Revija za evropsko pravo: VIII (2006) 2-3.

ČLANCI I RASPRAVE

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UDK: 341.017:061.1EC

str. 5-24.
Izvorni naučni rad

ABUSE OF A DOMINANT MARKET POSITION IN THE FRAMES OF THE EU ANTITRUST LAW

Abstract

In the frames of the EU antitrust law, dominant position on the market is not forbidden, unlawful and punishable by its own. The EU competition law applies only if undertakings abuse dominant position they possess on the single market. Accordingly, it will be first explored what dominant position on the single market is i.e. how to establish existence of dominant market position and afterwards it will be researched when dominant position is considered to be abused pursuant the EU antitrust law.

Ključne reči: monopoli, dominantni položaj, zloupotreba dominantnog položaja, relevantno tržište, pravo konkurencije Evropske unije.

Key words: monopoly, dominant position, abuse of dominant position, relevant market, EU competition law.

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INTRODUCTION

Within the EU antitrust law the prohibition of abuse of a dominant position is regulated primary by Article 82 of the Treaty Establishing European Community.

In pursuance of Article 82 of the EC Treaty any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) Directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions,

(b) limiting production, markets or technical development to the prejudice of consumers,

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

"There are three essential ingredients to this Article. There must be a dominant position, an abuse of that position and that abuse must affect trade between the Member States"[1].

THE CONCEPT OF DOMINANT POSITION

EC Treaty doesn't define concepts neither of dominant position on the market nor of its abuse. The content of these concepts is determined through decisions of the EU institutions made in individual cases.

Commission considers undertakings are in dominant position if they are able to conduct independently without taking into account their competitors, purchasers or suppliers. In the judgment made in the United Brands[2] case the Court of Justice stated that it is "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers". In judgement made in the

[1] Mike Cuthbert, ***Nutshels European Union Law***, (London 2003), p. 73.

[2] C 27 / 76 ***United Brands v. Commission*** [1978] ECR 207; [1978] 1CMLR 429.

case Hoffman La Roche[3] the Court of Justice says it precisely that in contrast to monopoly, dominant position doesn't exclude existence of some "amount" of competition but undertaking in dominant position on the market is able "at least to have appreciate influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment".

Dominant position on the market may be abused by only that undertaking which it has. Determination of dominant position on the (single) market is done through two elements: a) relevant market and b) market share.

Relevant market

Relevant market definition is a competition policy tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is implemented by the Commission The main purpose of relevant market definition is to identify in a systematic way the competitive constraints that the undertaking involved face. With another word the objective of defining a relevant market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behavior and of preventing them from behaving independently of effective competitive pressure[4].

The concept of relevant market is a specific one in the EU competition law. Its unique nature arises from the fact that it's subordinated to achievement of the European competition policy aims. The concept of relevant market includes:

a) the relevant product market

b) the relevant geographic market.

Relevant product market

Relevant product market contains all products, which compete to the product of undertaking whose market power has been establishing.

To measure an amount of competition on particular market and to separate one relevant product market from another it is necessary to set aside clearly a product

[3] C 85/76 ***Hoffman – La Roche v. Commission*** (***"Vitamins"***) [1979] ECR 461; [1979] 3CMLR 242.

[4] § 2 of the Commission Notice on the definition of relevant market for the purposes of Community competition law OJ 372, 09/12/1997, p. 5-13.

as their own that meet constant needs of consumers and that is in limited scope substitutable by other products.

"A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use"[5].

In order to determine relevant product market it must be asked four questions:

a) which firm is accused?

b) which products sold by it are involved in the complaint?

c) who buys them and

d) what else could be used by those customers with minimal adaptation to their business (i.e. what substitutes are there)?[6]

The primary criterion in the EU competition law for relevant product market definition is substitutability of the product. By the way absolutely irreplaceable products are very rare.

Degree of substitutability of the product may be determined regarding consumers or in regard to suppliers or producers. Towards consumers as final buyers or to wholesellers, degree of substitutability of products is expressed through their possibility to buy, regarding price, quality and scope of consumption of the product, another product. Towards suppliers, degree of substitutability of products is measured by possibilities of other producers or suppliers to adjust their technology of production from one to another product.

Procedure of definition of relevant product market begins by examination of features and purposes of the product in question. Thus the Court of Justice in the United Brand case set aside bananas market as particular product market based on their physical characteristics such as taste, softness, ease of handling, lack of seeds, balanced level of production during a year and so on. The second reason for setting aside the Court found out in somewhat peculiar purpose: satisfaction of needs of special categories of people such as very young, old and sick as well as it is used during practicing a special fixed diets.

However an analysis of the product characteristics and its intended use is not sufficient to show whether two products are demand substitutes. Functional

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[5] § 7(2) of the Commission Notice on the definition of relevant market for the purposes of Community competition law OJ 372, 09/12/1997, pp. 5-13.

[6] Valentine Korah, An Introductory Guide to EC Competition Law and Practice, (Oxford 2000), p. 70.

interchangeability or similarity in characteristics may not, in themselves, provide sufficient criteria, because the responsiveness of customers to relative price changes may be determined by other considerations as well. Conversely, differences in product characteristics are not in themselves sufficient to exclude demand substitutability, since this will depend to a large extent on how customers value different characteristics. For needs of further relevant product determination are designed special methods comprised in different econometric or statistic approaches. Thus first is examined consumers' preferences as in Michelin[7] case where the Court of Justice established existence of stronger users' of heavy goods vehicles preferences for Michelin tires because of tires sellers had to have Michelin tires on their storehouses. Data are collected from market researches, questionnaires, information on price movements in past etc. Afterwards are explored obstacles and costs that would be following for substitution of the product with another one. Further it is explored can consumers be divided on different categories and if the answer is affirmative, the question is may towards them be done price differentiation. Thus let us return to the example of Michelin case where were set aside two categories of tires buyers: track producers (which tires built in their lorries) and sellers of tires as spare parts. The Court of Justice established that Michelin company was able that from the mentioned categories of customers charge different prices and concluded that regarding different categories of customers are formed to particular tire markets. It is possible that regarding the same product "applied for more than one end use"[8].

Finally we come to the most important criterion: coefficient of cross-elasticity of demand i.e. the extent to which the customer can obtain similar goods or acceptable substitutes to these supplied by the dominant undertaking. Actually the question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5% to 10%) but permanent relative price increase in the products (and areas as well) being considered. If substitution were enough to make the price increase unprofitable because of resulting loss of sales, additional substitutes (and areas) are included in the relevant market. This would be done until the set of products (and geographic areas) is such that small, permanent increases in relative prices would be profitable[9].

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[7] C 322 / 81 Michelin (N.V. Nederlandische Baden – industrie Michelin) v. Commission [1983] ECR 3461; [1985] 1CMLR 282.

[8] Daniel Goyder, ***EC Competition Law***, (Oxford 1998), p. 327.

[9] § 17 of the Commission Notice on the definition or relevant market for the purposes of Community competition law OJ 372, 09 / 12 / 1997, pp. 5-13. The equivalent analysis is applicable in cases concerning the concentration of buying power.

Definition of relevant market either in its productive and geographic dimension has a key influence on estimation of market power and consequently on making a decision in the case. If more products are assessed as substitutable and competitive relevant product market is greater and share of the product and its producer on market is reduced. Therefore undertakings concerned, try to extend the scope of relevant product market by including as much as possible replaceable products. The Commission at its own side tries to restrict the scope of relevant product market regarding physical characteristics and intended use as well as high coefficient of cross-elasticity of demand. It contests undertakings' cites by emphasize of only relevant and permanent but not temporary, short-lived and minor factors. The Court of Justice made its stance towards every single case particularly but it prevail an opinion that till a case AKZO[10] it was preferred narrower concept of relevant product market.

Said in the simplest possible way, if there are more substitutes and territory is wider market share is less. But we are not able to work out a theme regarding on intensity of market dominance if before it's not explained market definition in geographical sense.

Relevant geographic market

Definition of the relevant geographic market is in function of:

(a) definition of relevant market (and, indirectly, dominance),

(b) determination whether a substantial part of the common market involved,

(c) seeing if there is any effect on trade between Member States.

The primary criterion for definition of the relevant geographic market is a dimension of territory. Actually it is a beginning criterion. What is the area where and enterprise may be able to engage in abuses which hinder effective competition depends on structure and scope of production and consumption as well as habits and economic abilities of sellers and buyers. In the ***United Brands*** case ECJ determined a concept of relevant market as a zone where objective conditions of competition applicable on the product in question have to be the same for all businessmen and where the conditions are homogenous enough to effect of economic power of undertaking can be assessed appropriately. It means that additional criterions to determine boundaries of relevant geographic market are: changes in prices between different areas and

[10] C 62 / 86 ***AKZO Chemie BV v. Commission*** [1986] ECR 1965; [1986] 3CMLR 273.

consequent reactions by customers (the same qualitative tests used for product market definition), basic demand characteristics (national preferences, preferences for national brands, language, culture and life style), views of customers and competitors, current geographic pattern of purchases, trade flows, pattern of shipments, barriers and switching costs associated to divert orders to companies located in other areas (transport costs, labour costs, quotas, custom tariffs etc) and other criterions like providing repair services, sale of spare parts and so on. Taking in account mentioned factors the relevant geographic market may be defined as "the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those areas"[11].

Anyway, the relevant geographic market is always determined as a space. It may be a territory of entire internal European market as in cases ***AKZO***, ***Hilty***[12] or ***Hoffman – La Roche***. It understands that territory of entire internal market is included if global world market is determined as the relevant geographic market as in cases ***Aerospatiale/Alenia/De Haviland***, IV/M 053, OJ 1991 L 334/42, ***Commercial Solvents***[13] or ***Wood Pulp***[14]. As relevant geographic market may be determined a territory narrower than the common market but that still represent its substantial part where abuse of dominant position may affect inter-Community trade. It may be territories of a few Member States (Germany, Denmark, Ireland, The Netherlands, Belgium and Luxembourg) as in ***United Brands*** case; territory of a single Member State as in cases ***Michelin*** (The Netherlands) or ***Hugin***[15] (United Kingdom) or even part of a Member State as in cases ***Suiker Unie***[16] (southwest Germany) or port of Genoa in C 18/93 ***Corsica Ferries v. Corpo dei Piloti del Porto di Genoa*** [1994] ECR I-1783 and in C 179/90 ***Merci Convenzionali Porto di Genoa v. Siderurgica Gabriolli SPA*** [1991] ECR I-5889.

After all criterions and analysis it remains to be, without a lot of complications, concluded that the relevant geographic market is the market where

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[11] § 8 of the Commission Notice on the definition on relevant market for the purposes of Community competition law OJ 372, 09/12/1997, p. 005-013.

[12] C 53/92 ***Hilty v. Commission***, [1994] ECR I-667.

[13] C 6-7/73 Commercial Solvents v. Commission, [1974] ECR 223.

[14] C 89, 104, 114, 116-117&125-129/85 ***Ahlstrom (A.) OY v. Commission*** ("***Woodpulp***"), [1993] ECR I-1307; [1994] 4CMLR 407.

[15] C 22/78 ***Hugin-Kassaregister A.B. v. Commission***, [1979] ECR 1869; [1979] 3CMLR 345.

[16] C 40-48, 50, 54-56, 111, 113&114/73 ***Suiker Unie and Others v. Commission*** ("***Sugar***"), [1975] ECR 1663

undertaking concerned sells goods or renders services. It is in majority of cases so obvious that thorough analyses are redundant.

Relevant geographic market considers on a part of the definition of abuse of dominant position from Article 82 (ex Art 86) of the EC Treaty that sounds: "... within the common market or in a substantial part of it"... If the undertaking doesn't have a dominant position within entire internal market or at least on its substantial part there is not any interest of the Community to act. It means that Commission wouldn't react even in the case of existing of any shape of unilateral restrictive business practice.

It may be concluded that both the Commission and the European Court are often prepared to limit the relevant geographic market to the territory of a single Member State. It is noticeable that territories of the smallest Member States are considered as substantial parts of the common market as in case C 142&156/84 ***BAT and Reynolds v. Commission*** [1979] ECR 4487 where was established that ***Rothmans International*** with market share of 47,8% was in dominance on markets of Belgium and Luxembourg as substantial part of the common market. This is the most probably done from political reasons the same as in case ***Radio Telefis Eireann (RTE***[17]) where it's established that territories of Ireland (Eire) and North Ireland are not represent substantial part of the common market because a million households in the area consists less than 1% of entire Community households.

INDIVIDUAL OR COLLECTIVE DOMINATION

It is clear that individual dominance on market exists if an undertaking has a monopolistic position. It is the easiest to establish dominant position on market in this case. However, markets where demand or supply is monopolised by one market player are rarely met today. The most disseminate market structure is oligopoly that means that on market may exist individual dominance if there are more companies (with high market share) to business on it. Oligopoly, therefore, pursuant to Article 82 (ex Art 86) of the EC Treaty is business environment for individual but not collective dominance on market. Collective dominance in the sense of Article 82 of the EC Treaty exists if more undertakings dominate on market and where each of them are legally independent but they together are unique economic unit. Mostly it is a group of undertakings consisted from parent company and its subsidiaries although it might be other shapes of grouping such as business associations or consortiums. Example of corporate groups which act as a single unit,

[17] C 241/91 RTE, BBC and ITP v. Commission.

e.g. parent and subsidiary is the case C 6-7/73 ***Commercial Solvents Corp. v. Commission,*** [1974] ECR 223.

There is only one controversial question. Is there collective dominance if more undertakings legally and factually independent act solely? In the ***Italian Flat Glass*** case No 89/93, OJ L 33/44 where three companies each made flat glass in Italy, the Commission has been trying to establish collective dominance alleging that this cartel that clearly breach Article 81 of the EC Treaty also contravened Article 82 (ex Art 86) of the EC Treaty as, taken together, the three companies held a dominant position on the Italian market for flat glass producing 95% of flat glass for car and 80% of flat glass for other industries. The Court of First Instance in its judgement T 68,77&78/89 ***Societa Italiana Vetro SpA et al v. Commission***, [1992] ECR II 1403 rejected the suggestion that the same factors showed a breach of Article 81 (ex Article 85) of the EC Treaty could also be used to demonstrate a breach of Article 82 (ex Art 86). However, the CFI accepted the argument that circumstances could arise where several undertakings together abuse a dominant position, although that was only likely to be the case where they were united by 'economic links' of some form. Further guidance on the nature of economic links provided in ***Almelo***[18] case where ECJ responded that all regional distributors to be regarded as collectively occupying a dominant position "must be linked in such way that they adopt the same conduct on the market". It means that the collective dominance is possible in the case of corporate group but no among of oligopoly members or their market because concept of market domination relies on a unilateral exercise of power as it stated in ***Zuchner v. Bayerische Veroinsbank,*** [1981] ECR 2021, but the concept of a joint dominant position has been held to be applicable to two or more undertakings operating in a vertical relationship as in T 228/97 ***Irish Sugar plc v. Commission***, [1999] ECR II-2969.

MARKET SHARE AND ASSESSING DOMINANCE

A detailed market analysis is needed for assessing dominance, taking account of the market share of undertaking and of competitors, control of production and distribution and financial and technical resources[19]. Since ***Continental Can*** where criterions to determine dominant position have been established first time by ECJ, priority is given to market share criterion. Determination of market share became beginning, unavoidable and crucial factor in each subsequent case of assessing dominance.

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[18] C 393/92 Gemeente Almelo and others v. Energiebedrijf Ijsselmij Nv, [1994] ECR I-1447.

[19] Penelope Kent, ***Nutcases European Union Law***, (London 2000), p. 129.

Market share is in legal theory determined "as a relation between scope of supply or sale of the product by undertaking concerned by assessing dominance and whole scope of supply or sale of the product on relevant market"[20]. Market share is expressed in percents. Market share is a sufficient criterion to determine undertakings' market power where undertaking has monopolistic position on global or on the common market as well as market share is quite small, up to 10%. However, in all other cases market share is not sufficient for assessing dominance and it is necessary to use ancillary criterions.

First it is needed to determine market share of competitors i.e. market structure. The EU authorities use classical method of comparison of market share of undertaking concerned by market shares of its competitors. Great difference between their market shares is a further evidence of market dominance as for example in ***Hoffman – La Roche*** where was established that market share of the company in supplying of market by vitamin B6 was 84,5% but its four the largest competitors had market shares less than 5% and 10%[21].

An access to market by potential competitors is very often a subject-matter of evaluation in decisions given on the occasion of assessing dominance. This question is particularly detailed analysed in ***United Brands*** and ***Hoffman – La Roche***. Through the Commission decisions is visible its intention to prevent abusive market conduct which would consolidate the dominant position of existing operator by setting obstacles to enter into market for other companies, especially if new types of markets EU in question[22].

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[20] All criterions for assessing dominance may be classified in three groups: 1) market structure criterions, 2) market conduct criterions and 3) market results criterions.

[21] In American anti-trust law since DoJ "Merger guidelines" (edition 1982) has been using ***Herfindahl – Hirshman Index*** (***HHI***) for calculation of degree of concentration of the market i.e. the position and number of competitors. ***HHI*** sums up the squares of individual market shares of all competitors. For example if a market consists from five firms with shares of 30%, 25%, 20%, 15% and 10% it has a ***HHI*** 2250 (900+625+400+225+100). Advantage of the method is of a technical nature predominantly because enabling performance of the market concentration by a single number that compared with a forward prescribed range towards that with an ***HHI*** bellow 1000 the market concentration can be characterised as low, between 1000 and 1800 as moderate and above 1800 as high. Second advantage of ***HHI*** method is the possibility to express (a)symmetry of disposition of market shares i.e. concentration of market share. Since adoption of Guidelines for vertical restraints sum of squares of market shares is used to calculate market concentration in the EU competition law (see general rules for evaluation of vertical restraints). Also ***HHI*** mentioned in Guideline for horizontal agreements in part of market power and market structure (§ 29) and in part of market position of the parties, concentration ratio, number of players and other structural factors (§ 96).

[22] Michael Gremminger & Gerald Miersch, ***Commission Acts Against Duales System Deutschland AG for the Abuse of a Dominant Position***, "EC Competition Policy Newsletter", No 2/2001, p. 29.

Availability of raw materials, financial and technical resources, bank support and technological advantages over competitors are very important indictors of behave independently and market power too.

In the EU competition law is used a criterion of total economic power for control of market dominant undertakings. This criterion however was not interpreted in consequential way. For example in ***Hoffman – La Roche*** the ECJ refused to take account of factors such as conglomerate character of the undertaking, turnover of the undertaking that is over total turnover of all other competitors as well as a fact that the company is one the head of the biggest group of producers of the relevant product on the world.

Except so called structural criterions it takes in account market conduct criterions, which may prove market dominance. Market conduct means the activities pursued by the undertaking in the course of its business, for example, its policies on pricing, output and sale promotion; and by 'performance' is meant the result of these activities, for example, the level of profits, the efficiency of production or the quality and range of the goods produced[23].

Finally, in evaluation of the market power an important role has the factor of time either as the period of time in which the undertaking has held its position in the market and as the period of time necessary for entry of new competitors onto market. Longer periods stronger indicate dominant position on relevant market.

United Brands case shows how results acquired from market analysis are virtually valued. There was established the market share of ***United Brands*** was fairly low (about 40%) but the relevant market was fragmented with no competitor holding more than 16%. ***United Brands*** was also identified as possessing superior technology to its competitors. ***United Brands*** controlled almost all stages of production and distribution, owning the banana plantations, and controlling transportation, distribution and ripening of its brand ***"Chiquita".*** Taking all of these factors in account, it was clear that ***United Brands*** was in a dominant position in the banana market in the EC.

Besides an attitude that market share is not ***a priori*** sufficient for conclusion on existence the dominant position on market, examples show that the EU bodies mostly relied on this criterion. Only if market share is insufficient in itself to establish the existence the dominant position other elements such as strong vertical integration, strict quality control, a technological lead over competitors, a strong brand name due to large-scale advertising campaigns, a highly specialized sales

[23] Marjo Ojala, The Competition Rules of the European Community and the Economy of Eastern Europe: a Study of the Possibility of Legal Transplants, (Helsinki 1996), p. 226.

network, absence of potential competition, an extensive assortment of products, mature markets, technological and financial resources, have been cited by the Commission and Court in support of the finding the dominance. This is because the market share is the most simple to spot or at least it is simpler then compare prices and marginal costs or is there a monopolistic profit or price discrimination. Nevertheless in this competition law field there is a certain degree of legal uncertainty. It is not possible to establish clearly where is a line between market share that indicate and market share that does not indicate market dominance. The decisions are as follows[24]:

(a) for market share of 75% or higher: if maintained over a relatively long period, no further evidence is needed (***Hoffman – La Roche*** (B2, B6, H – 75%+), ***Hilti*** (nail guns 70-80%), ***Tetra Pak II*** (cartons 90%);

(b) for market share between 40-55%: it's strong evidence of a dominant position but will require confirmation through evidence of the competitors' market shares and the firm's own structure (***Hoffman – La Roche*** (A 47% and C 65%), ***United Brands*** (bananas 40-45%), ***AKZO*** (hydrogen peroxide 50%);

(c) for market share of fewer than 25% a dominant position is very unlikely to be found to exist.

At the end it is important to emphasize that "dominance must be established both in terms of the product and geographic market"[25].

Abusive market conduct

The concept of abuse is an objective concept relating to the behavior of an undertakingin an a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.[26].

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[24] There are different opinions towards market share of 50%; except some situations, it's sufficient evidence of dominance.

[25] Nigel Foster, ***EC Law***, (Oxford 2003), p. 163.

[26] § 91(2) of the C 85/76 ***Hoffman – La Roche v. Commission*** (***"Vitamins"***) [1979] ECR 461; [1979] 3CMLR 242.

In the EU competition law is accepted a principle of objective abuse of dominant position on market that means that guilt is not important for existence of abusive market conduct i.e. abuse of dominant market position may exists independently of a guilt.

In Article 82 (ex Article 86) of the EC Treaty are enumerated examples of dominant market position abuse:

a) Directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions. Using of dominant position on relevant market for the sake of selling goods or rendering services by charging excessive prices is the most often form of abusive market conduct. "Conceptually, market power is the power to raise price above the competition level and, at least in the short term, to obtain supranormal profits"[27]. ***In United Brands*** the European Court of Justice said that charging a price that is excessive because it has no reasonable relation to the economic value of a product supplied is an abuse. When calculating the economic value of a product, it must be taken into consideration the production costs and then to compare current with former prices of the same undertaking and to prices of competitors. If there are no competitors or products are too peculiar it is used ancillary criterions as in ***British Telecommunications*** case where British national telecommunication company held a monopolistic position and where the Commission telecommunication service prices assessed in the context of maintenance of national telecommunication authorities income. Although dominant position is mostly acquired and examined regarding competitors, undertakings may be in vertical domination too. Example of supplier dominance is the case C 238/87 ***Volvo v. Veng*** [1988] ECR 6211 whereas customer dominance can be illustrated by purchasing power of Ministry of defense or health or other great customers. Therefore, unfair pricing as charging excessively high prices is exacted by dominant sellers whereas charging excessively low prices is exacted by dominant buyers.

"A dominant firm will abuse its position if it wages a long term, systematic price war against smaller competitors for the express purpose of driving them from the market"[28]. An example of predatory pricing is the case ***AKZO***[29] where the Court observed that prices lower than the average variable costs (AVC) which are used as a tool to lever out a competitor must be regarded as an abuse because a dominant undertaking has no any other interest in offering such prices except to eliminate its competitors in order to then raise the prices on the basis of its monopolistic

[27] § 119(1) of the Guidelines on Vertical Restraints.

[28] Marjo Ojala, The Competition Rules of the European Community and the Economy of Eastern Europe: a Study of the Possibility of Legal Transplants, (Helsinki 1996), p. 232.

[29] C 62/86 ***AKZO Chemie BV v. Commission*** [1986] ECR 1965; [1986] 3CMLR 273.

position, since each sale involves it in a loss, namely all the fixed costs and at least a part of the variable costs relating to the unit produced. Moreover, where an undertaking charges prices above AVC but bellow average total cost (ATC – sum of its fixed plus variable cost), these prices must be regard as an abuse where they form a part of an elimination plan. Such prices can remove from the market undertakings, which are perhaps as effective as the dominant undertaking but because of their lesser financial capacity are unable to resist the competition to which they are subjects. By the way the Court of Justice defined variable costs as only those which vary according to the level of output. Labour costs are treated as fixed.

More complex problem in uncovering of predatory pricing is occurred in regard to business of multi-service undertakings. Namely, in the Commission activities in implementation of competition policy it's noticeable a trend of introduction of competition into areas have been protected by legally or statutory monopoly. Conscious of the fact that competition at the one side contributes to competitiveness and that at the other side brings benefits for consumers through improved quality of services rendered by reduced price, it starts to open to competition such sectors of economy like telecommunications, air-transport, energy supply etc. Exposition to competition has not been doing hasty but gradually thus some services further enjoyed statutory monopoly advantages.

Up to recently absolutely protect, statutory monopolies have begun to fight against potential competitors, inter alia, by predatory pricing regarding services open to competition. Loss arisen by rendering of services provided in open competition has been substituted from profit gained by rendering of those services still protected by statutory monopoly (cross-subsidisation). Against this background the Commission established a concept of incremental costs as a yardstick by multi-service undertakings ordering that multi-service undertakings providing the specific service open to competition "...must earn revenue on which at least covers the costs attributable to or incremental to producing that specific service"[30]. The average incremental costs (AIC) of a particular service is defined as the difference in the firm's total cost with and without particular service supplied, divided by the output of providing of the particular service[31]. Although not the same words are employed, the Commission similarly defines incremental costs as the..."costs that are attributable to a specific service...These costs, which are dependant on the volume posted and arise solely as a function of the specific service, cease to exist if the

[30] § 10 of the Commission Decision No 354/2001 of the 20th March 2001 given in the case ***Deutsche Post AG*** – "***DPAG***" (OJ L 125, 05/05/2001).

[31] Tilman Lüder, ***A new Standard for Predatory Pricing***, (Presentation at the IBC Conference on Postal Services, Brussels 18th June 2002), p. 4.

service at issue is stopped"[32]. Incremental costs include both costs that arise in a short-term and medium term horizon: a) the service specific fixed costs i.e. the costs that arised over the medium term with the addition of the product line. Contrary to short-run marginal cost, incremental cost includes the product specific fixed cost, such as property, buildings, sorting installations as well as all operating expenses for material, which arise only on account of providing the additional product line; and b) the short-term variable cost, i.e. the cost changes with a short-term change in the level of output[33]. In order to assess which costs are attributable to specific service it is required thorough economic analysis all steps in the value-added chain. Standard of incremental costs is not opposed to multi-service undertakings that use common infrastructure for providing as many services as possible in function of achieving economies of scope but the standard "would essentially punish a monopolist for not making profit in competitive activities"[34].

Except of imposing of unfair purchase or selling prices, abuse of dominant market position may be done by imposing of other unfair trading conditions as in cases ***BRT v. SABAM***, 1974 ECR 313 or ***Eurofirma.***

b) Limiting production, markets or technical development to the prejudice of consumers. Export and import bans are usually considered to be abusive[35]. In the ***Sugar*** case the dominant undertaking was held to have placed itself in an abusive position by prohibiting its distributors from exporting to Member States or bringing pressure upon its dealers to channel exports to particular distributors. Moreover by threatening to withhold supplies so as to oblige to dealer to resell the product to certain clients and for certain uses the dominant undertaking was said to be limiting the market.

Refusal to deal i.e. supplying of raw materials and other goods and services may have and impact onto limitation of production or technical development and even elimination of customer. In case C 341/94 ***RTE, BBC and ITP v. Commission*** [1995] ECR I-743; ***RTE, BBC*** and ***ITP*** refused to supply ***Magill,*** a publisher in Ireland, with information about weekly television listings for the purpose of producing an independent guide. The Court of Justice accepted the Commission's finding that if the companies could not rely on intellectual property rights to justify refusal to supply (the information), such refusal amounting to be an abuse. An example for this shape of abuse can be found in ***Commercial Solvents*** case where potential

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[32] § 9 of the Commission Decision No 354/2001 of the 20th March 2001, "***DPAG***".

[33] Tilman Lüder, ***A new Standard for Predatory Pricing***, (Presentation at the IBC Conference on Postal Services, Brussels 18th June 2002), p. 6.

[34] Lüder, Tilman: ***Ibidem*** p. 11.

[35] Joined cases C 32&36-82/78 ***BMW Belgium SA v. Commission*** [1979] ECR 2435; [1980] 1CMLR 370.

competition was eliminated since the company's objective had been to reserve the raw materials it produced for its own in-house fabrication of the finished product.

Limitation of production, distribution or technical development by the dominant undertaking must be to the detriment of consumer. From mentioned it could be pointed that refusal to deal is not ***per se*** condemned. Refusal to deal is considered as abuse of dominant market position if it's unjustified. Is it justified or not would be assessed in each particular case and thus, there are examples where the Court is not accepted the Commission's qualifications that refusal to deal is abusive in cases ***Hugin Kassaregister*** (C 22/78 ***Hugin – Kassaregister A.B. v. Commission*** [1979] ECR 1869; [1979] 3CMLR 345) and ***British Petroleum*** (C 77/77 ***British Petroleum (BP) v. Commission*** [1978] ECR 1511). Refusal to deal won't be considered as abuse of dominant position if the goods or services can be provided under similar conditions at the other supplier. Generally, refusal to supply can be deemed justified in the cases of a selective distribution system where customer doesn't meet conditions properly set by supplier, genuine shortages and when a customer transfers its central activity to promoting a rival brand.

Regarding limitation of production, distribution or technical development by the dominant undertaking it is unavoidable to mention the American anti-trust law doctrine of "essential facilities" which seems to be assuming significance in Europe where a good example is a case ***B&I /Sealink Harbours and Stena Harbours*** [1992] 5CMLR 255. ***Sealink*** is both a British ferry operator and the port authority at ***Holyhead,*** Wales. Both ***Sealink*** and ***B&I*** use berths at ***Holyhead.*** The B&I berth is at the harbour mouth and, when ***Sealink***'s ferries pass, the water level rises so that ***B&I*** have to interrupt loading or unloading of their ferry. Only one such incident occurred per ***B&I*** ferry until October 1991 when ***Sealink*** announced new sailing times which would involve two ships passing each docked ***B&I*** ferry. ***B&I*** sought interim measures, prohibiting the new sailings, which the Commission granted. The Commission said that a dominant undertaking that owns or controls an essential facility and uses that facility will be guilty for abuse of dominant market position if either refuses to grant access to competitors or grants access on terms less favourable than those which it gives to its own services because ***essential facilities*** are those to which competitors must have access in order to provide services to customers properly.

c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. Classical examples are discounts, rebates, and allowances. In ***Hoffman – La Roche*** the ECJ distinguished between loyalty and quantity discounts. Loyalty discounts were granted to customers on the proportion of the customer's requirement for vitamins purchased. This had a "tying" effect too, compelling customers to buy from ***Hoffman – La Roche***

and was abusive. Quantity discounts were granted on the basis of volume of vitamins bought from the same firm and were legal. Discounts were also considered in ***Michelin*** case where the ECJ observed that discounts ***per se*** are not abusive[36] but loyalty rebates are. The problem is that discounts, especially for quantity, can be offered on a one-off basis but loyalty relates operate on a rolling basis and require continuity of purchase. This results in competitors being denied access to one's customers. Discounts must be justified by some economic service. Here, discount periods were measured over a one-year qualifying period and customers came under heavy pressure to buy ***Michelin*** tires over the whole period. This stopped free selection by customers and was not competitively – justified behavior. In June 2001 ***Michelin*** was again fined by the Commission for a complex system of quantitative rebates, bonuses and commercial agreements which constitute a loyalty – inducing and unfair system ***vis-a-vis*** its dealers, had operated in France from 1990 to 1998[37].

In ***United Brands***, price discrimination led to the conclusion that customers were not treated equally and this affected their competitive position. The dominant undertaking set prices for bananas already at sea in response to offers from the distributors and ripeners. At that stage the supply for the subsequent week was fixed, priority depending on demand.

d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. Article 82(d) covers all kinds of 'tying' arrangements. The objection to tying may be to enable an undertaking with dominant position on one market to gain competitive advantages on another market. Thus in case ***Tetra Pak II***, the Commission imposed a fine to ***Tetra Pak*** for requiring the customers to whom it supplied machines to use only ***Tetra Pak*** cartons and to obtain them from ***Tetra Pak*** subsidiary within the Member State where the customer was operating.

Generally it is deemed that undertaking in dominant position have stronger responsibility to restrain oneself from distortion of competition on both market where they are dominant and on another market. That's why the concept of tying trade covers loyalty rebates and so-called ***English clause. English clause*** is a contractual clause that gives a right to customer to look for equalization of prices if it gained a better offer from other suppliers. If the request wouldn't be satisfied customer is allowed to buy from another supplier and at the same time it doesn't lose loyalty rebate at the first supplier-contractor-dominant undertaking. ***English***

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[36] § 71 of the C 322/81 Michelin (N.V. Nederlandische Baden – industrie Michelin) v. Commission [1983] ECR 3461; [1985] 1CMLR 282.

[37] Press Release IP/01/873. The Commission regarded the fact that this was a second infringement, for the same anti-competitive behaviour, as an aggravating circumstance.

clause doesn't provide any protection to consumer but it is a way that dominant undertaking acquires information on prices and business policy at all of its competitors and thus it serve for strengthening of abusive exploitation of dominant position.

EFFECT ON TRADE BETWEEN MEMBER STATES

The same element occurs in Article 81 of the EC Treaty. We could only to point on examples of its narrow and extensive interpretation. The example for restrictive interpretation of inter-state condition is ***Hugin*** case where a Swedish parent company and its UK subsidiary terminated supplies of spare parts for their cash tills to the ***Liptons*** - a small company that operated in the greater London area, providing cash till repair service. The Court of Justice established that the volume of ***Liptons'*** trade was so small as to be insignificant and not attractive enough for other companies to want to import spares and satisfy ***Liptons'*** demand. Apart from that there was no evidence that ***Liptons*** was likely to expand its business into another Member State. Thus there was no effect on trade between Member States and therefore no breach of Article 82 of the EC Treaty.

Contrary in cases ***AKZO, Commercial Solvents*** and ***United Brands*** actual or potential threat for elimination of competition is treated as a consequence of the conduct which distorts the structure of the market and is regarded as affecting the inter-State trade although this did no represent an immediately harm to the ultimate consumer.

SUMMARY

EC Treaty doesn't define the concept of dominant position on the market. The content of the concept arises from decisions of the Court of Justice predominantly. In accordance with mentioned decisions, dominant position represents: a) power to endanger function of effective competition on the market and b) power to act independently regarding competitors, suppliers and consumers. Domination on the market is also turn out dynamically through behavior of a dominant undertaking towards other market participants.

Dominant position on the market is not forbidden, unlawful and punishable by their own. The EU competition law applies only if undertakings abused a dominant position they possess on the single market. Within the EU competition law the prohibition of abuse of a dominant position is regulated primary by Article 82 (ex

Art. 86) of the Treaty Establishing European Community through general clause and enumerated examples.

The essence of Article 82 of the EC Treaty is the control of the market power.

Doc. dr Sinisa Varga*

ZLOUPOTREBA DOMINANTNOG TRŽIŠNOG POLOŽAJA U OKVIRIMA ANTIMONOPOLSKOG PRAVA EVROPSKE UNIJE

Rezime

Zabrana zloupotrebe dominantnog položaja na tržištu EU je u materijalno-pravnom smislu u antimonopolskom pravu Evropske Unije prevashodno regulisana čl. 82. Ugovora o osnivanju Evropske Zajednice.

Na osnovu člana 82. Ugovora o osnivanju EZ nije u skladu sa tržištem i zabranjena je svaka zloupotreba u korišćenju dominantnog položaja na zajedničkom tržištu, ili na njegovom bitnom delu, od strane jednog ili više preduzeća, ukoliko bi to moglo štetno uticati na trgovinu između država članica. Nakon generalne klauzule sledi nabrajanje, primera radi, pojedinih slučajeva zloupotreba koje se naročito sastoje u:

(a) neposrednom ili posrednom nametanju neodgovarajuće kupovne ili prodajne cene ili ostalih uslova razmene,

(b) ograničavanju proizvodnje, plasmana ili tehničkog razvoja na štetu potrošača,

(c) primenjivanju nejednakih uslova na iste poslove sa različitim partnerima, stavljajući ih na taj način u lošiji konkurentski položaj,

(d) uslovljavanju zaključenja ugovora prihvatanjem dodatnih obaveza koje po svojoj prirodi ili prema trgovačkim običajima nisu u vezi sa predmetom ugovora.

Dominantan položaj na tržištu nije sam po sebi zabranjen, protivpravan i kažnjiv. Do primene pravnih normi komunitarnog antimonopolskog prava dolazi tek ako se dominantan položaj koji neko preduzeće ima na tržištu zloupotrebi, s tim što u

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Ugovoru o osnivanju EZ pojmovi ***dominantan položaj*** i njegova ***zloupotreba*** nisu određeni. Sadržina ovih pojmova izgrađena je kasnije kroz odluke organa Zajednice u pojedinačnim slučajevima. Tako prema presudi Suda pravde u slučaju ***Continental Can (C 6/72 Europemballage Corporation and Continental Can Co. Inc. v. Commission ("Continental Can") 1973 ECR 495; 1973 CMLR 199):*** "Preduzeća su u dominantnom položaju kada imaju moć da se ponašaju nezavisno, što ih stavlja u poziciju da delaju ne vodeći računa o svojim takmacima, kupcima ili dobavljačima". Što se tiče zloupotrebe dominantnog tržišnog položaja u antimonopolskom pravu EU je prihvaćen princip objektivne zloupotrebe dominantnog položaja na tržištu što znači da za postojanje zloupotrebe nije bitna krivica dominantnog preduzeća.