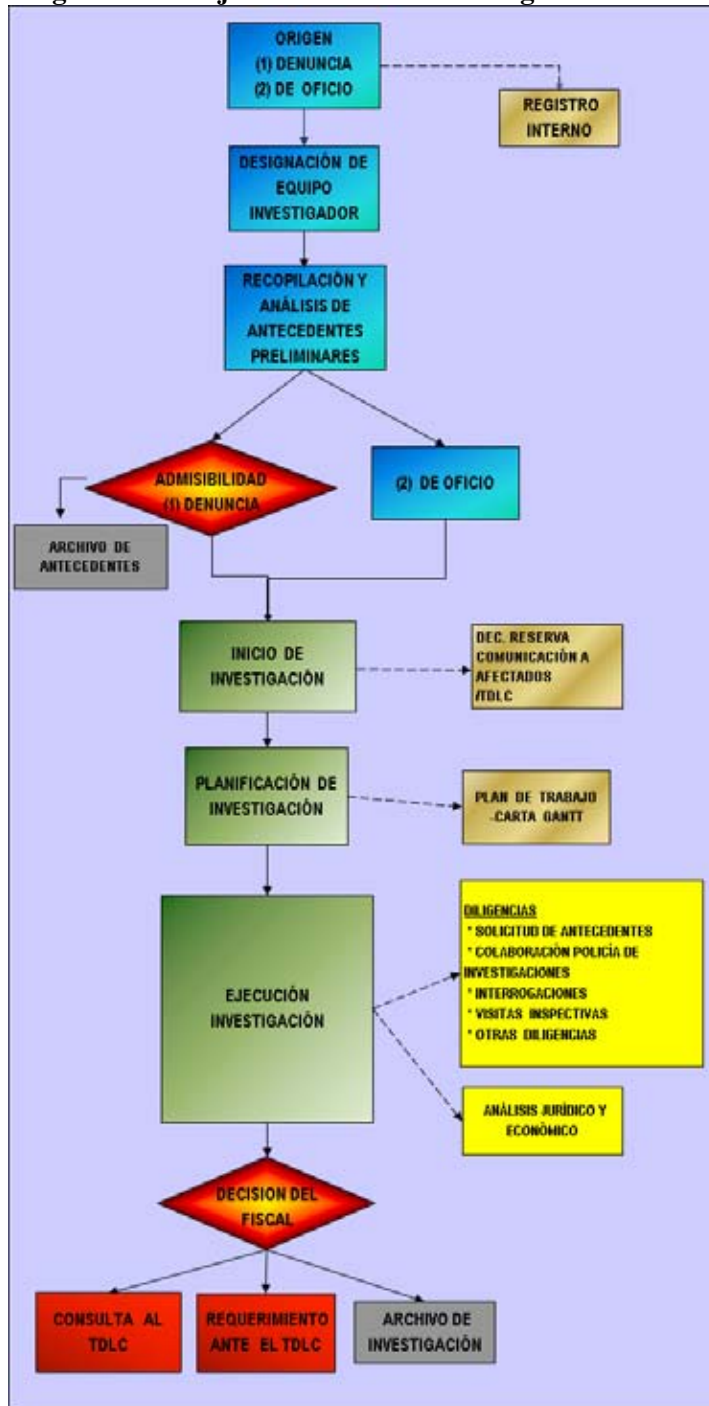
⁴ Resolución 02/2005 TDLC de enero de 2005, sobre la Consulta de Telefónica Móviles S.A., sobre aprobación de acuerdo de eventual toma de control de Bellsouth Comunicaciones S.A. [<http://www.tdlc.cl/DocumentosMultiples/Resolución-2-2005.pdf>]

⁵ Descargable en http://www.fne.cl/descargas/jurisprudencia/otros_informes_tdlc/informe_2_2009.pdf.

⁶ A modo de referencia, pueden ser consultados los informes evacuados por la FNE al TDLC sobre Licitación de Concesión Portuaria del Frente de Atraque N° 2 del Puerto de Valparaíso, de enero de este año. (En [http://mail.fne.cl/db/jurispru.nsf/60e31f9065c2d5a38425733e005df9fa/D1E16ABD6A4AAEA38425754D00513D51/\\$FILE/APORTA%20ANTECEDENTES-NC-313-08-2009.pdf](http://mail.fne.cl/db/jurispru.nsf/60e31f9065c2d5a38425733e005df9fa/D1E16ABD6A4AAEA38425754D00513D51/$FILE/APORTA%20ANTECEDENTES-NC-313-08-2009.pdf)).

Figura N° 2

Diagrama de Flujo del Proceso de Investigación en la FNE



d. Sírvase proporcionar un desglose de la plantilla de economistas y abogados empleados por el organismo encargado de la competencia, e informar sobre la capacidad de esos funcionarios para realizar análisis económicos complejos

En lo referido a economistas, favor remitirse a la pregunta 1.

En cuanto al equipo de abogados del Servicio, en general, ninguno de ellos tiene formación teórica a nivel de postgrado en economía; no obstante sí se cuenta con profesionales con maestrías y diplomados en derecho de la competencia, por lo que como parte de su formación general han cursado algunas materias relacionadas con microeconomía, organización industrial, regulación económica, etc.

Estos profesionales están en condiciones de alcanzar una acada comprensión de los análisis económicos de las causas que los economistas del Servicio puedan llevar a cabo, o de estudios con análisis económicos que puedan ser contratados externamente, o ser presentados por las contrapartes en procesos llevados ante tribunales.

3. *Sírvanse indicar qué teorías o modelos económicos han servido de base para determinar la existencia de conductas anticompetitivas con respecto a lo siguiente: a) definición de mercado, b) restricciones verticales, c) restricciones horizontales, d) abuso de posición de dominio, e) fusiones*

a. Definición del mercado

La FNE entiende por mercado relevante el de un producto o grupo de productos, en un área geográfica en que se produce, compra o vende, y en una dimensión temporal tales que resulte probable ejercer a su respecto poder de mercado.

Para la definición del mercado relevante la FNE usa el test del monopolista hipotético implementado por diferentes métodos como análisis económico, encuestas y evidencia econométrica. El uso de estos métodos difiere para cada caso y de acuerdo a la disponibilidad de datos. A continuación se señalan algunos ejemplos:

▪ **Uso de análisis económico**

En la etapa de definición del mercado relevante de todos los casos analizados por la Fiscalía se usa como primera herramienta el análisis económico bajo los supuestos del test del monopolista hipotético. Por lo tanto, se analiza cuál sería la reacción de los consumidores si un monopolista ejecutara un aumento de precios (entre 5% y 10%) no transitorio.

Por ejemplo, en el requerimiento a Compañía Chilena de Fósforos por exclusión y abuso de su poder de dominio,⁷ se analizó la reacción de los consumidores ante un aumento en el precio de los fósforos así como la sustitución que tienen los consumidores entre fósforos y otros métodos de encendido. Con este análisis se concluyó que el mercado relevante en este caso es de la comercialización de fósforos de seguridad pues el consumo

⁷ Este requerimiento, presentado ante el TDLC en junio de 2008, puede ser consultado en el sitio Web institucional en el siguiente link: [http://mail.fne.cl/db/jurispru.nsf/f81156e731dc3a808425733e005de0c3/B13F3F8E84D5F06384257479006B6FFE/\\$FILE/Fósforos.pdf](http://mail.fne.cl/db/jurispru.nsf/f81156e731dc3a808425733e005de0c3/B13F3F8E84D5F06384257479006B6FFE/$FILE/Fósforos.pdf)

de fósforos está destinado principalmente al encendido de artefactos en el hogar, por lo que son difícilmente sustituibles ante un aumento de precios.

▪ **Uso de encuestas**

Para la validación del análisis económico mencionado anteriormente, la FNE considera de vital importancia agregar un análisis de datos. Sin embargo, la disponibilidad de datos que reflejen la sustitución de los consumidores frente a un aumento de precios para todos los mercados es limitada.

Es así que se debe recurrir a nuevas metodologías que permitan recolectar la información necesaria para validar las hipótesis del mercado relevante. Para esto, la FNE está realizando encuestas que permitan validar el análisis económico. A modo de ejemplo de lo anterior, puede considerarse la incorporación de los datos levantados en una encuesta realizada por el SERNAC⁸ para el análisis de sustituibilidad entre distintos tipos de licores frente a aumentos de precio del pisco, utilizado en el análisis de una fusión de dos compañías pisqueras.

En el requerimiento recientemente presentado por la FNE en contra de Farmacias Cruz Verde, Farmacias Salcobrand y Farmacias Ahumada por concertación de precios,⁹ el mercado relevante fue definido como aquel determinado por cada uno de los medicamentos recetados por el médico tratante. Esta definición está basada en que los medicamentos objeto del acuerdo fueron aquellos que se venden bajo prescripción médica y por la tanto, son de difícil sustitución por el paciente. Para la validación de esta hipótesis la FNE está realizando encuestas donde se quiere identificar cuál es la reacción de los pacientes que consumen periódicamente medicamentos con prescripción médica ante un aumento del 10% en los precios.

▪ **Uso de evidencia econométrica**

Siempre que los datos lo permitan, es óptimo hacer uso de herramientas econométricas para la definición del mercado relevante sin embargo, son pocos los mercados donde los datos permiten hacer uso de estas herramientas.

Por ejemplo, la FNE validó los resultados obtenidos a partir de evidencia econométrica para determinar el mercado relevante en la industria del pisco.¹⁰ Para esto, los autores utilizaron una base de datos de la industria de bebidas alcohólicas con series bimensuales de ventas monetarias y cantidades vendidas para cinco bebidas alcohólicas –pisco, cerveza, vino, ron y whisky- en cuatro zonas geográficas de Chile. El objetivo de este análisis econométrico era estimar la elasticidad de precio del pisco y las elasticidades cruzadas de los posibles sustitutos. Para ello se estimó una función de demanda para cada una de las bebidas alcohólicas. Para hacer la estimación simultánea y teniendo en cuenta el hecho que muy posiblemente los errores de las funciones de demanda estaban correlacionados se estimó un modelo SUR.¹¹ Los

⁸ Servicio Nacional del Consumidor.

⁹ Presentado y acogido a tramitación por el TDLC en diciembre de 2008. En [http://mail.fne.cl/db/jurispru.nsf/f81156e731dc3a808425733e005de0c3/3799FB327616C30A8425751B005ED42C/\\$FILE/Farmacias.pdf](http://mail.fne.cl/db/jurispru.nsf/f81156e731dc3a808425733e005de0c3/3799FB327616C30A8425751B005ED42C/$FILE/Farmacias.pdf)

¹⁰ “Análisis del Mercado Relevante, la Concentración y las Barreras a la Entrada en la Industria del Pisco”, Claudio Agostini G. y Eduardo Saavedra P., diciembre 2005, estudio solicitado por la empresa Pernod Ricard Chile, para efectos de analizar los posibles efectos de una eventual fusión entre Compañía Pisquera de Chile S.A. y Cooperativa Agrícola Pisquera Elqui Limitada (Capel).

¹¹ En este caso las regresiones SUR (Seemingly Unrelated Regressions) son más eficientes dado que existen shocks no observados que afecten simultáneamente la demanda de las cinco bebidas alcohólicas.

resultados mostraron que ninguna de las elasticidades cruzadas respecto al precio del pisco es estadísticamente distinta de cero con lo que se puede concluir y reafirmar la hipótesis que el mercado relevante de producto es el mercado del pisco.

Los resultados de este estudio fueron considerados por la FNE para un requerimiento posterior presentado contra Cervera CCU.¹²

Otro de los mercados donde se aplicó el método SUR antes descrito, fue el de la distribución de gas residencial en la Región Metropolitana. En este caso, a través de esta técnica econométrica se estimaron las ecuaciones de demanda de gas natural y de gas licuado de petróleo.

b. Restricciones verticales

Para considerar que una restricción vertical tenga el carácter de anticompetitiva se debe considerar, primero, que el que ejecuta la conducta tenga poder de mercado y que dicha conducta tenga como fin de alcanzar, mantener o incrementar una posición dominante en un mercado relevante.

Si bien existe mucho análisis económico asociado a restricciones verticales –a modo de ejemplo, se puede citar el libro de organización industrial de J. Tirol o el *paper* de P. Rey y J. Tirol “The Logic of Vertical Restraints”-, la FNE destaca el modelo sobre el efecto succión de Bruce H. Kobayashi en su trabajo “*The Economics of Loyalty Discounts and Antitrust Law in the United States*” aplicado al análisis de políticas de descuentos por metas y pagos por exclusividad en el requerimiento contra la Compañía Chilena de Fósforos, antes comentado.

c. Restricciones horizontales (colusión)

Para estudiar la presencia de colusión en algunos mercados la FNE usa diferentes teorías y modelos económicos. Es importante mencionar que el uso de cada una de los modelos difiere de acuerdo a las características de cada caso. A continuación se señalan las teorías y modelos más usados en el análisis de colusión.

▪ Teoría económica

La primera etapa de análisis económico en estos casos consiste en estudiar si las características del mercado favorecen o no un comportamiento colusorio. Para esto se tiene en cuenta la teoría presentada en la guía “*Anti –Cartel Enforcement Manual*” de la International Competition Network y teoría económica expuesta en el documento “*The Economics of Tacit Collusion*”.¹³ Esta teoría sugiere que existen ciertas características de oferta, demanda y del producto que favorecen el comportamiento colusorio entre los participantes de un mercado.

Basados en estas guías, se estudian el número de competidores, participaciones de mercado, existencia de barreras a la entrada, transparencia de mercado, nivel de

¹² Este requerimiento, por abuso de posición de dominio mediante la imposición de cláusulas de exclusividad sobre sus distribuidores, fue presentado ante el TDLC y acogido a tramitación en marzo de 2008. El texto puede ser consultado en [http://mail.fne.cl/db/jurispru.nsf/f81156e731dc3a808425733e005de0c3/6C83032D1857A32984257410004A5061/\\$FILE/Requerimiento%20CCU.pdf](http://mail.fne.cl/db/jurispru.nsf/f81156e731dc3a808425733e005de0c3/6C83032D1857A32984257410004A5061/$FILE/Requerimiento%20CCU.pdf). El proceso finalizó de modo no contencioso, por medio de un avenimiento de las partes, aprobado por el H.TDLC en julio de 2008 (en http://www.tdlc.cl/DocumentosMultiples/Resolucion_Termino_62_2008.pdf)

¹³ IVALDI, Marc & JULLIEN, Bruno & REY, Patrick & SEABRIGHT, Paul & TIROLE, Jean, 2003. “The Economics of Tacit Collusion,” IDEI Working Papers 186, Institut d’Économie Industrielle (IDEI), Toulouse.

innovación, estructura de costos y homogeneidad o diferenciación del producto. La teoría presentada en estas guías es clave para el estudio de las características del mercado que se está analizando en cada uno de los casos.

▪ Evidencia Empírica

Adicionalmente, la FNE ha analizado este tipo de conductas por medio de la evidencia empírica y para esto ha hecho uso de diferentes modelos y herramientas econométricas. A continuación se señalan los modelos y herramientas utilizados:

- Estimación de funciones de demanda y oferta por medio de Mínimos Cuadrados en tres etapas y Mínimos Cuadrados en dos etapas.
- Análisis econométrico del comportamiento de ofertas de empresas en licitaciones públicas (oxígeno medicinal¹⁴ y asfalto en frío para bacheo¹⁵).
- Estudio del modelo de competencia de Cournot y estimación de resultados.
- Estimación del modelo estructural propuesto por Bresnahan (1982) orientado a encontrar un λ que mida el comportamiento de la industria.
- Estimación de modelos de variación conjetural.

También son destacables, dentro de conductas horizontales estudiadas por la FNE, las prácticas exclusorias. La Fiscalía ha desarrollado investigaciones por denuncias de prácticas predatorias en contra de una gran cadena de supermercados. El marco teórico utilizado fue el modelo de Walsh y Whelan,¹⁶ donde analizan las estrategias de *loss leading pricing* en un mercado retail multiproducto.

Por último se debe mencionar, como análisis empírico, el estudio en el mercado aéreo de transporte de pasajeros, en donde se modeló la comprobación de si las reiteradas suspensiones de vuelos en rutas competitivas del actor dominante se realizaron con el fin de perjudicar a otras aerolíneas. Para esto se utilizó la estimación econométrica de un modelo Poisson para datos de panel. Asimismo, se utilizó un modelo de efectos aleatorios y uno de efectos fijos condicionales.

d. Abuso de posición de dominio

Cualquier análisis de un abuso de posición de dominio resulta requiere determinar en forma preliminar el mercado relevante en el cual se desarrolla la posible conducta anticompetitiva denunciada. Para esto, tal como se presentó detalladamente en el literal (a), se utilizan las teorías o modelos económicos ya descritos.

En cuanto a explotaciones abusivas de posiciones de dominio se han utilizado una serie de teorías, partiendo desde la posición de dominio relativa (en casos en donde una marca de un determinado producto puede ser un mercado relevante en sí), o bien la teoría del contratante obligatorio, en donde existen activos específicos desarrollados para satisfacer las necesidades de una determinada empresa, así como la posibilidad de posición de dominio colectiva desarrollada por un grupo de empresas (Caso

¹⁴ Requerimiento de la FNE frente a empresas de oxígeno medicinal, de agosto de 2005 (puede ser consultado en [http://mail.fne.cl/db/jurispru.nsf/f81156e731dc3a808425733e005de0c3/D96D82DB8A191A04042570590072CF2E/\\$FILE/Requerimiento%20Oxígeno%20Medicinal.pdf](http://mail.fne.cl/db/jurispru.nsf/f81156e731dc3a808425733e005de0c3/D96D82DB8A191A04042570590072CF2E/$FILE/Requerimiento%20Oxígeno%20Medicinal.pdf)) y Sentencia N° 43 / 2006 del H. TDLC.

¹⁵ El informe económico que utilizó esta técnica de análisis (en http://www.tdlc.cl/DocumentosMultiples/Informe_Francisco_Caravia_FNE.pdf) fue presentado como parte del proceso contencioso "Requerimiento de la FNE contra Asfaltos Moldeables de Chile S.A. y otros", actualmente en tramitación ante la Corte Suprema.

¹⁶ Walsh, P., C. Whelan, "Loss Leading and Price Intervention in Multiproduct Retailing: Welfare Outcomes in a Second-Best World", *International Review of Law and Economics*, 19: 333-347, 1999.

Voissnet¹⁷), como posible abuso en mercados conexos (principalmente en mercados de telecomunicaciones con convergencia tecnológica). A lo anterior se añade la experiencia de los mercados disputable (*contestable markets*) a fin de determinar la competencia potencia y eficaz en un mercado en particular (como por ejemplo, el análisis desarrollado para la consulta de la fusión de aerolíneas nacionales LAN - Ladeco¹⁸) y la teoría de las instalaciones esenciales (*essential facilities*), de uso común en casos de empresas de servicios públicos, como eléctricas y sanitarias.

e. Fusiones

En el caso de operaciones de concentración horizontal, el análisis económico se utiliza, en primer lugar para la definición del o los mercados relevantes afectados por la operación en cuestión, en el mismo sentido que el planteado en el literal a).

4. *Sírvase indicar qué ha observado en el uso las siguientes técnicas empíricas: a) análisis de regresión; b) modelos de concentración; e) simulaciones de precios y modelos de Monte Carlo; d) modelos de puntuación (score) y de probit; y e) otras herramientas empíricas.*

Los problemas más frecuentes están relacionados con el uso de datos dado que para la mayoría de casos se cuenta con una disponibilidad limitada de éstos, lo que no permite el uso de técnicas econométricas que validen las hipótesis planteadas por medio del análisis económico –o, en el mejor de los casos, que afectan la robustez de los resultados obtenidos a través del uso de dichas técnicas.

Otro problema es que, aún teniendo los datos, algunas industrias envían datos poco consistentes lo que necesariamente implica dificultades para validar el análisis empírico y sus conclusiones.¹⁹

a. Análisis de regresión

El análisis de regresión es la técnica usada más frecuentemente y su modalidad de utilización difiere para cada uno casos que analiza la FNE –las agencias de competencia en el mundo- principalmente en función de la cantidad y calidad de la información cuantitativa disponible. Se ha usado modelos de panel, análisis de regresión SUR, análisis de regresión lineal con errores robustos, mínimos cuadrados en dos etapas y mínimos cuadrados en tres etapas.

El resultado más afinado obtenido a partir del uso de estos modelos, es el de obtener validaciones de hipótesis tanto para la definición de mercados relevantes en causas, como para el análisis de las conductas desarrolladas por actores en ciertas industrias analizadas.

¹⁷ Referido a la Demanda de Voissnet S.A. y requerimiento de la FNE en contra de CTC de agosto de 2005. La demanda presentada por la FNE puede ser consultada en el sitio Web institucional ([http://mail.fne.cl/db/jurispru.nsf/f81156e731dc3a808425733e005de0c3/194B88FB8EDBE7958425729C005ADA51/\\$FILE/Req.%20Voissnet.pdf](http://mail.fne.cl/db/jurispru.nsf/f81156e731dc3a808425733e005de0c3/194B88FB8EDBE7958425729C005ADA51/$FILE/Req.%20Voissnet.pdf)), en tanto que las sentencias de esta causa –Sentencia 45/ TDLC de octubre de 2006, y Resolución de la Corte Suprema, de julio de 2007- pueden ser descargadas en el link <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=782&GUID=>.

¹⁸ Resolución 459 de la Comisión Resolutiva, de marzo de 1996.

¹⁹ En función de las atribuciones de la FNE; una de las principales fuentes de información para los análisis que la agencia realiza, proviene de las empresas investigadas y, en determinados casos, de sus competidores. Empíricamente se ha podido constatar que las empresas no tienen, por lo general, registros de datos compatibles con las necesidades de información de la agencia (series de tiempo más cortas, con cambios metodológicos no documentados, etc.)

b. Modelos de concentración

Tanto en esta Fiscalía como en la mayor parte de otras agencias de competencia, se utiliza el Índice Herfindahl – Hirschman (HHI) para determinar el grado de concentración en determinada industria.

Al resultar que la aplicación del IHH y de las variaciones para esta medida en un mercado en función de una operación de concentración bajo análisis es de uso generalizado en otros países, su inclusión en una Guía para el Análisis Interno de Operaciones de Concentración de la FNE –en aplicaciones desde 2006, luego de un período de consulta pública- y su posterior implementación no ha resultado especialmente controvertida por parte de otros actores relevantes del mercado – abogados de la plaza, empresas, etc. Pese a lo anterior, la FNE se encuentra en período de evaluación de dicha guía, en particular en lo referido a la aplicabilidad de la metodología en el caso de análisis dinámicos de operaciones de concentración de conglomerados, y la pertinencia de los umbrales de concentración en el marco de economías pequeñas.

c. Simulaciones de precios y modelos de Monte Carlo

Esta metodología no es de aplicación generalizada en los análisis de la FNE.

d. Modelos de puntuación (*score*) y de *Probit*

Al igual que en el caso anterior, esta metodología no es de aplicación generalizada en los análisis de la FNE; no obstante para apoyar la definición del mercado relevante en una causa referida a prácticas concertadas (colusión) en la industria de las aseguradoras privadas de salud (Isapre). La utilización de una modelación econométrica *Probit* fue pertinente en ese caso en particular, dadas las características y el origen de la información disponible –se trabajó sobre la base de datos de la encuesta de hogares CASEN, principal encuesta de caracterización socioeconómica del país.²⁰

Como comentario adicional, sólo se ha visto que la utilización de modelos econométricos más avanzados que los análisis de regresiones multivariados tradicionales –de difusión más amplia e interpretación más sencilla de resultados-, son de comprensión relativamente más compleja para abogados –que aunque pueden ser especialistas en competencia, no tienen igual *expertise* económica y/o estadística-, en particular en el caso de ministros en tribunales no especializados o sin sala especializada –como es el caso de la Excma. Corte Suprema.

e. Otras herramientas empíricas

Bajo este enunciado se ha querido dejar especial mención para el levantamiento de información cuantitativa que la FNE ha venido incursionando, a modo de obtener información complementaria que permita validar o refutar determinadas hipótesis para causas de competencia, especialmente en materia de conducta del consumidor, patrones de consumo y la construcción de la mejor definición del mercado relevante del producto –aunque no sólo en esta materia.²¹

²⁰ Dicha técnica fue utilizada en el estudio de Agostini, Saavedra y Wellington (2005) “Colusión en el mercado de Isapres: Un Análisis de Competencia”, mandatado por la FNE.

²¹ Actualmente la FNE se encuentra estudiando el mercado de los prestadores médicos de salud, entre otros, a partir del estudio cualitativos “Dimensiones de Valor para la Elección de Prestadores Médicos de parte de los Usuarios”, que explora sobre los motivadores de las decisiones de consumo de las familias en este mercado.

En este sentido, destaca la utilización de estudios de percepción desarrollado a partir del uso de encuestas a proveedores de supermercados y técnicas cualitativas de entrevistas y *focus group* que la FNE contratara para apoyar su posición en la causa llevada en contra de las dos principales cadenas de supermercados del país.²²

En relación al uso de este tipo de información empírica en causas de competencia, se ha observado que, dado que sus resultados no tienen mayor ambición que servir de referencia, primera aproximación a un tema, o complemento de otra información cuantitativa disponible; sus resultados gozan de rápida comprensión y su utilización reviste de utilidad sin resultar particularmente controversiales para las causas en trámite judicial. A diferencia de esto, los estudios económicos que consideran modelación econométrica, suelen generar controversia y llevan a la contraparte a la presentación de otros estudios del mismo tipo que, a partir del uso de otras variables o de otras modelaciones, intentan refutar los resultados y conclusiones de la FNE que de ellos se deriven.

5. *Sírvanse indicar qué elementos dificultan la transmisión de razonamientos de tipo económico y pruebas empíricas a los siguientes destinatarios: a) Las partes involucradas en los casos de competencia; b) Los tribunales. Sírvanse indicar las estrategias utilizadas para sortear esas dificultades.*

a. Las partes involucradas en los casos de competencia

En el mismo sentido que la institucionalidad de competencia sufrió un cambio sustantivo en el año 2004, a partir de disolución de las Comisiones Preventivas y Comisión Resolutiva y la creación de un tribunal especializado de composición mixta (TDLC); el tratamiento de las causas de competencia –tanto por parte de la agencia como la de las contrapartes (abogados de la plaza y mundo empresarial)- ha sufrido un cambio, elevándose notoriamente el estándar de análisis económico.

De esta forma, a modo general, no existe gran dificultad en la transmisión de razonamiento de tipo económico y la utilización de antecedentes empíricos como parte de los elementos probatorios en causas en tramitación judicial. Tanto es así que en la actualidad, es común observar que las contrapartes contratan estudios económicos de nivel teórico y complejidad similar a los presentados por la FNE, a fin de apoyar sus posiciones o rebatir las posiciones de la agencia.²³ En este sentido, la principal dificultad dice relación con la asimetría de recursos entre las partes demandadas y la FNE para contratar y/o desarrollar estudios económicos.²⁴ Esto

²² G. Cumsille (2007), “Estudio de Opinión: Percepciones de los Proveedores de Supermercados”, mandatado por la FNE en la causa denominada “Requerimiento de la FNE contra D&S S.A. y Cencosud S.A.”, y cuyos resultados, entre otros, fueron utilizados en el informe de la FNE (2007), “Análisis Económico de la Industria de Supermercados en el marco de la Causa Rol N° 101 / 2006” (disponible en [http://mail.fne.cl/db/jurispru.nsf/60e31f9065c2d5a38425733e005df9fa/C458B8A7859924C684257362007E3A6E/\\$FILE/supermercados.pdf](http://mail.fne.cl/db/jurispru.nsf/60e31f9065c2d5a38425733e005df9fa/C458B8A7859924C684257362007E3A6E/$FILE/supermercados.pdf)).

²³ A modo de ejemplo, para la causa “Requerimiento de la Fiscalía Nacional Económica contra Isapre ING S.A. y otros”, las contrapartes demandadas –las cinco Isapre abiertas más grandes, en cuanto a número de afiliados- acompañaron al expediente 10 estudios con análisis económicos contratados a diferentes economistas de la plaza [entre otros, Sapelli (2006), “Análisis económico del Requerimiento del Fiscal Nacional Económico contra cinco Isapre (Informe Final)”]; Arrau, P. (2006), “Informe económico acerca del Requerimiento del Fiscal Nacional Económico en contra de un grupo de Isapre”; Edwards, G. (2006) “Análisis económico del seguro de salud en Chile”; Soto, R. (2006), “Ciclo económico y el mercado de seguros de salud en Chile”, etc.], más una tesis de grado y otros estudios e informes de tipo financiero. En contraposición, la Fiscalía presentó tres informes económicos elaborados por sus profesionales, más 1 estudio económico contratado externamente [Agostini, Saavedra y Wellington (2005) “Colusión en el mercado de Isapres: Un Análisis de Competencia”].

²⁴ Como se evidencia directamente de la nota anterior.

porque, independientemente de las competencias de los profesionales del Servicio, ninguno de ellos tiene dedicación exclusiva a una causa,²⁵ y los recursos de la Fiscalía para la contratación de estudios externos son acotados dentro del marco presupuestario de cada período.

Otro elemento ha considerar es que los autores de estudios económicos presentados como prueba por las contrapartes suelen ser, a su vez, presentados como testigos en su calidad de perito experto (o testigo experto, en conformidad a lo establecido en el Código de Procedimiento Civil, CPC). No obstante, en el caso de estudios económicos presentados por la Fiscalía, de elaboración de profesionales del Servicio, la participación de éstos como testigos expertos suele ser motivo de controversia y solicitud de tacha de la contraparte, aduciendo a que no existiría imparcialidad necesaria para declarar y por tener interés en el pleito, dada la relación de dependencia del profesional respecto de la Fiscalía.²⁶ Finalmente, y aunque este argumento ha sido parcialmente acogido por el TDLC,²⁷ esto no necesariamente ha afectado negativamente las pruebas aportadas por la FNE en las diferentes causas litigadas, toda vez que el valor probatorio de los informes evacuados por sus profesionales y aportados a las diferentes causa, deben ser apreciados de acuerdo a la reglas de la sana crítica conforme lo prescrito en el artículo 22°, inciso final del Decreto Ley N° 211.²⁸

b. Los tribunales

En lo referido al TDLC, no existiría dificultad alguna en la transmisión ni comprensión de elementos propios del análisis económico presentado por la FNE y las contrapartes en las diferentes causas que tiene a bien conocer, dado que es la misma Ley de Competencia que lo crea la que establece que su composición será de cinco miembros (Ministros), de los cuales dos, deberán ser profesionales universitarios licenciados o con post grados en ciencias económicas.²⁹

Adicionalmente y complementando lo anterior, la Ley de Competencia definió que este Tribunal contara, en su dotación de planta, con un equipo profesional de apoyo de dos profesionales universitarios del ámbito económico.³⁰

Según lo establecido en el Art- 27 de la Ley de Competencia, toda sentencia definitiva que imponga alguna de las medidas contempladas en el Art. 26, serán susceptible de recurso de reclamación ante la Corte Suprema; de este modo, la Exc. Corte Suprema

²⁵ En promedio, cada abogado y economista de las divisiones de línea del Servicio tiene a su cargo la investigación de entre 5 y 6 causas en simultáneo.

²⁶ Efectivamente, al respecto las partes contrarias a la FNE han argumentado que los numerales 4°, 5° y 6° del Artículo 358 del CPC, sobre las causales de inhabilitación para declarar, aplicarían a los profesionales funcionarios del Servicio:

“4°. Los criados domésticos o dependientes de la parte que los presente.

Se entenderá por dependiente, para los efectos de este artículo, el que preste habitualmente servicios retribuidos al que lo haya presentado por testigo, aunque no viva en su casa;

5° Los trabajadores y labradores dependientes de la persona que exige su testimonio;

6° Los que a juicio del tribunal carezcan de la imparcialidad necesaria para declarar por tener en el pleito interés directo o indirecto;”

²⁷ A modo de ejemplo, considere la tacha presentada al testigo Sr. Peralta, funcionario de la FNE, adheridas por todas las contrapartes y finalmente acogida en lo referido al numeral 4° del Art. 358 del CPC por parte del H. TDLC, expuesta en su Sentencia N° 43/2006, en su Considerando Tercero y su Resuelve en cuanto a las tachas.

²⁸ Según lo establecido por el TDLC en su inciso 3° del Considerando segundo de su Sentencia 33/2005 y Considerando 4°, inciso segundo de la Sentencia 43/2006.

²⁹ Art. 6, letra b), del Título II de la Ley de Competencia (DL 211/73 actualizado), sobre la creación del Tribunal de Defensa de la Libre Competencia. La importancia de que los ministros que conformen el Tribunal gocen de un conocimiento adecuado del análisis económico se refuerza en el mismo artículo al establecer además que “El Tribunal tendrá cuatro suplentes, dos de los cuales deberán ser abogados y dos licenciados o con post grados en ciencias económicas”.

³⁰ Art. 13 del Título II de la Ley de Competencia (DL 211/73 actualizado).

también puede eventualmente, tomar conocimiento, revisar y resolver en causas materia de defensa de la libre competencia. Cabe señalar que la Corte Suprema en Chile cuenta con salas especializadas,³¹ ninguna de ellas en materia económica, por lo que las reclamaciones a las disposiciones del Tribunal de Defensa de la Competencia -de forma y fondo- son conocidas y tramitadas por la Tercera Sala Constitucional. Aquí entonces, y en relación a la pregunta, es donde ocasionalmente pueden existir dificultades en la transmisión de razonamientos económicos y la valoración de pruebas empíricas; lo que se ha apreciado especialmente en la revocación de sentencias del H. TDLC en causas referidas a prácticas de precios predatorios³² y colusión³³.

Sección B

1. *¿Qué tipo de sistema se utiliza para resolver y examinar los casos relativos a cuestiones de competencia (procedimiento inquisitivo o acusatorio, administrativo o judicial)?*

En Chile el sistema que se utiliza es uno acusatorio judicial.

Es judicial porque en Chile el organismo encargado de conocer y juzgar los casos de competencia es el Tribunal de Defensa de la Libre Competencia (TDLC), órgano jurisdiccional especial e independiente, sujeto a la superintendencia directiva, correccional y económica de la Corte Suprema.

Es asimismo acusatorio, porque el TDLC no puede avocarse de oficio el conocimiento de eventuales atentados contra la libre competencia. Por el contrario, los únicos legitimados activos para iniciar una causa ante el TDLC por un supuesto atentado contra la competencia son los particulares -a través de una demanda- o la Fiscalía Nacional Económica -a través de un requerimiento.

2. *¿Las conclusiones económicas son un componente significativo e importante tanto de los procesos judiciales sobre la competencia como de la imposición de sanciones?*

Si. Es la misma Ley de Competencia (Decreto Ley N° 211) la que establece que las sentencias del TDLC deben ser fundadas y que deben enunciar los fundamentos de hecho, de derecho y económicos con arreglo a los cuales se pronuncia.

Si bien lo anterior es un requisito de las sentencias definitivas que dicta el TDLC, en la práctica el TDLC aplica diversos conceptos económicos en las distintas resoluciones intermedias dictadas durante los procesos que substancia.

³¹ En su funcionamiento ordinario, cuenta con tres salas especializadas: Primera Sala o Sala Civil, Segunda Sala o Sala Penal, Tercera Sala o Sala de Asuntos Constitucionales y de lo Contencioso Administrativo. En su funcionamiento extraordinario, también contempla una Cuarta Sala, en el ámbito Laboral – Previsional.

³² En relación al llamado Caso del Fibrocemento, la Sentencia Rol Corte Suprema N° 3449/2006, que revoca Sentencia N° 39/2006 del TDLC, acogiendo los recursos de reclamación de Cementa y Quimel en cuanto se condena a James Hardie Fibrocementos S.A. al pago de un mil (1000) UTA, por ejecutar la conducta de precios predatorios.

³³ En relación al llamado Caso de Oxígeno Medicinal, la Sentencia Rol Corte Suprema N° 5057/2006, que revoca Sentencia N° 43/2006 del TDLC, acogiendo los recursos de reclamación de AGA, Indura, Air Liquide y Praxair en contra de la Sent. 43/2006 TDLC y se declara que se rechaza el requerimiento formulado en contra de estas empresas productoras de oxígeno por la FNE.

Lo anterior se ve facilitado, en gran medida, por el hecho que el TDLC está compuesto por cinco miembros (Ministros), de los cuales dos, por expresa disposición de la Ley de Competencia, deben ser profesionales universitarios licenciados o con post grados en ciencias económicas. En esta misma línea, la Ley de Competencia contempla en la planta del TDLC a dos profesionales universitarios del ámbito económico que asisten al TDLC en el análisis de los casos.

3. *¿Para qué clase de prácticas anticompetitivas (restricciones verticales u horizontales, abuso de posición de dominio y fusiones) se ha determinado que el análisis económico resulta más necesario, útil y convincente?*

Los análisis económicos se han estimado por el TDLC como necesarios, útiles y convincentes en el estudio de toda clase de prácticas anticompetitivas.

4. *¿Qué problemas se les plantean a los tribunales cuando se trata de aceptar los razonamientos de tipo económico y las pruebas empíricas, y qué estrategias emplean para solucionarlos? ¿Se contempla en esas estrategias la posibilidad de que los tribunales recurran a expertos independientes?*

Dada la composición del TDLC, explicada en la respuesta a la pregunta 2, en el análisis de los casos de competencia que realiza éste Tribunal, no han existido problemas para aceptar razonamientos de tipo económico ni pruebas empíricas.

Sin embargo, hay que tener presente que las sentencias del TDLC son por regla general recurribles ante la Corte Suprema. En ese contexto, en algunas ocasiones la Corte Suprema, al conocer de dichos recursos, no ha compartido algunos de los razonamientos económicos del TDLC o no ha aceptado ciertas pruebas empíricas consideradas válidas por el TDLC. Esto ha ocurrido en casos relativos a precios predatorios y a prácticas colusivas.

5. *¿En qué medida se ha permitido a los economistas participar en los foros judiciales más importantes para emitir sentencia en los casos relacionados con el derecho de la competencia?*

Dado el alto grado de especialización del TDLC en materia económica, es muy común que en las causas que éste conoce las partes presenten diversos informes técnico-económicos que son debidamente analizados y considerados por el TDLC. En este sentido cabe hacer presente que el TDLC valora la prueba que se le presenta según el sistema de la sana crítica, por lo que tiene la facultad de dar mayor o menor mérito a los diversos medios de prueba presentados por las partes.

Colombia

Sección A

1. *Sírvanse proporcionar un desglose de la plantilla de economistas y juristas empleados por el organismo encargado de la competencia, e informar sobre la capacidad de esos funcionarios para realizar análisis económicos complejos.*

En total contamos con trece (13) economistas y dieciséis (16) abogados, además de recibir apoyo de al menos tres asesores en el desarrollo de las actividades de la autoridad de competencia. Del mismo modo, es preciso señalar que los funcionarios encargados de estos asuntos, tienen las capacidades necesarias para abordar análisis económicos, unos de mayor complejidad que otros y según el área de su especialidad.

2. *¿Con qué frecuencia recurre el organismo encargado de la competencia al análisis económico en el examen de casos de competencia? ¿Para qué clases de prácticas anticompetitivas se ha determinado que el análisis económico es más necesario y útil? ¿Se considera que el análisis económico es necesario y útil para evaluar la eficiencia dinámica en comparación con la eficiencia estática? Sírvanse dar ejemplos concretos de todos los casos mencionados.*

En todos los casos se efectúa análisis económico para evaluar casos de competencia.

En las de abuso de posición de dominio y en los acuerdos en donde hay práctica conscientemente paralela (y siempre en integraciones)

En Colombia se ha efectuado valoración de la eficiencia estática particularmente para los casos de integraciones y conductas que “(...) 1. (...) tengan por objeto la cooperación en investigaciones y desarrollo de nueva tecnología. 2. Los acuerdos sobre cumplimientos de normas, estándares y medidas no adoptadas como obligatorias por el organismo competente cuando no limiten la entrada de competidores al mercado (y) 3. Los que se refieran a procedimientos, métodos, sistemas y formas de utilización de facilidades comunes”³⁴. Para lo anterior es efectivamente útil y necesaria dicha valoración.

Entre los casos donde se ha efectuado valoración de la eficiencia estática está el de tasa alaiico (tipo de cambio para el pago de fletes aéreos) y cementos.

3. *Sírvanse indicar qué teorías o modelos económicos han servido de base para determinar la existencia de conductas anticompetitivas con respecto a lo siguiente: a) definición de mercado, b) restricciones verticales, c) restricciones horizontales, d) abuso de posición de dominio, e) fusiones*

³⁴ Artículo 49 del Decreto 2153 de 1992

Dentro de las teorías que se utilizan para evaluar comportamientos anticompetitivos se encuentran aquellos desarrollos de la microeconomía que permiten tipificar el comportamiento a investigar. Tal es el caso de los elementos que se extraen de la teoría del consumo para hacer análisis de sustituibilidad desde la demanda cuando se define el mercado relevante, o de la teoría de la producción cuando se especifican, por ejemplo, las barreras a la entrada que pueden existir en potenciales acuerdos de mercado. La variedad de test e índices que son utilizados en la caracterización de un mercado tal como el Índice de Herfindahl y Hirschman, el test de Elzinga y Hogarty, el test del monopolista hipotético el índice de Lerner, etc, están en función del tipo de investigación que esta autoridad de vigilancia y control vea necesario y pertinente realizar.

Hoy por hoy el uso de resultados provenientes de los desarrollos de teoría de juegos para entender dinámicas de interacciones al interior de un mercado y el diseño e implementación de metodologías econométricas para verificar resultados dentro de los rangos que la limitación de información lo permiten, hacen parte de la agenda y de los retos que este organismo viene desarrollando. A su vez, el tener disponible recursos cada vez más actualizados en materia de software estadístico y econométrico junto con el desarrollo de vínculos permanentes con equipos académicos de investigación en temas de competencia a nivel mundial, son sin duda los desafíos más importantes que tiene esta entidad en materia de su esfuerzo constante en el mejoramiento de sus capacidades técnicas en materia de evaluación de conductas anticompetitivas.

4. *Sírvase indicar qué ha observado en el uso las siguientes técnicas empíricas: a) análisis de regresión; b) modelos de concentración; c) simulaciones de precios y modelos de Monte Carlo; d) modelos de puntuación (score) y de probit; y e) otras herramientas empíricas.*

Cómo expresamos en la pregunta anterior, esta entidad viene generando un esfuerzo continuo por la adopción de nuevos instrumentos estadísticos y econométricos que agilizan y facilitan el desarrollo de sus funciones.

En consecuencia, son utilizadas con frecuencia en sus estudios análisis de correlaciones simples, diseño y evaluación de modelos de regresión con variables cuantitativas y cualitativas, modelos de simulación, entre otros todos ellos pensados como elementos cuantitativos que soportan la discusión jurídico económica que esta entidad tiene por obligación generar en torno a los temas que le compete. No obstante somos conscientes de la necesidad de mejoramiento constante en la implementación de instrumentos cuantitativos disponibles y de la capacitación permanente de sus funcionarios sobre nuevas técnicas que enriquecen el quehacer de esta entidad.

5. *Sírvanse indicar qué elementos dificultan la transmisión de razonamientos de tipo económico y pruebas empíricas a los siguientes destinatarios: a) Las partes involucradas en los casos de competencia; b) Los tribunales. Sírvanse indicar las estrategias utilizadas para sortear esas dificultades.*

Las partes involucradas, al encontrar razonamientos de tipo económico y evidencias

empíricas, perciben criterios objetivos que son objeto de motivación en las decisiones que emite la autoridad de competencia. Cuando se presentan dificultades para comprender dichos razonamientos, siempre la autoridad de competencia está dispuesta a atender las inquietudes y resolverlas en una instancia diferente a la litigiosa.

En lo que a los Tribunales/Cortes se refiere no se ha presentado a la fecha objeciones a los conceptos económicos que las decisiones contienen.

Sección B

1. *¿Qué tipo de sistema se utiliza para resolver y examinar los casos relativos a cuestiones de competencia (procedimiento inquisitivo o acusatorio, administrativo o judicial)?*

De acuerdo con lo señalado en el Decreto Ley 2153 de 1992, corresponde a la Superintendencia de Industria y Comercio velar por la observancia de las normas sobre promoción de la competencia y prácticas comerciales restrictivas, a menos que exista una norma que faculte a otra entidad para ello. En consecuencia respecto de las conductas constitutivas de prácticas comerciales restrictivas que se desarrollen en todos los sectores, salvo en los casos en que esta facultad haya sido conferida a otra autoridad, la Superintendencia de Industria y Comercio cuenta con una cláusula general de competencia en esta materia.

En materia de control previo de integraciones (artículo 4 de la ley 155 de 1959 aplicable en concordancia con el artículo 2, numeral 1 del decreto 2153 de 1992) aplicable a todas las empresas, cualquiera sea la actividad económica que desarrollen en los mercados del país la función la ejerce de manera general y residual la Superintendencia de Industria y Comercio.

Dado lo anterior, ante la Superintendencia los casos de competencia pueden iniciarse de oficio o a solicitud de parte, correspondiéndole adelantar la etapa de instrucción y decisión del caso; de manera que una vez en firme éstos pueden ser objeto de revisión ante la jurisdicción de lo Contencioso Administrativo.

2. *¿Las conclusiones económicas son un componente significativo e importante tanto de los procesos judiciales sobre la competencia como de la imposición de sanciones?*

N/A

3. *¿Para qué clase de prácticas anticompetitivas (restricciones verticales u horizontales, abuso de posición de dominio y fusiones) se ha determinado que el análisis económico resulta más necesario, útil y convincente?*

N/A

4. *¿Qué problemas se les plantean a los tribunales cuando se trata de aceptar los razonamientos de tipo económico y las pruebas empíricas, y qué estrategias emplean para solucionarlos? ¿Se contempla en esas estrategias la posibilidad de que los tribunales recurran a expertos independientes?*

N/A

5. *¿En qué medida se ha permitido a los economistas participar en los foros judiciales más importantes para emitir sentencia en los casos relacionados con el derecho de la competencia?*

N/A

Congo

Section A

1- Aspects institutionnels :

La direction générale de la consommation de la concurrence et de la répression des fraudes a été créée par décret n°2003-186 du 11 août 2003 portant attribution et organisation de la direction générale de la consommation de concurrence et de la répression des fraudes, avec ses onze (11) directions départementales, comprend 415 agents répartis principalement entre Brazzaville et Pointe-Noire, les deux villes à intense activités économiques ; dont une cinquantaine a un niveau de formation supérieur ou égal à la licence en économie ou en droit surtout, sans oublier un vétérinaire-inspecteur.

Les agents titulaires, au minimum, d'une licence sont à mesures de bénéficier d'une formation complémentaire spécifique à la concurrence et faire des analyses économiques complexes. Car nombreux d'entre eux ont des pré requis nécessaires en microéconomie, macroéconomie, comptabilité d'entreprise, comptabilité analytique, droit privé, droit commercial, droit des affaires, statistique, recherche opérationnelles, fiscalité d'entreprise, économie internationale, économétrie etc. D'autres ont eu à compléter leur formation de base en administration générale.

2- Fréquence d'utilisation de l'analyse économique:

La direction générale de la consommation de la concurrence et de la répression des fraudes a privilégié la mise en place du cadre fondamental de travail, en voulant se doter :

- De la loi sur la concurrence ;
- De la loi sur la protection du consommateur ;
- Du décret sur les procédures de contrôle commercial ;
- D'autres textes réglementaires pour le bon fonctionnement administratif ;
- Des agents formés dans les domaines de la consommation et de la concurrence.

Malheureusement aucun des objectifs n'a été atteint jusqu'à ce jour, à cause de nombreuses perturbations des programmes. Ainsi, faute d'un cadre juridique édifiant, les pratiques anticoncurrentielles dénoncées par la loi 6-94 du 1^{er} juin 1994 : les ententes, les concentrations, les abus de position dominante, les pratiques discriminatoires n'ont pas encore fait objet de contentieux susceptibles de permettre de dégager des fréquences d'utilisation de l'analyse économique dans l'appréciation des problèmes de concurrence.

Toutefois, les outils d'analyse économique nous seront nécessaires dans le traitement entre autres des parts de marché des entreprises, des coûts de revient, des calculs des indices de prix, des chiffres d'affaires, d'évaluer les risques des entreprises par rapport à la conjoncture etc.

3- Types d'analyse économique:

L'absence d'instrument juridique et d'une politique de concurrence n'est pas sans poser de problème lorsqu'il s'agit de donner un avis sur les pratiques anticoncurrentielles aux tribunaux.

Section B

Les tribunaux sont confrontés au problème d'appréciation des infractions suivant les cas présents, les insuffisances de la loi 6-94 du 1^{er} juin 1994 portant réglementation des prix, des normes commerciales, de constatation et répression des fraudes et les limites des dispositions législatives sectorielles.

Généralement, pour pallier à ces difficultés, le tribunal de commerce de Brazzaville, par exemple, recourt par jurisprudence aux dispositions du code civil français en article 13182, qui exige au responsable du préjudice de le réparer.

IVème PARTIE : PLAIDOYER DU CONGO

I- LES ATOUTS DU CONGO POUR LA PROMOTION D'UNE POLITIQUE DE LA CONCURRENCE

- la constitution du 20 janvier 2002 consacre l'économie libérale comme moteur de développement économique et social ;
- la charte communautaire d'investissement de la communauté économique et monétaire d'Afrique centrale (CEMAC) définit les règles d'investissement et confère aux opérateurs économiques une liberté d'entreprendre les affaires dans la sous région constituée des six Etats membres et du pays observateur : le Sao Tomé et Príncipe;
- le Congo est membre de l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA), qui prône également le Droit d'entreprendre dans les 17 Etats membres ; il est également membre de l'OMC;
- l'existence, bien que parcellaire, des réglementations sectorielles qu'il suffira d'harmoniser avec la loi générale sur la concurrence, à savoir : le code des hydrocarbures, le code minier, le code forestier, la loi sur l'énergie, la loi cadre sur la privatisation, la loi sur la télécommunication etc.;
- la disponibilité au Ministère du commerce de la consommation et des approvisionnements des agents de niveau licence en économie et droit, aptes à la spécialisation dans le domaine de la lutte contre les pratiques anticoncurrentielles ;
- l'existence de potentiels secteurs économiques, susceptibles de connaître un essor, à partir de la compétition saine et effective entre les entreprises qui y opèrent, tels que les secteurs de : télécommunications, pétrole, énergie, banques, forêts, transports aériens et transit.

II- DOLEANCES DU CONGO AUPRES DE LA CNUCED

- l'expertise technique, assistance juridique, dans l'élaboration des textes législatifs et réglementaires sur la régulation de la concurrence (loi cadre sur la concurrence en cours d'adoption, décret relatif à l'organisation et fonctionnement du Conseil national de la concurrence)

- l'appui institutionnel dans la formulation et la mise en œuvre des politiques de régulation de la concurrence (au niveau national et sectoriel, voire sous régional);
- le renforcement des capacités des cadres dans les domaines des enquêtes contre les pratiques anticoncurrentielles ;
- l'appui dans la mise en place et le fonctionnement du réseau d'information et documentation sur les questions de concurrence ;

Czech Republic

Section A

1. *Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis:*

The number of staff within the Competition Section (the Office for the Protection of Competition also deals with state aid and public procurement issues) is 41. There are 24 lawyers and 17 economists divided into 6 departments (cartels, mergers, services, manufacturing and chief economist). The Chief Economist department is the one to undertake economic analysis and provide the rest of the departments with complex economic background for their cases.

2. *How frequently does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited:*

The Office for the Protection of Competition (hereinafter also referred to as “the Office”) has recently increased its efforts to apply economic analyses in competition cases. In particular for the cases of abuse of dominant position, cartel cases (assessment of a price level in case the cartel agreement wouldn't be effective) and merger assessment. The Office has no experience so far with the economic analyses in the assessment of dynamic and static efficiency. We expect, however, that the benefits may provide us with an additional set of relevant data for the efficiency assessment.

3. *Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to: market definition, vertical restraints, horizontal restraints, abuse of dominance, mergers, and what problems/challenges were encountered?*

The Office does not use one particular method for assessing certain anticompetitive behaviour, however the Office follows the Guidelines of European Commission as long as its decision-making practice. In case a concern exists that competition has been restricted in the market the Office acts in such a way to remedy the competition environment as soon as possible. The incentives about anticompetitive behaviour come from competitors as well as from the Office. In case of mergers the competitors have to submit a proposal for merger to the Office. The Office thus has the possibility to deeply assess whether such a merger would be in conflict with competition in the market. However, in all the cases a) to e) the Office is trying to use techniques appropriate to the particular cases and to develop the current techniques to fit in the developing competition environment.

The experience techniques are used only in difficult cases and their results serve only as a supportive argument. With regard to the current more-economic approach we can expect more frequent application of empirical techniques in the Office's practice in the future.

Most often problems the Office has faced include insufficient database for further data-application, difficult application of simplified models on dynamically changing markets, extremely difficult modelling, outcomes-interpretation problems and demonstrativeness of sophisticated market analysis.

4. *What is your experience with the use of empirical techniques: a) regression analysis, b) concentration models, c) price simulations and Monte Carlo models, d) score and probit models and e) other empirical tools?*

- a) The Office has used regression analysis only for its internal purposes.
- b) Concentration models have been used in several cases, including final decisions of the Office.
- c) Price simulations have been used during many administrative proceedings and merger assessments. Predominantly for the price prediction within the internal assessment of the price prior the conclusion of a cartel agreement and within the assessment of intended merger approval, not as a basic element of evidence. The Office has no experience with application of Monte Carlo models.
- d) The Office has no experience with the application of score and probit models
- e) Other empirical tools have been used in limited number of proceedings, mainly for the internal assessment purposes.

5. *What difficulties are encountered in communicating economic reasoning and empirical evidence to: a) various parties involved in competition cases; and b) the Courts. And what strategies are employed to overcome them?*

Various parties involved in competition cases often submit their own expert analysis, demonstrating different opinions than those of the Office. It is necessary then, to ensure well-respected expert opinion is available in case that economic reasoning of the Office contradicts the submitted one. Further, and that is a general problem of economic reasoning within the administrative proceedings, parties to the proceeding are often unwilling to provide relevant data or, more precisely, data which would best fit intended economic analysis. Therefore, economic reasoning is challenged subsequently with reference to imperfect data inputs or unbiased data assessment. As regards the empirical evidence the Office has not faced so many difficulties while presenting those to involved parties providing the fact that the evidence was precisely specified and the process of demonstration clearly defined.

As for the courts, economic reasoning still remains very difficult to introduce as for the insufficient knowledge on economic approaches of the judges dealing with the competition cases, along with stronger accent on legal reasoning leaving the economic

reasoning with lower probative value and weakening the Office's position. The same issue for the empirical evidence occurs while demonstrating at courts.

The Office has been cooperating with the judges of courts, which are dealing with the competition cases, on preparation of seminars and workshops to increase general knowledge of both judges and competition enforcers on economic reasoning and its application in the decision-making practice.

Section B

1. *What type of system do you have for the resolution/review of competition cases (inquisitorial/adversarial, administrative/judicial)?*

As regards the review of competition cases in the Czech Republic general procedure is based on administrative/judicial system. First- and second-instance decisions are issued by the administrative body (the Office). Then, appeal may be lodged to the Regional Court and its decisions may be challenged at the Supreme Administrative Court.

2. *Is economic evidence a significant and an important component in the proceedings of competition cases before the courts and the determining of sanctions?*

The economic evidence has risen in its importance significantly. The Czech courts, however, have limited experience with using an economic analyses and evidence during the competition cases proceedings. It is expected that the Office will organize seminars and conferences focused on economic evidence in competition cases in cooperation with judges from Regional Court and Supreme Administrative Court, which are responsible for the appealing procedure of all competition cases. Moreover, experience from the international forums (e.g. OECD, ICN, UNCTAD) gained during the working meetings of the Office's officials shall be used extensively to draw attention to the issues of economic tools in competition cases.

3. *For which class of anticompetitive practices (vertical restraints, horizontal restraints, abuse of dominance, and mergers) have you found economic analysis particularly necessary, useful and convincing?*

As mentioned in previous answers, Czech Courts have limited experience with the economic analysis in competition cases so far, yet there have been cases where more sophisticated analyses were presented. Those were especially vertical restraint cases and abuse of dominance.

4. *What difficulties are encountered by the courts with accepting economic reasoning and empirical evidence and what strategies are employed by the courts to overcome them? Do these strategies include the possibility for the courts to make use of independent experts?*

The courts have faced problems while accepting economic reasoning of particular competition cases which had been appealed. However, empirical evidence does not tend to be comprehensive problem for the Czech courts as there is a possibility to cooperate with independent experts. Some difficulties have occurred while using economic reasoning in administrative proceedings of the Office, which was inspired by the highly-developed competition authorities and European Commission. In particular, judges haven't been prepared for such detailed and sophisticated reasoning. Therefore some of the important evidence that had been implemented in the reasoning was not given with the appropriate stress leading to a certain disappointment of the Office which had allocated competition and economic experts to ensure the highest level of the expertise. It is expected that more independent experts shall be involved in the procedure of economic reasoning assessment.

5. *How have the economists been incorporated to the primary judicial forums to adjudicate competition law cases?*

No, they haven't. There is a possibility for the judge to call on an expert in cases of complex economic reasoning.

Ecuador

Sección A

1. *Sírvanse proporcionar un desglose de la plantilla de economistas y juristas empleados por el organismo encargado de la competencia, e informar sobre la capacidad de esos funcionarios para realizar análisis económicos complejos.*

No procede por que no hay ley, peor autoridad

2. *¿Con qué frecuencia recurre el organismo encargado de la competencia al análisis económico en el examen de casos de competencia? ¿Para qué clases de prácticas anticompetitivas se ha determinado que el análisis económico es más necesario y útil? ¿Se considera que e análisis económico es necesario y útil para evaluar la eficiencia dinámica en comparación con la eficiencia estática? Sírvanse dar ejemplos concretos de todos los casos mencionados.*

No procede por que no hay ley, peor autoridad

3. *Sírvanse indicar qué teorías o modelos económicos han servido de base para determinar la existencia de conductas anticompetitivas con respecto a lo siguiente: a) definición de mercado, b) restricciones verticales, c) restricciones horizontales, d) abuso de posición de dominio, e) fusiones*

No procede por que no hay ley, peor autoridad

4. *Sírvase indicar qué ha observado en el uso las siguientes técnicas empíricas: a) análisis de regresión; b) modelos de concentración; e) simulaciones de precios y modelos de Monte Carlo; d) modelos de puntuación (score) y de probit; y e) otras herramientas empíricas.*

No procede por que no hay ley, peor autoridad

5. *Sírvanse indicar qué elementos dificultan la transmisión de razonamientos de tipo económico y pruebas empíricas a los siguientes destinatarios: a) Las partes involucradas en los casos de competencia; b) Los tribunales. Sírvanse indicar las estrategias utilizadas para sortear esas dificultades.*

No procede por que no hay ley, peor autoridad

Sección B

1. *¿Qué tipo de sistema se utiliza para resolver y examinar los casos relativos a cuestiones de competencia (procedimiento inquisitivo o acusatorio, administrativo o judicial)?*

No procede por que no hay ley, peor autoridad

2. *¿Las conclusiones económicas son un componente significativo e importante tanto de los procesos judiciales sobre la competencia como de la imposición de sanciones?*

No procede por que no hay ley, peor autoridad

3. *¿Para qué clase de prácticas anticompetitivas (restricciones verticales u horizontales, abuso de posición de dominio y fusiones) se ha determinado que el análisis económico resulta más necesario, útil y convincente?*

No procede por que no hay ley, peor autoridad

4. *¿Qué problemas se les plantean a los tribunales cuando se trata de aceptar los razonamientos de tipo económico y las pruebas empíricas, y qué estrategias emplean para solucionarlos? ¿Se contempla en esas estrategias la posibilidad de que los tribunales recurran a expertos independientes?*

No procede por que no hay ley, peor autoridad

5. *¿En qué medida se ha permitido a los economistas participar en los foros judiciales más importantes para emitir sentencia en los casos relacionados con el derecho de la competencia?*

No procede por que no hay ley, peor autoridad

Finland

Section A

1. *Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis:*

The number of economists employed by the FCA is 18 and the number of lawyers is 15.

2. *How frequently does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited:*

The FCA uses economic analysis regularly in the background analysis of competition cases. The FCA has found economic analysis to be necessary and useful in e.g. constructing and testing the theory of harm. The FCA has found economic analysis also very important in the assessment of static efficiency.

3. *Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to: market definition, vertical restraints, horizontal restraints, abuse of dominance, mergers, and what problems/challenges were encountered?*

Economic evidence has played an important role. The FCA has relied on demand estimation when defining market and on, for example, theories on resale price maintenance when assessing vertical restraints and on, for example, dynamic game theory and economics of tacit collusion when assessing horizontal restraints.

4. *What is your experience with the use of empirical techniques: a) regression analysis, b) concentration models, c) price simulations and Monte Carlo models, d) score and probit models and e) other empirical tools?*

The FCA has used the following techniques: regression analysis, simulations and the assessment of potential harm and detriment to consumers.

5. *What difficulties are encountered in communicating economic reasoning and empirical evidence to: a) various parties involved in competition cases; and b) the Courts. And what strategies are employed to overcome them?*

The FCA has provided information about its experiences in communicating economic reasoning and empirical evidence to the courts in its contribution to the OECD Roundtable on Techniques for Presenting Complex Economic Analysis to Judges. The contribution is available at: <http://www.oecd.org/dataoecd/39/59/41776770.pdf>

Section B

N/A

Germany

Section A

1. *Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis:*

The Federal Cartel Office has 269 employees (converted into full time employees). About 73 employees are lawyers. 46 employees have a university degree in economics. Most of the economists are working as case handlers in the decision divisions of the Federal Cartel Office.

The Federal Cartel Office possesses and continuously improves its capacity to also undertake – where this seems appropriate and suitable (see answer to question 2 below) – complex economic analysis in the form of the application of quantitative and econometric techniques. The Federal Cartel Office has a specialized economic section which was newly established in July 2007 (see question 4 below). A training programme organized by the economic section inter alia provides a forum within the Federal Cartel Office to inform about and discuss recent trends in economic analysis.

2. *How frequently does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited:*

Due to the fact that competition law enforcement is essentially equivalent to the application of economic principles by enforcing the law, economic analysis is used in almost every case handled by the Federal Cartel Office. The state-of-play of competition economics, which is mainly derived from theoretical industrial economics, provides the background and basis for the principles and standards applied in single cases. In addition, economic analysis is used to collect the relevant evidence for assessing single cases. In this context “economic analysis” should, however, not be equated with the application of highly sophisticated and complex “quantitative techniques / econometric methods”. While complex econometric analysis may – depending on the relevant circumstances of the case (e.g. with respect to data availability) – be a useful tool to gather the relevant evidence for assessing a single competition case, the omission to apply complex quantitative techniques in a specific case should not (necessarily) be considered as a lack of “economic analysis”. In many cases other techniques traditionally used by competition authorities to gather the relevant facts such as (1.) market surveys, (2.) questionnaires to market participants, (3.) analysis of internal business documents, or (4.) interviews with market participants may provide a sufficient basis for assessing whether a specific event (e.g. merger) or market conduct has to be considered as anticompetitive.

According to these principles, the application of complex economic analysis (by way of “econometric techniques”) by the Bundeskartellamt heavily depends on the specific case and the underlying economic aspect when applying the competition law. Considering past experience, more complex econometric analysis seems a suitable instrument, for example, for defining the relevant market and assessing the degree of market power of market players under scrutiny.

3. *Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to: market definition, vertical restraints, horizontal restraints, abuse of dominance, mergers, and what problems/challenges were encountered?*

See reply to question 2.

4. *What is your experience with the use of empirical techniques: a) regression analysis, b) concentration models, c) price simulations and Monte Carlo models, d) score and probit models and e) other empirical tools?*

In the recent past the Federal Cartel Office has increased its capabilities to use empirical techniques. In July 2007 an economic section was installed to support the case handlers when applying complex empirical techniques. The Federal Cartel Office has applied regression analysis to define the relevant market. Other, more complex methods, - despite being of great theoretical value and interest have so far been of very limited practical relevance in case work.

5. *What difficulties are encountered in communicating economic reasoning and empirical evidence to: a) various parties involved in competition cases; and b) the Courts. And what strategies are employed to overcome them?*

The Federal Cartel Office experienced that it is good practice to communicate the economic analysis by way of precise and transparent documentation of the analysis process with results provided at different levels of abstraction.

Section B

1. *What type of system do you have for the resolution/review of competition cases (inquisitorial/adversarial, administrative/judicial)?*

The Federal Cartel Office, an agency assigned to the Federal Ministry of Economics and Technology, is the administrative authority responsible for investigating and deciding competition cases. Decisions are taken by one of twelve decision divisions. The chairman and two associate members of the relevant decision division decide by majority vote. They are not subject to internal or external instructions within their decisions.

The decisions of the Bundeskartellamt are subject to appeal at the Higher Regional Court in Düsseldorf. Four senates of three judges decide the competition cases. In questions of points of law a further review is possible by the Federal Court of Justice in Karlsruhe.

The decisions of the Bundeskartellamt and the judgements of the Higher Regional Court and the Federal Court of Justice are taken within an inquisitorial framework.

2. *Is economic evidence a significant and an important component in the proceedings of competition cases before the courts and the determining of sanctions?*

Economic evidence plays an important role when deciding about competition cases, e.g. when defining the relevant market.

In the recent past several economic studies by external experts have been presented to the Federal Cartel Office and the courts. These studies address different matters of economic analysis, e.g. the additional profit obtained from a cartel.

3. *For which class of anticompetitive practices (vertical restraints, horizontal restraints, abuse of dominance, and mergers) have you found economic analysis particularly necessary, useful and convincing?*

Economic analysis is important for all types of anticompetitive practices.

4. *What difficulties are encountered by the courts with accepting economic reasoning and empirical evidence and what strategies are employed by the courts to overcome them? Do these strategies include the possibility for the courts to make use of independent experts?*

N/A

5. *How have the economists been incorporated to the primary judicial forums to adjudicate competition law cases?*

The opinions of the economists of the parties (economists of the Federal Cartel Office or representatives of the involved companies) and of external economists mandated by the companies can be presented to the courts within the statements of the parties. External economists can also be heard as amicus curiae or mandated by the courts themselves.

Greece

Section A

1. Institutional issues

Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis.

The following table presents the Hellenic Competition Commission staff breakdown into different categories:

Hellenic Competition Commission Staff Breakdown		
Administrative staff		29
Scientific staff	Economists	32
	Lawyers	16
Total		77

The majority of the scientific staff, both economists and lawyers possess a master degree and in many cases a PhD degree or are working on their thesis. Consequently, there is high capacity especially across economists to understand and undertake complex economic analysis. Furthermore, within the first year of appointment, all scientific staff undertakes courses on competition economics (theory and practice) that are usually taught by academics of the Athens University of Economics and Business, who are considered experts in this field. Mainly lawyers, but also economists attend international conferences and workshops whenever possible.

2. Prevalence of the Use of Economic Analysis

How frequent does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic versus static efficiency? Please attach specific case histories for each of the instances cited.

In the Hellenic Competition Commission almost all antitrust cases, as well as mergers and acquisitions are assigned jointly to one economist (belonging to one of the Operational Directorates A' or B') and one legal expert - lawyer (belonging to the Legal Services). For each case, first the analysis of "real events" takes place, which includes the relevant market definition both in antitrust cases (vertical or horizontal restrains, abuse of dominant position) and mergers, market analysis and estimation of the level of competition in the relevant market (see also answer to ques. 3). Economic theory is also used in order to link the "real events" with specific law transgressions.

3. Kinds of Economic Analysis

Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to: a) Market definition, b) Vertical restraints, c) Horizontal restraints, d) Abuse of dominance, e) Mergers, and what problems/challenges were encountered?

a) Market definition

There are two aspects to consider to market definition: i) product and ii) geographical. The products included in the relevant market, and the geographic boundaries of that market are determined by the extent to which customers can readily switch between substitute products, or suppliers can readily switch their facilities to the supply of alternative products. The key to market definition is substitutability.

i) Product market definition:

The generally accepted conceptual approach to market definition, used in many jurisdictions, is the SSNIP test (also known as the hypothetical monopolist test); however, the HCC does not use it so often, mainly because of practical issues (relevant with difficulties in gathering the data and time constraints).

Usually when trying to define the relevant product market the HCC takes into account the following types of information, useful for the analysis of demand-side substitution:

- Product characteristics such as physical properties and intended use;
- Responses from customers, competitors and interested and informed third parties to questions about customer behavior;
- Information enabling the estimation of “switching costs” that customer might incur in changing from the product of one supplier to that of another.
- Past business decisions relating to market shares. This may include documents such as marketing studies, consumer surveys, market analyses prepared for investors, and internal business analyses (eg board papers, business plans and strategy documents).
- Information on demand-side substitution in similar markets in other countries (usually from the European Commission or others NCA surveys or past decisions).

In defining the product market, the HCC considers also the potential for supply-side substitution, which occurs when a price rise prompts other firms to start supplying, at short notice, an effective substitute to the product in question. Supply-side substitution will usually come from firms with existing facilities, providing similar products and/or operating in adjacent areas and imports. The HCC looks at the following types of information when assessing supply-side substitution:

- Information on past supply-side substitution (for example, information on the extent to which supply-side substitution has resulted from variations in price);
- Information on the willingness of customers to switch to new suppliers
- Information on the adjustment costs for the production of a new product for potential suppliers;
- Information on the production processes involved;
- The extent of spare capacity within the industry;
- The business plans of potential suppliers and the assessment of their competitive threat by firms in the market;
- Assessment by independent technical consultants and interested third parties of the likelihood and feasibility of supply-side substitution; and
- Information on supply-side substitution in similar markets in other countries (usually from the European Commission or other NCA surveys or past decisions).

(ii) Geographic market

HCC considers the following information, when available, for defining the geographic market (international, national, regional or limited to certain localities):

- The cost to customers of switching to products supplied in other geographic areas and the cost to suppliers of supplying products to different areas (eg transport costs) in relation to the value of the products and the length of time taken to make the switch;
- Information on consumer preferences by area;
- Product characteristics such as perishability;
- Information on differences in pricing, sales, advertising and marketing strategies by area; and
- Information on flows of goods between regions and any legislative, natural, strategically created or other barriers to entry.

b) Vertical restraints

Vertical restraints can, in principle, occur at any stage of the supply/distribution process for a product or service. The main “types” of vertical restraints faced by the HCC can be classified as: i) Resale Price Maintenance (retail price fixed by the producer; e.g. the book market. A price floor or price ceiling), ii) Refusal to Supply in a Selective distribution scheme limiting the number of distributors, iii) Exclusive Distribution where Distributors are assigned exclusivity within a geographic area or over a particular class of consumer or goods (e.g. newspaper distribution) and iv) Exclusive Dealing where the retailer is prohibited from stocking/promoting competing products.

The evaluating process when assessing these behaviors is framed around two key questions dealing with (i) signs of market power at the manufacturer and/or retailer level and (ii) the effects on competition. So far indicators of efficiency are not evaluated by HCC (mainly due to lack of data).

c) Horizontal restraints

The listing, which is not exclusive, includes direct or indirect fixing of prices or trading conditions, and sharing of markets or suppliers. All forms of agreements to divide markets and control prices, including profit pooling and mark-up agreements and private “fair trade practice” rules, are prohibited. Most of the cases dealing with this form of anticompetitive behavior were based on hard core evidence (documentation, associations’ decision to fix prices, intentional communication, price information exchange etc). However, in addition HCC has analysed data with a view to show implementation of a cartel agreement, for example evidence of marketplace effect (e.g. simultaneous price changes), or evidence that the colluders announced agreed price increases or met to monitor compliance.

d) Abuse of dominance

The first issue to deal with these cases of anticompetitive behavior is the identification of the dominant position the, i.e. a firm’s ability to engage in business activities that “prevent effective competition from being maintained”. From an economic perspective, competition can be said to be effective when no firm, either acting individually or in

concert, is able to exercise substantial market power. The standard definition of market power is the ability to profitably raise price (through the restriction of output) above the level that would prevail under competitive conditions. HCC usually calculates the market shares of firms in the market, both in absolute terms and relative to each other as an indication of the extent of a firm's market power. For instance, a firm with a large market share relative to other firms in the same market may have the ability to raise its price independently of other firms, at least to some extent. Further, a large market share may confer substantial advantages in bargaining with suppliers upstream, or buyers downstream, and a firm may be able to control prices in its favor or impose unreasonable restraints in the negotiation process. However, a firm with a large market share will not always be able to exert market power. Hence, other features of the market are considered as well, such as the extent of switching costs, the existence of competitors in the same relevant market with the same degree of vertical integration, threats of entry and countervailing buyer power, which could affect a firm's ability to exercise its market power. In order to calculate market shares, HCC uses information from a variety of sources including the main parties, other competitors, customers, buyers, suppliers, trade associations and market research reports. Market shares can be measured in terms of revenues, volumes, production capacities or inputs, depending on the markets. HCC also looks at measures of the degree of concentration of the market (which are primarily measures of the structure of the market). The most common measure used is the Herfindahl-Hirschman Index (HHI). Relative to the identification of market power in abuse of dominance cases is the market definition, i.e. the identification of relevant markets (see above). The main issues dealt by HCC regarding abuse of dominance concern discounts and rebates (target and fidelity), discriminating against retail resellers that did not distribute its products on an exclusive basis and refusal to supply.

e) Mergers

Market definition plays a critical role in evaluating merger cases, as in abuse of dominance cases (and the relevant market shares and the degree of concentration). The most common measure used for the degree of concentration is again the Herfindahl-Hirschman Index (HHI).

According to the law, when appraising whether a concentration can impede significantly competition in a relevant market, HCC takes into account:

(a) The structure of all the markets concerned.

According to the law, when appraising whether a concentration can impede significantly competition in a relevant market, HCC takes into account:

(a) The structure of all the markets concerned.

(b) The actual or potential competition from undertakings located either within Greece or abroad.

(c) Any legal or other barriers to entry the market.

(d) The market position of the undertakings concerned and their economic and financial power.

(e) The alternatives available to suppliers and users, their access to supplies or markets.

(f) Supply and demand trends for the relevant goods and services.

(g) The interests of the intermediate and ultimate consumers, and

(h) The development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

4. Experience with the Use of Empirical Techniques

What is your experience with the use of empirical techniques: (a) regression analysis; (b) concentration models, (c) price simulations, (d) score and probit models and (e) other empirical tools?

The Hellenic Competition Commission has employed many economists that possess a very good knowledge of the above mentioned econometric techniques, as well as statistical packages and particularly SPSS, E-Views and Stata. Nevertheless, due to time constraints in the investigation of antitrust cases and particularly mergers, as well as because of the lack of appropriate data, econometric techniques have been used in very few cases. The following paragraphs offer a short description of two case studies, where econometric analysis has been used:

a) Decision 421/V/2008 –BP Hellas A.E & Shell Hellas A.E.

The HCC is about the case of the local units of oil giants BP PLC and Royal Dutch Shell PLC a total of nearly €50 million (17% of the turnover of the two undertakings on the relevant market) for allegedly cooperating on pricing practices. Specifically, BP Hellas was fined 30.06 million euros and Shell Hellas €19.66 million. The HCC were found to have agreed to harmonize their practices regarding their discount policies in parts of Greece. According to the decision BP Hellas and Shell Hellas showed "an intention to not compete with each other, using discounts as a tool to converge their net wholesale prices." The HCC accepted the 17.7.2006 additional proposal of General Directorate. Following the *ex officio* investigation launched by the General Directorate of Competition into the wholesale oil market, the plenary session of the HCC convened on 6 April 2006 in order to examine the relevant proposal of the General Directorate for possible infringements of the Hellenic Competition Act (Law 703/1977) by the oil companies. The HCC decided that the discussion of the above mentioned case should be repeated according to the article 19 paragraph 1 of its regulation procedure so that a complementary proposal could be prepared by the General Directorate of Competition. The General Directorate of Competition has taken into account all the arguments of the two parties (BP Hellas S.A and Shell Hellas S.A) as they were stated in the oral hearing. The General Directorate of Competition, after having examined the arguments of the undertakings, retains its initial position for the existence of a common discount policy by the two oil companies in order to fix the prices in unleaded petrol. The common discount policy is considered by the Directorate to constitute a serious violation of the European and National competition law (articles 81 of the EC Treaty and 1 of the law 703/77).

The investigation carried out *ex officio* by the DG of the Hellenic Competition Commission showed that in the period between 1.1.2003 and 31.12.2003 BP and Shell coordinated their discount policies. In particular, BP and Shell –which are the only active multinational companies in Greece and their joint market share in unleaded gasoline (95 RON) is approximately 40 %– applied different discounts in the regions of Greece, but of the same ratio between them. That is to say, if BP applies a discount A in prefecture F and Shell applies a discount (of different amount) B in the same prefecture (F), then, if BP applies a discount $[A+50\%]$ in prefecture G then Shell applies a discount $[B+50\%]$ in that prefecture (G). It has to be noted that the above discounts resulted from calculations and are the average discounts of all the retailers inside each prefecture, as BP & Shell give different discounts to each one of their retailers. It should also be mentioned that in the discount policy there is no "transparency", that is to say a company does not know and is not in a position to find out the discounts of its competitor.

The common discount policy pattern can not be explained by reasonable economic factors as the analysis showed (e.g transportation cost, economic geography across regions, demand conditions, etc), since the two oil companies: a) have different cost structure, b)

have different logistic scheme across the Greek regions, c) are different in terms of the number of branded petrol stations (Shell Hellas A.E has approximately 200 COCO petrol stations (nearly 25% of total stations).

In contrast to a competitive pricing policy in which discounts are used in order to enhance the level of local competition between the petrol retailers (intra-brand and inter-brand competition), discounts of the two companies are not systematically correlated with the volume of unleaded petrol.

Geographical regions (zones) are indicative examples which do not constitute by their own the critical piece of evidence. The last can be derived from the analysis and the economic interpretation of the data given that rebates in their vast majority do not change over the year but remain surprisingly constant.

The concerted practice by the two undertakings refers to the implementation of a common discount ratio policy in order to equalise the level of final (wholesale) petrol prices.

Legal assessment of the practices at stake:

- The parallel conduct of the two companies has no other plausible explanation than that of a concerted practice (CJ, 31/3/1993, *Woodpulp*, cases C-89, 104, 114, 116, 117 and 125-129/85, ECR I-1307, para. 71).
- According to art. 81, § 1, EC, all concerted practices between undertakings which may affect trade between Member States and which have as their object or effect the restriction of competition within the common market, “*and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions*” are prohibited. The above described conduct, that is the establishment of discounts in common by the two undertakings, falls within the ambit of this provision.
- According to art. 81, § 1, EC, all concerted practices between undertakings which may affect trade between Member States and which have as their object or effect the restriction of competition within the common market, “*and in particular those which: (c) share markets or sources of supply*” are prohibited. The above described conduct, that is the division of Greek territory in “discount regions”, falls within the ambit of this provision too.
- Given the specific circumstances of the relevant market (product and geographic), the undertakings involved, their economic power, market shares and conduct, the prerequisites of the Commission Notice on effect on trade are met.

b) Decision’s 369/V/2007 & 373/V/2007 – Cartel of Milk (Cow Milk)

During 2006, the Directorate General of the Hellenic Competition Commission started an ex officio investigation regarding the dairy products market. On June and November 2006, the Directorate General of the Hellenic Competition Commission conducted inspections in some undertakings and Association of undertakings. The statement of objections issued on December 2006 referred to five infringements on the Hellenic markets for the manufacture and distribution of milk and dairy products both based on raw-cow milk. The first part of the statement of objections concerned an agreement adopted in 2004 between five companies (VIVARTIA S.A., FAGE S.A., MEVGAL S.A., NESTLE HELLAS S.A. and OLYMPOS S.A.) not only to fix prices offered to producers of cow milk for the purchase of cow milk which would then be processed by the dairy companies but also to obstruct the movements of producers between the aforementioned companies (allocation of sources of supply). The aforementioned infringements have been established by documents exchanged between these companies, handwritten notes, internal documents and some statements. The second part of the statement of objections referred to two decisions taken by SEVGAP (Association of Dairy Industries): a) to give its members access to the prices kept by ELOG (public authority entrusted with the power to communicate to the Commission the prices of raw milk paid to milk producers in accordance with article 6 of Commission Regulation 562/05- SEVGAP has been represented by one member in ELOG’s board of directors) and

b) to fix prices offered to producers of cow milk for the purchase of cow milk which would then be processed by the dairy companies- decision adopted in 2001. The first infringement has been established by some statements, whereas the second one by relevant documents. The third part of the statement of objections concerns concerted practices between some companies (KRI KRI, SERGAL, EBROFARMA, RODOPI, VIVARTIA, OLYMPOS and MEVGAL) established through the exchange of their price lists and through meetings convened to co-ordinate their discount policy. The findings supporting these infringements were faxes through which price lists of some companies were sent to another (duration between 2003-2006), relevant documents and the fact that one of the companies (VIVARTIA) admitted the second infringement (coordination of the discount policy). The fourth part of the statement of objections concerns vertical agreements between some companies (VIVARTIA, FAGE, MEVGAL, KRI KRI, RODOPI) and their distributors to fix (minimum) resale prices of dairy products. The last part of the statement of objections concerns vertical agreements between some companies (VIVARTIA, FAGE, OLYMPOS, MEVGAL, RODOPI) and super markets (CARREFOUR, VASILOPOULOS, SKLAVENTIS, VEROPOULOS, ELOMAS, MASOUTIS, ATLANTIK) to fix (minimum) retail prices of dairy products. On February 2007, before proceeding with the oral hearings, the Hellenic Competition Commission decided to split the oral hearings between horizontal and vertical agreements and to issue two different decisions. The oral hearings for the first case (horizontal agreements) ended on May 2007 and the HCC's final decision was issued on November 2007. The oral hearings for the second case (vertical agreements) ended on June 2007 and the HCC's final decision was issued on December 2007.

5. Feedback on the Use of Economic Analysis

What difficulties are encountered in communicating economic reasoning and empirical evidence to: (a) various parties in competition cases; and (b) the Courts, and what strategies are employed to overcome them?

- (a) The various parties in competition cases are usually represented by lawyers who are not always familiar with competition economic theory or even terminology in some cases. However, when hearings take place, company representatives (such as the chief executive or the financial officer) are also present, thus, at least one member of each party is able to understand the economic analysis presented in each case.
- (b) As already mentioned, most of the Members of the Hellenic Competition Commission (at least 6 out of 11) are academics or representatives of the economic and commercial sector (Economic and Social Council of Greece, of the Federation of Greek Industries, the Hellenic Confederation of Professionals, Craftsmen and Merchants and the National Confederation of Hellenic Commerce), while the remaining have a legal background. In total, the composition of the Commission, always includes members that have a good grasp of economic theory and its applications. If the case ends up to the Court of Appeals, then it is demanding to communicate economic reasoning because the Court is strictly composed by judges that do not usually have any economic background or training on relevant issues.

Section B

1. What type of systems do you have for the resolution/review of competition cases (inquisitorial/ adversarial, administrative/judicial).

The system for the resolution of competition cases is administrative at first level (Hellenic Competition Commission) and judicial at secondary level (Court of Appeals).

2. Is economic evidence a significant and an important component in the proceedings of competition cases before the courts and the determining of sanctions?

As already mentioned, the resolution of competition cases is initially performed by the Hellenic Competition Commission which consists of members with both legal and economic background. The Directorate-General of Competition composes a report describing the facts and the legal background of the case and presents it in front of the HCC. The report includes all the economic evidence gathered, as well as economic analysis and proposes a fine where applicable. If the case is being processed at the secondary level, at the Court of Appeals, economic evidence is still an important component in the proceedings of the competition cases, but more complex economic analysis is generally not used, as it is difficult to be communicated with a strictly judicial body.

3. For which class of anticompetitive practices (vertical restraints, horizontal restraints, abuse of dominance, and mergers) have you found economic analysis particularly necessary, useful and convincing?

Communicating economic reasoning in the cases of mergers and acquisitions is necessary and more relevant than in the cases of abuse of dominance or anti-trust cases, as the economic theory used in the former cases is much more straightforward and the economic data more accurate and easy to process than in the latter cases.

4. What difficulties are encountered by the courts with accepting economic reasoning and empirical evidence, and what strategies are employed by the courts to overcome them? Do these strategies include the possibility for the courts to make use of independent experts?

The answer to this question depends on the composition of the Court of Appeals. There is no common strategy to be followed for communicating economic reasoning to the courts.

5. How have economists been incorporated into the primary judicial forums to adjudicate competition law cases?

As already mentioned, there are no primary judicial forums that judge competition cases. Only at a secondary level, the case is examined by the Court of Appeals and thus by a clear judicial body. Usually, at least six economists participate at the plenum of the Hellenic Competition Commission that processes competition cases at first level. The Court of Appeals that processes cases at secondary level is composed strictly by judges and, thus, economists may be called only to testify.

ANNEX I

Ministry of Environment, Physical Planning and Public Works / General Secretariat of Public Works / Special Service of Roads in Attica Region was the responsible authority for implementation of two of the major projects in Greece, by the concession and co-financing method.

The Ministry of Environment, Physical Planning and Public Works, acting on behalf of the Greek State, conducted an International Tender under the Restricted Procedure for the implementation of the Project “Design -Construction - Self-Financing and Exploitation of the Free Motorway of Elefsina - Stavros - Spata Airport and Ymittos Western Peripheral Motorway” (known also as “Attiki Odos”). The Concession Contract was signed in Athens on 23 May 1996 between the Greek State, and the Greek group of companies, by the corporate name “Attiki Odos S.A.”. The concession was validated with the Law 2445 (FEK A 274/16.12.1996). By the Concession Contract the Project Owner provides to the Contractor, and the Contractor accepts the exclusive right to the Design-Build, Development, Organisation, Operation and Exploitation of the Project Elefsina-Stavros-Spata Airport Free Motorway (E.S.S.M) and Ymittos Western Peripheral Motorway (I.W.P.M.). Additionally the Project Owner Concedes to the Contractor the Right to charge and collect tolls for its own account from the users for the duration of the Concession Period, as this is agreed in the contract. The concession period is twenty (20) years.

The concession contract for the “Design, Construction, Financing, Maintenance and Operation of the Rion – Antirion Bridge” was signed in Athens on January 3rd 1996, by the Greek State and Gefyra S.A. The concession was validated with the Law 2395 (FEK A 71/1996). The concessionaire has the right to finance, design, construct, operate and maintain the Bridge together with the right to levy and to collect for its own account tolls from Users during the Concession Period. The concession period is forty-two (42) years.

ANNEX II

LAW no 3389

Partnerships between the public and private sectors

See attachment

Hungary

Section A

1. *Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis:*

The total staff number of the Hungarian Competition Authority (GVH) is 125, among which 87 colleagues are dealing with cases and the remaining 38 people are part of the administrative staff. In regards of the graduation, out of the 87 colleagues 36 are lawyers, 28 economists and 23 have other type of diploma.

The Chief Economist Section was established within the GVH on the 1st September 2006. The section comprises of the Chief economist and two other colleagues.

2. *How frequently does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited:*

The GVH aims to implement economic logic in almost all antitrust (§81 and §82) cases, but a good part of the cases does not require deep economic analysis. The GVH usually uses quantitative economic analysis in cases where an effect-based logic is needed or when a lot depends on a thorough market definition: more complicated (usually Phase II) mergers, price-based abuses of dominance, and certain horizontal and vertical agreements. This work is mostly done by the Chief Economist Section, whose work is frequently complemented by that of the Competition Policy Section.

In merger control, the most useful applications of the economic approach were the use of questionnaire techniques in delineating geographic markets and evaluating potential competition (Mondi/Dunapack, case number Vj-159/2007) and a bidding study in order to evaluate the effect of a 4-3 merger in the area of business data and Internet services (HTCC/Matel, Vj-19/2007). In §82 cases, a detailed analysis of multi-market predation was provided in a cable television case (T-Cable, Vj-88/2007), both in terms of evaluating dominance and the firm's conduct. Concerning §81 cases, we found economic analysis a useful complement to dealing with facilitating practices: in an information exchange case (Exchange offices, Vj-83/2005), it was shown that the firms involved in information exchange behaved similarly to each other, but differently from the firms not involved.

No case has arisen in recent years in which there was a specific need to evaluate efficiencies.

3. *Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to: market definition, vertical restraints, horizontal restraints, abuse of dominance, mergers, and what problems/challenges were encountered?*

A central problem that applies generally to all questions is getting good enough data to produce robust results, which are at the same time intuitive, and are therefore understandable to lawyers and can complement their legal reasoning.

- a) There has been no case in which it was possible to use a proper market definition technique involving demand estimation, or to implement a SSNIP-type analysis in the strict sense (mostly due to data problems, and time constraints in the case of mergers). If the market has encountered shocks, we relied mostly on shock analysis, as we found this method to be the easiest to understand for lawyers. Given a long enough time series of prices, we also use price correlation analysis (stationarity analysis) to complementing our reasoning. In some cases, we found questionnaire techniques particularly useful.
- b) In evaluating the effects of exclusionary clauses, we generally use Delimitis-type tests.
- c) In the information exchange case mentioned above, we analysed time series of firms' daily prices using simple descriptive statistics. In evaluating the effects of conduct in a recommended price case by a professional organization, we relied on a questionnaire result asking how important these recommendations were for industry members and analysing whether members of that specific organization were charging higher prices than non-members.
- d) In the predation case mentioned above, we did a detailed analysis of costs comparing them to prices charged. We also conducted simple regression analysis concerning dominance by showing that if the cable television company acted as a monopoly in a certain geographic area then that lead to considerably higher prices (thereby showing that potential competition did not restrict the incumbent's position). The problems encountered here naturally concerned the costs, as the cost allocation we used was debated by the parties.
- e) On the use of a bidding study and questionnaire techniques, see the cases mentioned above, in the previous point. We usually strive to compare the price and demand trends of the merging companies to those of outsiders in order to evaluate which competitive constraints are the more serious ones – but it is usually much harder to get good quality data from third parties.

4. *What is your experience with the use of empirical techniques: a) regression analysis, b) concentration models, c) price simulations and Monte Carlo models, d) score and probit models and e) other empirical tools?*

- a) When we came into the possession of data good enough to enable the implementation of regression analysis (which was not often the case), we were satisfied with the results. Regression analysis provides the opportunity to control for the factors the parties usually put forward as "natural explanations", and the results can be made understandable to non-economists as well. However, it is hard to find very robust regression results, and therefore they

cannot provide definitive proof and are used more for complementary purposes.

- b) We used concentration models in a few merger cases, and also in evaluating dominance and ascertaining the correct market definition (to show that the geographic market is larger). These models are however not definitive from a methodological point of view, thus we use them more for illustrative purposes to support other evidence.
- c) We have never used simulation techniques, and in fact do not possess the background to implement them, neither in terms of data, nor in terms of software. We also believe that it would be relatively hard for non-economist (and even for some economists) to understand the results.
- d) We have never used score / probit techniques. In a case involving the estimation of switching costs, we used a simple regression model that resembled a probit model, but it was not used as definitive evidence.
- e) As price data are much easier to obtain, we tend to use simple descriptive statistics on price series (correlation, stationarity analysis). Even if there are drawbacks to this method, we found them illustrative for non-economists too.

5. *What difficulties are encountered in communicating economic reasoning and empirical evidence to: a) various parties involved in competition cases; and b) the Courts. And what strategies are employed to overcome them?*

- e) If the discussion is between the economists of the parties and the GVH, it is usually productive, although we cannot naturally agree on all the points. However, these discussions can be very useful to clarify data needs and which kind of data can be provided by the first (or third) parties. If the case raises potential competition problems, we usually signal this to the parties (sometimes communicating a worst case scenario) before the end of investigation, in order to provoke reactions in them. So far we have had favourable experiences with maintaining this continuous dialogue, especially in merger cases.
- f) Economic evidence is rarely used in court proceedings, thus our experience is limited. Our strategy is to make the economically and methodologically sound reasoning as simple and intuitive as possible, so that the judge can comprehend the main points. If the court lacks the necessary knowledge to decide on the validity of the economic reasoning employed, it has the possibility to engage independent experts upon the request of a party – this, however, has not occurred thus far.

Section B

1. *What type of system do you have for the resolution/review of competition cases (inquisitorial/adversarial, administrative/judicial)?*

The procedure of the GVH is an administrative procedure, where the investigators of the GVH investigate the case, and prepare a report. After completing the

investigation, the investigator (the case-handler) prepares a report, which he submits to the Competition Council, together with the files. On the grounds of this report the Competition Council issues its preliminary position. After the reactions of the parties and the facultative trial (a trial shall be held if it is requested by the party or considered necessary by the Competition Council proceeding in the case) the Competition Council makes its decision. The Competition Council is an independent body within the authority since it is independent from the investigation sections which are in charge of the investigative functions.

The decisions of the Competition Council may be appealed at the court (Municipal Court of Budapest at first instance), which is of course completely independent from the authority.

2. *Is economic evidence a significant and an important component in the proceedings of competition cases before the courts and the determining of sanctions?*

Economic evidence³⁵ is usually not a significant and important component in court proceedings, although it is becoming more and more significant. During the last years not only the GVH, but also the parties are trying to use economic evidence (e.g. quantitative analysis) to support their standpoint.

The GVH has around 100 ongoing cases before Court, and in less than 5 cases economic evidence is used. This is mainly due to the fact that most of cases are consumer deception cases³⁶, where economic evidence is not used at all.

3. *For which class of anticompetitive practices (vertical restraints, horizontal restraints, abuse of dominance, and mergers) have you found economic analysis particularly necessary, useful and convincing?*

We feel that economic analysis is particularly necessary and useful in case of certain types of:

- a) vertical restraints (e.g. where we had to prove the likely effects of a restraint),
- b) abuse of dominance (e.g. predatory pricing), and
- c) mergers.

At least these are the cases where the GVH has used economic evidence.

We have to emphasize also that the GVH has used once economic evidence in a horizontal case (i.e. price information cartel), where the documentary evidence was supported by the economic evidence.

4. *What difficulties are encountered by the courts with accepting economic reasoning and empirical evidence and what strategies are employed by*

³⁵ We use the phrase „economic evidence” in a strict sense: e.g. complex quantitative analysis. Economic evidence in a wider sense (e.g. simple price comparison, calculation of market share, and HHI index, etc.) is used of course much more often during GVH and Court proceedings.

³⁶ The GVH has also jurisdiction to decide on consumer deception cases. Around 60% of the decisions deal with these issues.

the courts to overcome them? Do these strategies include the possibility for the courts to make use of independent experts?

As noted before economic evidence is not frequently used in court proceedings, so we have limited experience, but we might say that if the court lacks the necessary knowledge to decide on economic reasoning, it has the possibility to make use of independent experts upon request of a party.

5. *How have the economists been incorporated to the primary judicial forums to adjudicate competition law cases?*

Economists are not incorporated to the primary judicial forum, but one judge, who is usually deciding the most complex cases at the Municipal Court of Budapest, has an economic degree also.

Please see the answer given in point 4. regarding the use of experts.

Indonesia

Section A

1. *Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis:*

Up to this time, KPPU already have 27 economic analysts and 28 lawyers. In order to enhance the competition cases analysis, KPPU could also assign some economic analyst and lawyer from the expert and academic community for a certain period; it was acknowledged as the Working Group. Usually, they would be assigned for 3 months, and it could be extended due to the necessity. While for now, the capacity of the KPPU's officials in undertakes economic analysis are quite sufficient, but still need a lot of improvement. KPPU's official still had some difficulties in analysing cases which need complex economic analysis, such as the analysis concerning market definition, vertical restraints, horizontal restraints, abuse of dominance and mergers. KPPU's officials still need advanced trainings and workshops in economic analysis.

2. *How frequently does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited:*

Most competition cases that were handled by KPPU were always analysed from 2 sides' point of view, which were law analysis and economic analysis. While for rule of reason cases were always being assessed with the economic analysis. Normatively, the use of economic analysis was important, because every in competition case it was important to make consideration on the economic impact that might be rise in the short term and in the long term. The examples of competition cases with complex economic analysis that had been handled by KPPU were the case of Temasek Holdings, Astro Paid Television and cartel in determining short message tariff among the cellular operators.

3. *Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to: market definition, vertical restraints, horizontal restraints, abuse of dominance, mergers, and what problems/challenges were encountered?*

In the context of assessing anticompetitive behaviour cases, KPPU use SSNIP Test to assess the relevant market. The example of the implementation is on the Temasek Case (Case No. 7/KPPU-L/2007). The link to see the complete Decision File of Temasek Case is http://www.kppu.go.id/docs/Putusan/putusan_temasek.pdf

There are several Challenges in Case Handling Procedure:

- Limited guidelines issued by KPPU
- Limited time for complaint review
- Limited authority to searching data
- Limited authority to searching evidences
- Less capacity to conduct market survey

4. *What is your experience with the use of empirical techniques: a) regression analysis, b) concentration models, c) price simulations and Monte Carlo models, d) score and probit models and e) other empirical tools?*

- Three Stages Least Square
- HHI, CR, Modified HHI

In Temasek Case (Case No. 7/KPPU-L/2007), KPPU applied the concentration models of ratio CR and HHI in order to gain perspectives of market structure. KPPU used this empirical techniques because it could explained more about Multiple Positions in market structure. Temasek Holdings were proven had multiple positions in the market, where it had the majority shares in Telkomsel (PT. Telekomunikasi Selular) and Indosat (PT. Indosat, Tbk). This two cellular operators were in the same market , which means they supposed to compete to each other. To analyse this case, KPPU used the HHI theory which was modified (General Modified HHI), because to analyse the multiple position case, the normal HHI theory could not be used, The link to see the complete Decision File of Temasek Case is http://www.kppu.go.id/docs/Putusan/putusan_temasek.pdf

5. *What difficulties are encountered in communicating economic reasoning and empirical evidence to: a) various parties involved in competition cases; and b) the Courts. And what strategies are employed to overcome them?*

Problems that often emerged was the shortage of understanding from the parties and the judges about the economic analysis that was analyzed from the competition policy point of view, as well as the different understanding and different interpretation of the economic analysis between the parties and the judges with the economic analysis in the competition policy which always measured the caused impact in the short term and in the long term. As a result, many times KPPU were incurred a loss when its decision was annulled by the judges who didn't have the right interpretation of competition law and policy. As efforts to minimize this problem, KPPU determined an integrated advocacy and communication strategy in order to maximize the socialization efforts on the competition law in the business community and law enforcer society. Some of the strategies were the implementation of competition workshop for the judges and competition seminars in the community of local government, academics, and business community in all over Indonesia.

Section B

6. *What type of system do you have for the resolution/review of competition cases (inquisitorial/adversarial, administrative/judicial)?*

Administrative or judicial.

The legal efforts toward the decision of the Indonesia competition agency (KPPU) were administrative or judicial, which is appeal to the district court, not to administrative court.

7. *Is economic evidence a significant and an important component in the proceedings of competition cases before the courts and the determining of sanctions?*

Yes, it is an important component. The courts also carried out the analysis of the substance towards the KPPU decision in order to consider whether the economic evidences that were used already appropriate or not. At this time, KPPU had already released guideline of administrative procedure according to article 47 Law No. 5 Year 1999 concerning about the imposition of fines (administrative sanction). This guideline also applied the economic evidence as one of the calculation method to calculate the fine that will be forfeiture to the reported parties.

8. *For which class of anticompetitive practices (vertical restraints, horizontal restraints, abuse of dominance, and mergers) have you found economic analysis particularly necessary, useful and convincing?*

We found economic analysis particularly useful in abuse of dominant position cases and merger cases (note: up to this time, KPPU did not yet handle any merger case due to the merger regulation that did not yet formed and composed). Economic analysis need to be implemented to measure whether there was a company in the market that had the dominant position, as well as to measure the impact that might be occurred of this dominant position towards the economy and community welfare. While in merger cases, we use the economic analysis to estimate the impact of merger implementation against the competition.

9. *What difficulties are encountered by the courts with accepting economic reasoning and empirical evidence and what strategies are employed by the courts to overcome them? Do these strategies include the possibility for the courts to make use of independent experts?*

So far, KPPU have no difficulties or problems with the courts in accepting economic reasoning and empirical evidence. The courts usually more stressed the case violation behaviour that was carried out, whether it has filled the criteria to against the regulations or not. It makes the court rarely conducted a further exploration in the economic analysis. Based on the law provision that was applied in the court, the Supreme Court's regulation no. 3 year 2005 stated that the court as the appeal institution basically only carried out the inspection toward the KPPU decision and its dossier, but if the court believe that an additional investigation still need to be done, then the court could put an order to KPPU to investigate information from various party, including from independent experts. The District Court itself did not allow using an independent expert according to the mentioned Supreme Court's regulation.

10. *How have the economists been incorporated to the primary judicial forums to adjudicate competition law cases?*

Every case handling in KPPU always involved the economist since the beginning of the investigation process. The work load that was given to the economist was the same as the investigator, but they had the specific task to carry out the economic calculation. In the objection process, the economists (experts) could be involved as witnesses, while the examination shall be undertake by the competition agency, not the district court.

Japan

Section A

1. *Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis:*

The JFTC employs 18 lawyers and 6 economists as of the end of the December 2008. They work on the formulation of various guidelines and analyses related to investigations of individual cases as experts of their professional areas. They are involved in the decision making-process within the JFTC secretariat and provide useful inputs to the necessary decision of the JFTC. At the same time, the AMA stipulates that the chairman and commissioners of the JFTC shall be appointed from among experts in law or economics. Currently, one of the commissioners has the career as a professor of economics.

The JFTC established a research unit, the Competition Policy Research Center (CPRC), within the General Secretariat in June 2003. The CPRC develops activities aiming to reinforce the theoretical foundation for the enforcement of the AMA and other related laws as well as the planning, suggestion and evaluation of competition policy by such as conducting collaborative studies between outside researchers/practitioners and JFTC officials.

The CPRC provides special training courses on economics in cooperation with the Personnel Division. The purpose of these training courses is to have JFTC officials acquire an in-depth knowledge of economics required for making use of economic analysis for the enforcement of the AMA as well as planning of competition policies.

2. *How frequently does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited:*

Six economists are engaging in works mainly in the economic research office (CPRC) and the merger and acquisitions division where economic analysis is most needed in the JFTC. They give advice concerning various issues inside the JFTC as necessary from the perspective of economics.

The revised Merger Guidelines (March 2007) stipulate that the impact of business combinations on competition shall be determined in consideration of dynamic efficiency, including streamlining of the research and development system, as well as static efficiency such as economies of scale and reduction in transportation costs, and that business combinations that create a state of monopoly or quasi-monopoly are hardly ever justified by their efficiency.

Japan has seen no case of business combination in which the concerned companies claimed that their business combination would serve to improve efficiency, including static efficiency, and the JFTC made a judgment in light of improved efficiency. Therefore, there is no experience of using economic analysis in evaluating dynamic efficiency and static efficiency.

3. *Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to: market definition, vertical restraints, horizontal restraints, abuse of dominance, mergers, and what problems/challenges were encountered?*

The Merger Guidelines revised in March 2007 have adopted the so-called SSNIP Test (Hypothetical Monopolist Test) regarding market definitions. Anticompetitive effect is analyzed from the viewpoints of substantial restraints of competition both by unilateral conduct and by coordinated conduct and in consideration of factors such as import, entry, competitive pressure from users, efficiency, etc. The ideas underlining the Merger Guidelines are similar to those in the US and the EU and take account of economic thinking.

4. *What is your experience with the use of empirical techniques: a) regression analysis, b) concentration models, c) price simulations and Monte Carlo models, d) score and probit models and e) other empirical tools?*

The JFTC examined the degree of substitutability between products of the parties concerned by measuring cross-elasticity of demand among products of individual manufacturers using the data on their prices and quantities in the following cases: “Transfer of Sanitary Goods Business from Shiseido Co., Ltd. to Unicharm Corporation” (published in FY2005), “Acquisition of Stock of Yamaki Co., Ltd. by Ajinomoto Co., Inc.” (published in FY2006) and “Acquisition of Stock of Myojo Foods Co., Ltd. by Nissin Food Products Co., Ltd.” (published in FY2006).

The CPRC studied various economic analysis techniques used for merger reviews and published a joint research report titled “Merger Review and Economic Analysis” (published in November 2005). The CPRC also conducted quantitative analysis such as merger simulations on a hypothetical case or a past case in the joint research reports titled “Economic Analysis of Mergers and Goods Differentiation” (published in October 2006) and “Local Market Competition in Retail Service Industries -Case Studies of the Japanese Movie Industry-”(published in November 2008). Regarding cartels, the CPRC conducted a regression analysis on the bid price in a bid-rigging case regarding the procurement by a local government and published a joint research report titled “Fact-finding Survey and Economic Analysis on Cartels” (published in March 2008).

5. *What difficulties are encountered in communicating economic reasoning and empirical evidence to: a) various parties involved in competition cases; and b) the Courts. And what strategies are employed to overcome them?*

It would appear that the difficulties in communicating economic reasoning and empirical evidence with outside parties are for example, a lack of understanding or a lack of common view resulting from different approaches between law and economics. To respond to these problems, it would be important to strengthen theoretical foundation of competition authorities, to create common languages between law and economics and to disseminate information externally.

From this point of view, the CPRC has the objective to build and improve functional and sustainable cooperative platforms between intellectual resources of outside researchers/practitioners and staff members of the JFTC in order to reinforce theoretical foundation on which we enforce the AMA and plan, suggest, and evaluate competition policy from medium- and long-term perspective as well as from the perspective to utilize it to implement measures for current issues.

The CPRC put out the information through hosting international symposiums joined by officials of foreign competition authorities and academic specialists and open seminars to introduce the results of its research and important topics on competition policy.

Section B

N/A

Korea

Section A

1. *Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis:*

The KFTC is composed of experts with diverse backgrounds including economists and lawyers. As of 2008, the KFTC has a total of 491 in staff. There are 63 economists including 40 with BA in economics 17 with MA in economics and 6 with Ph. D in economics, and 30 lawyers.

<Staff capability to conduct complex economic analysis>

In December 2005, the KFTC newly set up the Economic Analysis Division in charge of economic analysis to establish the ground for enhancing capacity for economic analysis. As of January 2009, the Division has Director with Ph. D in economics and 4 staff with BA in economics.

As a central unit for economic analysis at the KFTC, the Economic Analysis Division plays a supporting role for case-handling Divisions. Mainly, the Division validates the economic analysis report submitted by examinees regarding a case and conducts empirical analysis (econometric analysis) using objective data and reviews related economic theories.

Also with the view of strengthening economic analysis capability of the entire staff, the Division holds annual workshops to introduce economic theories and empirical analysis techniques.

In order to complement the internal capability for economic analysis, the KFTC is proactive in tapping to outside experts as well. Forming an advisory network comprising experts in econometrics, the KFTC has established partnership concerning outsourcing research and advisory.

2. *How frequently does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited:*

In recent years, in terms of large-scale mergers, abuse of market dominance, and cartel cases, in most cases, most examinees submit economic analysis reports. This is a testimony to growing importance of economic analysis in case deliberation. Especially, in merger and abuse of market dominance cases, the role of economic analysis is becoming pronounced.

<Types of anticompetitive practices where economic analysis is particularly necessary and useful>

A close look at the economic analysis conducted by the KFTC shows the growing importance of economic analysis in abuse of market dominance and cartel cases.

When it comes to merger cases, economic analysis can be useful in defining relevant markets and determining anti-competitiveness of the merger. In abuse of market dominance cases, economic analysis is necessary and useful in determining whether the concerned undertaking is dominant or not and whether there has been any anti-competitive practice. In addition, in handling cartel cases, economic analysis can be used in estimating the size of undue profit made by cartel participants.

<KFTC finds economic analysis useful and necessary in comparing static and dynamic efficiency>

The KFTC in principle bans anticompetitive mergers but allows exceptions where economic efficiency gained through the merger that would otherwise have been impossible outweighs the harm from restrained competition.

In fact, examinees argue that the merger in question would raise efficiency (mainly static) in the form of reduced production cost through economies of scale or scope, integration of production facilities, and rationalizations of production process.

A case in point is the merger between System Operators of 2004. In the case, examinees wished to integrate transmission networks, sales offices, studios, online sales and digital broadcasting through the merger and they argued that the merger would bring efficiency worth 190 billion won for the next 10 years in reduced cost.

In response, the KFTC analyzed the expected efficiency and anti-competitive harm for the next 5 years and converted it into the current value, weighing the two. As a result, the expected efficiency gain through the merger was estimated at some 10.7 billion won while the anti-competitive harm like raised usage fees was estimated at some 28.2 billion won. With the expected benefits outweighed by the anti-competitive harm, the argument of examinees was not accepted.

Meanwhile, the KFTC factored in the possibility of dynamic changes of the relevant market handling the Auction-Gmarket merger case in 2008. Its analysis showed that the proposed merger would raise their market share to 87.2% in the open market places online. Still the KFTC approved of the proposed merger, citing the possibility of dynamic changes in the Internet-based industry.

In other words, the KFTC concluded that by the nature of the Internet-based industry, the cost for market entry is low and thus anytime new competitors can enter the market, and without bearing a huge initial cost, the existing online shopping malls can transform into open markets with relative ease.

In addition, the new post merger company seemed to be able to emerge as a viable competitor for Internet portals in the shopping search service market. Therefore, the

KFTC concluded that considering portals were likely to enter the open market sectors increasingly and the market could see a dynamic change, the anti-competitive harm, if any, would be just temporary.

3. *Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to: market definition, vertical restraints, horizontal restraints, abuse of dominance, mergers, and what problems/challenges were encountered?*

The KFTC employs various economic theories and models in conducting economic analysis in major cases like mergers, abuse of dominance and cartels. The following are KFTC's major cases and economic theories & models used.

(1) E- LAND Retail –Carrefour merger case('06)

The E-LAND Retail- Carrefour case is a merger case between local supermarkets that provide one-stop grocery shopping service. In this case, market definition and the anti-competitive effects like price rise through the merger in question were contentious points.

Regarding market definition, the KFTC defined the supermarket with its floor space 3,000 m² or more that provides one-stop grocery shopping service as the relevant market, whereas the acquiring undertaking (E-LAND Retail) argued that its type of business is similar to that of department stores and so it is in competition with department stores rather than supermarkets.

Concerning this, the price-market structure relationship, which was derived from the fixed effect panel model, was a focal point, and eventually, the KFTC imposed a corrective order on the acquiring undertaking to sell off its stores in three relevant geographical markets based on the following analysis result.

First, regarding market definition, the price level of the acquiring firm seemed to have more to do with the existence of nearby supermarkets and the number of the stores than with the existence of nearby department stores. This means KFTC's market definition is more valid than examinees'.

Second, regarding anti-competitiveness, the price level of the acquiring firm seemed to be lower by an average of 4.2% in the case where the acquired firm's store is near the acquiring firm than otherwise. This suggests that the concerned merger would abolish competition between the two supermarkets, making price raise more likely.

(2) Calculation of damages caused by cartel activity ('08)

As in 2000, the KFTC ferreted out and imposed corrective measures on 5 local oil refineries for having collaborated in the bid for military oil supply, the Ministry of Defence filed damages suit against them. After 6-year-long deliberation, the Seoul District Court ordered defendants to pay 81 billion won in damages. But the defendants challenged the ruling and appealed to the High Court, which is now deliberating the case.

The amount of damages by price-fixing can be equivalent to the difference (loss) between the price as a result of price-fixing (successful price tendered) and the price that would have been without price fixing (proper price). The difference can be calculated through various methods like the before-and-after method, the yardstick method and difference in different method.

The court adopted the difference in difference method to calculate the difference (loss) by the price cartel, which considered not just successful prices for the Defence Ministry's bidding during both cartel and non-cartel periods but also successful prices for the bids issued by the private sectors.

(3) Abuse of market dominance by Internet portals ('08)

This case was initiated as Korea's leading Internet portal Naver banned in a contract with online video content providers advertising on videos seen as Naver search results.

In the case, the KFTC made a case using the latest economic theory "two-sided market," according to which Internet portals provide search service to portal users and outlink service to video content providers respectively.

Therefore, an Internet portal constitutes a two-sided market, and Naver as a two-sided platform, leveraged the user network it has established in the Internet search market to constrain video content providers' advertisement profits, thereby restraining competition.

(4) Microsoft's abuse of market dominance ('05)

This is a case where Microsoft was found to have tied its Window Media Server program to its market-dominating PC Server Operating System and bundled its PC OS with Window Media Player and Window Messenger programs.

Handling the MS case, the KFTC tapped to the conventional leverage theory, one of the market foreclosure theories, to determine the anti-competitive effects of MS's conduct.

According to the conventional leverage theory, it is plausible for a dominant firm to leverage its market power and bundle its main product with a complementary product so as to restrain consumers' right to choose as they please, exclude its competitors in the market and thus to secure further monopolized profit.

The KFTC concluded that MS restrained competition in the tied market and undermined consumer interests by transmitting its market power in the tying market to the tied market.

4. *What is your experience with the use of empirical techniques: a) regression analysis, b) concentration models, c) price simulations and Monte Carlo models, d) score and probit models and e) other empirical tools?*

(1) Regression analysis

The KFTC is active in using regression analysis whenever related data is available. Especially, in conducting economic analysis using natural experiment, regression analysis plays an important role in defining the relevant markets and determining anti-competitive effects.

In the supermarket merger case, the KFTC used regression analysis to estimate the impact of the existence of nearby supermarkets or their number on the acquiring firm's product prices and found that the acquiring firm was in effective competition with other supermarkets and the concerned merger would have anti-competitive effects.

Plus, regarding the System Operators' merger case, the KFTC also used regression analysis to find out whether broadcasting service fees are different between competitive service areas and monopolized service areas. Through the analysis, the KFTC has proved that the post-merger monopolized service areas are highly likely to see price raises.

(2) Concentration models

The KFTC uses HHI (Herfindalh-Hirschman Index) as a measure of market concentration. Market concentration analysis using the HHI is not a determinant of anti-competitive effects of its own. Rather, the HHI test is meaningful as a threshold test to sort out cases worthy of focused examination.

When the HHI exceeds 2,500, it is an indication of a highly concentrated market; when the HHI is less than 1,200, a lowly concentrated market; when the HHI is between 1,200 and 2,500, a mid-level concentrated market. With the introduction of safe harbours, where the post-merger HHI is less than 1,200; 1,200 or larger and less than 2,500 and the increment is less than 250; 2,500 or larger and the increment is less than 150, a merger qualifies for the safe harbour, thereby processing the merger review swiftly.

Along with the HHI, the previously used measure, CR_K is also considered in estimating market concentration. The KFTC used the HHI and CR_K to analyze potential changes in market concentration in the supermarket merger case.

(3) Merger simulations

In recent years, mainly for merger cases, empirical analysis using merger simulations is being used. This method is relatively more complex than other methods, thus taking as much more time and cost.

Especially, when it comes to merger simulations, estimation of demand elasticity is important, but there is certain limits in estimating it based on just data. So in practice, the questionnaire survey is used to indirectly estimate demand elasticity. Therefore, if the questionnaire method is not sophisticated enough, the estimate of demand

elasticity is to be distorted, eventually affecting the decision on the anti-competitive effects.

(4) Probit models

Examining MS's abuse of market dominance case in 2005, the KFTC conducted quantitative analysis using Probit model. Microsoft was found to have tied its Window Messenger program to its PC OS, and the quantitative analysis found that this tying practice was thought to increase the possibility that consumers will choose MS Messenger as their main messenger by about 22 to 35%.

Tying was thought to have caused tipping effects in the messenger market, driven out competing enterprises in the market and blocked new entrants from entry to the market, which overall indicates a considerable market foreclosure.

(5) Other empirical analysis methods

Critical loss analysis

The KFTC largely resorts to critical loss analysis for market definition. In a representative case of liquor company merger of 2006 (Hite Beer-Jinro), with respect to market definition, whether to treat soju-a vodka-like Korean liquor- and beer as the same product market or as a separate market was a moot point.

The KFTC reckoned that in case the soju price of a hypothetically dominant firm rises by 5% first and then 10% respectively in the soju market, the price raise would enable the firm to expand its profit. Thereby, the KFTC concluded that the soju market alone can constitute a relevant product market.

In addition, in the beer market as well, the 5% or 10% increase in prices was shown to earn a hypothetically dominant firm more profit, thereby rendering the beer market a separate relevant product market. Therefore, the KFTC defined soju and beer as a separate product market.

Elzinga-Hogarty Test

The Elzinga-Hogarty Test, which defines a geographical market based on inter-regional trading volume, has merits in its simplicity of analysis. But as the inter-regional trading volume is neither a necessary nor a sufficient element for defining a geographical market, using the test mechanically might cause problems. Therefore, the KFTC does not define a geographical market using the Elzinga-Hogarty Test exclusively, but instead, taps to other test methods as well, like critical loss analysis.

For example, in the liquor company merger case of 2003 (Muhak-Daesun Distilling), the KFTC used the Elzinga-Hogarty Test to define the Busan and South Gyeongsang Province, not the national market as the relevant geographical soju market. That is, in the Busan and South Gyeongsang Province market, local suppliers had been supplying 84% of the total demand, with 85% and 91% of the respective supply volume consumed within the concerned market.

Diversion ratio analysis

Handling the supermarket merger case (Home Plus-Homever), the KFTC used the diversion ratio analysis method in order to determine the anti-competitive effects. The analysis showed that a high diversion ratio means a high substitutability between two products, and therefore, a merger between companies whose products have a high diversion ratio has a high possibility of price raises and hence bigger anti-competitive effects.

In the Home Plus-Homever merger case, the KFTC estimated the diversion ratio of customers of the acquired firm Homever to Home Plus to determine the anti-competitive effects. To elaborate, the KFTC supposed a case where Homever suspends its operation, and then surveyed consumers on which alternative store they will choose. The result was that in total 5 areas, the diversion ratio of customers to Home Plus was estimated high, which means in these areas, the possibility of restrained competition and consumer damage in the form of price raises was thought to be considerable.

<Challenges in using economic models or empirical analysis methods>

In case of critical loss analysis and other empirical analysis, availability of necessary data emerges as a problem. For example, for the use of critical loss analysis, actual sales reduction rate should be calculated, which can be done in two ways; the deriving of a demand function and consumer survey.

In deriving a demand function, it is practically difficult to collect necessary data on the past prices and sales volume. For consumer survey, it is pointed out that the questionnaire consisting of leading questions or the respondents' tendency for redundant response might lead to over-estimation of reduction in sales.

In addition, as most mergers should be reviewed by a certain time limit, market definition or the determining on anti-competitive effects should be done under a very tight schedule, and in particular, in complex large-scale merger cases, economic analysis rarely gets done without time pressure.

5. *What difficulties are encountered in communicating economic reasoning and empirical evidence to: a) various parties involved in competition cases; and b) the Courts. And what strategies are employed to overcome them?*

When it comes to antitrust cases like mergers or abuse of market dominance where economic analysis is a contentious issue, it is often commonplace to see lack of awareness or understanding of empirical analysis techniques or terms on the part of lawyers and legal experts and thus difficulty in getting across the analysis result to the parties concerned.

And besides, as antitrust litigation is on the rise, how effectively and persuasively the economic analysis result is delivered to the courts has surfaced as an important issue. It is a reality that the court has still hard time in fully understanding the complex and jargon-ridden economic analysis and incorporating it into the case deliberation. Given

this reality, it is an absolute imperative that we should facilitate communication between the competition authority and the court.

To overcome these difficulties, the KFTC is trying to write an easy-to-understand Examination Report and Resolution with graphs and indices in case the economic analysis methods used entail complex quantitative analysis.

Also, the KFTC tries to consider direct evidence obtained through case investigations and examination process, statement of the concerned parties and statistics, before explaining the economic analysis result, so as to make the result a basis for an objective and reasonable decision-making.

Section B

1. *What type of system do you have for the resolution/review of competition cases (inquisitorial/adversarial, administrative/judicial)?*

The KFTC as a quasi-judicial (a court of first instance) administrative agency ensures the examinees' right to defend under the same cross-examination structure as in the court's trial procedure.

Yet, for the sake of public interests, "establishment of the competition order" as with the court in criminal cases, the KFTC is equipped with ex-officio authority.

2. *Is economic evidence a significant and an important component in the proceedings of competition cases before the courts and the determining of sanctions?*

Economic evidence is an important component in the proceedings of competition cases before the courts and the determining of sanctions.

Basically, economic evidence is necessary for determining anti-competitiveness of competition cases and also essential for determining illegality by types of conducts.

In case of abuse of market dominance, economic evidence is required for determining of dominant positions; for market definition in merger cases; and for presumption of concerted activities in undue concerted activities.

3. *For which class of anticompetitive practices (vertical restraints, horizontal restraints, abuse of dominance, and mergers) have you found economic analysis particularly necessary, useful and convincing?*

Economic analysis is essential for all types of antitrust infringement cases which require market definition or the determining of anti-competitiveness.

In most cases, abuse of market dominance and merger cases require economic analysis and so does assuming undue concerted activities.

4. *What difficulties are encountered by the courts with accepting economic reasoning and empirical evidence and what strategies are employed by the courts to overcome them? Do these strategies include the possibility for the courts to make use of independent experts?*

In competition cases, when the result of the examinee's economic analysis and that of the KFTC's conflict each other, the court consults with independent third party economists before handing out a final ruling.

Bid rigging case involving 5 oil refineries concerning military oil supply('00)

5. *How have the economists been incorporated to the primary judicial forums to adjudicate competition law cases?*

Where economic analysis emerges as a moot point during the KFTC's case deliberation as a court of first instance, economists with expertise in the relevant sector are summoned as references and heard.

"Attendance of and hearing from the concerned parties, related parties and references," "designation of experts and entrusting of experts"(Article 50 of the MRFTA), "hearing from a special organization or an expert with technical expertise with respect to the case"(Article 37 of Rules of Procedure)

In the proceedings for appeals by examinees dissatisfied with KFTC's decision, economists submit comments and give testimony as references or witnesses.

Latvia

Section A

1. *Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis:*

In order to improve the competence of the authority in dealing with complex economic analysis recently there is established one staff position of the Chief Economist and employed. In Analytical Departments of the Competition Council experts – economists are employed. The proportion of the staff in terms of economists and lawyers is about 50%:50%.

2. *How frequently does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited:*

The most cases where the economic analysis is absolutely necessary are these of abuse of dominant position in assessment of unjustified, excessive or exclusionary prices and merger cases in assessment of creating market power by merged parties. For weighting of market shares for participants of the relevant market, such economic methods are used as Herfindahl-Hirschmann index (HHI), the Concentration Index (CR) as well as company profitability indicators are in certain cases rated to estimate competitiveness of the particular enterprise as entity. The creation of costs are analysed in cases where it is necessary to estimate excessively high prices.

Economic analysis is provided as well in so called administrative and supervision cases on abuse of dominant position as well as on predatory pricing, margin squeeze and discrimination. As example of economic analysis could be mentioned comparative analysis of prices offered by different market participants in connection with other indicators, for example market shares, market power, level of costs (different kinds of costs), calculations of cost prices, comparative analysis of profitableness indicators for different market participants in connection with other factors – amount of market share, price level, dynamics of raw material prices. Also SSNIP test is applied, as well as the first attempts to apply the “critical point” test (18 control questions characterising the particular branch and market participants) were provided and Arreda/Turner test, where changes of prices are compared with cost prices. Economic analysis in the Competition Council is a necessary element of casework. It is clear, that such analysis has to be provided systematically and in longer period of time, for example during few months.

3. Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to: market definition, vertical restraints, horizontal restraints, abuse of dominance, mergers, and what problems/challenges were encountered?

N/A

4. What is your experience with the use of empirical techniques: a) regression analysis, b) concentration models, c) price simulations and Monte Carlo models, d) score and probit models and e) other empirical tools?

a) market definition

Porter's 5 forces method, analysis of supply and demand side, Herfindahl-Hirschmann index and Concentration Index.

b) vertical restraints

Evaluation according to interpretations of EC competition law and practice (mainly guidelines and notices – definition of relevant market etc.).

c) horizontal restraints

Evaluation according to interpretations of EC competition law and practice (mainly guidelines and notices – definition of relevant market etc.).

d) abuse of dominance

Cost-price analysis in cases of predatory and excessive pricing.

e) mergers

Herfindahl-Hirschmann index and Concentration Index

And, what problems/challenges were encountered?

What are the uncovered areas and depends on more resources and knowledge:

More precise "simulation" of effect to competition in future at the merger cases where CC has suspicions of negative effects.

Analysis of cartel risks under the economic methodology. Use of econometric models in cartel cases.

5. What difficulties are encountered in communicating economic reasoning and empirical evidence to: a) various parties involved in competition cases; and b) the Courts. And what strategies are employed to overcome them?

Burden of prove is on CC and we have to prove the credibility of economic methods used. If economic methods were applied in cases of other competition authorities (also EC) then there are fewer problems to prove.

There is very low possibility to hire economic expert. There are no specific competition economists, high financial contributions, independence of general economic experts which have sectoral knowledge could be easily contested due to

situation that mostly they were or are employed (or connected in other way) with undertakings.

There still are insufficient discussions with parties regarding economical reasoning and empirical evidences. Mostly all arguments from the parties are legal. Also appellations to the Courts mostly contain legal arguments, what is reason why it is not possible to encounter difficulties in communicating economic reasoning and empirical evidence to various parties or to the Court. In some cases there different views on product market definitions.

Section B

1. *What type of system do you have for the resolution/review of competition cases (inquisitorial/adversarial, administrative/judicial)?*

Decisions of Competition Council of Latvia may be directly appealed. Judgment of Administrative Regional Court may be appealed in cassation instance at Supreme Court. In appellation process Administrative Court should also apply the principle of objective investigation.

If private claim would be brought, it would be reviewed according to Civil Law (adversarial system).

2. *Is economic evidence a significant and an important component in the proceedings of competition cases before the courts and the determining of sanctions?*

Mostly all appellations are based on legal arguments, procedural infringements or wrong interpretation of Competition Law. Also decisions where economical evidences and reasoning was important were not appealed or still are in court.

3. *For which class of anticompetitive practices (vertical restraints, horizontal restraints, abuse of dominance, and mergers) have you found economic analysis particularly necessary, useful and convincing?*

Economical analysis is particularly useful in dominance and merger cases. But still there are not enough practice in court.

4. *What difficulties are encountered by the courts with accepting economic reasoning and empirical evidence and what strategies are employed by the courts to overcome them? Do these strategies include the possibility for the courts to make use of independent experts?*

Still no relevant practice. Administrative Procedure Law provides courts with rights to request opinion of independent experts.

5. *How have the economists been incorporated to the primary judicial forums to adjudicate competition law cases?*

No practical experience obtained on this issue yet.

Madagascar

Section A

1. *Prière de nous fournir des informations détaillées sur la composition de votre effectif en distinguant le nombre de juristes et d'économistes qui font partie de votre personnel. Par ailleurs, nous vous serions reconnaissants de nous donner des précisions sur la capacité de votre personnel à effectuer des analyses économiques complexes dans l'examen d'un cas de concurrence.*

La loi sur la concurrence à Madagascar dispose que les infractions qu'elle prévoit sont constatées par les officiers de police judiciaire, par les commissaires et contrôleurs du commerce et de la concurrence, dûment commissionnés et assermentés et, pour les affaires dont le Conseil de la concurrence est saisi, par les rapporteurs du Conseil.

Cependant, les capacités en matière d'analyse économique des commissaires et contrôleurs du commerce et de la concurrence au sein du ministère chargé du commerce sont encore à bâtir et mettre en œuvre.

Fréquence d'utilisation des éléments de l'analyse économique

2. *Prière de nous donner des informations sur la fréquence avec laquelle vous faites recours à l'analyse économique dans l'examen des cas de violation des règles de la concurrence. Indiquer les types de pratiques anticoncurrentielles dont l'analyse économique vous a été particulièrement utile au cours de leur examen. L'analyse économique vous a-t-elle paru nécessaire et utile lors de l'évaluation de l'efficacité statique/dynamique? Prière de joindre des exemples dans chacune de ces situations.*

Type d'analyse économique

3. *Prière de nous indiquer les théories ou modèles sur lesquels vous vous êtes appuyés dans l'examen des comportements anticoncurrentiels notamment sur les points suivants:*

- a) la définition du marché pertinent
- b) les restrictions verticales
- c) les restrictions horizontales
- d) l'abus de position dominante
- e) les fusions

Quels sont les problèmes que vous avez rencontrés dans ce contexte?

N/A

4. *Quelle expérience avez-vous dans l'usage des méthodes empiriques: notamment: a) les méthodes de régression; b) les modèles de concentration; c) les techniques de simulations des prix et la méthode Monte Carlo; la méthode des scores et les modèles probits; et e) d'autres techniques empiriques?*

N/A

Section B

1. *Quel type de système légal existe dans votre pays pour régler ou réexaminer les différends relatifs à la concurrence ?*

Le Conseil de la concurrence est un organe national indépendant composé de sept membres, nommés pour un mandat de quatre ans, par voie de décret pris en Conseil des Ministres, sur proposition du Ministre chargé du commerce. Il a compétence pour connaître de toutes les affaires relevant des pratiques anticoncurrentielles (ententes, abus de position dominante, monopoles et concentrations). L'instruction et la procédure devant le Conseil de la concurrence sont pleinement contradictoires, assurant en cela aux intéressés les garanties nécessaires et des possibilités de recours devant le Conseil d'Etat. Le quorum de cinq conseillers est requis pour la validité de la décision.

Les décisions du Conseil de la concurrence peuvent faire l'objet, dans le délai d'un mois à compter de leur notification, d'un recours en annulation pour vices de forme devant le Conseil d'Etat. Le recours n'est pas suspensif. Le sursis à exécution ne peut être ordonnée que si la décision entraîne des conséquences excessives ou si des faits nouveaux sont intervenus.

Les pratiques restrictives de concurrence sont poursuivies devant les juridictions de droit commun. Toutefois, leurs auteurs ont la faculté de solliciter une transaction et dans ce cas, le Ministre chargé du Commerce est obligatoirement saisi soit par le Procureur de la République, soit par toute autre autorité en cas de constatation par des officiers de police judiciaire.

2. *L'analyse économique constitue-t-elle une composante importante et significative dans l'examen des affaires relatives à la concurrence dans votre juridiction, y compris dans la détermination des sanctions?*

N/A

3. *Pour quels genres de pratiques anticoncurrentielles (restrictions verticales, restrictions horizontales, abus de position dominante, et fusion) avez-vous trouvé l'usage de l'analyse économique particulièrement indispensable, utile et bénéfique ?*

N/A

4. *Quelles sont les difficultés rencontrées par votre juridiction pour accepter d'intégrer l'analyse économique et les méthodes empiriques dans sa démarche? Quelles sont les stratégies adoptées par votre juridiction pour surmonter ses difficultés? Ces stratégies incluent-elle l'utilisation d'un expert indépendant?*

Dans le nouveau cadre institutionnel, le Conseil de la concurrence, organe dégagé des contradictions engendrées par le contrôle des prix et libre de toute tutelle, se voit confier le soin de s'informer, de décider le cas échéant de redresser les pratiques prohibées et d'arbitrer, selon les règles du jeu préétablies, entre les intérêts en présence.

Un ou plusieurs rapporteurs peuvent être nommés au sein du Conseil de la concurrence par arrêté du Ministre chargé du commerce, sur proposition du Président du Conseil. Eventuellement, le Conseil de la concurrence peut recourir au concours de personnalités spécialisées dans des domaines déterminés pour lui apporter des avis sur certains points d'ordre technique.

5. *Comment les économistes ont-ils été intégrés dans le système judiciaire pour examiner les affaires relatives aux violations des règles de concurrence?*

Ce n'est pas une mince affaire que de mettre en place les institutions et autres structures étatiques qui auront compétence à appliquer le droit de la concurrence. Le manque de ressources est un énorme obstacle à l'application efficace du droit de la concurrence. Il ne s'agit pas uniquement de ressources financières, mais aussi de la capacité institutionnelle, particulièrement le manque de ressources humaines compétentes et de la capacité plus générale de la société de s'engager dans le processus de réforme. Tout pays qui se dote d'un droit de la concurrence aura besoin de juges et d'avocats formés en la matière ainsi que d'un personnel compétent apte à repérer et à traiter un comportement anticoncurrentiel.

Malawi

Section A

1. *Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis:*

Currently, the commission authority is being run on an interim basis by staff from the line Ministry of Industry and Trade. Currently there are two Economists running the interim secretariat. The authority is incapacitated to handle complex economic analysis due to the limited number of staff available and considering that competition is a new and specialized field there has not been much capacity building at institutional level to enhance the skills in this field.

2. *How frequently does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited:*

The Commission has not handled many types of cases with regard to anticompetitive trade practices. However, the Commission handled one case on anti-competitive conduct which involved exclusive dealing arrangement and the use of economic analysis was very useful in the assessment of dynamic efficiency vs. static efficiency in this case.

The case mainly involved companies that entered into exclusive dealing arrangement with agents. Consequently, the practice restricted competition in the relevant markets as the agents could not engage into business with other competitors. The Company in the long run dominated the market through its influence on the agents and government deliberate policy in restricting importation of the products through import licensing.

3. *Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to: market definition, vertical restraints, horizontal restraints, abuse of dominance, mergers, and what problems/challenges were encountered?*

- a) market definition
Small but Significant Non- Transitory Increase in Price (SSNIP) test
- b) vertical restraints
- c) horizontal restraints
- d) abuse of dominance
Small but Significant Non- Transitory Increase in Price (SSNIP) test
- e) mergers

Small but Significant Non- Transitory Increase in Price (SSNIP) test

And, what problem/challenges were encountered? The main challenge is getting data to conduct the tests.

4. *What is your experience with the use of empirical techniques: a) regression analysis, b) concentration models, c) price simulations and Monte Carlo models, d) score and probit models and e) other empirical tools?*

Only one member of staff in the Secretariat has some training in conducting econometric models and has some experience in regression analysis and concentration models.

5. *What difficulties are encountered in communicating economic reasoning and empirical evidence to: a) various parties involved in competition cases; and b) the Courts. And what strategies are employed to overcome them?*

The main problem is trying to translate the economic reasoning in a manner that the particular parties will understand.

The Commission has not had any experience in the Courts. However, the Judges have been trained and it is hoped that if a case gets to the Courts, the Commission will rely more on explaining the resulting effects/impact/outcome of the conduct than the figures.

And, what strategies are employed to overcome them? The Commission prepares in advance the examples it must give to the parties involved to make it as clear as possible.

Section B

The Judiciary has not dealt with any competition cases. However, once a matter is taken to the Courts, it follows the judicial system where by parties give submissions and a decision is made by the Judge.

Mauritius

Section A

1. *Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis:*

We would expect to employ around 3-4 economists and 3-4 lawyers as permanent staff members in the Commission, once it has reached its full complement. These staff are in addition to the five commissioners, among whom it is expected there will be at least one experienced economist and an experienced lawyer. In addition, short-term and temporary staff may be employed, particularly through links with the University, to deal with increases in workload requiring professional skills. The Executive Director of the CCM was formerly Chief Economist at the Competition Commission in the UK.

2. *How frequently does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited:*

As noted above, the CCM has not yet conducted any cases, so there is no specific experience to draw upon. However, we note that the 2007 Act provides for a 'rule of reason' approach to assessment of abuse of monopoly power (and for merger control) – the only per se prohibition is for price fixing. This implies that the effects of any particular behavior must be assessed before a decision can be taken as to whether the behavior restricts, prevents or distorts competition (or whether a merger will result in a substantial lessening of competition). We therefore expect to make use of economic analysis in deciding such cases.

3. *Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to: market definition, vertical restraints, horizontal restraints, abuse of dominance, mergers, and what problems/challenges were encountered?*

As noted above, the CCM has not yet carried out investigations and therefore has not experience to report.

4. *What is your experience with the use of empirical techniques: a) regression analysis, b) concentration models, c) price simulations and Monte Carlo models, d) score and probit models and e) other empirical tools?*

Same as above.

5. *What difficulties are encountered in communicating economic reasoning and empirical evidence to: a) various parties involved in competition cases; and b) the Courts. And what strategies are employed to overcome them?*

Same as above. The Act provides for a right of appeal to the Supreme Court, but no cases have yet been brought.

Section B

N/A

México

Sección A

1. *Sírvanse proporcionar un desglose de la plantilla de economistas y juristas empleados por el organismo encargado de la competencia, e informar sobre la capacidad de esos funcionarios para realizar análisis económicos complejos.*

A finales de 2007 la plantilla de la Comisión estuvo conformada por un total de 176 plazas, de las cuales 135 corresponden a nivel de mando y 41 a nivel operativo.

El personal de mando se integro de la siguiente manera:

Profesión	Número	
Economistas	41	
Abogados	29	
Otras	65	

Fuente: Informe Anual de la Comisión Federal de Competencia. 2007

De los 5 comisionados, incluido el presidente, 3 cuentan con estudios de Doctorado en Economía. Asimismo, un porcentaje importante de los economistas que laboran en la Comisión cuentan con estudios de Maestría y en menor medida, hay economistas que cuenta con estudios de Doctorado. Es importante indicar que el proceso de selección de personal, en particular para los puestos donde se requieren economistas, exige que los candidatos hayan tomado cursos de organización industrial y regulación económica, ya que el grueso de las pruebas contiene cuestiones relacionadas con estos temas. Tal proceso de selección permite que se reclute personal con un sólido conocimiento en materia de competencia y aptitudes para llevar a cabo un análisis económico efectivo en los casos que se presenten ante la Comisión.

Aunado a lo anterior, la Comisión invierte una cantidad considerable de recursos para capacitar a los funcionarios que laboran en ella, incluyendo cursos impartidos por instituciones nacionales e internacionales; conferencias dictadas por funcionarios de agencias de competencia internacionales; seminarios impartidos por expertos en materia de competencia económica. El objetivo que tiene la capacitación otorgada a los funcionarios es que ésta tenga una aplicación directa e inmediata a sus labores, en este sentido, la capacitación tiene la finalidad de dotar a los funcionarios de herramientas y elementos que les permitan potencializar su trabajo.

2. *¿Con qué frecuencia recurre el organismo encargado de la competencia al análisis económico en el examen de casos de competencia? ¿Para qué clases de prácticas anticompetitivas se ha determinado que el análisis económico es más necesario y útil? ¿Se considera que e análisis económico es necesario y útil para evaluar la eficiencia dinámica en comparación con la eficiencia estática? Sírvanse dar ejemplos concretos de todos los casos mencionados.*

La Comisión Federal de Competencia (CFC) usa el análisis económico de manera regular para abordar casos de competencia, debido a la naturaleza económica de los casos y en atención a que la Ley Federal de Competencia Económica (LFCE o la Ley) y su reglamento (RLFCE) expresamente establecen elementos de naturaleza económica que la CFC debe considerar para su resolución.

La Ley prohíbe 2 tipos de prácticas contrarias a la competencia: prácticas monopólicas absolutas (acuerdos colusivos horizontales) y relativas (abuso de dominancia y restricciones verticales) y faculta a la CFC a impugnar y sancionar concentraciones cuyo objeto o efecto sea anticompetitivo. La CFC también resuelve sobre la incorporación de medidas protectoras y promotoras de la competencia en los procesos de privatización, así como en los procedimientos de asignación de concesiones y permisos que realicen dependencias y entidades de la administración pública federal. En particular evalúa si la participación de algún agente generará problemas de competencia en el mercado de que se trate, de resultar ganador. Finalmente, resuelve sobre cuestiones de competencia efectiva o existencia de poder sustancial en mercados relevantes a que hacen referencia otras leyes, reglamentos o disposiciones administrativas. Salvo por las prácticas monopólicas absolutas, la Ley requiere que las resoluciones de la CFC incorporen un análisis de mercado relevante y poder sustancial de mercado con base en elementos específicos que abarcan los aspectos económicos sustanciales del análisis de competencia, como se explica a continuación.

En el caso de las prácticas monopólicas absolutas, el artículo 9 prohíbe las acciones de los agentes que tengan como objeto o efecto: fijar precios; restringir la oferta en el mercado; segmentar el mercado; y coordinar posturas en licitaciones. Así, éstas prácticas generan daño a los consumidores en la medida que estos adquieren bienes en el mercado a precios superiores a los que resultaría de haber competencia. Para sancionar este tipo de comportamientos la CFC requiere únicamente mostrar que el acuerdo se llevó a cabo, la evidencia directa (documentos, testimoniales, confesionales, etc.) es el elemento más útil que ha tenido la Comisión para demostrar la responsabilidad de los agentes en este tipo de casos. No obstante, se han presentado casos en donde no se tiene ningún elemento directo para demostrar la responsabilidad de los agentes, por lo tanto la Comisión ha tenido que recurrir a la evidencia indirecta que tiene un importante componente de análisis económico. En general, ésta se ha utilizado en casos donde dos o más agentes han coordinado sus posturas en licitaciones públicas en los cuales la colusión se infiere a partir del análisis de las ofertas.

En el caso de las prácticas monopólicas relativas, se consideran conductas contrarias a la competencia en términos de desplazar indebidamente a los competidores, impedirles su acceso al mercado, o establecer ventajas para algún o algunos participantes en el mercado. En el artículo 10 de la Ley se tipifican 11 conductas específicas: división vertical del mercado, exclusividades, negativa de trato; depredación de precios; subsidios cruzados; aumentar los costos de las rivales, ventas atadas, boicot, otorgar descuentos a cambio de exclusividades, discriminación de precios y establecer el precio de reventa. Es decir, se consideran prácticas monopólicas relativas tanto las restricciones verticales como el abuso de dominancia. Los presuntos responsables pueden alegar que la conducta genera ganancias en

eficiencias de manera que su efecto neto es benéfico para el consumidor. La CFC debe considerar estas ganancias en caso de que se acrediten.

Para sancionar este tipo de comportamiento, la Comisión requiere mostrar que el agente económico que la lleva a cabo posee poder sustancial en el mercado relevante, el cual se define previamente, y que la conducta señalada genera daño o bien que tiene ese objeto. Para llegar a una conclusión y establecer si efectivamente los agentes económicos involucrados violaron la Ley, la Comisión invariablemente debe de incluir en sus resoluciones un análisis económico a la par de las consideraciones jurídicas.

Respecto de las concentraciones, la Ley establece un procedimiento de notificación previa y faculta a la CFC para impugnar y sancionar aquellas que determine que generan daño a la competencia. Los indicios de ello son que la concentración confiera al agente económico resultante poder sustancial, restrinja el acceso de competidores al mercado y tenga como objeto o efecto facilitar comportamiento anticompetitivo. Los elementos que la CFC debe analizar para ello son el mercado relevante; su poder de mercado; los participantes y el nivel de concentración del mercado; los efectos de la concentración en el mercado relevante y mercados relacionados; las relaciones de propiedad de las partes en otros agentes del mercado relevante o mercados relacionados; y las ganancias en eficiencia que la concentración genere por ahorros en costos fijos o de transporte.

Para las resoluciones sobre condiciones de competencia en mercados relevantes y sobre procesos de privatización y procedimientos de asignación de concesiones y permisos se utilizan básicamente los mismos criterios de análisis.

Para definir el mercado relevante, el artículo 12 de la Ley establece que se debe tomar en consideración:

- Las posibilidades de sustitución;
- Los costos de distribución, del bien y de sus insumos;
- Los costos y probabilidades para que los consumidores acudan a otros mercados; y
- Las restricciones normativas.

Para determinar si un agente económico tiene poder sustancial, el artículo 13 de la Ley dispone que se debe considerar:

- Participación de mercado y la capacidad para fijar precios o restringir la oferta;
- Barreras a la entrada;
- Determinar el poder de sus competidores;
- Las condiciones de acceso de todos los competidores a la fuente de insumos
- El comportamiento reciente del agente.

Los niveles de concentración se estiman con base en el índice Herfindahl-Hirschman y el de dominancia. La metodología adoptada establece umbrales debajo de los cuales se presume que una concentración tiene poca probabilidad de afectar de manera adversa la competencia. Sin embargo, la determinación de su efecto requiere un análisis global de todos los elementos señalados.

A continuación se exponen ejemplos del análisis económico realizado por la CFC respecto de cada uno de los elementos que deben contener las resoluciones: mercado relevante, determinación del poder sustancial, ganancias en eficiencia, elementos económicos que sustentan que se realizó la práctica (para el caso de las prácticas monopólicas relativas), y elementos que permitan demostrar que la práctica (concentración) genera (generará) daños a los competidores y/o consumidores:

Telmex

Telmex es el principal operador de telecomunicaciones en México al cual, desde el inicio de operaciones de la CFC, se le ha envuelto en un sinnúmero de procedimientos referentes a prácticas monopólicas relativas. En muchos de estos casos, derivado del tamaño de su red y de la dificultad para replicarla, la CFC ha determinado que tiene poder sustancial en diversos mercados de telecomunicaciones. Entre las prácticas que se le han imputado a Telmex se encuentran: negativa de trato, incremento de costos de los competidores, subsidios cruzados y discriminación. El siguiente ejemplo resume los elementos que la CFC consideró para determinar el mercado relevante en uno de esos casos.

En el expediente DE-12-2000 Miditel denunció a Telmex por rehusarse unilateralmente a proporcionarle servicios disponibles y normalmente ofrecidos a terceros, en virtud de que Telmex rescindió a Miditel los contratos de suministro de servicios de telecomunicaciones y conducción de señales para la prestación de los servicios de tráfico de reventa, en los mercados de servicio de transporte interurbano y de servicios de acceso o interconexión. La CFC definió el mercado relevante del servicio de transporte interurbano (o servicios intermedios de telefonía de larga distancia) y en específico en el mercado de servicio de reventa de larga distancia en virtud de los siguientes elementos:

Telmex contaba con un número importante de enlaces en todo el territorio nacional en las bandas de frecuencia que podían transmitir señales de largo alcance y, por lo tanto, utilizarse para el transporte interurbano. Los enlaces de microondas que podrían considerarse como sustitutos de la red alámbrica de Telmex, pertenecían, en su mayoría a la misma empresa. Los enlaces vía satélite eran significativamente más caros que la red alámbrica por lo que no podían considerarse como sustitutos del servicio de transporte interurbano que proporciona Telmex. Se concluyó que no existían sustitutos para la red de Telmex por la que se proporciona el servicio de transporte interurbano.

Telmex posee más del 80% de la red nacional de fibra óptica, mientras que los nuevos concesionarios comunican con su propia infraestructura solo a las principales ciudades del país. Derivado del hecho de que existían ciudades que aún no estaban abiertas a la prescripción, el alcance de la red de Telmex resultaba indispensable para terminar las llamadas originadas en ciudades que sí están abiertas. Por lo tanto, las redes de los nuevos concesionarios, por su cobertura, no eran sustituto y era poco probable que pudieran reproducir en el mediano o largo plazo a la de Telmex.

Desde el punto de vista geográfico, el mercado relevante se definió como la comunicación de larga distancia entre una central asignada a un grupo de centrales locales y otra central asignada a un grupo de centrales distinto. La infraestructura con

que contaban los nuevos concesionarios comunicaba básicamente a las principales ciudades del país, por lo que la propensión a contratar servicios intermedios tendía a ser elevada. De esta forma, el mercado relevante tenía una dimensión nacional. En las ciudades no abiertas a la prescripción, los operadores de larga distancia no contaban con alternativas para el servicio de reventa proporcionado por Telmex. En el caso de las otras localidades, donde se utiliza con fines de redundancia o por desborde de tráfico, las probabilidades de acudir a otros mercados eran reducidas por razones de eficiencia.

Telmex trató de desvirtuar el mercado relevante definido argumentando que la propia fibra óptica de los competidores de larga distancia también era sustituto. La Comisión determinó que no se desvirtuaba el mercado relevante porque la red de larga distancia de fibra óptica de los competidores no participaba en el mercado relevante puesto que este era el de transporte interurbano, para lo cual no tienen infraestructura los competidores. Adicionalmente, consideró que en el corto plazo no hay sustitución de la red de fibra óptica.

Warner Lambert

En el expediente IO-16-96 se analizó una depredación de precios en el mercado de las gomas de mascar en el territorio nacional. A continuación se describe el análisis realizado por la Comisión para establecer que Warner tenía poder sustancial en el mercado.

En primer lugar se estableció que una empresa tenía poder de mercado si podía tener utilidades por arriba de lo normal por períodos prolongados de tiempo y si podía aumentar sus precios por arriba del costo económico sin perder una parte importante de su venta. La información ofrecida permitió observar que Warner fue capaz de aumentar el precio de varios de sus productos sin que perdiera significativamente su participación. Se demostró que el precio relativo entre el producto de Warner y el de su competidor más cercano aumentó 2.6% entre 1994 y 1995 sin embargo ello aumentó su volumen desplazado en 8.13% mientras que el de su competidor disminuyó 26.3%. Independientemente de lo anterior, el precio del producto de Warner fue equivalente en una proporción entre el 42% y 46% del precio del producto de su competidor durante el período investigado, no obstante que no había diferencia sustancial entre estos dos productos, de acuerdo a una prueba pericial química.

Otro elemento que se presentó para determinar que Warner tenía poder sustancial fue el hecho de que en el mercado relevante existieran barreras a la entrada. Tal conclusión se derivó del hecho de que Warner dominó el mercado durante décadas sin que se presentaran competidores de tamaño relativamente sustancial. Esto permitió inferir que las barreras a la entrada surgen del posicionamiento de la marca del producto que se comercializa en el segmento formal del mercado y la barrera relativa a los costos de las importaciones.

Uno de los productos de Warner tenía una importante presencia de marca en el mercado ya que a pesar de que su precio aumentó más que el de sus competidores, fue capaz de aumentar su demanda, mientras que la de su competidor disminuyó. Por otro lado, se concluyó que en el segmento informal del mercado la marca no tenía tanto peso como en el segmento formal en gran parte por que las compras son impulsivas.

En tal situación, mantener un producto que se vende por debajo de su costo, equivale a enviar una señal al mercado que desincentiva a los competidores potenciales a acudir a éste segmento. El elemento anterior, en conjunto con el hecho de que para acudir al mercado formal se requieren de altas inversiones para posicionar la marca, permitió determinar que la depredación de precios funciona como barrera a la entrada para ambos segmentos del mercado relevante.

El análisis anterior permitió concluir que Warner gozaba de poder sustancial. Para probar la depredación de precios se estimaron los costos en base de un prorrateo sobre los costos de ventas y no sobre las ventas netas, como lo proponía Warner. Se aplicaron ambas metodologías y se encontró que durante el período analizado Warner había obtenido pérdidas mientras que con la metodología propuesta por Warner, se encontró que en 6 de los 9 períodos presentó pérdidas. Tal criterio se aplicó a los datos de su competidor y se encontró que las pérdidas que había obtenido éste eran muy similares al crecimiento obtenido por Warner en el mismo período, lo que se consideró como un indicio de que los consumidores del competidor se desplazaron a Warner. Por último se demostró que el competidor había sido desplazado del mercado relevante pues presentó una baja en su participación.

Telmex

En el expediente DE-16-95 se acusó a Telmex de otorgar subsidios cruzados a su compañía de telefonía móvil, Telcel. Para acreditar tal práctica, la CFC realizó el siguiente análisis:

La Comisión identificó que los estados financieros de Telcel mostraban pérdidas durante el periodo 1994-1996, tal información sirvió para inferir que el precio promedio por cliente no fue suficiente para cubrir sus costos, adicionalmente se demostró que en Telcel se decretaron incrementos de capital social para financiar las pérdidas, la última empresa que financió tal operación fue una subsidiaria de Telmex. Esos elementos dieron suficientes bases para concluir que existió un subsidio cruzado de Telmex a Telcel durante el periodo mencionado.

Adicionalmente se mostró que el precio al que se ofreció el servicio estuvo por encima del costo medio variable y por debajo del costo medio total de Telcel para todo el periodo analizado. Asimismo se encontraron inconsistencias en los resultados de la empresa; en primer lugar, el precio de Telcel fue menor que el de Iusacell, lo que evitó a ambas empresas obtener utilidades positivas. Segundo, a pesar de que su número de suscriptores aumentó significativamente, Telcel presentó pérdidas durante el periodo 1994-1996, lo que le permitió incrementar su participación en el mercado. Tercero, el crecimiento en el número de suscriptores mostró un dinamismo que no justificaba mantener los precios por debajo de los costos, además se demostró que Iusacell era tan eficiente como Telcel, lo que implica que la eficiencia aparente, mostrada por Telcel, no fue sino el resultado de un esfuerzo sistemático para prevenir el desarrollo de su principal competidor en el mercado de la telefonía celular.

Ferromex y Ferrosur

En 2005 fueron presentadas ante la CFC, de manera independiente, dos notificaciones de concentración. Tales operaciones tendrían como consecuencia dejar en manos de un agente económico dos vías troncales del Sistema Ferroviario Mexicano (SFM). Al quedar en manos de un solo conglomerado la administración de Ferromex y Ferrosur

aumentaba la probabilidad de generar daño en el mercado. A continuación se presentan los elementos que la CFC consideró respecto al daño que podría generar, de autorizarse, la concentración.

En este caso la Comisión consideró que la concentración tendría repercusiones negativas para la competencia en el SFM. En primer lugar se estableció que el Gobierno, a través de la partición del SFM en tres vías troncales y varias rutas cortas, buscaba promover la competencia en el sector, para reforzar tal objetivo señaló que los agentes que obtuvieran la concesión para participar en una vía troncal tendrían la obligación de ofrecer servicios de interconexión y derechos de paso a los otros concesionarios, algunos de estos obligatorios. Adicionalmente en los títulos de concesión de cada una de las vías troncales se manifestó expresamente que tales agentes no pueden participar con más del 5% en el capital total de otra de las vías troncales.

Se determinó que el mercado relevante era el servicio público de transporte ferroviario de carga en todo el territorio nacional, se llegó a esta definición una vez que se consideró los sustitutos directos e indirectos. Se consideró al servicio ferroviario como una industria de red en donde las economías de alcance y densidad juegan un papel preponderante. La determinación geográfica nacional se determinó con base en el hecho de que es posible llegar a cualquier parte del país a través del SFM y a la acumulación de nodos a lo largo del territorio nacional que generaba la concentración.

La CFC determinó que el peligro potencial de la concentración era la acumulación del mayor número de nodos en puertos y fronteras aumentando su participación de mercado. Este hecho les permitiría desviar rutas y con ello desplazar al tercer operador de una vía troncal del SFM, Kansas City. Uno de los problemas que prevalecen en el SFM es la negativa de los operadores para ofrecer la interconexión y los derechos de paso, en este contexto, la acumulación de puntos dificultaría aún más llegar a un acuerdo con estas líneas para hacer efectivas las disposiciones de la ley sectorial. Por otro lado, el usuario final tendría que pagar precios más altos por viajes interlineales que tengan origen en Kansas, dado el número de puntos que acumularía el nuevo agente. Igualmente, el agente resultante tendría incentivos para cobrar precios más bajos en rutas mucho más largas, retardando así el tiempo de carga encareciendo los costos para los usuarios. Los agentes notificantes alegaron que la concentración acarrearía ganancias en eficiencia sin embargo la Comisión determinó que éstas no iban a tener un impacto benéfico sobre los consumidores. La Comisión decidió no autorizar la concentración por los efectos que tendría sobre el mercado relevante, los agentes notificantes han tratado de revertir tal resolución a través de la vía judicial, el procedimiento sigue en litigio.

Aeropuertos y Servicios Auxiliares en el Aeropuerto Internacional de Cancún

En el siguiente ejemplo se expondrá una situación en donde un agente económico expone argumentos económicos que permiten a la Comisión reconsiderar su determinación. En 1997 una agrupación de empresas de transporte precontratado que prestaban sus servicios en el aeropuerto internacional de Cancún presentaron un escrito a la Comisión para informarle sobre condiciones discriminatorias que las

ponían en desventaja frente a los taxistas que prestan sus servicios en el aeropuerto. Ante tal situación la CFC inició una investigación de oficio³⁷.

Como resultado de la investigación, la CFC estableció que el servicio que prestaban los agentes era el mismo desde la perspectiva de los consumidores y que por ende pertenecían al mismo mercado relevante, en este sentido el servicio de acceso debería de ser el mismo para cualquier persona que proporcionara servicios de transporte. No obstante el aeropuerto establecía diferentes precios y condiciones de venta para los diferentes prestadores de servicios situados en igualdad de condiciones a la vez que les prohibía el uso del estacionamiento. Se consideró que el servicio de acceso y los espacios de estacionamiento eran elementos esenciales sin los cuales no podrían prestar sus servicios de transporte, cualquiera que sea su modalidad.

Ante tales elementos, la presunta responsable entregó a la CFC mayor información respecto a la forma en que establecía los cobros a cada tipo de servicio y la diferencia entre los servicios de transporte precontratado y taxis. Tales elementos fueron evaluados por la Comisión y se concluyó lo siguiente: respecto a que eran servicios similares desde el punto de vista del consumidor, se estimó que para que eso se cumpliera, el precio de ambos servicios debería ser similar sin embargo en el caso del transporte precontratado el consumidor no sabía la cantidad que pagaba. Los servicios que solicitaban al aeropuerto tanto los taxistas como los de transporte precontratado eran distintos: los taxistas solicitaban permiso para hacer base momentánea, por lo que pagaban una renta, las denunciadas solicitaban la renta de un espacio para la guarda y depósito de las unidades. Por otro lado, para que los taxistas pudieran dar servicio en el aeropuerto, debían comprometerse a brindarlo con ciertas normas de calidad que les generaban costos que las unidades de transporte precontratado no enfrentaban, por lo tanto, para compensar este hecho se les cobra, a estas últimas, una tarifa superior. Por último se concluyó que el servicio de taxi no era una opción para el pasajero que arribara al aeropuerto habiendo ya contratado el servicio de transporte puesto que se incurriría en un doble gasto. Tras este análisis, la Comisión decidió resolver que los agentes no se encontraban en igualdad de condiciones y por lo tanto no se incurría en una práctica anticompetitiva.

Yakult

Por último abordaremos un expediente donde el presunto responsable acreditó que la práctica tenía ganancias en eficiencia. En el año 2000 Casa Ley acudió a la CFC a presentar una demanda en contra de Yakult por la comisión de presuntas prácticas monopólicas consistentes en establecer el precio de reventa y negar el suministro de su producto. El mercado relevante se definió como el de la producción de bebidas lácteas fermentadas tipo Yakult. Para desvirtuar la acreditación de la práctica, Yakult demostró que no tenía poder de mercado y que su sistema de distribución generaba ganancias en eficiencia. Respecto al último punto se estableció lo siguiente.

Yakult afirmó que en lo que respecta al precio de venta al consumidor final, tal estrategia tiene como finalidad garantizar la operación de su sistema de comercialización, integrado por agencias exclusivas, supermercados y tiendas de

³⁷ La Comisión resolvió el caso el 13 de agosto de 1998 declarando acreditada la discriminación por parte del Aeropuerto Internacional de Cancún. Por razones procesales un juez otorgó un amparo al grupo aeroportuario y obligó a la CFC a emitir un nuevo Oficio de Presunta Responsabilidad. El 2 de mayo de 2002 se resolvió sobre éste procedimiento.

autoservicio, cremerías y distribuidores independientes, así como la de proteger fundamentalmente a estos últimos, ya que realizan el 51% de las ventas totales del producto. Yakult alegó que era necesario proteger a sus distribuidores independientes (canal de cambaceo) debido a que en los otros canales enfrenta costos adicionales como los costos por devoluciones y el costo financiero del crédito que ofrece a las tiendas de autoservicios. A su vez, se disminuían los costos en publicidad pues el medio principal para dar a conocer el producto es por viva voz. La CFC estimó que el canal de cambaceo trae beneficios sustanciales tanto para los consumidores como para la empresa y por lo tanto sí logra acreditar ganancias en eficiencia.

3. *Sírvanse indicar qué teorías o modelos económicos han servido de base para determinar la existencia de conductas anticompetitivas con respecto a lo siguiente: a) definición de mercado, b) restricciones verticales, c) restricciones horizontales, d) abuso de posición de dominio, e) fusiones*

a) definición de mercado

Para determinar el mercado relevante la Comisión identifica productos sustitutos de los bienes en cuestión. Para ello se busca que el bien satisfaga las mismas necesidades, tenga características similares y que el precio de ambos bienes no difiera mucho entre sí, de manera que puedan ser intercambiables. Aunque por lo general no es posible aplicar la prueba de un incremento pequeño pero significativo en el precio (SSNIP) el criterio de sustitución básicamente se encuadra en este concepto. Esta prueba se ha aplicado cuando se obtuvo información de precio e ingresos de venta para los bienes que se consideran sustitutos.

La poca información que proporcionan los agentes implicados en los asuntos de la CFC ocasiona que la determinación del mercado relevante se realice principalmente por medio de elementos cualitativos. Con mejores datos se podría complementar el análisis que actualmente se realiza. No obstante esta dificultad, la Comisión ha sido capaz de considerar diversos elementos al momento de definir un mercado relevante. Un ejemplo de esto es la diferenciación de productos. En estas situaciones se ha tratado de determinar hasta qué punto las diferencias entre distintos bienes hace que los consumidores los consideren como diferentes. Un ejemplo de tal análisis se encuentra presente en el expediente CNT-02-2008.

En esta concentración intervinieron dos agentes que ofrecen servicios educativos a nivel medio superior, superior y posgrado. Se establecieron las bases teóricas que giran alrededor de la educación desde un punto de vista económico, con esto se determinó el papel de las escuelas para producir capital humano y de los estudiantes como insumo y producto del proceso educativo. En este sentido, la educación es una inversión cuyos resultados son desconocidos y dependen de la calidad de los estudiantes y de las instituciones. También se determinó que la competencia entre universidades era jerárquica, en este sentido la competencia se da entre grupos o segmentos de escuelas con riqueza y ranking similares. En la parte alta de la jerarquía, las universidades compiten por reclutar a los mejores estudiantes. En la parte baja, la competencia es por consumidores que compran el producto y es aquí donde entra el papel de la diferenciación entre los servicios educativos.

Para realizar el análisis dentro del segmento de educación media básica se excluyeron las escuelas públicas y se planteó la necesidad de determinar con precisión cuáles son las instituciones privadas que puede considerarse como sustitutos cercanos al servicio de las notificantes. Los elementos cualitativos considerados para determinar si los servicios que brindan las notificantes son cercanos entre sí incluyeron: la revisión de los planes de estudio, la forma de evaluación, las actividades extracurriculares, el perfil de los egresados, los turnos. Los elementos cuantitativos fueron: los precios y la matrícula que atendía cada una de ellas.

Del análisis de precios se encontró que una institución tenía precios más altos en los campus ubicados en la Ciudad de México, Guadalajara y Monterrey de una magnitud del 22.2%, 8.9% y 11.9% respectivamente. El impacto que tuvo sobre la matrícula la estrategia de precios mostró resultados dispares. Para el caso de la escuela más costosa, tanto la matrícula total como la de nuevo ingreso aumentó sostenidamente. Para la escuela con menores tarifas, la matrícula mostró un incremento que no es sostenido. La Comisión explicó el incremento de la matrícula en los primeros años del período analizado como consecuencia del conflicto de 1999 en la UNAM que hizo que los estudiantes buscaran otras opciones educativas. Se concluyó que si los servicios ofrecidos por las escuelas a integrarse fueran sustitutos cercanos, la matrícula en cada una de ellas tendría un comportamiento similar. Se determinó que las escuelas presentaban características y funciones de demandas distintas por lo tanto no pertenecían al mismo mercado relevante en la Ciudad de México.

b) restricciones verticales y abuso de dominancia

Como se refirió previamente, en el análisis de prácticas monopólicas relativas, para determinar el poder sustancial de un agente se analizan las barreras a la entrada y las ganancias en eficiencia que aleguen los presuntos responsables. En cuanto a las barreras a la entrada, el Reglamento de la LFCE (RLFCE) establece los elementos pueden ser considerados como tales: requisitos de capital; la eficiencia de los mercados financieros; acceso a canales de distribución; costos hundidos y de ajuste, barreras legales, derechos de propiedad industrial, inversiones en publicidad, posicionamiento de marca, conductas de los agentes establecidos, subsidios discriminatorios; y barreras regulatorias al comercio internacional.

Por lo que hace a las ganancias en eficiencia, la Ley establece que un agente puede acreditar que su comportamiento genera ganancias en eficiencia que aporten una mejora neto al bienestar del consumidor. Entre ellas considera las siguientes: innovaciones; mejoras tecnológicas; economías de escala y alcance.

En sus investigaciones sobre el daño que puede generar una práctica monopólica relativa, la CFC ha utilizado conceptos como recursos esenciales y grupo económico. La acreditación de una restricción vertical a través de la teoría de los recursos esenciales se ha aplicado en asuntos que involucran a Telmex, entre otros. En estos casos se ha determinado que la red propiedad de este agente es un insumo esencial y por lo tanto, la negativa a interconectarse con otros operadores o bien a prestarles diversos servicios, elimina la posibilidad de que estos últimos puedan competir en el mercado. En algunos casos esta situación es más crítica por ejemplo en aquellos en donde Telmex se ha rehusado a terminar llamadas de otros operadores en ciudades que no estaban abiertas a la prescripción y aquel es el único agente que puede hacerlo. También se ha considerado como un recurso esencial la red de teléfonos

públicos de Telmex porque las restricciones para que los usuarios los utilicen para hacer llamadas de larga distancia a través de operadores distintos a este operador elimina la competencia en este mercado.

En algunos casos, una práctica es llevada a cabo mediante una confabulación de varios agentes que no son totalmente independientes entre sí. En estos casos la Comisión ha utilizado el concepto de grupo económico. Los vínculos directos o indirectos que se establecen entre empresas que concurren en principio como competidores del mismo mercado, pueden traducirse en el ejercicio de poder sustancial. Los vínculos entre empresa suponen la ausencia de independencia y por lo tanto existe una dirección unitaria en la política empresarial. La Comisión ha concluido que existe un grupo económico y consecuentemente una dirección unitaria cuando se verifican o actualizan cualquiera de los siguientes criterios o una combinación de los mismos:

- a) Cuando una persona, directa o indirectamente, es tenedora o titular de acciones o partes sociales, con derecho pleno a voto, que representen más del cincuenta por ciento (50%) del capital social de dos o más personas morales;
- b) Cuando una persona es tenedora o titular de acciones o partes sociales con derecho pleno a voto, de dos o más personas morales, cuyo valor representa el mayor porcentaje del capital social de estas personas, respecto a los demás accionistas de las mismas;
- c) Cuando una o varias personas, directa o indirectamente, tenga la facultad de dirigir o administrar a una o más personas morales en virtud de las facultades que le otorga su posición dentro de los órganos de dirección y/o administración de la sociedad o sociedades en cuestión;
- d) Cuando una persona tenga la capacidad o derecho de designar la mayoría de los miembros del consejo de administración u órgano equivalente de otra persona;
- e) Cuando una persona, directa o indirectamente, tenga la capacidad o el derecho de designar al director, gerente o factor principal de otras personas;
- f) Cuando una persona y las vinculadas a está por parentesco consanguíneo o por afinidad tengan participación en una o diversas personas morales;
- g) Cuando una o varias personas tengan la facultad de dirigir o administrar a otras personas morales en virtud de uno o varios contratos, incluyendo el acto constitutivo de dichas personas morales;
- h) Cuando las partes expresamente así lo reconozcan;
- i) Cuando las actividades mercantiles de una o varias sociedades se realizan preponderantemente con la sociedad controladora o con las personas morales controladas directa o indirectamente por la o las personas físicas que ejercen dicho control.

Un ejemplo de la aplicación del concepto del grupo económico a una resolución de la CFC se encuentra en el expediente DE-21-2003 en el que se estudiaron las condiciones de exclusividad que varios embotelladores de Coca – Cola (CC) a lo largo del país, tenían con los distribuidores detallistas. Con las exclusividades, las embotelladoras de CC esperaban impedir la entrada de un nuevo competidor de bebidas carbonatadas, Big Cola. La Comisión demostró que las embotelladoras conformaban un grupo económico debido a que tenían una relación con The Coca – Cola Company. Para determinar el poder sustancial e incluso para estimar la multa

por la acreditación de la práctica se consideró la vinculación de los agentes a través del grupo económico.

c) restricciones horizontales

En el expediente DE-10-01 se analizó la presunta coordinación en licitaciones públicas de materiales químicos reveladores de placas. La CFC analizó las ofertas económicas hechas por los agentes acusados en las licitaciones convocadas por las dos principales instituciones de seguridad social (IMSS e ISSSTE) y encontró que en todas las licitaciones, excepto en 4, los únicos participantes fueron el demandante y los demandados. De acuerdo a la Comisión, el que existiera un pequeño número de participantes hacia atractiva la concertación entre participantes.

Los documentos revelaron que los agentes demandados habían hecho la misma oferta en todos los procedimientos no obstante que la única referencia que tenían disponible era la página de internet que publica los precios a los que el IMSS adquirió los bienes en una licitación anterior. La información publicada por la autoridad no representa un precio techo para convocatorias posteriores. Para el caso de la demandante y, en las situaciones en donde han participado otros agentes, se han presentado posturas diferentes entre sí, por lo tanto se consideró que los precios publicados no presentaron una referencia para otras convocatorias para el resto de los agentes.

d) concentraciones

La herramienta más utilizada cuando la CFC estudia una concentración son los índices de concentración del mercado. La determinación de estos nos da un indicio de que tan probable será que una concentración tenga efectos adversos en el mercado, para tal efecto se definieron los umbrales críticos. No obstante, tales índices no son concluyentes por lo tanto el análisis debe ser llevado a cabo independientemente de los preceptos establecidos en la ley. Todas las resoluciones de la CFC respecto a concentraciones incluyen un análisis de los índices de concentración.

Adicionalmente, la Comisión considera importante establecer los efectos que puede tener en el mercado las concentraciones verticales, por ello el análisis en este tipo de casos se realiza en ambos sentidos de la cadena de producción. Algunas resoluciones han utilizado la teoría del “desplazamiento” (foreclosure) para determinar los incentivos que puede tener una empresa que se concentra para sacar del mercado a competidores en la parte de arriba de la cadena de producción (a través de exclusividades) o bien en la parte de abajo (a través de negativa de suministro de insumos). En la resolución del expediente CNT-023-2007 se analizó el impacto de que Mexichem Derivados, una empresa que participa en el mercado ascendente de producción y comercialización de sosa cáustica líquida, concentrara a Quimir, una empresa que participa en el mercado descendente de producción y comercialización de pirofosfato tetrasódico (STPP) utilizado en aplicaciones técnicas. Para evaluar los efectos anticompetitivos de un posible cierre de mercado se consideró si existían los incentivos al desplazamiento por parte de la empresa que pretende integrarse; los efectos del cierre de mercado sobre las empresas rivales y cómo afectaría su habilidad para competir; cómo impactaría en la competencia el cambio en la habilidad de las rivales para competir; y cómo cambia la integración vertical de los incentivos de la empresa integrada en el mercado ascendente.

Respecto a la negativa de suministro se estableció que Mexichem es una empresa dominante en el mercado ascendente de producción y comercialización de un insumo que se requiere para la producción de STPP. Con la integración Mexichem participaría en el mercado descendente a través de Quimir, mercado en donde sólo existen dos participantes. Se concluyó que en este caso no era probable que Mexichem tuviera incentivos a negar el suministro a su competidor dado que éste es el único proveedor para Quimir de un insumo para producir STPP, tal insumo no está disponible en el mercado mundial, en tanto su producción es básicamente de autoconsumo.

Por lo que respecta al desplazamiento de competidores en la parte de arriba de la cadena productiva se consideró que Quimir no había tenido relaciones comerciales con competidores de Mexichem en el mercado de arriba desde hacía más de 3 años, por lo tanto la concentración no incidiría en desplazar a ningún competidor de Mexichem.

Dentro del mismo contexto también se ha utilizado la teoría de efectos coordinados. En las concentraciones verticales la integración puede facilitar la coordinación tanto en el mercado de arriba como en el de de abajo de la cadena productiva. Es más probable que estas situaciones se den en aquellos mercados con un alto grado de concentración y con importantes barreras a la entrada. Entre los elementos que se analizan están: si la concentración elimina a un comprador disruptivo; si facilita las estrategias de monitoreo que permitan identificar más fácilmente a un agente que se desvíe; la posibilidad de que con la concentración pueda más fácilmente intercambiarse información; la probabilidad de que pueda presentarse un “Outlet effect” o un “Reaction effect”; etc.

4. *Sírvase indicar qué ha observado en el uso las siguientes técnicas empíricas: a) análisis de regresión; b) modelos de concentración; c) simulaciones de precios y modelos de Monte Carlo; d) modelos de puntuación (score) y de probit; y e) otras herramientas empíricas.*

En el análisis de concentraciones, las herramientas que la CFC utiliza con mayor frecuencia son los índices de concentración, en particular el Índice de Herfindahl – Hirschman y el Índice de Dominancia. Para su elaboración, la Comisión utiliza las participaciones de mercado en las ventas totales preferentemente sobre otros indicadores (número de clientes, capacidad productiva, etc.), esto se debe a que las ventas son observadas sin ambigüedades y son un buen indicador de la importancia de un competidor en el mercado. La Comisión estableció umbrales máximos en el valor de los índices y sus variaciones para los cuales la concentración tendrá pocas probabilidades de afectar el proceso de competencia. No obstante, los índices, aún cumpliendo con los umbrales, no son por sí mismos concluyentes, es necesario revisar de forma separada las cuestiones señaladas en los artículos 13 y 18 de la LFCE y los artículos 12 y 13 de su reglamento.

Respecto a trabajo econométrico, son pocas las veces que éste ha sido realizado por la Comisión. Al igual que como ocurre con los índices de concentración, los resultados obtenidos a través de tales herramientas no son concluyentes y son utilizados para

reforzar las conclusiones a las que se ha llegado a través de la reflexión analítica de los casos.

Dentro de las herramientas utilizadas se encuentra varias que corresponden al análisis de series de tiempo como son; raíces unitarias y análisis de cointegración. Un ejemplo del uso de estas herramientas se observa en el expediente CNT-027-2008 el cual estudió la concentración entre Grupo Simec, Corporación de Aceros DM y Procesadora Industrial, estos agentes coincidían en el mercado del acero. Estas técnicas fueron utilizadas para verificar si la tendencia de largo plazo del precio de dos bienes tenía una relación estable y dar elementos adicionales a la hipótesis de coordinación de precio entre competidores.

La Comisión había recibido quejas por parte de distribuidores y comercializadores de realización de prácticas anticompetitivas por parte de los fabricantes de productos derivados del acero. La Comisión notó que los precios de los competidores mostraban un comportamiento muy similar, al aplicarse las pruebas de cointegración se determinó que los precios ofrecidos por los productores estaban cointegrados no obstante que el precio utilizado para hacer las estimaciones no podía ser observado entre competidores. Se concluyó que tal comportamiento podía ser resultado de cualquier estructura de mercado (colusión, oligopolio, competencia, etc.). Comparaciones con otros índices de precio de sustitutos, insumos e información adicional permitió concluir que no había coordinación en precios.

5. Sírvanse indicar qué elementos dificultan la transmisión de razonamientos de tipo económico y pruebas empíricas a los siguientes destinatarios: a) Las partes involucradas en los casos de competencia; b) Los tribunales. Sírvanse indicar las estrategias utilizadas para sortear esas dificultades.

En general, es posible distinguir entre los problemas para comunicar razonamientos económicos y evidencia empírica a las partes involucradas y a las instancias judiciales. Las partes involucradas tienden a cuestionar los aspectos sustantivos de dichos razonamientos ofreciendo análisis alternativos con los que buscan desvirtuar el marco teórico y el uso de la evidencia presentada por la CFC, dentro de los procedimientos seguidos ante la propia CFC y las instancias revisoras. Por otro lado, las autoridades judiciales tienden a decidir las demandas interpuestas por las partes con base en la legalidad de los aspectos procedimentales y no entran a discutir los asuntos de fondo asociados con el análisis económico de las conductas anticompetitivas³⁸. Esto se explica en buena medida por la falta de especialización en materia de competencia económica de dichas autoridades y la naturaleza conceptual de la LFCE y su reglamento. En consecuencia, la CFC utiliza estrategias diferenciadas para abordar las dificultades que enfrenta con cada tipo de interlocutor.

La CFC enfrenta limitaciones importantes para sustentar su análisis económico con evidencia empírica cuantitativa por la falta de disponibilidad de datos como series de precios o costos a nivel desagregado. Para remediar esta limitación, busca basar su análisis económico en marcos teóricos económicos aplicables al caso particular en razón de la estructura del mercado y otras características observables que expliquen la

³⁸ OECD (2004) Políticas y Ley de competencia económica en México ed. OECD y Banco Interamericano de Desarrollo.

lógica y viabilidad del comportamiento anticompetitivo y el daño real o potencial que genera.

Los resúmenes de casos de las respuestas previas ilustran este enfoque. Así, por ejemplo, la CFC busca sustentar sus definiciones de mercado relevante en evidencia cualitativa que permita determinar el grado de sustitución de los productos candidatos desde la perspectiva de los clientes o consumidores. También utiliza datos cualitativos y cuantitativos para determinar si un agente detenta poder sustancial de mercado con base en la valoración de los elementos previstos en el artículo 13 de la LFCE como la participación de mercado, grado de concentración, existencia de barreras a la entrada, y acceso a insumos.

Este enfoque requiere que la CFC plantee hipótesis sólidas sobre las conductas que presume tendrán un efecto anticompetitivo. Para ello trabaja en la elaboración de criterios para identificar las condiciones bajo las cuales las conductas tipificadas como prácticas monopólicas relativas tienen efecto anticompetitivo y distinguirlas de aquellas que, por el contrario, pudieran justificarse por generar eficiencias superiores a sus efectos anticompetitivos y por lo tanto incrementen el bienestar del consumidor.

Por lo que concierne a la comunicación con las autoridades del poder judicial, en primer lugar la CFC ha tenido que defender el uso mismo de conceptos económicos previstos en el texto de la LFCE de cara a impugnaciones sobre su inconstitucionalidad planteada por diversas demandantes debido a que no contiene definiciones formales, entre otros argumentos. Al respecto, ha conseguido sentencias que ratifican su constitucionalidad y validan las definiciones que la CFC ha adoptado al aplicar los conceptos previstos en la Ley, así como los criterios e instrumentos analíticos previstos en su reglamento. Para ello, la CFC ha basado su defensa en la existencia de dichos conceptos en la disciplina económica y en la doctrina internacional del derecho de la competencia.

En segundo lugar, la CFC también ha defendido su uso de conceptos económicos no contenidos en la LFCE en las resoluciones. Por ejemplo, en las resoluciones de los expedientes DE-06-2000 y DC-02-2001³⁹ la Comisión utilizó el concepto de grupo económico. En lo que respecta al primer expediente, el Poder Judicial Federal convalidó la resolución emitida por la CFC, determinando que el concepto de grupo económico tiene su fundamento en la LFCE y se deriva de intereses comerciales y financieros comunes. Respecto al segundo expediente, el Tribunal Colegiado negó el amparo a las quejas en virtud de que a pesar de que el concepto de grupo económico no está contemplado en la Ley, sí puede ser aplicado en el razonamiento de la autoridad, dado que es un término económico aplicado a lo jurídico.

En tercer lugar, cuando las partes involucradas impugnan las resoluciones de la Comisión ante instancias judiciales pueden ofrecer pruebas periciales en economía. Las reglas del procedimiento en los juicios de amparo obligan al tribunal a contratar a su propio experto. El problema con este tipo de pruebas es que los tribunales cuentan con pocos recursos, y que en México existe un reducido número de economistas especializados en materia de competencia. Esto podría llevar a que el juez tenga una

³⁹ El primer expediente es sobre una práctica monopólica relativa realizada por Grupo Coca – Cola consistente en llevar a cabo acuerdos de exclusividad. El segundo es un procedimiento para determinar si existían condiciones de oferta efectiva en la distribución de gas LP en la República Mexicana.

percepción errónea sobre los asuntos económicos del caso, debido a la falta de conocimiento del experto contratado sobre el caso específico que se trate. En atención a esta situación la CFC desarrolla programas de capacitación para jueces, magistrados y sus asistentes.

Sección B

N/A

Pakistan

Section A

1. *Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis:*

Five economists and ten lawyers are employed in the Competition Commission of Pakistan (CCP). They are able to undertake complex economic analysis⁴⁰.

2. *How frequently does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited:*

Assessment of competition cases mostly involves economic analysis in one form or another.

Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Delineation of a relevant market and economic assessment of anticompetitive effects.

Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited. Yes, economic analysis is necessary and useful. However, since 2007, when the CCP was formed, certain cases involved a blend of economic and accounting techniques to assess efficiency such as Dupont analysis, cost analysis and differential cost analysis. Notable instances are those of fertilizer, automobiles and cement.

3. *Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to: market definition, vertical restraints, horizontal restraints, abuse of dominance, mergers, and what problems/challenges were encountered?*

a. Cross-elasticity of demand indicating products that are in the same market: responsiveness of the sales of one product to price changes of the other. And Elzinga-Hogarty Test and Shrieves Test assessing competition in geographic markets. Small but Significant Nontransitory Increase in Price (SSNIP) Test for defining the relevant market. Product and territorial market definition - substitutability

⁴⁰ Our newly inducted case-handlers, however, need specialized training to apply latest tools of economic analysis while examining competition cases.

dominance, pricing power, measures of concentration.

b. Nil.

c. Determined on the basis of evidence of cartel or collusion. However, economic effects of cartels and horizontal agreements need analysis.

d. Defining a monopoly/dominant position, defining the market, assessing the degree of market power, relevance of cost, identifying exclusionary conduct and assessing exploitative conduct and their economic effects.

e. Determination of market shares and market concentration ratios. The merger provisions of the competition law require economic analysis involving assessment of: substantial lessening of competition, the degree of market power and claims about advantages.

Selected Decisions of the CCP

A summary of selected cases and techniques used is provided below:

Banks' case: Section 4 of the Competition Ordinance, 2007 is primarily based on Article 81 of the EU Treaty. In EU, an agreement constitutes an infringement of Article 81 only if it has anti-competition effects. The effects test requires an examination of the economic conditions prevailing in the relevant market and effects of the agreement on competition in the said market.

All 42 banks in Pakistan were adjudged guilty of cartelisation, of which seven banks and the Pakistan Banking Association were fined an aggregate of Rs.205 million⁴¹. The case involved determination of relevant market, comparison of benefit offered to the customers and *vice versa*.

Cement cartel case: After thorough investigation with respect to cartelisation and collusive behaviour on the part of economic agents in the cement sector, the Commission undertook a forcible search operation for the first time in Pakistan which naturally evoked a rather strong reaction from those affected but garnered appreciation from the general public and consumers. Show cause notices have been issued to the relevant parties and the matter is under process as per Competition Ordinance, 2007.

Collusive tendering: Active investigation is also underway with respect to a collusive tendering allegation which pertains to a Government sponsored trust entity. Show cause notice in the said case has been issued.

Bahria University case: A leading business school has also been effectively penalised and ordered to make appropriate refunds to students who were forced to buy lap-top computers from the school at the time of admission. The business school has also been directed to desist from this practice of tying computer sales to admissions. This was a case of 'tie ins'. CCP noted that proving a claim of tying, the jurisprudence as developed in most mature competition law regimes, i.e., those of the United States and the European Union, requires, under the rule of reason that the following five elements be proved: (1) a tie exists between two separate products; (2) the tying seller (University) has a dominant position in the tying product (educational services)

⁴¹ The banks took the matter to the Court.

market so as to be able to prevent, restrict, reduce or distort competition in the tied product market (laptops); (3) coercion (or forcing) by the seller to purchase the two products; (4) the tie affects a “not-insubstantial” amount of commerce, or forecloses competition to some extent, in the tied product; and (5) the tying seller has some economic interest in the sales of the tied product.

Mobilink case: The arrangement of the selling of the Blackberry handset, the provision of BlackBerry internet and e-mail service (BIS & BES) and the mobile telecommunication service (SMS) are bundled and tied in such a manner through SIM locking that if the customer surrenders one product for example mobile telecommunication service he is denied provision of other services as well. Mobilink - a leading cellular company was ordered by the CCP to appropriately arrange the unlocking of SIMs from a particular handset sold by them, and also to clearly disclose and advertise the tie-ins of the handset sold with the related telephony services offered. The bundling of the handset with other services must be made unequivocally clear in all advertisements and promotional material.

Two closely-linked and obviously dominant fertiliser companies, substantially owned by an army trust, were ordered to suitably de-link and separate so that they are incentivised to act as separate entities. The issues involved determination of relevant market. In the fertiliser sector - with reference to the dominant position of Fauji Fertilizer Company (FFC), a significant finding emerged. FFC argued that its large size had resulted in greater efficiency and its undue economic power was therefore justified. However, the Commission was able to establish that this was not the case. FFC had not been able to reap any economies of scale. On the contrary, it was less efficient than the smaller firms in the industry that had lower unit costs. The application of the gateway provision was therefore denied to FFC.

Difficulties:

In all the steps i.e., detection and investigation, case development, decision-making, litigation, remedies and sanctions - the first and foremost question relates to the selection of applicable theories/methodologies from the vast and varied literature of industrial organization economics to assess/examine competition law cases. Secondly, how economic concepts could be converted into practical conditions or steps. Thirdly and more importantly, is there sufficient data to conduct a meaningful economic analysis.

In Pakistan, other than the companies, several organizations - Ministry of Industries, Securities and Exchange Commission, Federal/ provincial Bureau(s) of Statistics, Federal Board of Revenue, manufacturers' associations/ consumer groups (to some extent) and chambers of commerce and industry - collect periodical data relating to business activities. It is understandable that such data are not always in a desirable form. Besides, these data sources have limitations of their own, for instance, all the units in a particular sector may not be members of a business group, gaps in the publication of survey reports, a large informal/ un-organized sector, and so on. To avoid this exercise of filling the gaps in data jigsaw puzzle with non-complementary pieces, the CCP will need to implement a plan for maintaining customized data collection – which *per se* is not a simple task.

Another tricky task involves application of various econometric and other tools to identify variables such as, for instance, relevant geographic market, relevant product market, relevant market share including aspects of international competition, etc. and their consequences for competition. Economic analysis has to be fully integrated with the specificities of a particular case to identify anticompetitive practices, looking into market structures for competition law violations, and after determining causality, working out suitable remedies while considering the degree of violation/ damages.

4. *What is your experience with the use of empirical techniques: a) regression analysis, b) concentration models, c) price simulations and Monte Carlo models, d) score and probit models and e) other empirical tools?*

CCP has used concentration models in the dominance cases. For other tools, kindly see response to Question No. 3 of Part III ⁴².

5. *What difficulties are encountered in communicating economic reasoning and empirical evidence to: a) various parties involved in competition cases; and b) the Courts. And what strategies are employed to overcome them?*

There have not been many competition cases during the short span of competition law enforcement in Pakistan. Yet, relying on the experience, the major challenge lies in communication and presentation of the economic analysis in a 'digestible' form such that it is equally understandable for all the stakeholders, including the courts. The way CCP adopted to overcome this difficulty was to issue speaking orders incorporating analysis, case law from other jurisdictions, economic literature and their citation. This approach provides an opportunity to the reader to better understand the logic and he/she could also refer to the sources indicated as per his level of interest for deeper understanding⁴³.

Section B

1. *What type of system do you have for the resolution/review of competition cases (inquisitorial/adversarial, administrative/judicial)?*

The system is adversarial in nature. Infact, CCP itself is a quasi judicial organisation. As per Competition Ordinance, 2007, an order of a Member/ authorised officer of CCP is appealable before an appellate bench comprising at least two Members of the CCP who had not been involved in the original decision. Further redress can always be sought against the final order of the CCP through an appeal before the Supreme Court of Pakistan.

⁴² Interested readers may like to see CCP reports available at: <http://www.cc.gov.pk/Reports.htm>.

⁴³ Considering the outreach and transparency, the orders of the CP are available on its website: <http://www.cc.gov.pk/mcaorders.htm>.

2. *Is economic evidence a significant and an important component in the proceedings of competition cases before the courts and the determining of sanctions?*

Yes, it is. For other aspects placed before the courts kindly see response to Question No. 4 of Part III (B).

3. *For which class of anticompetitive practices (vertical restraints, horizontal restraints, abuse of dominance, and mergers) have you found economic analysis particularly necessary, useful and convincing?*

Horizontal restraints and abuse of dominance.

4. *What difficulties are encountered by the courts with accepting economic reasoning and empirical evidence and what strategies are employed by the courts to overcome them? Do these strategies include the possibility for the courts to make use of independent experts?*

During the short span of Competition Ordinance enforcement, there have not been competition cases with the courts that require economic reasoning, etc. Mostly, the cases filed with the superior courts were on grounds of law relating to composition of the Competition Commission, its powers and its jurisdiction, modus operandi to conduct enquiry or secure evidence, etc. However, if required, the courts can get opinions of independent experts.

5. *How have the economists been incorporated to the primary judicial forums to adjudicate competition law cases?*

Eminent law firms and corporate lawyers usually have economists and economic analysts on their panel. They assist the lawyers in preparing their arguments on economic issues. Also, the *amicus curiae* may also volunteer to assist the court in deciding a matter before it.

Panamá

Sección A

1. *Sírvanse proporcionar un desglose de la plantilla de economistas y juristas empleados por el organismo encargado de la competencia, e informar sobre la capacidad de esos funcionarios para realizar análisis económicos complejos.*

En la Dirección Nacional de Libre Competencia de la Autoridad de Protección al Consumidor y Defensa de la Competencia se analizan los temas de competencia. Esta Dirección está compuesta por 6 economistas y 6 abogados. Los análisis económicos complejos son realizados por economistas, los cuales poseen cinco de ellos Maestrías. Todos los economistas están capacitados para hacer análisis económico y de competencia complejos. Cuatro economistas pueden hacer análisis económicos complejos. Los otros dos economistas tienen especialidades en Finanzas y Comercio internacional.

2. *¿Con qué frecuencia recurre el organismo encargado de la competencia al análisis económico en el examen de casos de competencia? ¿Para qué clases de prácticas anticompetitivas se ha determinado que el análisis económico es más necesario y útil? ¿Se considera que el análisis económico es necesario y útil para evaluar la eficiencia dinámica en comparación con la eficiencia estática? Sírvanse dar ejemplos concretos de todos los casos mencionados.*

En todos los casos de competencia se ha utilizado el análisis económico, en prácticas relativas y absolutas, al tenor de la Ley 45 de 2007. Este tipo de análisis ha sido particularmente útil en los casos de prácticas relativas, debido a que debe demostrarse la presencia de poder sustancial de mercado y hacer análisis de eficiencia económica. Tanto para evaluar la eficiencia dinámica como estática, el análisis económico ha sido un factor clave, dado que conforme se evalúa la estructura, conducta y desempeño de los agentes económicos en un mercado pertinente, cobra una mayor importancia hacer un análisis integral, respecto de la dinámica de la competencia, ya sea a lo largo de un período tal como para un momento específico.

Por ejemplo, en los casos de competencia por prácticas monopolísticas relativas, se puede citar de la venta restringida de combustible en la terminal de despacho, de Bahía Las Minas, mediante la cual una empresa tiene poder sustancial, por controlar dicha instalación o facilidad esencial y favorece a unos clientes en detrimento de otros a los que da un trato discriminatorio, que afecta la comercialización y competencia aguas abajo en la distribución minorista. La determinación del poder sustancial de mercado y la posibilidad de ejercerlo de forma abusiva, solo se ha podido determinar sobre la base del análisis económico, considerando las razones de eficiencia económica que justifiquen tal práctica, que se viene suscitando desde principios de este año.

El análisis económico en la valoración de la eficiencia dinámica y la eficiencia estática es importante cuando se analizan casos en los cuales los resultados de las acciones tomadas sean valorados en el corto plazo (eficiencia estática) y en el largo plazo (eficiencia dinámica), este razonamiento permite de alguna forma prever el comportamiento de las acciones tomadas y por ende conocer de alguna manera cuál será el resultado de estas acciones, es muy importante este análisis porque permite tener una idea más clara de los resultados esperados, y poder valorar de alguna forma en el presente las situaciones que pudieran ocurrir en el futuro, casos como el cableado de televisión en el edificio Terramar se valoró cuál era el comportamiento en el corto plazo, (eficiencia estática) dejar a los inquilinos con un solo operador por cable y los sustitutos fueran inalámbricos o promover una apertura total en el segmento alámbrico (eficiencia dinámica) y cualquier operador que deseara no solo en este edificio, sino en todas las propiedades horizontales, pudiera hacerlo.

3. *Sírvanse indicar qué teorías o modelos económicos han servido de base para determinar la existencia de conductas anticompetitivas con respecto a lo siguiente: a) definición de mercado, b) restricciones verticales, c) restricciones horizontales, d) abuso de posición de dominio, e) fusiones*

a) definición de mercado: Ha sido importante el modelo de libre oferta y demanda, para determinar las posibilidades de competencia regional o por áreas sobre la base de la contestabilidad de los mercados y de los grados o niveles de sustituibilidad entre productos por el lado de la demanda, basado en los gustos y preferencias de los consumidores y hasta donde se ha podido, utilizar coeficientes de elasticidades.

b) restricciones verticales: La medición de la participación de mercado, para ver el grado de concentración o de poder de mercado, ha sido fundamental en estos análisis, al igual que para analizar las posibilidades objetivas de abusar de una posición de dominio, para desplazar a otros competidores en un mercado pertinente, bajo condiciones irrazonables. Se calculan índices de concentración económica como CR4, Herfindahl-Hirschmann, Dominancia.

c) restricciones horizontales: En el caso de las restricciones horizontales, ha sido mucho más limitado el uso de las teorías, toda que el fundamento es un acuerdo per sé, como por ejemplo, en el caso de la venta de concreto por parte de las únicas dos empresas existentes en el país, las cuales constituyen un duopolio natural, y que existen graves indicios de que han acordado unificar el aumento del precio del concreto, en un sector estratégico como es el de la construcción. Ante este tipo de prácticas de acuerdo a nuestra norma, no se entra a analizar ningún tipo de razonabilidad económica, toda vez que las decisiones entre agentes económicos deben ser independientes y tal vez es lo único rescatable de la teoría económica o modelo de libre oferta y demanda, bajo la cual los agentes económicos toman decisiones de manera aislada y sin compartir información, más allá de la que sea libremente observable en el mercado.

d) abuso de posición de dominio: Aplica para el caso de prácticas verticales e incluso en la evaluación previa de fusiones. La experiencia ha sido similar y es complementaria en los casos descritos.

e) fusiones: La experiencia obtenida en el caso de la fusión de dos empresas papeleras locales, conllevó nuevamente al uso de las herramientas teóricas disponibles, para construir la verificación previa y evaluar las condiciones de competencia futuras, post fusión. Se evaluó la competencia en función de la cantidad de competidores y su participación relativa de mercado, al igual que las opciones de precios para el consumidor y distintos perfiles de productos ofrecidos en el mercado, evaluando la sustituibilidad funcional.

Además, en varios casos de fusiones se calculan índices de concentración económica como CR4, Herfindahl-Hirschmann, Dominancia, Jiny.

y qué problemas o desafíos encontró? Uno de los mayores problemas encontrados en todos los casos al analizar las condiciones de competencia, desde el punto de vista del modelo de libre oferta y demanda, es la limitada información por el lado de la demanda, especialmente en lo referente a gustos y preferencias, limitando mucho el análisis a los precios y variables subyacentes como los costos y ventas, lo cual como es lógico, conlleva un sesgo metodológico, por no ser variables que permitan identificar adecuadamente las condiciones de competencia y sólo de una manera aproximada.

Otro de los problemas fundamentales que se ha encontrado, es con relación al papel que deben jugar las agencias gubernamentales regulatorias y la agencia de competencia, de poder encontrar un punto común vinculante y no contradictorio con el papel de ambas. Es decir, lograr la complementariedad de ambas políticas, sin invadir el plano sectorial, bajo las normas regulatorias. En este sentido, el celo y la falta de coordinación y de colaboración entre las agencias regulatorias y la agencia de competencia ha sido el talón de aquiles, para impulsar el enfoque de competencia funcional.

De igual manera, estas limitantes se han observado en los procesos de licitación, por ejemplo, de oxígeno, medicamentos, combustibles, etc., en los cuales las entidades responsables no valoran o toman en consideración los problemas de competencia que pueden generar sus acciones, al preparar los pliegos de cargos, que terminan por reducir la cantidad de propuestas y por ende de proveedores. Por consiguiente es necesario que las entidades públicas, sometan previo a análisis de competencia sus procesos de licitación para la adquisición de bienes o la prestación de servicios, a la agencia de competencia.

4. *Sírvase indicar qué ha observado en el uso las siguientes técnicas empíricas: a) análisis de regresión; b) modelos de concentración; c) simulaciones de precios y modelos de Monte Carlo; d) modelos de puntuación (score) y de probit; y e) otras herramientas empíricas.*

Análisis de regresión:

Modelos de concentración: en este apartado los índices de Pietra y Gini no han sido utilizados. Sí hemos los índices de CR4, Herfindahl-Hirschmann, Dominancia.

Simulación de precios y modelos tipo Monte Carlo: No se ha utilizado.

Modelos de resultado o de probit: No se ha utilizado.

Otras herramientas empíricas: se tuvo la oportunidad de estimar un Índice de Lerner, para estimar el grado de concentración y de competencia en las licitaciones de oxígeno médico de la entidad de seguridad social. Se utilizó la técnica econométrica de datos de panel (efectos fijos), para estimar una función de demanda bietápica y extraer coeficiente de elasticidad precio de la demanda con el que finalmente se obtuvo el Índice de Lerner.

También se tuvo la oportunidad de estimar un Índice de Lerner, para medir el grado de competencia en el mercado de hidrocarburos en Panamá, con la misma técnica de datos de panel, por efectos aleatorios. Respecto del uso de modelos de probabilidad (probit, tobit y logit), se han empleado con los datos de sección cruzada de la Encuesta Nacional de Gasto de Consumo, para estimar probabilidades de consumo de determinados bienes o servicios, en función de los perfiles de ingresos de los consumidores, de manera muy limitada y en combinación con técnicas de análisis multivariante, como por ejemplo, análisis factorial por componentes principales.

Finalmente, en un caso de Salvaguardia (caso porcino) se tuvo que utilizar la técnica de modelos ARIMA, para estimar los sacrificios para seis meses y completar la base de datos, ante la ausencia de información oficial disponible. El modelo resultante, fue un proceso ARIMA multiplicativo (con componente regular y estacional).⁴⁴

5. Sírvanse indicar qué elementos dificultan la transmisión de razonamientos de tipo económico y pruebas empíricas a los siguientes destinatarios: a) Las partes involucradas en los casos de competencia; b) Los tribunales. Sírvanse indicar las estrategias utilizadas para sortear esas dificultades.

Existen dificultades al comunicar razonamientos económicos. Las partes y jueces carecen de formación en Economía. Las partes (entiéndase agente económicos y abogados) carecen en muchos casos de la capacidad de análisis en materia de competencia (fondo) y manejan los casos principalmente recurriendo al procedimiento (forma) para dilatar los procesos.

Respecto a las partes involucradas es importante hacerles ver que como contraparte somos la instancia oficial y que no es posible para ellos manipular la información económica, para su beneficio. La teoría económica brinda toda una gama de herramientas cuantitativas y analíticas que son neutrales y que manejadas de manera objetiva, proporcionan resultados imparciales. Es por ello que la fuente de información debe ser neutral a las partes y de manera imparcial. Sin embargo, dada la falencia de datos, los que proporcionan los agentes económicos implicados, suele ser la única disponible, por lo que es importante su verificación u obtención muchas

⁴⁴ La Agencia de competencia también es responsable de los temas de protección al consumidor. Desde 1996 hasta 2006 también la Institución de competencia era responsable de los temas de Comercio desleal y salvaguardia, pero con el cambio de la Ley en el año 2006 esas funciones fueron asignadas al Ministerio de Comercio e Industrias.

veces mediante diligencias exhibitorias, cuando no se pueden obtener mediante su colaboración.

Con relación a los tribunales/Cortes, aún no se ha podido lograr una concienciación eficaz respecto a que el análisis económicos, se constituyen en la piedra angular no solo de los casos de competencia, sino también de la política de competencia, dado que su fundamento teórico es puramente económico, aunque se enmarque bajo los parámetros de la Ley 45 de 2007. Es importante continuar con el proceso de formación del personal que labora en los tribunales (jueces, magistrados y funcionarios en general), de la importancia de fundamentar los fallos sobre las valoraciones que permite tanto el modelo como la misma teoría económica del derecho.

y qué estrategias se emplean para superarlas? Los Jueces deben tener mayor conocimiento de los temas de competencia (fondo). Se han hecho esfuerzos en esta vía pero aún falta por hacer. Se debe promover en la Carrera de Derecho que se imparte en las Facultades de Derecho en Panamá la inclusión de la materia o seminario, por lo menos, de competencia. La Escuela Judicial juega un papel importante en esta formación pero aun hace falta por hacer. Una buena iniciativa es invitar a jueces de la materia de otros países que hayan avanzado en esta materia a dictar seminarios de casos que sirvan para incrementar el conocimiento de los nacionales. A estos seminarios no solo deben invitar a los del área metropolitana sino también a los del interior del país que en menor medida, por competencia judicial, deben ver estos temas.

Además, se debe continuar con los programas de formación y de educación general, a los agentes económicos, al personal de los tribunales/cortes, entidades públicas, etc., dado que es un proceso que debe verse a largo plazo.

Sección B

N/A

Perú

Sección A

1. *Sírvanse proporcionar un desglose de la plantilla de economistas y juristas empleados por el organismo encargado de la competencia, e informar sobre la capacidad de esos funcionarios para realizar análisis económicos complejos.*

La autoridad encargada de la aplicación de las normas de libre competencia (prohibición de abusos de posición de dominio y prácticas colusorias; y control de concentraciones en el sector eléctrico) en el INDECOPI es la CLC. Las decisiones de la CLC son apelables ante la SDC. A su vez, el INDECOPI cuenta con una Gerencia de Estudios Económicos (en adelante, la GEE) que puede brindar apoyo técnico a sus áreas resolutivas.

La CLC está conformada por 4 miembros a tiempo parcial (3 economistas y 1 abogado) y cuenta con una Secretaría Técnica (en adelante, STCLC). La STCLC está conformada por 7 abogados y 6 economistas. De los 6 economistas, 5 cuentan con estudios de maestría en temas de economía, organización industrial, competencia, regulación o estadística.

La SDC está conformada por 5 miembros a tiempo parcial (2 economistas y 3 abogados) y cuenta con una Secretaría Técnica (en adelante, STSDC). La STSDC está conformada por 6 abogados con estudios de posgrado y maestrías en regulación de servicios públicos, concesiones y competencia.

La GEE está conformada por 11 economistas. De ellos 1 posee un doctorado y 6 estudios de maestría en economía, competencia, organización industrial, comercio internacional, cooperación económica o matemática.

Como puede apreciarse por la conformación de las áreas vinculadas al análisis de casos de libre competencia, el INDECOPI cuenta con personal capacitado para afrontar análisis económicos complejos al tratarse de especialistas con formación académica en temas como organización industrial, estadística y competencia.

2. *¿Con qué frecuencia recurre el organismo encargado de la competencia al análisis económico en el examen de casos de competencia? ¿Para qué clases de prácticas anticompetitivas se ha determinado que el análisis económico es más necesario y útil? ¿Se considera que el análisis económico es necesario y útil para evaluar la eficiencia dinámica en comparación con la eficiencia estática? Sírvanse dar ejemplos concretos de todos los casos mencionados.*

El análisis económico está presente casi en la totalidad de las evaluaciones que realiza el INDECOPI para los casos de libre competencia.

Es particularmente necesaria y útil la utilización del análisis económico en los casos de abuso de posición de dominio. En efecto, el análisis económico es necesario para evaluar aspectos como: el mercado relevante, posición de dominio, efectos pro y anticompetitivos, el impacto sobre la eficiencia, el cálculo de las sanciones, etc.

Definitivamente, el análisis económico también es importante en la valoración de la eficiencia.

Se puede citar como ejemplos de casos en los que el análisis económico ha sido importante, los siguientes:

En el caso iniciado de oficio por denuncia de Ferrocarril Santuario Inca Machu Picchu S.A.C. en contra de Fetrans por abuso de posición de dominio a través de la negativa injustificada de alquiler de material tractivo y rodante, se utilizó para la definición del mercado relevante un análisis de sensibilidad y rentabilidad de posibles sustitutos del alquiler de material tractivo y rodante al denunciado. Asimismo, para la evaluación de la existencia de posición de dominio se analizó el grado de concentración en el mercado y las barreras a la entrada existentes. Finalmente, el cálculo de las sanciones requirió la estimación del beneficio esperado del grupo económico del denunciado.

En el caso iniciado por denuncia del señor Federico León y León contra 4 empresas productoras de textiles por una presunta concertación de precios en la compra de algodón pima, se analizaron las características de mercado (homogeneidad del producto a través de una evaluación cualitativa y análisis de costos; la concentración del mercado; la simetría y similitud de las empresas a través de un análisis de costos, volúmenes de producción, procesos y metas; la elasticidad de la oferta; y la sustituibilidad del producto) con objeto de identificar si existían características facilitadoras de prácticas colusorias. Se utilizó un análisis econométrico y un análisis de precios y volúmenes de compra de algodón nacional e importado y la relación existente entre ambas variables para evaluar la hipótesis de concertación.

3. *Sírvanse indicar qué teorías o modelos económicos han servido de base para determinar la existencia de conductas anticompetitivas con respecto a lo siguiente: a) definición de mercado, b) restricciones verticales, c) restricciones horizontales, d) abuso de posición de dominio, e) fusiones*

Mercado relevante:

SSNIP test

Análisis de correlación de precios

Elzinga y Hogarty test

Teoría de switching costs

Análisis cualitativo sobre características, usos y preferencias de los consumidores

Análisis de evolución histórica de patrones de consumo

Análisis de costos de transporte

Restricciones verticales:

Teoría de cierre de mercado, duración y cláusulas de rescisión en casos de contratos de exclusividad

Teoría de free riding

Teoría de costos de transacción

Restricciones horizontales:

Análisis de correlación de precios

Modelos de oligopolio (p.e. líder - seguidor)

Teoría de costos de transacción

Análisis de características de mercado que facilitan la colusión (p.e. homogeneidad del producto, inelasticidad de la demanda, concentración del mercado, etc.)

Análisis de varianza

Abuso de posición de dominio:

Teoría de índices de concentración (p.e. IHH)

Teoría de barreras a la entrada (p.e. economías de escala o costos hundidos)

Teoría de mercados contestables

Foreclosure theory

Leverage theory

Fusiones (únicamente en el sector eléctrico):

Teoría de índices de concentración (p.e. IHH)

Análisis de efectos sobre niveles de precios de acuerdo al marco regulatorio sectorial

El desafío principal para la aplicación de modelos o teorías económicas en el análisis de competencia es el acceso a la información estadística necesaria. En efecto, en muchos casos la información con el detalle necesario no se encuentra ni en otros organismos del gobierno ni en los agentes privados.

4. *Sírvase indicar qué ha observado en el uso las siguientes técnicas empíricas: a) análisis de regresión; b) modelos de concentración; c) simulaciones de precios y modelos de Monte Carlo; d) modelos de puntuación (score) y de probit; y e) otras herramientas empíricas.*

Se ha utilizado en el análisis de casos de libre competencia:

Modelos de regresión paramétricos para determinar factores que explican precios

Análisis de series de tiempo (modelos Autorregresivos Integrados de Media Móviles - ARIMA)

Aplicación de estadísticos como coeficientes de correlación y análisis de varianza

Análisis de índices de concentración (p.e. IHH)

5. *Sírvanse indicar qué elementos dificultan la transmisión de razonamientos de tipo económico y pruebas empíricas a los siguientes destinatarios: a) Las partes involucradas en los casos de competencia; b) Los*

tribunales. Sírvanse indicar las estrategias utilizadas para sortear esas dificultades.

La dificultad que se encuentra al comunicar el análisis de competencia tanto a las partes como a las cortes, es lograr un claro entendimiento de la lógica económica utilizada, lo que es más difícil dependiendo de la complejidad del análisis y de las técnicas utilizadas. Al respecto, la estrategia utilizada para superar ese problema es presentar una explicación clara y precisa de los temas más complejos en los informes, resoluciones o audiencias (por ejemplo, se utilizan anexos informativos a los informes escritos).

Sección B

N/A

PNG

Section A

1. *Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis:*

The ICCC is a fairly small organisation comprising of 54 staff. Within this ceiling, there are nine (9) Economists and three (3) Lawyers. Since its inception, ICCC staff continue to the necessary skills to undertake competition and economic analysis. Where there is a need for complex economic analysis, the ICCC engages industry expert/consultants to assist.

2. *How frequently does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited:*

The ICCC applies economic analysis in most of its work. The Commission's assessment of competition cases such as mergers and acquisitions is often confined to qualitative economic analysis mainly due to unavailability or poor availability of data. For example, this is undertaken in regard to assessing business merger and acquisition where dynamic characteristics of the market including growth, innovation and product differentiation are considered. Refer to:

<http://www.iccc.gov.pg/publicregister/authorizations.htm> for specific competition case

3. *Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to: market definition, vertical restraints, horizontal restraints, abuse of dominance, mergers, and what problems/challenges were encountered?*

The ICCC is continuously developing its human resources capacity to fully comprehend and utilise the different economic theories/models to analyse various anticompetitive behaviours. Some of the economic theories/models used so far include Porters Five Forces of Competitive Position model, Demand and supply substitution model, HIH Index and the SNIP test. The Commission is satisfied with the use of these models.

4. *What is your experience with the use of empirical techniques: a) regression analysis, b) concentration models, c) price simulations and Monte Carlo models, d) score and probit models and e) other empirical tools?*

In some of the industry reviews undertaken by the ICCC, for example the PNG Insurance Industry Review, concentration ratios could not be used due to data discrepancy between the various insurance underwriters, instead the HIH Index was used to examine market concentration of the industry.

5. *What difficulties are encountered in communicating economic reasoning and empirical evidence to: a) various parties involved in competition cases; and b) the Courts. And what strategies are employed to overcome them?*

c) _____ various parties involved in competition cases;

Regulating anti-competitive practices in order to promote competition is fairly new in PNG which has been introduced with the enactment of the Independent Consumer & Competition Act 2002. The market conduct rules contained in the ICCC Act are similar to those applied in New Zealand and other places in the world and the ICCC and parties involved in competition cases are slowly coming to terms with the new concepts. Lawyers and non-economists rely heavily on expert advice from economists and particular industry experts to understand the economic and industry concepts relevant for interpreting and applying the particular market conduct rules.

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d) _____ the Courts-

Complaints on breaches of the market conduct rules are dealt with first by ICCC whose decisions are subject to appeal to an independent administrative appeals panel and ultimately subject to judicial review by the courts of law. There have not been any court cases to date dealing directly with alleged breaches of market conduct rules, although there have been a series of court cases between the incumbent state owned telecommunications company and a new entrant mobile phone company over interpretation of the former's statutory monopoly over certain telecommunications services. Where court cases dealing directly with alleged breaches of market conduct rules which are not otherwise exempted by statute are instituted, the courts will most likely rely heavily on expert evidence from economists and industry experts as well as precedents from similar jurisdictions overseas to assist in interpreting and applying the law.

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And what strategies are employed to overcome them? One of the measures employed by the ICCC in its initial establishment phase is to develop an advocacy programme aimed at creating awareness for lawyers and judges about the statutory powers of the Commission, prohibitions, penalties/remedies and exemptions under the ICCC Act, including evidence gathering and the sort of evidence that would need to be relied upon for economic analysis of the cases.

Section B

1. *What type of system do you have for the resolution/review of competition cases (inquisitorial/adversarial, administrative/judicial)?*

PNG has an adversarial judicial system, and as noted above, resolution of competition cases goes through an administrative process before going to the courts of law. It is

also open at the option of any party to go direct to the court for interim preventative orders and damages for losses suffered as a result of the anti-competitive practices of another party.

2. *Is economic evidence a significant and an important component in the proceedings of competition cases before the courts and the determining of sanctions?*

Yes, it is.

3. *For which class of anticompetitive practices (vertical restraints, horizontal restraints, abuse of dominance, and mergers) have you found economic analysis particularly necessary, useful and convincing?*

As noted above, there have not been any court cases as yet but ICCC has found economic analysis necessary and useful in all the above classes of anti-competitive practices and we believe the appeals panel and the courts will find it equally necessary and useful in dealing with all those practices.

4. *What difficulties are encountered by the courts with accepting economic reasoning and empirical evidence and what strategies are employed by the courts to overcome them? Do these strategies include the possibility for the courts to make use of independent experts?*

Most judges and magistrates do not have exposure to economics and would likely require independent expert advice from economists to assist in understanding economic reasoning in order to apply them in resolving specific cases.

5. *How have the economists been incorporated to the primary judicial forums to adjudicate competition law cases?*

This has to yet occur in PNG but there is provision for alternative dispute resolution (ADR) or arbitration where parties could request for a tribunal to be made up of economists, lawyers and other experts to adjudicate on competition law cases. In a court case, economists can be called as expert witnesses by the parties or by the court to assist it in the case.

Poland

Section A

1. *Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis:*

Main tasks associated with economic analyses and market research are carried out by the Market Analyses Department, which employs 11 economists, two of whom hold Ph. D.'s in economics. 5 persons routinely handle issues associated with competition policy and economic analysis. There are also several economists working in our enforcement department and local offices (which also deal with competition issues). More complex analysis, however, is usually handled by the Market Analyses Department.

Our capacity to undertake very complex economic analysis is limited, when compared to leading competition authorities (like US DOJ/FTC or British OFT), which is mainly a consequence of the fact, that it is not as much a part of our proceedings, as it is in the case of the afore-mentioned authorities. Should the need arise, however, we should be able to go ahead with complex data analysis and assessment of complicated theories of harm.

2. *How frequently does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited:*

Complex economic issues (like intensive use of advanced econometric techniques, merger simulation, etc.) are not particularly prevalent in the process of assessing competition cases. It is mainly a result of the following facts:

- Overwhelming majority of cases can be satisfactorily resolved without resorting to such techniques,
- The parties in the proceedings do not present, let alone rely on such evidence,
- Difficulties with access to requisite data,
- Problems with presenting the results of the application of advanced economic techniques to judges.

There are several areas, where we found economic analysis useful:

- assessing strategic conduct (e.g. predatory pricing), where it allows to create a credible theory of harm and test the facts against it,
- defining the relevant market (drawing conclusions from consumer behaviour),

– merger control (relevant markets and incentives of the parties to engage in anticompetitive behaviour after the merger).

3. *Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to: market definition, vertical restraints, horizontal restraints, abuse of dominance, mergers, and what problems/challenges were encountered?*

While analyzing those issues, the authority uses standard theories, modified to suit the circumstances of the case. Main problems with applying theories to concrete cases consist in the lack of data and difficulties in assessing facts crucial to the application of a given theory (“are barriers to entry high enough to make predatory pricing rational?”, “is a given fair facility sufficiently distinguished from other trading places in the city?”, etc.).

4. *What is your experience with the use of empirical techniques: a) regression analysis, b) concentration models, c) price simulations and Monte Carlo models, d) score and probit models and e) other empirical tools?*

So far we have not used or felt the need to use the above-mentioned tools for the reasons explained in the answer to question 2.

5. *What difficulties are encountered in communicating economic reasoning and empirical evidence to: a) various parties involved in competition cases; and b) the Courts. And what strategies are employed to overcome them?*

We do not face particular problems with communicating economic and empirical evidence to the parties involved in the proceedings, as they are usually represented by sophisticated legal firms. As to the court, to avoid problems with interpretation of economic reasoning and empirical evidence, we try to present those in as simple a manner as possible, explaining all the essential concepts and avoiding overly “technical” terminology.

Section B

Polish system for the resolution of competition cases is administrative and inquisitorial. Before instituting antimonopoly proceedings, with the aim to evaluate whether there is a likelihood of the breach the competition rules, the President of the Office of Competition and Consumer Protection (OCCP) may initiate explanatory proceedings. Such proceedings are conducted without presence of the undertakings since no formal objections or accusations are formulated. When there is a likelihood of the breach of the competition rules OCCP initiates antimonopoly proceedings (solely on the ex officio basis). The party concerned is informed and it may take part in they course of proceedings.

Polish system for the review of competition cases is judicial and the proceedings are conducted on the basis of civil procedure. Within two weeks from the date of

deliverance of the decision by the President of the OCCP, the appeals are to be handled by the Court for Competition and Consumer Protection (CCCP). Within two weeks from the deliverance of its judgment with the justification, the appeals can be lodged before the Court of Appeals. Finally, Supreme Court (cassation instance) reviews appeals from the judgments of the Court of Appeals, which shall be lodged within 2 months from their deliverance with the justification.

Modern antitrust litigation often involves complex economic and econometric analysis. Over the years, when deciding in the competition law cases more economic and effect based approach has been adopted also by the Polish courts. Therefore, depending on the facts of a particular case, evidences based on the economic analysis can be of a crucial importance in the proceedings. It shall be noted that this type of analysis is potentially useful for each type of cases decided by the courts (vertical restraints, horizontal restraints, abuse of dominance and mergers).

According to the Polish Code of Civil Procedure, courts can admit the evidence based on the analysis performed not only by the court experts, who are chosen from amongst the economists officially appointed by the President of the Regional Court, but also other experts (independent experts) after they have given their pledge. This evidence is afterwards assessed by the court and constitutes a basis for the court's factual findings. Since this kind of judicial application of the economic analysis as a tool helping decide cases often demands specific skills, special trainings for judges in this respect could certainly be beneficial.

República Dominicana

Sección A

1. *Sírvanse proporcionar un desglose de la plantilla de economistas y juristas empleados por el organismo encargado de la competencia, e informar sobre la capacidad de esos funcionarios para realizar análisis económicos complejos.*

Prevalencia en el uso del análisis económico

2. *¿Con qué frecuencia recurre el organismo encargado de la competencia al análisis económico en el examen de casos de competencia? ¿Para qué clases de prácticas anticompetitivas se ha determinado que el análisis económico es más necesario y útil? ¿Se considera que el análisis económico es necesario y útil para evaluar la eficiencia dinámica en comparación con la eficiencia estática? Sírvanse dar ejemplos concretos de todos los casos mencionados.*

Tipos de análisis económicos

3. *Sírvanse indicar qué teorías o modelos económicos han servido de base para determinar la existencia de conductas anticompetitivas con respecto a lo siguiente: a) definición de mercado, b) restricciones verticales, c) restricciones horizontales, d) abuso de posición de dominio, e) fusiones*

N/A

4. *Sírvase indicar qué ha observado en el uso las siguientes técnicas empíricas: a) análisis de regresión; b) modelos de concentración; c) simulaciones de precios y modelos de Monte Carlo; d) modelos de puntuación (score) y de probit; y e) otras herramientas empíricas.*

N/A

5. *Sírvanse indicar qué elementos dificultan la transmisión de razonamientos de tipo económico y pruebas empíricas a los siguientes destinatarios: a) Las partes involucradas en los casos de competencia; b) Los tribunales. Sírvanse indicar las estrategias utilizadas para sortear esas dificultades.*

N/A

Sección B

N/A

Russia

Section A

1. *Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis:*

On 01.01.2008 the actual number of staff of the FAS Russia was 2079 persons (366 persons in the Central Office, 1713 in the Regional Offices). The information given below is related to the Central Office only:

«lawyers» – 108 persons;

«economists» - 99 persons;

«other professionals» - 66 persons (people having technical and other education, as well as incomplete higher education);

«support staff» - 93 persons.

25 employees of the Central Office have an academic degree, out of them 13 have an academic degree in economics.

2. *How frequently does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited:*

The current Russian legislation provides for compulsory conduction of market analysis (sector enquiry) for the Federal Antimonopoly Service (FAS Russia) to make a decision on the case of violation of competition law or on the pre-merger notification of the economic entity within the frameworks of control over economic concentration.

The FAS Russia can independently initiate conduction of the relevant market analysis, moreover the FAS Russia annually makes a Plan of market analysis on its own initiative.

The Russian legislation also provides the FAS Russia with the powers to conduct market analysis under the resolution of the Government of the Russian Federation.

The authority can conduct market analysis either itself or use the service of the third parties. It should be taken into account that budget expenses when holding the analysis itself are generally lower than when using the services of the third parties.

Market analysis conducted by the FAS Russia is not an end in itself. It results in actions of administrative and economic nature aimed at elimination of competition law infringement. In this course the time period of such analysis should include both the moment of taking the managing decision by the authorities of the FAS Russia and the moment by which achievement of results from the taken action is assumed to take

place. Ideally such analysis should be continuous that requires much staff and material resources.

3. *Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to: market definition, vertical restraints, horizontal restraints, abuse of dominance, mergers, and what problems/challenges were encountered?*

The main method for defining market according to which it is necessary to prepare an analysis is a test of a hypothetical monopolist (SSNIP (HTM)), as a basis for comparing prices and application of data on competitors. The major problems we face when using this method is the right choice of the basic price value and time period of a test.

4. *What is your experience with the use of empirical techniques: a) regression analysis, b) concentration models, c) price simulations and Monte Carlo models, d) score and probit models and e) other empirical tools?*

We have a very little experience (see appendix).

5. *What difficulties are encountered in communicating economic reasoning and empirical evidence to: a) various parties involved in competition cases; and b) the Courts. And what strategies are employed to overcome them?*

Usage of empiric data is an integrate part of the market analysis, because it is only on its basis that one can make a conclusion on price and production dynamics on the relevant market, determine the most important factors influencing it, determine the approximate list of its participants, homogeneity of the market and make a conclusion on presence or absence of the dominance on the market.

To conduct market analysis the FAS Russia requests information from economic entities and state authorities according to the special powers designated to the antimonopoly authority (neglecting of such requests results in administrative liability according to the law). This information can contain:

- data of state statistics characterizing economic entities' activity;
- information received from tax, customs and other state authorities, local self-governments;
- information from private and legal persons;
- results of merchandising expertise, conclusions of the specialized organizations, as well as certain experts;
- data of state and independent information centers and services;
- data of consumers associations and producers associations;
- mass media reports;
- data of researches of the antimonopoly authority itself and of antimonopoly authorities of other states;

- data of marketing, social studies, sample interviews and questionnaires of economic entities, citizens and civil institutions;
- technical specifications and other standards;
- applications of private and legal persons to the antimonopoly authority;
- data of other sources.

As for transparency of the results of analysis, the FAS Russia is limited by the prohibition to disclose the commercial secret of the subjects to the analysis. Therefore the FAS Russia submits to courts and third parties involved in the case on violation of competition law only aggregated indicators (volume of product market, market shares of economic entities, etc).

Section B

1. *What type of system do you have for the resolution/review of competition cases (inquisitorial/adversarial, administrative/judicial)?*

Peculiarity of the FAS Russia is that it is a quasi-judicial body, i.e. the antimonopoly authority issues a decision which is compulsory for execution by the relevant economic entities. The Russian competition law clearly states the regulation under which submission of an appeal to court immediately ceases decision of the antimonopoly body for the period of its consideration in court. Thus when making a decision on case on violation of competition law the FAS Russia applies administrative method and method of getting as much information as possible according to the Russian legislation.

2. *Is economic evidence a significant and an important component in the proceedings of competition cases before the courts and the determining of sanctions?*

Yes, economic evidence is a significant and important component in the proceedings of competition cases before the courts and the determining of sanctions.

3. *For which class of anticompetitive practices (vertical restraints, horizontal restraints, abuse of dominance, and mergers) have you found economic analysis particularly necessary, useful and convincing?*

For all.

4. *What difficulties are encountered by the courts with accepting economic reasoning and empirical evidence and what strategies are employed by the courts to overcome them? Do these strategies include the possibility for the courts to make use of independent experts?*

See question 5 of the Section A.

Involvement to the market analysis of its participants (sellers, buyers, etc) as well as independent experts is extremely important, as they generally know well its peculiarity and can provide additional information – both qualitative and quantitative. However involvement of market participants is possibly only for receiving the information; its analysis and interpretation are subject to the competence of the antimonopoly authority. Although the FAS Russia orders other organization to conduct market studies, this is done only for the most interested markets for the antimonopoly authority and such analysis does not have a legal force. It should also be taken into account that the Russian antimonopoly authority as a state controlling authority has an access to the commercial secret of private companies that other organizations do not have.

5. *How have the economists been incorporated to the primary judicial forums to adjudicate competition law cases?*

See question 1 of the Section B. To consider every case on violation of competition law the antimonopoly authority creates in order established by the law the Commission on consideration of cases on competition law infringement. This Commission acts on behalf of the antimonopoly authority. It consists inter alia of the expert of the Analytical Department (usually economist). The main function of economists of the antimonopoly authority during the judicial sitting is participation in proving of presence of the violation of the competition law by the defendant and calculation of the economic damage made by the defendant.

Appendix. Case description

1. “Monopolistically high price on underground brine”

Within the frameworks of this case the signs of monopolistically high price were for the first time analyzed basing on determination given in the Article 6 of the Russian Law on protection of competition.

Short description

OJSC “Kaustik” has 100% market share on the market of underground brine. And OJSC “Chimprom” (Volgograd) applied to the antimonopoly authority to admit the price of Kaustik on underground brine as monopolistically high.

The signs of the monopolistically high price were analyzed basing on criteria set by the point 2 part 1 article 6 of the Law on protection of competition determining the monopolistically high price as the price exceeding the sum of the costs and profit necessary to produce and sell such product.

Criteria set by the point 1 part 1 article 6 of the Law on protection of competition determining the monopolistically high price as price exceeding the price formed under competition on the product market, comparable with the number of product sold during the certain period of time, with structure of buyers or sellers of the product and terms of access (hereinafter referred to as comparable product market) and set by economic entities that are not a part of group of persons with

buyers or sellers of the product and that don't occupy a dominant position on the comparable product market, could not have been applied to determine signs of the monopolistically high price, as there are no comparable product markets in the meaning of the abovementioned regulations.

As a result of the analysis of actual calculation of OJSC "Kaustik" that envisaged study of the structure of expenses of the economic entity necessary to produce underground brine there was made a conclusion that the level of shop price, formed by OKSC "Kaustik" is economically justified. At the same time it was revealed that in the calculations submitted by OJSC "Kaustik" sections of manufacturing (indirect) costs are economically unjustified, as they considerably exceed expenses necessary to produce and sell underground brine.

According to the statement of OJSC "Kaustik" in order to meet its own needs with the underground brine under achieving of the production volume on the level of the given technical capacities and to meet the needs of OJSC "Chimprom" it is necessary to set two additional boreholes in operation. Price for setting them in operation and providing the infrastructure is approximately 147,83 mln roubles. The Director General of OJSC "Kaustik" took a decision to include the investing costs on building and construction of additional boreholes into the price on brine for third parties. These boreholes were supposed to be open in the 4 quarter of 2007. However the FAS Russia didn't receive any documents proving this fact, neither did it receive any other documents with calculations of this investment costs.

That made the FAS Russia to conclude that inclusion of investing costs on building of new boreholes into the underground brine price for third parties was unjustified.

The analysis of the Kaustik's underground brine price structure showed the following:

Sale of underground brine was made with high level of profitability (ratio of profit to costs). In the analyzed period (2004-2006) the profitability reached almost 100%, in the third quarter of 2006 it made up 68,57 %.

At the same time average profitability in the chemical sector in Russia in 2005 made up 15,2%, and in January till July of 2006 it was 14,6% (Russian Statistics Agency).

Such a high profitability of OJSC "Kaustik" emerged also as a result of inclusion into the price of the above mentioned investing costs.

The FAS Russia admitted that OJSC "Kaustik" abused its dominant position and issued an instruction to eliminate its abuse and to undertake actions to promote competition: to remote from the price on the underground brine the investing costs; to notify the FAS Russia on any planning excesses in price in comparison to the average sectoral for the previous year; to conclude an agreement with OJSC "Chimprom" on supply of underground brine at the appropriate price.

2. The FAS Russia actively suppressed violation of competition law on the construction material markets. One of the cases that received much publicity was a case initiated in 2005 against OJSC “EUROCEMENT-group”.

On October 11, 2005 the FAS Russia Commission on consideration of cases on violation of competition law admitted the OJSC “EUROCEMENT-group” guilty in establishing monopolistically high price on cement.

The FAS Russia issued an instruction to OJSC “EUROCEMENT-group” to reduce by November 1, 2005 the sale price on cement by the level of fair competitive price and set in November, 2005 the weighted average sale price on cement not higher than 1361 roubles and the maximum price on general constructing cement as 1497,1 roubles for tone without VAT and railway tariff.

The trial ended by the amicable agreement (taking into consideration the social and economic effect the “EUROCEMENT-group” had in Russia) under which “EUROCEMENT-group” was fined at about 267 mln roubles and obliged to implement its 10 bln roubles investment program on comprehensive complex modernization and technical re-equipment of cement factories. Moreover “EUROCEMENT-group” committed itself to meet the requirement of the competition law, not to undertake unjustified actions on reduction and restriction of cement production without prior notification to the FAS Russia. Furthermore it was obliged to notify the FAS Russia on all the transactions as a result of which it could purchase more than 15% of shares of economic entities.

Serbia

Section A

1. *Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis:*

Commission for Protection of Competition was established in 2006 and has 12 case handlers, out of which 7 law persons and 3 economists, thus Commission's departments are not in position and do not dispose with capacities to undertake complex economic analysis.

2. *How frequently does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited:*

So far, Commission applied economic analysis only in several merger cases. Among the cases that the Commission dealt with was the case concerning merger between retail chain stores, selling primarily grocery. Economic analysis was applied to define relevant product market, or more precisely, to investigate the conduct of consumers in major Serbian towns, Another issue that was dealt with was actual relationship between trade chains and suppliers (exploitation of buyers' power).

Other case related to vertical concentration between manufacturer of raw tobacco and major tobacco producer. The analysis was again used to define relevant market i.e. whether the tobacco market may be segmented to market of lower, medium and higher class, in view of the habits of the smokers in Serbia. It was of specific significance because the tobacco producer was particularly active on the market of lower class of cigarets and the manufacturer of tobacco also produces tobacco for the same lower quality of cigaretes.

3. *Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to: market definition, vertical restraints, horizontal restraints, abuse of dominance, mergers, and what problems/challenges were encountered?*

a) Market definition

Commission applies SSNIP test and the problems that we are faced with are insufficient data for assessment of potential demand and supply of substitutability. Microeconomics in Serbia has not been developed yet which is a result of state controlled economy in the previous period.

4. *What is your experience with the use of empirical techniques: a) regression analysis, b) concentration models, c) price simulations and Monte Carlo models, d) score and probit models and e) other empirical tools?*

Commission does not have any experience with the models stated in your question.

5. *What difficulties are encountered in communicating economic reasoning and empirical evidence to: a) various parties involved in competition cases; and b) the Courts. And what strategies are employed to overcome them?*

a) As concerns this issue, disputes usually occur as concerns definition of relevant market and the parties involved usually ask for their definition to be made, which defines the market more widely.

b) As concerns the Courts, the court competent for assessing the decisions issued by Commission is Supreme Court – Administrative Dept. Our experience up to now showed that the judges dealt only with procedural matters in competition cases, while merits of the case were not looked into, that is why economic reasoning and empirical evidence were not considered.

Commission engaged independent institutions active in market analysis with the aim to define relevant market. According to the new Law which is being drafted, the court competent to deal with competition matters shall be Commercial Court. Judges of that court are specialised in the field of economic law, thus we expect that empirical evidence and economic reasoning will be the core of their interest.

Section B

1. *What type of system do you have for the resolution/review of competition cases (inquisitorial/adversarial, administrative/judicial)?*

N/A

2. *Is economic evidence a significant and an important component in the proceedings of competition cases before the courts and the determining of sanctions?*

N/A

3. *For which class of anticompetitive practices (vertical restraints, horizontal restraints, abuse of dominance, and mergers) have you found economic analysis particularly necessary, useful and convincing?*

In the course of its activities, the Commission's practice displayed the fact that economic analysis is useful and necessary in all cases of anticompetitive practice,

regardless whether it is a question of vertical restraints, horizontal restraints or abuse of dominance, as well as conditionally approved mergers.

4. *What difficulties are encountered by the courts with accepting economic reasoning and empirical evidence and what strategies are employed by the courts to overcome them? Do these strategies include the possibility for the courts to make use of independent experts?*

N/A

5. *How have the economists been incorporated to the primary judicial forums to adjudicate competition law cases?*

N/A

Seychelles

Section A

N/A

Section B

1. *What type of system do you have for the resolution/review of competition cases (inquisitorial/adversarial, administrative/judicial)?*

The cases will first be resolved by a board of Commissioners. The board of commissioners will be a part of the Fair Trading Commission under which the Competition Law will fall under. For appeal against the decision of the Commissioners there will be a tribunal system which will be headed by a magistrate.

2. *Is economic evidence a significant and an important component in the proceedings of competition cases before the courts and the determining of sanctions?*

Economic evidence will be an important component in the proceedings of competition cases.

3. *For which class of anticompetitive practices (vertical restraints, horizontal restraints, abuse of dominance, and mergers) have you found economic analysis particularly necessary, useful and convincing?*

Given that we have not yet implemented our Competition Policy, it is difficult to foresee what class of anticompetitive practices will make use of economic analysis; however, it is being proposed that economic analysis is used for all the classes.

4. *What difficulties are encountered by the courts with accepting economic reasoning and empirical evidence and what strategies are employed by the courts to overcome them? Do these strategies include the possibility for the courts to make use of independent experts?*

Not experience yet

5. *How have the economists been incorporated to the primary judicial forums to adjudicate competition law cases?*

Not experience yet

Sri Lanka

Section A

1. *Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis:*

In the absence of a clearly identified the national competition authority, Consumer Affairs Authority established under the Act N0 08 of 2003 is considered as the *de facto* national competition authority in Sri Lanka for this purpose. The Consumer Affairs Authority employs three economists and eight lawyers in the implementation of anticompetitive practices and abuse of dominant position. Functionally, the Authority combines “consumer protection” and “competition” functions within a single agency to enhance the competition mission. In achieving the common goal of consumer interest, the Authority carryout in-depth studies such as market structure, market behavior, consumer behavior, market research, capacity analysis, performance evaluation, market & price forecasting etc.

2. *How frequently does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited:*

N/A

3. *Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to: market definition, vertical restraints, horizontal restraints, abuse of dominance, mergers, and what problems/challenges were encountered?*

N/A

4. *What is your experience with the use of empirical techniques: a) regression analysis, b) concentration models, c) price simulations and Monte Carlo models, d) score and probit models and e) other empirical tools?*

- All the sector specific regulatory bodies including the Consumer Affairs Authority are empowered to investigate in to “abuse of monopoly” and anticompetitive practices which operate against “public interest”. In almost all the cases, the Agencies concerned use economic analysis.
- Main categories of anti competitive practices arise from collective behavior among firms and abuse of dominant market situation. Activities such as

refusal to supply, predatory pricing, price discrimination, distribution policy (conditional sales, exclusive supply, exclusive purchase and selective distribution), inserting non competitive clauses in contracts, vertical and horizontal restraints, limiting access to essential goods and service etc come under these broader category.

- Sri Lanka economy is small and market is not developed adequately to have effective regulatory mechanism to protect healthy competition. The present legislations deals with only abuse of dominance and anti competitive practices which operates against the “Public Interest”. The public awareness regarding the competition & laws or the existence are not adequate to bring about the expected public reaction to the competition policy in Sri Lanka.
- The Consumer affairs Authority is in the process of bringing in amendments to the existing legislation specially to deal with monopolies and mergers

5. *What difficulties are encountered in communicating economic reasoning and empirical evidence to: a) various parties involved in competition cases; and b) the Courts. And what strategies are employed to overcome them?*

N/A

Section B

N/A

Sweden

Section A

1. *Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis:*

Among the staff of the Swedish Competition Authority there are 49 lawyers (whereof 21 with court experience) and 48 economists (whereof 9 with a Ph.D.). The staff has a good capacity to undertake complex economic analysis.

External expertise can also be hired, if deemed necessary.

Prevalence of the Use of Economic Analysis

2. *How frequently does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited:*

Economic analysis is an integral part of assessing competition cases. We use economic analysis in all classes of anticompetitive practices. The economic analysis is particularly useful in merger analysis and abuse of dominance cases, but even in cartel cases we have found the economic analysis necessary.

3. *Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to: market definition, vertical restraints, horizontal restraints, abuse of dominance, mergers, and what problems/challenges were encountered?*

(This answer combines the answers to questions 3 and 4) We follow the Commission notices and guidelines as a starting point. We try to distinguish the correct theory of harm and test whether the facts of the case support the theory. In doing so, we use a wide range of different models and empirical techniques including regression analysis, and price simulations.

4. *What is your experience with the use of empirical techniques: a) regression analysis, b) concentration models, c) price simulations and Monte Carlo models, d) score and probit models and e) other empirical tools?*

Cf. Answer to question 3 above.

5. *What difficulties are encountered in communicating economic reasoning and empirical evidence to: a) various parties involved in competition cases; and b) the Courts. And what strategies are employed to overcome them?*

a) We have found it quite easy to communicate the economic analysis to the parties. They are often using economic analysis themselves and are open to economic reasoning

b) The two courts for competition law cases in Sweden have economic experts among the judges so they are open to economic reasoning and empirical evidence from our side and from the other parties.

Section B

1. *What type of system do you have for the resolution/review of competition cases (inquisitorial/adversarial, administrative/judicial)?*

Competition cases are dealt with as cases not amenable to out of court settlements. The process is characterised by an adversarial judicial review.

2. *Is economic evidence a significant and an important component in the proceedings of competition cases before the courts and the determining of sanctions?*

In competition cases economic expertise has been deemed necessary. When adjudicating such cases, both judicial instances (the Stockholm City Court, which is the court of first instance in competition cases, and the Market Court) consist of both legal and economic expertise. This is a recognition of the importance of economic analysis in competition cases.

3. *For which class of anticompetitive practices (vertical restraints, horizontal restraints, abuse of dominance, and mergers) have you found economic analysis particularly necessary, useful and convincing?*

N/A

4. *What difficulties are encountered by the courts with accepting economic reasoning and empirical evidence and what strategies are employed by the courts to overcome them? Do these strategies include the possibility for the courts to make use of independent experts?*

N/A

5. *How have the economists been incorporated to the primary judicial forums to adjudicate competition law cases?*

The Market Court consists of a chairman and a vice chairman plus five special members. The chairman, the vice chairman and one of the special members must be lawyers with experience as judges. The other special members are experts in economics.

Switzerland

Section A

1. *Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis:*

At the end of 2008, the Secretariat of the Competition Commission (hereafter: Secretariat) employed 64 members of staff (corresponding to a total of 57.9 full-time positions). Of those, 43 were specialist officers (12 economists, 31 lawyers), 11 specialist trainees (2 economists, 9 lawyers) and 10 employees in the resources and logistics service. Thus, by the end of 2008, 14 economists were employed.

With 14 economists altogether, the capacity to undertake complex economic analysis is limited. So far, such analysis has only been used for some selected cases, partly due to limited staff resources, partly due to a lack of data and partly due to a lack of necessity (see also answer to question 2).

2. *How frequently does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited:*

Basic economic analysis is frequently used, e.g. regarding the definition of the relevant market. Complex economic analysis is only used for selected cases, for various reasons. Firstly, data needed for a thorough econometric analysis is many times not available. Secondly, the Secretariat has limited personnel resources. Thirdly, the necessity to apply complex economic analysis might be less pronounced in Switzerland than in other countries. For many competition agencies, a substantial part of their empirical work is related to the efficiency defence. Whereas the U.S. and other countries use the SLC-test (SLC: substantial lessening of competition) combined with a possible efficiency defence for analysing merger cases, the Swiss law focuses on whether a merger creates or strengthens a dominant position liable to eliminate effective competition (Lcart, art. 10, Abs. 2, lit. a). This means that empirically evaluating efficiency is much less important in Switzerland than elsewhere.

Two cases for which the Secretariat applied extensive economic analysis are the following:

Firstly, in the investigation „Markt für Schlachtschweine“ (Recht und Politik des Wettbewerbs, hereafter RPW, 2004/3, pp. 674–777), the Secretariat analysed whether two of the largest meat processing companies in Switzerland, Micarna and Bell, had a dominant position in the market for the purchase of pigs for slaughter. In the process

of defining the relevant product market, the Secretariat had to decide whether various categories of pigs (with and without special labels e.g. with regards to species-appropriate husbandry of the pigs) belonged to the same market. It found that the price development of most categories were highly correlated. The Secretariat also tested for co-integration⁴⁵ and found that the prices of all four categories of pigs were co-integrated. Thus the Secretariat concluded that pigs without labels and those with labels belonged to the same market.

In contrast, the Secretariat found that the prices for pigs for slaughter were only relatively weakly correlated with prices for cattle for slaughter (oxen, cows and calves). A simple OLS-estimation⁴⁶ with the price for pigs as the left-hand-side variable and the prices for calves, cows and oxen as explanatory variables (together with a constant and seasonal dummies) showed that the coefficients regarding cows and oxen were not significant, whereas the coefficient for the price of calves was significant at the 5%-level but had only a weak influence on the price of pigs. The Secretariat also found that not all time series considered were co-integrated at degree 1. Finally, it concluded that other animals did not belong to the same relevant product market.

Secondly, the Secretariat studied the petrol market during the years 1993–2000 („Benzinmarkt Schweiz (Zeitraum 1993–2000)“, RPW 2002/1, pp. 77–96). Its aim was to analyse whether the firms active in this market coordinated their behaviour. For that, the Secretariat examined the price-level of the so-called lead-free 95 petrol for Switzerland, using the methods of the new empirical industrial organization (cf. Bresnahan, *Empirical Studies of Industries with Market Power*, *Handbook of Industrial Organization*, Vol. 2, pp. 1011–57). The empirical study estimated a so-called market power parameter, which is 0 for perfect competition and 1 for a monopoly. The estimate for this parameter (under an assumed short-run price elasticity of 0.24) was 0.18 for the market for lead-free 95 petrol in Switzerland which corresponds to Cournot-competition with 6 players of equal size. The 95%-confidence interval belonging to this estimate was between 0.042 (three players) and 0.329 (24 players). Thus the estimate signalled a competitive situation rather than coordinated behaviour.

From time to time, the Secretariat applies simple economic tests to clarify a subquestion within a current case. In the case of Heineken/Eichhof (RPW 2008/3, pp. 422–459) for example, the Secretariat analysed whether the beer consumption in Switzerland was constant by carrying out a stationary test. Every now and then, the Secretariat also uses empirical tests to back up descriptive findings, without finally publishing the empirical analysis.

Economic analysis is useful for examining both coordinated behaviour and a possible abuse of a dominant position. As mentioned before, tests are often used for answering a subquestion within a decision, e.g. for determining the relevant product market.

⁴⁵ With the method of Johansen and that of Engle and Granger.

⁴⁶ OLS: ordinary least squares.

The Secretariat takes both static and dynamic efficiency arguments into consideration,⁴⁷ but does usually not assess them quantitatively.

In the investigation “Sammelrevers 1993 für den Verkauf preisgebundener Verlagserzeugnisse in der Schweiz” (RPW 2005/2, pp. 269–311), which dealt with the fixing of retail prices of German-language books in Switzerland, the Secretariat examined whether this price fixing could be justified on grounds of economic efficiency. It carried out an extensive (descriptive) analysis on whether it would be likely that the amount or the quality of books (including the quality of service) would increase as a result of the retail price maintenance. The efficiency test showed that the positive effects claimed for the price fixing could not be proven and therefore could not justify the restraint of competition. Due to a lack of data however, the Secretariat did not apply any econometric analysis.

3. *Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to: market definition, vertical restraints, horizontal restraints, abuse of dominance, mergers, and what problems/challenges were encountered?*

- a) correlation and co-integration test (cf. Schweinemarkt, RPW, 2004/3, pp. 674–777), SSNIP-test⁴⁸
- b) –
- c) –
- d) –
- e) Concentration measures which the Secretariat uses often are the Herfindahl-Hirschman-Index (HHI) and the concentration ratio (e.g. CR2).⁴⁹ These concentration measures are easy to apply. When assessing mergers, one of the theories the Secretariat has relied on is the theory of joint dominant position.

4. *What is your experience with the use of empirical techniques: a) regression analysis, b) concentration models, c) price simulations and Monte Carlo models, d) score and probit models and e) other empirical tools?*

Overall, the Secretariat has only few experience with the use of empirical techniques. Empirical techniques:

- a) OLS (e.g. Markt für Schlachtschweine, 2004/3, pp. 674–777)
- b) frequently HHI and K2 (e.g. mergers in the retail industry sector)
- c) not done so far
- d) not done so far
- e) correlation, co-integration test

⁴⁷ According to article 5 para. 2 of the Federal Act on Cartels and Other Restraints of Competition (Cartel Act; Lcart), “An agreement is deemed to be justified on grounds of economic efficiency: a) when it is necessary in order to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally; and b) when such agreement will not in any way whatsoever allow the enterprises concerned to eliminate effective competition.”

⁴⁸ Small but Significant Non-transitory Increase in Price

⁴⁹ See e.g. mergers in the retail sector: Migros/Denner RPW 2008/1, pp. 129–212, K2: table 10, HHI: table 15; Coop/Fust RPW 2008/3, pp. 475–506, Coop/Carrefour, forthcoming in RPW 2008/4, CR2: table 6 and HHI: table 10.

5. *What difficulties are encountered in communicating economic reasoning and empirical evidence to: a) various parties involved in competition cases; and b) the Courts. And what strategies are employed to overcome them?*

The Secretariat aims to present empirical evidence as simple as possible. As mentioned before, the Competition Commission and its Secretariat have so far only seldom used (non-descriptive) empirical evidence in their decisions. Until now, they have not encountered any difficulties in communicating economic reasoning and empirical evidence.

Section B

N/A

Trinidad and Tobago

Section A

1. *Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis:*

The Trinidad and Tobago Fair Trading Commission has not yet been established. However, the proposed organizational structure of the Commission includes two investigators who may have a background in economics and one legal counsel.

2. *How frequently does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited:*

N/A

3. *Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to: market definition, vertical restraints, horizontal restraints, abuse of dominance, mergers, and what problems/challenges were encountered?*

N/A

4. *What is your experience with the use of empirical techniques: a) regression analysis, b) concentration models, c) price simulations and Monte Carlo models, d) score and probit models and e) other empirical tools?*

N/A

5. *What difficulties are encountered in communicating economic reasoning and empirical evidence to: a) various parties involved in competition cases; and b) the Courts. And what strategies are employed to overcome them?*

N/A

Section B

1. *What type of system do you have for the resolution/review of competition cases (inquisitorial/adversarial, administrative/judicial)?*

The Act provides for an administrative/judicial system for the resolution/review of competition cases.

2. *Is economic evidence a significant and an important component in the proceedings of competition cases before the courts and the determining of sanctions?*

N/A

3. *For which class of anticompetitive practices (vertical restraints, horizontal restraints, abuse of dominance, and mergers) have you found economic analysis particularly necessary, useful and convincing?*

N/A

4. *What difficulties are encountered by the courts with accepting economic reasoning and empirical evidence and what strategies are employed by the courts to overcome them? Do these strategies include the possibility for the courts to make use of independent experts?*

N/A

5. *How have the economists been incorporated to the primary judicial forums to adjudicate competition law cases?*

N/A

Tunisia

Section A

Aspects institutionnels:

1. *Prière de nous fournir des informations détaillées sur la composition de votre effectif en indiquant le nombre d'économistes et de juristes employés par les autorités chargées des questions de concurrence.*

La mise en œuvre de la politique de la concurrence en Tunisie a nécessité de nouvelles ressources humaines vu la nature des nouvelles prérogatives accordées aux autorités de la concurrence. En effet depuis le début des années 90, une direction générale chargée de la concurrence a été créée au niveau du ministère chargé du commerce. Un effectif important a été recruté graduellement entre les années 2000 et 2008 composé majoritairement de juristes et d'économistes. En effet la composition actuelle de l'effectif est 36% (81 personnes d'économistes et 38% de juristes (84) et le reste de l'effectif (58 personnes) a des spécialités diverses.

Types d'analyse économique

2. *Prière d'indiquer les théories ou modèle sur lesquels vous vous êtes appuyés pour évaluer l'existence de comportement anticoncurrentiels dans les cas suivants :*
 - a) *la définition du marché*
 - b) *les restrictions verticales*
 - c) *les restrictions horizontales*
 - d) *l'abus de position dominante*
 - e) *les fusions*

Quels problèmes avez-vous alors rencontrés ?

- a) la définition du marché : Pour définir le marché pertinent, nous nous appuyons sur :
 - la substituabilité des produits par l'analyse des élasticités des prix et l'analyse de l'offre et de la demande
 - la détermination du marché géographique
 - l'observation des évolutions des prix
 - l'estimation de la fonction de la demande
 - l'analyse du taux de marge
 - la corrélation
- b) les restrictions verticales : Après la délimitation du marché pertinent, les inspecteurs analysent les prix de vente (l'identité des prix de vente au sein d'un réseau) et le volume de vente puisque les accords se bornent à fixer, généralement, le prix ou le volume d'une transaction précise de vente ou d'achat.
 - a. les restrictions horizontales : la même démarche que les restrictions verticales, la direction de la concurrence procède par la délimitation du marché pertinent. Ensuite elle s'appuie sur l'observation des variations des prix identiques ou quasiment identiques et simultanées entre des

entreprises concurrentes et sur l'étude de la structure du marché (forte concentration, niveau élevé des barrières à l'entrée...).

L'analyse des performances commerciales peut fournir en matière de concurrence des indices de comportements suspects notamment :

- des profits anormalement bas ou anormalement élevés
- l'évolution des parts de marchés stables
-
- c) l'abus de position dominante : après la définition du marché pertinent, il est fait recours à l'analyse des prix, à l'élasticité des prix, à l'analyse de la substituabilité du côté de la demande, de l'offre ainsi que l'analyse de la position financière de l'entreprise et ses investissements.

- d) Les fusions : le contrôle des opérations de concentrations se fait à double niveau : le contrôle ex-ante et le contrôle ex-post des fusions. A cet effet, l'étude et le contrôle ex-ante des fusions se basent sur :
 - la définition du marché pertinent
 - l'observation des évolutions des prix c'est-à-dire les variations des prix d'une période donnée.
 - L'analyse des taux de marge
 - L'estimation de la fonction de la demande (l'élasticité- prix croisée des fonctions de la demande)
 - l'indice d'Herfindahl- Hirschman (IHH) qui donne une estimation global des marchés sur lesquels l'opération de concentration a un impact : $IHH = \sum_{Ni=1} (S_i)^2$; avec S_i les parts de marché de chacune des entreprises présente sur le marché et N le nombre d'entreprises présentes sur le marché.

Si IHH après fusion ≤ 1000 , pas d'examen

Si $1000 \leq IHH \leq 1800$ après fusion et ΔIHH supérieur à 100, examen.

Si $IHH \geq 1800$ et $\Delta IHH \geq 50$, examen

Cependant, il est à noter que la direction de la concurrence n'a pas encore essayé d'utiliser, les modèles économétriques (les régressions multiples, des régressions à variables qualitatives) et le modèle SNIPP (test du monopole hypothétique), pour évaluer les pratiques anticoncurrentielles. En effet la taille de l'économie nationale, la nature du tissu économique composé essentiellement de PME ne justifient pas le recours à ces méthodes sophistiquées.

3. *Quelle expérience avez-vous de l'utilisation de méthodes empiriques comme: a) les analyses de régression; b) les modèles de concentration; c) les techniques de simulation des prix et la méthode de monte-carlo; d) les méthodes et indices des probits et e) d'autres outils empiriques ?*

Avis concernant l'utilisation de l'analyse économique

L'utilisation de ces méthodes dépend de la structure du marché ainsi que de ses spécificités, la taille des entreprises impliquées dans ces affaires, l'ampleur de leur impact sur le marché concerné, ainsi que la disponibilité de l'information à long terme.

Ces méthodes nécessitent aussi que les autorités de la concurrence soient dotées d'un personnel hautement qualifié capable d'utiliser ces méthodes (création de poste de chef économiste au niveau de la commission européenne, FTC...). Par ailleurs, une formation spécifique du personnel de ces autorités est sollicité et serait d'un grand intérêt.

La nature du tissu économique tunisien qui est constitué principalement par des PME et quelques groupements ne requiert pas l'utilisation de ces méthodes qui reste assez compliquées pour de jeunes autorités.

Section B

Avis concernant l'utilisation de l'analyse économique

1. *quel type de système avez-vous mis en place pour régler ou réexaminer les affaires de concurrence (procédure inquisitoire /accusatoire, administrative/judiciaire) ?*

Bien que la loi relative à la concurrence et aux prix a accordé, à une autorité spécialisée, le droit exclusif de statuer sur les pratiques anticoncurrentielles, elle n'a pas défini de procédures spécifiques.

Ces dernières ne sont ni d'ordre pénales, ni d'ordre administratives. En effet, la littérature des articles penche vers une procédure inquisitoire notamment par :

- L'instauration de la saisine d'office.
- La séparation entre les pouvoirs de jugement et les pouvoirs d'instruction par la création d'un poste de rapporteur général chargé d'assurer la coordination, le suivi, le contrôle et la supervision des travaux des rapporteurs.
- La conduite des enquêtes sur place par les rapporteurs dans les conditions réglementaires et après autorisation du président du conseil.
- La transmission à l'issue de l'instruction d'un rapport aux contrevenants qui disposent d'un délai d'un mois pour présenter leurs mémoires.

En outre les agents de la Direction Générale de la Concurrence et des Enquêtes Economiques sont considérés comme des officiers de police judiciaire par le fait qu'il soient habilités à constater et poursuivre les infractions relatives aux pratiques anticoncurrentielles . Ayant à cet effet des prérogatives de perquisition et de verbalisation.

2. *Les données économiques constituent –elles une composante importante et significative de la procédure dans les affaires de concurrence portées devant le tribunal et de la détermination des sanctions ?*

L'instruction des affaires de concurrence est dominée par la procédure et le juridisme, la dimension économique n'est pas toujours prise en compte faute de maîtriser l'utilisation des modèles économétriques d'autant plus que les juges ont une formation strictement juridique.

Or le droit de la concurrence traite aussi des aspects économiques tels que le dommage à l'économie, intérêt du consommateur, l'accès au marché...

3. *Pour quels types de pratiques anticoncurrentielles (restrictions verticales, restrictions horizontales, abus de position dominante et fusions) l'analyse économique s'est-elle révélée particulièrement indispensable, utile et concluante ?*

L'analyse économique est utile pour tous les types de pratiques anticoncurrentielles mais elle s'avère particulièrement indispensable, et concluante pour les opérations de concentration puisqu'elle assure un contrôle préventif des fusions.

En effet, l'analyse économique peut prédire une éventuelle corrélation puis la quantifier entre une opération de fusion réalisée et une hausse de prix sur le marché pertinent, à partir de l'analyse de données passées en termes de parts de marché, des prix, de la production, de la structure...

Le but étant d'empêcher, par le biais de contrôle préventif, l'abus de positions dominantes souvent générateurs de pratiques anticoncurrentielles.

Ukraine

Section A

1. *Please provide a breakdown of the staff complement in terms of the number of economists and lawyers employed by the competition authority and comment on the staff's capacity to undertake complex economic analysis:*

Economists - 62; Lawyers - 64

2. *How frequently does your competition authority use economic analysis when assessing competition cases? Which class of anticompetitive practices have you found economic analysis to be particularly necessary and useful? Have you found economic analysis necessary and useful in the assessment of dynamic efficiency vs. static efficiency? Please attach specific case histories for each of the instances cited:*

Economic analysis is an essential element of commodity market determination, analysis of pricing in conditions of limitation or lack of competition. In addition, the legislation of Ukraine on protection of economic competition envisages the possibility of recognition of anticompetitive coordinated actions committed by business entities based on data of the economic analysis.

In particular, in determination of commodity markets, analysis of consumer capability is essential. It is easy to switch from consumption of one commodity to another. This, in turn, requires determination of consumer characteristics of the goods, conditions of consumption, conditions of sale, prices; in some cases, there is a need for analysis of indicators of demand elasticity, use of econometric methods (SNIPP-test and the like). In some cases, this analysis goes beyond economic analysis as such and requires involvement of data of other disciplines. For example, during poultry market research based on differences in chemical properties, different biological effects of consumption of frozen and refrigerated poultry, the turnover spheres of these two types of products were defined as separate markets. During the research of sintered ore and pellet markets on the basis of the data provided by metallurgy experts, it was determined that, since both types of products are formed in the same technological production chain, used also in the same production chain, and are not significantly different in price, they form a single market.

Another aspect of commodity markets determination requires establishing a minimum territory, outside of which, from consumer's perspective, purchase of a certain commodity is impossible or impractical. This, in turn, requires analysis of capabilities of territorial movement of supply and demand, any obstacles to such movement, including economic (territorial difference in price, cost of production and transportation, etc.). In some cases, it is expedient to determine the degree of market openness for interregional (international) trade. For example, in determining the commodity market of services of grain storage in elevators, it was determined that, provided the elevator is located at a distance over 40 kilometers from the grain

producer, the transport costs in ordinary conditions begin to exceed 10 percent of the cost of grain, which makes its storage outside 40 kilometers radius impractical. In this connection, the territory of turnover of the respective goods (services) was defined within a radius of 40 kilometers from the place of production of grain for storage.

During the determination of commodity market and the situation of business entities therein, the analysis of entry barriers to commodity markets is required. This, in turn, requires studying such circumstances as amount of costs of production process distribution, gaining access to necessary infrastructure, acquisition of production means, raw materials, labor, and necessary intellectual property rights, non-current costs, presence or absence of economies of scale effect, cumulative improvement of quality, saving on the range, network effect etc. Evaluation of presence and height of barriers to enter a commodity market in some cases involves determination of the rules of entering a new industry for new business and establishment inside it. For example, during paper bags market research, it was determined that the cost of purchasing and installing a new paper bags production line can be compensated with profits from the goods sale in the time, for which in normal conditions a bank loan in the required amount is provided. Moreover, there are about 100 major manufacturers of paper bags in the world, and more than 900 smaller ones, there are no obstacles to paper bags import into Ukraine, transportation costs are low. Foreign company “M”, which started to sell its goods in Ukraine, gained a market share of about 10 percent in two years. Based on this, a conclusion was made about the absence of considerable economic barriers to enter the paper bags market.

Determination of a market is made when considering any cases of monopoly (dominant) position abuse and any allegations of business entities concentration. Thus, during 2007-2008, the above means of economic analysis were used by the bodies of the Antimonopoly Committee of Ukraine more than 2.5 thousand times.

The legislation of Ukraine prohibits business entities that hold a monopoly (dominant) position in commodity markets to set such purchasing or selling prices of goods, which would be impossible to be set in the conditions of substantial competition in market. Accordingly, to prove a crime of such nature, it is necessary first of all to determine the pricing model that would exist in the conditions of considerable competition in the market, secondly, to compare this model with the actual findings and, thirdly, to explain the differences, if any. The most difficult part is determination of a competitive pricing model. It may be carried out in two basic ways.

The first way is comparing the actual price for a product that exists in the market with signs of dominance, to the price of the same (or similar) product in a competitive market. For example, the company “L” sold certain kinds of oil both in the domestic market of Ukraine, where it held a dominant position, and in foreign markets, where it experienced significant competition.

Thus, the price in the domestic market at that moment 15-20 percent exceeded the price on the foreign market. The analysis of cost, income level, and other factors that influence the price showed that the price of external (competitive) market was not undervalued. The analysis did neither reveal any factors that would condition establishment of a higher price of the goods in the domestic market. Accordingly, the price established by the company “L” for the goods sold in the domestic market,

which is characterized by a significant limitation of competition, was determined as a price that would be impossible to establish under substantial competition in the market. However, cases when an economic entity sells a product in both competitive and monopolized markets are fairly rare. Therefore, in most cases, there is a need to use the elements of price modeling, which provides, inter alia, the analysis of production costs (sales costs) in terms of their necessity and comparison to similar costs related to goods sold in competitive markets. For example, business entity “X” performs assessment of real estate necessary for its state registration while holding a monopoly position in the relevant market. Analyzing the tariff for this work established by the company, it was revealed that time outlays, on the basis of which the tariff was calculated, were several times higher compared to the actual outlays. In addition, the tariff implied charging consumers for certain types of work that were not performed at all. Assuming that, in competition, each seller seeks to minimize its costs, the pricing model, which includes costs that were not actually incurred, was identified as impossible under substantial competition in the market, and the price established based on this model as the price that would be impossible to establish under substantial competition in the market.

Analysis of profitability (return) level is also possible, but its application is difficult due to the complexity of determining the objective criteria of fair determination of this index. In general, during 2008, pricing analysis of business entities that hold a monopoly (dominant) position was performed by the bodies of the Antimonopoly Committee of Ukraine approximately 280 times.

Regarding anticompetitive coordinated actions of business entities, in the absence of direct evidence of collusion between competitors, the legislation of Ukraine allows recognizing actions (omission) in a commodity market that led or may lead to prevention, elimination, or limitation of competition as anticompetitive coordinated actions, if the analysis of the situation on the market goods disfigures the presence of objective reasons for such actions (omission). This rule usually applies in consideration of cases related to signs of anticompetitive coordinated actions of business entities in reference to price. Its application requires, inter alia, the analysis of supply and demand dynamics, the ratio of prices and sales volume dynamics. For example, five business entities, which sell light petroleum products via petrol stations in the city of D., simultaneously increased price of their goods to the same level.

As the analysis revealed, neither demand nor supply changed at the time of the price increase; neither did the purchasing price of oil products or other costs associated with their sale change. At the same time, the actual cost per unit of goods for all five vendors was different. Furthermore, after a certain period of time after the price increase, the oil sales began to decline for two business entities, but they did not lower their price to restore them, despite having this ability. The analysis by a body of the Antimonopoly Committee of Ukraine revealed the presence of anticompetitive coordinated actions of the business entities. In 2008, the Antimonopoly Committee of Ukraine applied the rule that provides for recognition of anticompetitive coordinated actions of business entities based on economic analysis over 100 times.

3. *Which economic theories/models have you relied on when assessing anticompetitive behaviour with regard to: market definition, vertical restraints, horizontal restraints, abuse of dominance, mergers, and what problems/challenges were encountered?*

In the legislation of Ukraine on protection of economic competition and working practice of the Antimonopoly Committee of Ukraine, a commodity market is defined as a sphere of turnover of goods (exchangeable goods), in which, for a certain period and within a certain area, there is supply and demand. The determination of commodity market comprises mainly determination of commodity limits, territorial (geographical) boundaries of the market, barriers to entry and exit, market shares of separate business entities, indicators of market concentration.

In the law enforcement practices of the AMCU, vertical limitations are considered in two aspects: first, as certain actions (omission) of an economic entity that holds monopoly (dominant) position in a particular commodity market, which have or may have an impact on markets, vertically compatible with those, in which this entity occupies monopoly (dominant) position, that would be impossible in the absence of such a situation, and secondly, as a coordinated behavior of business entities, operating in a specific market, which leads or may lead to prevention, elimination, or limitation of competition in the other, vertically compatible commodity market.

Horizontal limitations are considered in practice in law enforcement practices of AMCU as unilateral use by an entity of its market power against its competitors, or coordinated behavior of business entities (competitors) that has or may have the consequence of prevention, elimination or limitation of competition in the commodity market, in which they compete.

According to the concept envisaged by the competition legislation of Ukraine, the abuse of monopoly (dominant) position partially includes by both vertical and horizontal and defined as action or inaction of an entity that occupies monopoly (dominant) position in the market, which led or may lead to the prevention, elimination or limitation of competition or infringement of interests of consumers or business entities, and would be impossible under considerable competition in the market.

Exercising control over concentration of business entities, including mergers and acquisitions, AMCU analyzes their consequences in terms of presence or absence of monopolization of markets or considerable limitation of competition in them. For this purpose, it takes into account, in particular, changes in market concentration, the possibility of emergence of any barriers to enter the market (exit the market), vertical limitations, horizontal coordinating effects.

If such consequences are possible, the Antimonopoly Committee cannot permit such concentration. However, a concentration that was not allowed by the Antimonopoly Committee as leading to monopolization or considerable limitation of competition in the market, may be allow by the Cabinet of Ministers of Ukraine, if the positive effect of concentration on the public interest prevails over the negative effects of limitation of competition, and such limitations are necessary to achieve the objective of concentration and not pose any threat to the system of market economy.

4. *What is your experience with the use of empirical techniques: a) regression analysis, b) concentration models, c) price simulations and Monte Carlo models, d) score and probit models and e) other empirical tools?*

The main problems arising during the application of certain economic theories (models), including the said mathematical methods (such as regression analysis, Monte Carlo, cause models and the like) are:

- the need to prove that these theoretical provisions relate to the legal notions enshrined in the legislation;
- the need to adapt these models to specific conditions or other commodity markets and circumstances that appear in them;
- absence or deficiency of evidence necessary to use the tools provided by these models;
- complexity of appropriate analytical tools, which makes its practical use difficult.

5. *What difficulties are encountered in communicating economic reasoning and empirical evidence to: a) various parties involved in competition cases; and b) the Courts. And what strategies are employed to overcome them?*

Defendants involved in competition cases and, in many cases, courts, consider economic analysis data, especially interpretations of events based on economic theory, only as additional non-self-sustained evidence, as provisions on implementation of economic analysis are not enshrined in legislative rules.

Therefore, wider use of data obtained using the methods of economic analysis requires consolidation of the relevant provisions in the legislation.

Section B

Fact finding in respect of a business entity's committing violation of the legislation for protection of economic competition usually requires market investigations.

In accordance with Article 7 of the Law of Ukraine «On Antimonopoly Committee of Ukraine», in particular, determination of the product market borders and business entities' position on the market by any other governmental bodies (including courts) except the Committee is not allowed.

Taking into consideration this fact, there are only individual cases, when courts (subject to absence of resolutions of the Committee's bodies) settle disputes between business entities based on the competition legislation. Mostly, this concerns settlement of disputes related to unfair competition.

The standpoint of the Supreme Business Court of Ukraine supported by the Committee is the following:

«in the course resolving the dispute in the case, the circumstances of which are connected with determination of the product market borders and/or the monopoly condition of the business entity therein, the Business court shall not again determine such borders and/or monopoly condition, after their determination by the Antimonopoly Committee of Ukraine, thus undertaking the obligations of the aforesaid body, but shall verify the compliance of the related resolution of the Antimonopoly Committee of Ukraine with the requirements of the legislation in effect».

Court practices in cases of invalidation of resolutions of the Committee's bodies on violations as provided for by part 3 of Article 6 of the Law of Ukraine «On protection of economic competition», when the fact of anti-competitive conspiracy can be proved only based on indirect evidence of such violation (economic analysis), have not been formed yet.

Uruguay

Sección A

1. *Sírvanse proporcionar un desglose de la plantilla de economistas y juristas empleados por el organismo encargado de la competencia, e informar sobre la capacidad de esos funcionarios para realizar análisis económicos complejos.*

Existe un economista y un abogado en el tema.

2. *¿Con qué frecuencia recurre el organismo encargado de la competencia al análisis económico en el examen de casos de competencia? ¿Para qué clases de prácticas anticompetitivas se ha determinado que el análisis económico es más necesario y útil? ¿Se considera que e análisis económico es necesario y útil para evaluar la eficiencia dinámica en comparación con la eficiencia estática? Sírvanse dar ejemplos concretos de todos los casos mencionados.*

Siempre se utiliza el análisis económico. En caso de que existan datos se pueden realizar análisis para la determinación del mercado relevante.

Ninguna en particular.

Siempre está presente.

3. *Sírvanse indicar qué teorías o modelos económicos han servido de base para determinar la existencia de conductas anticompetitivas con respecto a lo siguiente: a) definición de mercado, b) restricciones verticales, c) restricciones horizontales, d) abuso de posición de dominio, e) fusiones*

No queda clara la pregunta, pero intentaré una respuesta.

- a) Para la definición de mercado relevante se utiliza información cualitativa. Si es posible, hay información disponible, test de precios.
- b) Para las restricciones verticales, se estudia los efectos exclusorios y las posibles eficiencias de las mismas (en términos de inversiones específicas o doble marginalización)
- c) Si hay un cartel se sanciona.
- d) Se estudia la posición dominante y las posibles eficiencias.
- e) Todavía no se han estudiado fusiones.

Los principales desafíos están asociados a obtener la necesaria información.

4. *Sírvase indicar qué ha observado en el uso las siguientes técnicas empíricas: a) análisis de regresión; b) modelos de concentración; e) simulaciones de precios y modelos de Monte Carlo; d) modelos de puntuación (score) y de probit; y e) otras herramientas empíricas.*

No se usó ninguna de las mencionadas técnicas, con excepción de test de precios para determinar mercados relevantes.

5. *Sírvanse indicar qué elementos dificultan la transmisión de razonamientos de tipo económico y pruebas empíricas a los siguientes destinatarios: a) Las partes involucradas en los casos de competencia; b) Los tribunales. Sírvanse indicar las estrategias utilizadas para sortear esas dificultades.*

Respecto de a) se busca que las conclusiones sean en términos sencillos y llanos. Respecto de b), si bien es igual que en el caso anterior, los tribunales superiores no se interesan ni comprenden los análisis económicos complejos, simplemente se detienen en las cuestiones formales.

Sección B

1. *¿Qué tipo de sistema se utiliza para resolver y examinar los casos relativos a cuestiones de competencia (procedimiento inquisitivo o acusatorio, administrativo o judicial)?*

A nivel de solución es inquisitorial y administrativo, a nivel de revisión es adversarial y judicial.

2. *¿Las conclusiones económicas son un componente significativo e importante tanto de los procesos judiciales sobre la competencia como de la imposición de sanciones?*

Si en los procedimientos, no a nivel de revisión administrativa y judicial.

3. *¿Para qué clase de prácticas anticompetitivas (restricciones verticales u horizontales, abuso de posición de dominio y fusiones) se ha determinado que el análisis económico resulta más necesario, útil y convincente?*

En ninguno en particular.

4. *¿Qué problemas se les plantean a los tribunales cuando se trata de aceptar los razonamientos de tipo económico y las pruebas empíricas, y qué estrategias emplean para solucionarlos? ¿Se contempla en esas estrategias la posibilidad de que los tribunales recurran a expertos independientes?*

El análisis económico se utiliza meramente en la tramitación de los casos. Cuando los casos se revisan, se basan sustantivamente en cuestiones formales y legales donde no hay en lo absoluto énfasis ni análisis en lo económico.

5. ¿En qué medida se ha permitido a los economistas participar en los foros judiciales más importantes para emitir sentencia en los casos relacionados con el derecho de la competencia?

Siempre se trabajó con economistas.

USA

Section A

Our answer to Question 1 of Section A is that the Department of Justice's Antitrust Division currently employs 782 persons, including 345 attorneys and 60 economists. The comparable figures for the Federal Trade Commission are 1117, including 575 attorneys and 74 economists. Of the FTC's attorneys and economists, approximately 232 attorneys and 58 economists are primarily assigned to work on competition matters.⁵⁰ Both agencies' staffs are fully capable of undertaking and employing complex economic analysis where it is required. It should be noted that not all antitrust cases call for complex economic analysis, and especially not per se illegal or "hard core cartel" cases, where a negative economic impact is presumed from the nature of the agreements concerned.

Our answers to Questions 2 through 5 may be found in a paper which the United States submitted to the OECD's Competition Committee last year – "Techniques for Presenting Complex Economic Analysis to Judges," DAF/COMP/WP3/SD(2008)27, 11 February 2008. A copy of that paper is attached.

Section B

The United States is not providing a response to Section B, as it is neither appropriate nor feasible to request our judiciary to answer these questions. We are providing a general response to Section A, however.

⁵⁰ The remainder are assigned to work on consumer protection matters or work in functions that do not directly relate to either competition or consumer protection.