THE PRACTICE OF EFFICIENCY DEFENSE IN ANTITRUST CASES: A COMPARISON OF BRICS AND EUROPEAN CASES

EDUARDO PONTUAL RIBEIRO,

Federal University of Rio de Janeiro (Rio de Janeiro, Brazil),

SVETLANA GOLOVANOVA,

National Research University Higher School of Economics
(Nizhny Novgorod, Russia)

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In non-merger antitrust cases efficiencies should play a significant role when authorities decide on cases as many potentially anticompetitive practices may have pro-competition effects, according to economic theory. In many jurisdictions rule of reason or effect based legal standard is claimed to be the policy adopted according to the own authorities. For such legal standards, considering efficiencies is part of the standard analysis protocol. We review the practice of efficiency defense in antitrust cases in selected BRICS and European countries. The case study shows that efficiencies are considered in rulings less often than expected. Similar arguments are used across countries, suggesting a common underlying economic analysis across jurisdictions that may have different legal institutions. We have employed the cross-country comparison based on Brazil, Russia, India, and South Africa cases. We also summarize the main reasons for efficiencies analysis not to be able to reverse the concluded anticompetitive effect from a business practice.

Keywords: competition law enforcement; efficiency defense; anticompetitive agreements; case study; Brazil, Russia, India, and South Africa.

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Introduction

Most competition laws across jurisdictions point that often antitrust cases should be evaluated considering the capacity to generate (potential) effects or that potential anticompetitive harm should be balanced with potential competitive benefits from the business conduct. The conduct could lead to a more efficient outcome, as understood in economic welfare analysis.[1]

Such efficiencies claims are standard in defendants' arguments in antitrust proceedings (as well as merger cases). The relevance of efficiencies arguments in competition policy practice may be far from such "rule of reason" (U.S. analysis) or "effects based" (EU analysis) analysis in non-cartel cases. There may be presumptions that lead to *per se* or object-based conclusions of illegality of certain conducts. Efficiencies may have such a high burden of proof that they are not even effectively considered by the authority. Katsoulacos and Makri (2020)[2] show that few convicted cases by the European Competition Authority have a detailed analysis of efficiencies. Katsoulacos et al. (2021)[3] confirm the conclusion for the Greek, French and Russian Competition authorities. Golovanova et al. (2022)[4] paint a similar picture for BRIS countries (Brazil, Russia, India, and South Africa).

The few cases where efficiencies have been fully considered by the competition authority across jurisdictions may attract attention to investigate whether the arguments were the same or not. It is known that international institutions as the

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1 Organisation for Economic Co-operation and Development (OECD), *The Role of Efficiency Claims in Antitrust Proceedings* (2012) (May 26, 2023), available at https://www.oecd.org/competition/EfficiencyClaims2012.pdf.

2 Yannis Katsoulacos & Galateia Makri, *The Role of Economics and the Type of Legal Standards in Antitrust Enforcement by the EC: An Empirical Investigation*, 9(3) J. Antitrust Enforc. 457 (2021).

3 Yannis Katsoulacos et al., *Comparing the Role of Economics/Effects-Based in Antitrust Enforcement and its Relation to the Judicial Review in the EC to Other Countries*, 12(2) J. Eur. Compet. L. Prac. 122 (2021).

4 Svetlana Golovanova et al., Testing the convergence of legal standards in antitrust investigations in BRICS (2022), presentation delivered at the CRESSE conference, Crete, Greece, 1 July 2022.

OECD,[5] and the International Competition Network strive to disseminate best practices or guidance in the tools and economic reasoning for analyzing cases.[6] At the same time, the underlying economic theory provides unifying framework for analysis.[7]

In this paper we review the practice of efficiencies arguments in cases on anticompetitive agreements using case study across different jurisdictions, namely, the EU, the UK, and BRIS countries (Brazil, Russia, India, and South Africa). The former are mature jurisdictions from high income countries, while the latter are younger jurisdictions, regarding the implementation of modern competition law.

Interestingly, the international discussion of efficiency arguments in the analysis of abuse of dominance, conducts or agreements appears to be foreshadowed by merger efficiencies analysis. While there are discussions of *per se* legal presumptions of some business conducts (as discussed in Ahlborn et al., 2004,[8] e.g.), the actual examples of efficiencies arguments are not extensive.[9]

Previous analysis of legal standards[10] indicated that efficiency analysis in cases on horizontal agreements and exclusionary abuse of dominance in cases where anticompetitive behavior was found is not frequent. The jurisdictions differ in the frequency that efficiency arguments are considered in cases. Overall, it is rarer in BRIS countries compared to the European countries.

We select cases on vertical restraints and horizontal agreements to gain knowledge from valid efficiencies arguments in conduct cases. Our analysis limits itself to vertical and horizontal agreements to allow better comparison of arguments. The analysis starts from convicted cases as non-convicted or cases that ended in cease-and-desist agreements may have a limited analysis of efficiencies. We do

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5 The most recent discussion of "Economic analysis and evidence in abuse cases" in December 2021 had contributions from over 20 countries (May 26, 2023), available at https://www.oecd.org/daf/competition/economic-analysis-and-evidence-in-abuse-cases.htm.

6 For an example of the ICN, take the Vertical Restraints report (May 26, 2023), available at https://internationalcompetitionnetwork.org/wp-content/uploads/2019/05/UCWG-2019-Vertical-Restraints-Project.pdf.

7 For example, Massimo Motta's *Competition Policy* book has been translated into Spanish, Chinese, Portuguese, Italian and Hungaria (May 26, 2023), available at https://sites.google.com/site/massimomottawebpage/short-cv.

8 Christian Ahlborn et al., *The Antitrust Economics of Tying: A Farewell to Per Se Illegality*, 49(1-2) Antitrust Bull. 287 (2004).

9 We take as illustrative the discussions in one of the international forums. In many of the countries contributions to roundtables by the OCDE, focus is on mergers, and less so on analysis of conducts and agreements, as may be seen in OECD, *Competition Policy and Efficiency Claims in Horizontal Agreements* (1995) (May 26, 2023), available at https://www.oecd.org/daf/competition/2379526.pdf; OECD, *The Role of Efficiency Claims in Antitrust Proceedings* (2012) (May 26, 2023), available at https://www.oecd.org/competition/EfficiencyClaims2012.pdf; OECD, *Safe Harbours and Legal Presumptions in Competition Law* (2017) (May 26, 2023), available at https://www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm.

10 Katsoulacos & Makri 2020; Katsoulacos et al. 2021; Golovanova et al. 2022.

not provide a broad review of all cases with efficiencies as we focus on detailed arguments presented in each case. This may be more helpful to antitrust practitioners given that broad overviews are available, as cited above.

The paper is organized as follows. The first section presents the place of efficiency analysis in the logic of antitrust investigation and briefly overviews the related norms of the selected jurisdictions' competition laws. The second section provides the case summaries. The last section gathers concluding comments.

1. Comparative Treatment of Efficiency Effects

Legal standards may be interpreted as the extent of economic analysis necessary to prove a violation of competition law. Legal standards may be understood as the evidentiary evidence level or the decision-making process to reach a verdict in antitrust cases.

There are two extremes for legal standards, broadly speaking. *Per se* (or object-based approach) means that some conduct is presumed to contradict requirements of the competition law and there is no need to prove negative effects on the market and agents of the market. A jurisdiction competition law may state that such presumption exists, while in other jurisdictions, case law may conclude that the chance of no anticompetitive effect is extremely unlikely. The presumption is grounded on previous analysis.

The other extreme is a full effect-based approach. This requires that actual or potential anticompetitive effects (under the welfare standard adopted in the competition law) are proven. For the effects to be confirmed from the business practice, the application of all the following screens would be required,[11] in addition to characterizing that the practice existed:

- Market analysis for the possibility of anticompetitive effects;
- Competition restriction effects;
- Theory of harm from the anticompetitive effect to consumers;
- Efficiency, or welfare enhancing, effects from the conduct;
- Balancing of competition restriction and efficiency effects.

The legal framework in a jurisdiction may allow the competition authority to stop at any stage of the analysis, with the use of presumptions to conclude the analysis. This depends on the adopted legal standard and specifics of each case. As we shall see below, the efficiency step is motivated by defendants' arguments, with a burden of proof shift from the authority to the parties.

Violations of competition law can be divided into 2 main groups: agreements that restrict competition (horizontal or vertical) and abuse of dominance. In Tables 1

[11] Yannis Katsoulacos, *On the Concepts of Legal Standards and Substantive Standards (and How the Latter Influences the Choice of the Former)*, 7(3) J. Antitrust Enforc. 365 (2019); Yannis Katsoulacos, *Legal and Substantive Standards in Competition Law Enforcement: Relationships and Jurisdictional Variations*, 68(2) Anali Pravnog fakulteta u Beogradu 7 (2020).

and 2 we present norms of competition laws related to efficiency analysis in selected jurisdictions: EU, UK and four of five BRICS countries (Brazil, Russia, India, and South Africa). In most countries except Brazil, there are specific sections of competition law that deal with abuse of dominance and with agreements.

As of agreements, in the competition laws presented of the analyzed jurisdictions there are specific norms that point that efficiency effects should be taken into consideration by a competition authority when deciding on the case.

The general meaning is the same. Anticompetitive agreements are prohibited. But some exceptions are possible if there may be effects that either shelter consumers from welfare harm or generate other benefits to the economy, i.e. if business practice contributes to improving production/distribution, or supports technical or economic progress.

In South Africa the list and the wording are a bit different with the focus on export promotion, support to small and medium businesses, again growth and development and employment, with no requirement that consumers directly benefit from it.

Table 1: **Exceptions for antitrust purposes: agreements**

EU, **UK**: Art. 101(3) of the TFEU	Improving the production or distribution of goods or contribute to promoting technical or economic progress
UK: Section 9(1) of the Competition Act (1998)	(i) improving production or distribution, or (ii) promoting technical or economic progress
Brazil: par. 6, art. 88, Law 12.529/2011.	(From mergers) increase productivity or quality and innovations, if passed on to consumers
Russia: Art. 13 of the Law on Protection of Competition (2006)	improving the production, sale of goods or stimulating technical, economic progress or increasing the competitiveness of Russian-made goods on the world commodity market
India: Art. 19(3)(f) of the Competition act (2002)	Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services
South Africa: Art. 10(3) (b) of the Competition act (1998)	1998: (i) maintenance or promotion of exports; (ii) promotion of the effective entry into, participation in or expansion within a market by small and medium businesses…; (iii) change in productive capacity necessary to stop decline in an industry; (iv) the economic development, growth, transformation or stability of any industry designated by the Minister… 2018: (v) competitiveness and efficiency gains that promote employment or industrial expansion

In case of abuse of dominance, the situation is a bit different. The norms of competition laws in Europe and the UK do not contain any exceptions related to efficiencies for abuses of dominance. In Russia, Brazil and South Africa the norms are the same with the ones for agreements. However, in Russia there is a precise list of conducts for which such analysis is applicable. Lastly, in India the list of efficiencies for abuse of dominance cases is different from the one for agreements. It is stated that the business practice should contribute to relative advantages and thus to economic development.

Table 2: **Exceptions for antitrust purposes: abuse of dominance**

EU, UK: Art. 102 of the TFEU	No exemptions
UK: Section 9(1) of the Competition Act (1998)	No exemptions
Brazil: par. 6, art. 88, Law 12.529/2011.	(from mergers) increase productivity or quality and innovations, if passed on to consumers
Russia: Art. 13 of the Law on Protection of Competition (2006)	Improving the production, sale of goods or stimulating technical, economic progress or increasing the competitiveness of Russian-made goods on the world commodity market
India: Art. 19(4)(l) of the Competition act (2002)	Relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition
South Africa: Art. 10(3)(b) of the Competition act (1998)	1998: (i) maintenance or promotion of exports; (ii) promotion of the effective entry into, participation in or expansion within a market by small and medium businesses…; (iii) change in productive capacity necessary to stop decline in an industry; (iv) the economic development, growth, transformation or stability of any industry designated by the Minister… 2018: (v) competitiveness and efficiency gains that promote employment or industrial expansion

It is worth saying that the practice of antitrust enforcement might differ from what follows from the norms. For example, O'Donohue and Padilla (2020)[12] show that investigations of abuse of dominance in Europe and UK may include efficiency analysis "under objective justifications."

Several criteria are to be satisfied to provide an exception to a particular anticompetitive business practice. They are explicitly formulated in European and UK competition laws. Something similar can be found in other countries.[13]

• *Improvement/Promotion Criterion* means that it is necessary to provide evidence on the efficiency effects.

• *Indispensability Criterion* means that it is important to prove that the efficiencies are the result of the business practice under consideration and could not be achieved without it. We can find such explicit norms in competition laws in Europe, UK and Brazil (for mergers).

• *Consumer Benefit Criterion* means that it is required to prove that consumers receive a fair share of the resulting benefit. This is actually related to the last screen of analysis, which is balancing of positive and negative effects. Such norms are present in the competition laws in Europe, UK, Russia and Brazil.

• *No Elimination of Competition Criterion* is the requirement for anticompetitive effect to be limited so that not to affect a substantial part of the products in question.

It is stated in the laws in all the countries that the burden of proof to justify efficiency effects is on the violator side. Companies are allowed to provide arguments to justify their practice that restricts competition. In case they do, the competition authority should consider and assess the arguments.

The likelihood that the decision making by the authority reaches the stage that efficiencies are considered varies depending on the conduct (*see* Table 3).

Table 3: **Legal standards by conducts**

Group of conducts	**Conducts**	**Competition restriction effect**	**Legal standards (written law)**
Horizontal agreements	(1) Cartels (market sharing, price fixing, bid rigging…) (2) Concerted practice	(1) Presumed (2) To be proved (effect-based)	(1) *Per se* (2) Effect based

[12] Robert O'Donoghue & Jorge Padilla, *The Law and Economics of Article 102 TFEU* (3rd ed. 2020).

[13] For the case of Brazil for example, the Compliance Guidelines summarizes the case law and suggests that indispensability (restrain is required to generate or sustain the efficiency) and reasonableness (there are no other means to achieve the same goals) criteria are required for the potential lawfulness of conducts.

Vertical agreements	(1) Vertical exclusionary agreements (2) RPM	To be proved (effect-based)	Effect based
Abuse of dominance	(1) Exploitative practices (unfair price, price discrimination) (2) Exclusionary practices (boycott, tying, non-price discrimination…)	(1) Presumed (2) Mix	(1) *Per se* ** (2) Mix

Source: Avdasheva et al. 2020.[14] Note: Mix – some conducts may be effects based while others may be *per se*, depending on the jurisdiction. ** The Brazilian competition authority (CADE) has not accepted cases on exploitative practices such as excessive prices and price discrimination, if unrelated to other practices, such as exclusion[15]. *See, e.g.*, Ribeiro & Mattos (2018).

Some types of conduct are presumed to have strong anticompetitive effect in all jurisdictions. Cartels are a prime example. In the presence of direct evidence of the conduct the harm to competition is not to be proved (object-based approach). In other words, it is very unlikely to meet efficiency analysis in antitrust investigations of market sharing, price fixing, bid rigging. In some jurisdictions companies are not even allowed to provide evidence justifying this business practice as "such practices cannot be justified." Abuses of dominance are also often *per se* illegal, which means that anticompetitive effects of presumed to be stronger than possible efficiency effects. This minimizes the chance of application of an effect-based approach. However, there are exceptions.

On the other hand, the impact of vertical agreements on social or consumer welfare is not obvious.[16] Both antitrust and not antitrust explanations of such business practices are possible. This is well recognized in different jurisdictions that mostly apply effect-based approach investigating such cases.

[14] Svetlana Avdasheva et al., *The Contribution of BRICS to the International Competition Policy Regime*, in Leonid M. Grigoryev & Adrian Pabst (eds.). Global Governance in Transformation Challenges for International Cooperation 241 (2020).

[15] *See, e.g.*, Eduardo P. Ribeiro & Cesar Mattos, *The Brazilian Experience with Excessive Pricing Cases: Hello, Goodbye*, in Yannis Katsoulacos & Frederic Jenny (eds.), Excessive Pricing and Competition Law Enforcement 173 (2018)

[16] Massimo Motta, *Competition Policy* (2004).

2. Efficiency Analysis in Antitrust Investigations: Case Studies

In our study, we focus on infringement decisions. This means that efficiency effects were considered, but found not enough to compensate harm from restriction of competition.

The case selection criteria pose a trade-off to researchers. On the one hand, in infringement decisions efficiencies may be weak so that the anticompetitive harm evaluation is not reversed by efficiencies. On the other hand, most closed cases without infringements may not reach the efficiency analysis stage, as they may lack material evidence that the practice took place or the conduct does not have potential for anticompetitive effect. Other cases that may have agreements may be reviewed in a superficial or incomplete way. Often the motivation for an agreement between the party and the competition authority is exactly a shorter investigation with not all elements for conviction, such as efficiencies, investigated. This is motivated by convenience and efficiency of competition policy (costs *vs* benefits of the investigation).

The case studies we present are selected from information gathered reading cases. The infringement decisions were read, and the legal standard characteristics based on the above steps were analyzed. For those cases where efficiencies were significantly considered by the competition authority in the decision, we selected some for the case study below.

2.1. The European Practice

The EU practice of efficiency analysis in antitrust cases has been reviewed in Katsoulacos and Makri (2020) and Katsoulacos et al. (2021). The main conclusion that arises from their analysis is that instances when efficiencies are considered in detail are actually few, even excluding horizontal agreements, where the analysis tends to be under object-based standard.

Below we provide details on efficiency analysis in two cases decided by the EC and CMA, for vertical agreements and concerted practice. These jurisdictions are chosen as they influence significantly the competition policy practice in other jurisdictions.[17] The most recent cases are chosen for the analysis.

EC: Case AT. 40208 – vertical agreement

This is the case, brought against the International Skating Union (ISU). This is an international sport federation recognized by the International Olympic Committee as the body that manages figure skating and speed skating on ice in the world. ISU controls the organization of important international speed skating events, such as

[17] The influence of European competition policy in the rest of the world has been argued by Anu Bradford et al., *The Global Dominance of European Competition Law over American Antitrust Law*, 16(4) J. Empirical Legal Stud. 731 (2019).

the European and World Championships, as well as access to the Winter Olympic Games.

Under so-named *eligibility rules* adopted by the organization, speed skaters were not allowed to participate in events that are not authorized by the Union or a local association/federation that is a member of the Union. Otherwise, they would be subject to sanctions ranging from a warning to a lifetime ineligibility. This would basically ban the athlete from the sport as it would bar her participating in events organized by the union, including the Olympic Games. Under the ISU athlete eligibility rules, the organizers of competing sport events, not authorized by, or possibly competing with the Union, met difficulties attracting skaters. The athletes did not want to take a risk of becoming ineligible.

The Commission's point of view was that restriction of competition through authorization of sport events allowed the ISU not to let third parties to commercially exploit speed skating events by selling of tickets, media and sponsoring rights. What is important here is that the criteria for the authorization were found unclear and voluntary.

ISU provided several efficiency arguments aimed to justify its practice, explaining the benefits from authorization (Table 4).

Table 4: **Efficiency arguments in the case**

Arguments of the violator(s)	**Response of the Competition authority**
• One-stop-shop contributes to improving the production or distribution of goods or to promoting technical and economic progress • It also ensures that events do not clash with major events on the International Skating Calendar • Pre-authorization protects the pyramid structure of the sport and the ISU's role as a sole regulator of the sport • It also protects from free-riding	• Authorization criteria are not clear, objective, transparent and non-discriminatory and go further than necessary to protect legitimate aims • Indispensability Criterion and Consumer Benefit Criterion are not satisfied

The first three points in the ISU list of arguments are about benefits resulting from the Union as a sole regulator of the sport, as it would contribute to better production and distribution of the products and would not overlap with the main sport events. At the same time, pre-authorization helps to protect this leading role. One may note that the anticompetitive effect is presented by the organization as an efficiency by itself.

The Commission mentions that such logic is not acceptable and that the quality arguments require more evidence. It also states that in the absence of clear and non-discriminatory authorization criteria, it is impossible to discuss benefits which resulted from pre-authorization.

The fourth ISU point is related to free riding. The Union shows it invested a lot in administering and developing speed skating and that it does not want third party event organizers to benefit from this. However, the mechanism of the free riding has not been explained and, thus, the argument is rejected.

Irrespective of the presence or absence of the mentioned efficiencies, the Union did not prove that there was no other way to reach the targets but the restriction of competition and the ban for skaters to participate third parties' sport events. So, Indispensability Criterion and Consumer Benefit Criterion were not satisfied.

UK: Case 50283 – cartel

This is a rare example of market sharing (cartel), where efficiency arguments were considered in the analysis. It is a UK case on market sharing decided in 2017. The market of cleanroom laundry services and consumables was under consideration. Several producers of the services in the UK set up a joint venture (JV) and started to provide their services under the Micronclean Brand, from 1980 onwards. After a number of mergers and acquisitions, the number of JV parties decreased to 2 with 50% shareholding each. These entities provided about 80% of the services on the market.

At some point of time, the two companies decided to update their trademark license agreements (TMLA). In particular, they included explicit clauses on market sharing. The TMLAs clauses signed by the JV and its parties fixed "allocated territories" and obligations of the companies not to obtain a customer in the other licensee's territory under the trademark (Micronclean) without written permission. The antitrust authority showed the companies followed this strategy till the termination of the joint venture.

What is interesting in this case is that the companies provided efficiency arguments, which were analyzed by the Competition and Markets Authority (CMA) on the merits (Table 5). There was an initial questioning whether the cartel accusation was unfounded, as a licensing agreement was in play. To clarify the role and limitations of TMLAs, the case required further investigation. The CMA noted that a particular characteristic of this licensing was that the vertical restrain from IP was from a JV to downstream companies that were the same companies with the JV controllers. That is why the agreement was considered horizontal in nature rather than vertical.

The companies did a lot to show that they contributed to social welfare. There were 3 groups of arguments.

The first one is the development of new production facilities. The companies provided data on investments in construction and improvement of cleanroom

laundries. They also identified that development of trademark and marketing standards were beneficial to consumers as this resulted in better qualities of the services. However, the companies were not able to show that all these were a consequence of market sharing. Most of the investments of this type were made in the early stages of the joint venture, much before the relevant period. So, this argument was rejected by the authority.

The companies also argued that they continued to invest in the quality of their services during the relevant period of time. They provided information on R&D projects and facts on bringing new products to the market. The companies mentioned that sharing costs and resources (for advertising, website creation, management and so on) allowed them to decrease costs and improve the quality of services for consumers. The non-confidential version of the decision does not show, however, if any cost calculations were provided. There is also mentioning that such activities required some protection from free riding, with no explanation on what was meant.

Table 5: **Efficiency arguments in the case**

Arguments of the violator(s)	**Response of the Competition authority**
Development of new facilities and the development of new services and intellectual property: • Examples of new cleanroom laundry services • Statistics on investments in the construction, maintenance and improvement of the cleanroom laundries • Introducing a single trademark and joint brand marketing standards to be used by all businesses applying that trademark	These were completed primarily in the early stages of the JV, many years before the relevant period
Benefits shared with consumers in the form of improved products and lower costs: • Examples of R&D, innovation, and bringing new products to market (patent innovations relating to mop systems, cleanroom wipes and cleanroom garments) • The JV enabled the Parties to share costs and resources, resulting in lower costs and higher quality to consumers. Areas of joint activity identified included advertising, the creation of technical literature, and website creation and management	All the examples appear to be benefits of co-operative working. None of these examples of benefits which have any relationship with territorial restrictions

Efficiencies resulting directly from the abilities: • to "jointly sell" to customers with more than one site, with each site being serviced by its "local" laundry, and so reducing transport costs • to use the other Party's laundry facility in the event of an incident or disaster, and so limit disruption to customers; • to avoid potential customer confusion caused by both Parties operating under the Micronclean Brand	The Addressees have not provided any quantified evidence It is unclear that any of these points could not have been achieved without the Restrictions

The competition agency, on the basis of all the information provided, confirmed that there could be efficiencies resulted from cooperation between the companies. However, there was no evidence that the efficiencies *resulted* from the territorial restrictions. Even if so, the restrictions were not indispensable to these efficiencies, as there could be other ways to reach the same result. Besides, there was no quantitative assessment of the benefits to consumers to prove they overweight the harm.

There was also a group of arguments that were somehow related to geography and location of laundries: optimization of logistics in order to minimize transport costs; efforts aimed to avoid potential customer confusion given that both companies used the same brand. These were just statements, without any quantitative assessment. The arguments were rejected as, again, market sharing was not proved to be the only way to reach these targets.

2.2. The Practice of BRIS Countries

In Table 6 we provide information on the frequency of appearance of efficiency effects analysis in antitrust decisions made by competition authorities of Brazil, Russia, India, and South Africa.

Table 6: **Efficiency analysis in antitrust cases by BRIS**

	Case decision period	The number of cases with efficiency analysis / total number of cases by conduct groups (% of cases with efficiency analysis)			
		Cartels	Concerted practice	Vertical agreements	Abuse of dominance
Brazil	2013–2020	4 / 115 (3,5%)	0 / 0 (-)	4 / 9 (44,4%)	1 / 10 (10,0%)
Russia	2008–2018	0 / 554 (0%)	0 / 170 (0%)	0 / 308 (0%)	0 / 255 (0%)
India	2011–2020	0 / 60 (0%)	0 / 6 (0%)	2 / 5 (40,0%)	1 / 14 (7,1%)
South Africa	2002–2021	0 / 25 (0%)	0 / 2 (0%)	1 / 8 (12,5%)	0 / 1 (0%)

Source: Based on information from Golovanova, Ribeiro, 2022.

The table illustrates that efficiency analysis in cases on horizontal agreements and exclusionary abuse of dominance is rare in BRIS countries. Compared to other BRIS countries, Brazil applies efficiency analysis more often. It is also the only jurisdiction in the group which applies this analysis in cartel cases. There are no cases with efficiency analysis in Russia[18]. Below we provide details on efficiency analysis in some cases decided by the authorities. The most recent cases are chosen for the analysis.

Brazil: Case 08012.005009/2010-60 – vertical agreement

An automobile audio and accessories parts manufacturer (H-Buster) complained to the Brazilian competition authority (CADE) that PST, another audio and accessories manufacturer, was imposing exclusive dealings contracts with distributors and retailers. Such exclusive agreements were blocking the expansion and entry of competitors in the market for vehicle alarm systems.

PST imposed exclusive contracts with retailers and, mainly, distributors, that forbid them to sell competitors' products. PST was found to have a significant market share, above 70% of non-OES alarm systems, and the extent of distributors under such contracts reached 30-40%. As the exclusive contracts blocked access to the most efficient resellers, it effectively hindered growth by competitors and entrants. The contracts were in effect for more than five years and were used by PST as it gained market share.

The efficiency arguments of the company and the response of the competition authority to the arguments are summarized in Table 7.

Table 7: **Efficiency arguments in the case**

Arguments of the violator(s)	Response of the Competition authority
• Higher quality lets retailers seek exclusive dealing • Protection of specific investments in training and marketing	• Investments in training and marketing were observed in distributors and retailers not under exclusive contracts • Market information pointed that the very high market share induced distributors to take the exclusive deals to guarantee supply by the firm

It claimed that the products sold were of higher quality than the ones produced by competitors and that the exclusive agreements were necessary to protect specific

[18] Given the likelihood of judicial review of antitrust cases in Russia, it is often the case that the best companies' strategy is to take efficiencies arguments to courts directly, instead of presenting them in full during the antitrust investigation by Russian competition authority (FAS). For the extent of judicial review in antitrust cases in Russia *see, e.g.*, Avdasheva et al. 2020.

investments with the dealers such as training of sales force and mechanics and advertising products. The authority obtained evidence showing that the training of the sales force and mechanics was general and took place with dealers not under exclusive agreements. In addition, advertising materials were not essential in multiproduct stores (general auto parts stores), as they were provided for products not under exclusive dealing by PST itself. This led to the conclusion that the protection of specific investments was unsubstantiated by the evidence.

The fact that the products were of supposedly higher quality was seen as an argument against the exclusive dealing. CADE argued that the higher quality was a substitute for exclusive agreements, as the quality would generate demand for the PST products. As such, the agreements were considered not indispensable to secure access to retailers and distributors. Last, but not least, the very high market share of the PST forced the distributors to accept the exclusive agreements so not to lose the opportunity to sell such high-demand product. The anticompetitive effect was that once the exclusive agreement was signed, future potentially efficient entrants would not be able to access the most effective retail channel, according to CADE.

Given (i) the unproven indispensability of exclusive contracts to support alleged specific investments; (ii) that the specific investments were not specific nor key to the sale of the products; efficiencies were concluded not observed and unable to counteract the exclusionary effects of the conduct.

Brazil: Case 08012.001591/200447 - cartel

In a string of cases,[19] physicians have gathered under trade associations or self-regulatory bodies (guilds organized by the State), to negotiate individual honoraria for patient visits, when the patients have contracted services with health management organizations (HMOs). The negotiation referred to the use of a price table (that indexed relative prices for different services, such as a review visit or a surgery). Often, the trade associations or self-regulatory bodies would promote boycotts to HMOs and/or threaten to sue and ban from practice physicians that did not abide to the collective bargaining. After the negotiations, individual physicians would sign contracts with HMOs. In another set of cases, the defendants were trade associations (or cooperatives) that were contracted by HMOs to provide services through their associates.

The analysis at CADE on price tables and collective bargaining by business entities in the health industry is varied and differentiates individuals and entities. Labs and hospitals were systematically convicted of cartel when jointly negotiating with HMOs, in a *per se* analysis. Trade associations that were contracted by HMOs

[19] Other cases referred to different regions of the country, or different physicians' entities and health management organizations (HMOs). *See, e.g.*, 08012.005101/2004-17, 08012.004276/2004-32 and 08012.009381/2004-50 to mention those with similar efficiencies analysis. The complete list of cases may be seen at (DEE-CADE, 2021).

to provide services were also convicted of concerted practices, in a *per se* analysis, when imposing restrictive clauses such as exclusive dealing with the HMOs. For individuals, contracted directly by HMOs, though with a negotiation, the analysis was under a modified rule of reason, with potential efficiencies allowed to eventually balance the concerted practice effects.

The argument for a different treatment of individual physicians when organized to bargain, but contracted independently, was that the numerous physicians would be atomistic in the market and have no market power at all. The asymmetry in bargaining with (a concentrated market) of HMOs was seen as an argument for moving beyond *per se*.

The main point of violators was an argument of efficiencies arising from compensating market power (Table 8). It may sound peculiar to use a compensating market power argument as an efficiency defense. In the international literature, the discussion would be of countervailing market power. The argument of compensating market power as an efficiency argument was present in the Horizontal Merger Guidelines, both in the original 2002 version and the 2016 revision.

The efficiency argument was also coached in a broad non-economy, legal argument of what the competition law should evaluate to conviction as an anticompetitive harm. The decisions use the argument of abusiveness as a mandate from the competition law and in case of structurally weak bargaining position.[20] In addition, the argument was that for skilled services such as physicians, a minimum and fair price would entice quality services. Nevertheless, for the compensating market power efficiency defense to be valid[21] a number of restrictions were imposed, such as skilled individuals being contracted, clear bargaining asymmetry to begin with, no harmful boycotts, the use of price table as references and limited to individuals.

The medical trade associations were convicted as the price table negotiated included imaging and exams conducted by (physician owned) labs and clinics, beyond individual physicians' activities. The bargaining included strict boycotts that rendered patients either non-serviced or having to pay more than the price on the negotiation table.

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[20] The structurally weak bargaining position is a legal concept in Brazil that states that workers (and to some extent, individual consumers) have an unfair situation when bargaining with large buyers of labor (or sellers of goods), as the latter are atomistic, and face take it or leave situations. The legal term in Portuguese would be "hipossuficiência."

[21] The reporting Commissioner argued for antitrust immunity or legality in a modified *per se*, of such bargaining instances.

Table 8: **Efficiency arguments in the case**

Arguments of the violator(s)	Response of the Competition authority
• Price tables with minimum prices would provide fair compensations according to complexity of tasks, inducing quality services • There is clear asymmetry in bargaining of atomistic physicians and dominant HMOs in their product markets • The HMO boycotts by physicians and penalties for non-abiding association members are necessary for bargaining	• The quality argument was accepted for physicians • The compensating market power argument was accepted for individual physicians contracted on a person-by-person basis • Boycotts harm consumers, and price tables negotiated affect both individual physicians' fees and business entities such as labs and clinics (that have more bargaining power than atomistic physicians)

India: Case 03/2011 – vertical agreement

This is the case against a number of car producers: Honda, Fiat, Ford, BMW, Mercedes Benz, General Motors, Maruti Suzuki, Mahindra and Mahindra, Nissan Motor, Skoda Auto, Tata Motors Limited, Volkswagen, Toyota Kirloskar, Hindustan Motors. Denial of market access to independent repairers was the conduct under consideration.

The Competition Commission of India (CCI) analyzed clauses of agreements between the car manufactures and independent equipment producers, as well as the clauses of authorized dealer agreements. It was found that the supply of spare parts and diagnostic tools to the open market was restricted, as both their licensed producers and authorized dealers could not resell for open market (non-authorized dealers). This resulted that only authorized dealers were allowed to provide the service of repair, maintenance, and servicing of such automobiles. Technological information, diagnostic tools and software programs required for that also were not freely available to the independent repair workshops.

The case was presented as a case on restrictions of competition on the after-sale market. The main efficiency arguments of the companies are summarized in Table 9.

The companies stated that the restraints were aimed to safeguard the buyers from purchasing spurious and counterfeit spares by mistake. When it is known that such parts cannot be bought on a free market, independent repairers cannot mislead clients and sell products of unknown quality as if they were original, according to the defendant's arguments. The companies also argued that the quality of the service depends a lot on the skills of the specialists that fit spare parts. So, even if the parts are original, the service provided by an unskilled person may lead to safety damages.

The companies do not have resources to train thousands of "roadside" mechanics. The restrictions were the argued as the only way to ensure the quality of the services. The defendants also mentioned that many spare parts were manufactured using trade secrets and confidential information, which they wanted to protect.

The arguments were rejected by the competition authority. According to the CCI ruling, car owners should not be restricted in their decision whether to use or not the services of authorized centers by inability of original spare parts. Besides, given that after the warrant period consumers shift to spurious spares anyway, non-availability of original spares results in incentives to use not original ones.

Arguments related to protection of intellectual property right were rejected as well as companies did not explain how selling of the products on the open market compromise the intellectual property rights.

Table 9: **Efficiency arguments in the case**

Arguments of the violator(s)	**Response of the Competition authority**
Quality protection • to safeguard the buyers from purchasing spurious and counterfeit spares; • to maintain the quality of the spare parts; • to ensure that the spare parts meet the quality standards through quality and safety tests carried out by the OEM; • to ensure an organized system of warranty support to end consumers	Since substantial segments of car owners shifts to unauthorized network for their repair and maintenance needs once their warranty expires, the absence of genuine spare parts, tools leads to a rise in usage of spurious spare parts, thus jeopardizing the safety of car owners and leading to high emissions

The main argument for the dismissal of the efficiencies was the unreasonableness of the restraints, with an imbalance of the supposed benefits to the protected and the means to reach such benefits. The case did not deal with IP licensing in so far manufacturers would still be obliged to produce parts only under licensing. The case focused on the control of the sale of production under licensing in the repair (non-OEM) market.

South Africa: Case CR188Nov15 – vertical agreement

This is the case against the company Uniplate, a producer of embossing machines and number plate blanks. There are 3 types of the machines used in the country, 2 of which are produced by the company. Each type of the embossing machines requires a corresponding type of a plate blank. The company required its customers

to exclusively purchase all types of blanks when purchasing its embossing machine of any type. So after buying a type A machine the customer had to buy plate blanks of type A and B only from the Uniplate company even having B type machine produced by a competitor. A 10-years exclusivity period was required.

The efficiency arguments provided by the company and the response of the competition authority (Table 10). The main argument of Uniplate was the need to recoup its R&D costs for development of the machines. It argued that it used the strategy of cross-subsidization when the machines were provided at a subsidized cost or at no cost and the main profit was from selling plate blanks. Thus, the company had to guaranty a certain demand for plate blanks during a certain time period, to cover R&D investments.

From the non-confidential version of the decision on the antitrust case we see that the company provided investment, production costs prices and sales data. Such data could be used to assess the period of time necessary for recoupment of initial investments by cross-subsidization (net present value of the project). This would justify the 10-year exclusivity period. According to the SACC the data provided was not able to sustain the 10-year exclusivity requirement.

Table 10: **Efficiency arguments in the case**

Arguments of the violator(s)	**Response of the Competition authority**
Recoupment of R&D costs (of about R15 million) Cross subsidization: the machines are provided at a subsidized cost or at no cost (data on costs and margins)	R&D costs and cross subsidization statements are not supported by the evidence (not relevant period, methodology is not clear) The data is not helpful in supporting the claim that the company required a 10-years exclusivity period in all types of blanks
Preventing free-riding and quality control (just a statement)	Not sustainable as: • use of the company's blanks on unknown suppliers' machine is allowed (free riding on the machines) • no legislation or SABS requirements preventing the use of a different blank plate, no evidence on SABS certification revoked because of this
Free servicing and ongoing maintenance of the embossing machines	6-months warranty period No evidence that the practice was more favorable to the embossers than what is contained in the agreement. Invoicing embossers for maintenance costs without exclusivity requirements by a competitor did not make its machines unaffordable to the customers

Preventing free riding and quality arguments were mentioned as well. However, no empirical evidence was provided. The company stated that the use of unknown suppliers' blanks on the company's machine would harm the quality of the final goods and could harm the machines as well. However, the company failed to provide any evidence to confirm the harm. Moreover, based on the results of independent expertise, the competition authority proved that the mix of machines and plate blanks of the same type but produced by different companies was technically possible without a decrease in the quality of the final good.

Uniplated named the practice of use of competitor's plates on its equipment a free-riding, as there were investments in development of the equipment. But Uniplate's business practice was aimed to enforce using its plates irrespective of the equipment used. According to the logic above, it's a free riding as well (use of Uniplate plates on the equipment of competitors). As such, the argument was dismissed as a reasonable restriction of trade.

Conclusion

Most competition laws across jurisdictions point that often antitrust cases should be evaluated taking into account either the capacity to generate (potential) effects or that potential anticompetitive harm should be balanced with potential competitive benefits. The competitive benefit of the business conduct would lead to a more efficient outcome, as understood in economic welfare analysis.

Such efficiencies arguments are standard in defendants' arguments in antitrust proceedings. The relevance of efficiencies arguments in competition law enforcement practice may be far from such "rule of reason" (U.S. analysis) or "effects based" (EU analysis) analysis in non-cartel cases.

The evidence collected by other researchers indicates that efficiency analysis in antitrust cases is not frequent and, overall, it is rarer in BRIS countries compared to the European ones. In this paper we contribute to the literature and review the actual practice of efficiency analysis in cases on anticompetitive agreements using case study across selected jurisdictions, namely, the EU, the UK and BRIS countries (Brazil, Russia, India, and South Africa) with the focus on the last. We show that BRIS jurisdictions differ in the frequency that efficiency arguments are considered in antitrust cases. Compared to other BRIS countries, Brazil applies efficiency analysis more often. It is also the only jurisdiction which applies this analysis in cartel cases. At the other extreme, in the more than one thousand Russian antitrust cases, none contain analysis of efficiency arguments by the competition authority.

Moving on to the actual case study analysis of sample cases that have a proper efficiency analysis, our paper identifies that efficiency arguments may not be far from well-established economic theory, such as the avoidance of free riding and protection of specific investments on vertical restraints.

The main issues for efficiencies analysis not to be able to reverse the concluded anticompetitive effect from a business practice can be collected under the following. First, it appears that parties do not provide strong backing to justify restraints on competition, as actual problems are often vaguely stated. Second, competition authorities, when shifting the burden to defendants to present the efficiency arguments, move the decision making to a standard that only very strong evidence of actual benefits would reverse the preliminary anticompetitive conclusions. Third, other rights, such as intellectual property rights protection, may be seen by competition authorities as evaluated under competition effects and not under a safe harbor. In general, the Indispensability Criterion is often used by authorities to dismiss the efficiency claims.

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Information about the authors

Eduardo Pontual Ribeiro (Rio de Janeiro, Brazil) – Professor, Institute of Economics, Federal University of Rio de Janeiro (250 Av. Pasteur, Rio de Janeiro, 22290-250, Brazil; e-mail: eribeiro@ie.ufrj.br).

Svetlana Golovanova (Nizhny Novgorod, Russia) – Professor, National Research University Higher School of Economics (25/12 Bolshaya Pecherskaya St., Nizhny Novgorod, 603155, Russia; e-mail: svgolovanova@hse.ru).