PROMOTING COMPETITIVENESS BY FIGHTING AGAINST ABUSES OF A DOMINANT MARKET POSITION

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Abstract: *Competition is a basic mechanism of the market economy involving supply and demand. The legislative framework of the European competition policy is provided by the Treaty on the Functioning of the European Union (TFEU)(Articles 101–109). Without an effective EU competition policy, the Single Market cannot reach its full potential. Competition policy is also crucial in allowing the EU to crack down on abuses of dominant position, cartels and concerted practices that harm consumers. To be in a dominant position is not itself illegal. A dominant company has a special responsibility to ensure that its conduct does not distort competition.*

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Introductory remarks

The perfect competition is the ideal model of the most efficient economy. Market competition is imperfect when at least one of pure and perfect competition rules is not checked. Participants can influence individually the relationship between demand and supply of commodities and the price level. Depending on the number and force of the economic operators, producer and consumer the market with imperfect competition could exist in one of the following forms: monopoly, oligopoly and monopolistic competition.

The monopoly is characterized by the existence of a single market manufacturer of a certain product. Another feature is the lack of substitutes for the product. In such a situation, the competitive game is distorted, since the product price is fixed by the producing company, not as a result of supply and demand. Consumers are forced to buy the product offered by the monopoly, in the absence of other options. The monopoly price is higher than that prevailing in markets where there is competition. However, an argument that has been advanced to support monopoly, namely that it can lead to high profits, which in turn provides a basis for innovation. Monopoly laws treat it differently depending on the market share that a trader holds because in modern economies monopolies are very rare.

Oligopoly is a market term structure controlled by a small number of producers and buyers. The fundamental feature of the market is oligopolistic interdependence shares of different producers, meaning that prices, quantity of products offered and a producer profits depend on the reactions of

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other manufacturers. The profit maximization on the oligopolistic market is based on either the homogeneity of the product and the price competition, either on adoption of a strategy of product differentiation and competition outside the price by certain performance relating to efficiency in use.

The monopolistic competition lies between perfect competition and monopoly. It is characterized by a large number of competitors, product differentiation, free market access and the limited ability of influencing prices. The rules are meant to stimulate emulation and enforce loyalty market competition.

A competition that is not regulated and monitored by the state could lead to deviant behavior on the part of traders and affect the interests of consumers. Protecting it can follow two paths: a preventive one and one focused on sanctions. Unfortunately, preventive control proves to be ineffective most of the time, the only solution is the application of sanctions, government interference in the game competition being indispensable.

Dominant position and abuse of dominant position

To be in a dominant position is not in itself illegal. A dominant company has a special responsibility to ensure that its conduct does not distort competition. The concept of dominance was defined by the European Court of Justice in the United Brands Company and United Brands Continental BV against Commission of the European Communities as a position of economic force enjoyed by an organization which enables it to affect competition in a market relevant by the ability he has to behave independently of its competitors and its buyers and ultimately, to final consumers of the product concerned. The existence of a dominant position stems, usually in possession of a large market share over a long period. To analyze whether an operator is dominant, we take into consideration the constraints they face in relation to the ability to behave independently in the market (Lazarus, 2013, p. 175).

Art. 102 of the TFEU does not define the abuse of dominance. In the case of Hoffman-La Roche against The Commission, the European Court of Justice has shown that the abuse of dominance is determined by the relationship between the market shares of the concerned organization and of its most important competitors, by the technological advantage enjoyed by an organization over its competitors or the existence of a highly developed network of sales and lack of potential competition.

In the legal literature, the abuse of dominance was defined as 'conduct of an organization in a dominant position, regardless of its subjective attitude, likely to harm consumers' interests and / or obstruct normal competition in a relevant market, in those contexts where competition is already weakened due to the presence of the concerned organization' (Didea, 2014, p. 121).

To prevent and combat all forms of abuse of dominance, European and national legislations exemplify only some of the acts that may constitute abuse of a dominant position. Abuse of dominant position can appear in a variety of forms, such as:

- Imposing, directly or indirectly, prices or unfair trading conditions;
- Limiting production, markets or technical development to the prejudice of consumers;
- In relations with trading partners: applying dissimilar conditions to equivalent services, causing, in this way, some of them a competitive disadvantage;
- Making the signing of contracts the 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;
- Excessive pricing or predatory pricing in order to eliminate competitors or export sale below cost, coverage differences by imposing increased prices to the domestic consumers;
- Exploiting the dependence of another organization to such an organization or organizations, which has no equivalent alternative conditions;
- Breaking contractual relations for the sole reason that the partner refuses to submit to unjustified commercial conditions.

Detecting abuse of dominance: case studies

Delimitating the abuse of dominant position by a loyal competitive behavior is a complex operation. From the legal point of view, we establish a presumption that one or more organization is in a dominant position as long as the aggregate quota on the relevant market recorded in the period under investigation, exceed 40%. Natural or legal persons affected by an abuse of a dominant position may refer to the competent competition authority (Competition Council or the European Commission). Defining the relevant market is important to identify the competitive constraints faced by an organization, as well as the market shares of operators. The relevant market should be analyzed both in terms of product and geographic location.

The next step involves determining the position of this entity in the relevant identified market. In this sense, the competition authority will check the market structure in terms of competitors (number, position in the market), market shares, barriers to entry and exit from the market, market effects, evidence supporting an abuse. (Niels *et al*., 2011, p. 185)

The Tomra Systems /European Commission case. Tomra group is the manufacturer of vending machines for beverage packaging recovery, depending on certain parameters, such as its shape, barcode, etc. The European Commission received a complaint from a competitor who complained that Tomra Systems committed a dominant position abuse, preventing it from entering the market.

Regarding the relevant market in terms of products, the Commission found that there is a market for bottle recycling machines and geographically, the competitive behavior has a national dimension. However, the Commission found that Tomra Systems is in a dominant position as market shares on all relevant markets were beyond constant market shares of the competitors. To stop the abuse, the Commission found that the investigated company intended constantly to preserve their dominance and market share through means such as preventing the entry of new market operators, keeping competitors small by limiting their growth possibilities, weakening and eliminating competitors' acquisition or other methods. These strategies were implemented by signing a significant number of exclusive agreements with supermarket chains, which previously imposed quantitative individualized targets. All these agreements, commitments or promises of customers were qualified by The Commission as a limitation of market access and of the growth opportunities for existing and potential competitors. The Commission completed its analysis by examining the likely effects of the practices complained of in the relevant market. Thus, The Commission found that throughout the period under review, the company's market share has remained relatively stable, while competitors who have demonstrated the potential to gain greater market share have been eliminated through purchase and the remaining competitors have been eliminated from the market. Even from the perspective of consumers there have not been identified advantages, as prices have not decreased with increasing sales volumes, as was natural, on the contrary, they have stagnated or even increased.

Intel Corp. / European Commission Case. Intel Company was penalized for dominant position abuse following an European Commission investigation that lasted eight years for two types of anti-competitive behavior, namely: total grant or partial hidden discounts of computer manufacturers on condition that they buy all or almost all x86 chips produced by Intel; bribing computer manufacturers to halt or delay the launch of some computers with x86 chips belonging to the competition and to limit the sales channels for these products.

Regarding the relevant market, the products in question are UPC Links x86 (PC processors). The geographical market has been defined as worldwide. With regard to dominance, the Commission found that Intel held consistently high market share of about 70%. Moreover, the relevant product market barriers to entry and expansion are present. Intel's competitive behavior was described as abusive because it gave restricted discounts correlated to the acquisition of UPC totally Intel x86 sites, which led to limiting choice for consumers and lower incentives for innovation. Secondly, the Commission found that Intel made payments to three computer manufacturers (HP, Acer and Lenovo) in order for them to postpone or cancel the launch of products equipped with UPC technology based on the main competitor (AMD) technology and / or impose restrictions on the distribution of these products.

Conclusion

The legal Romanian provisions on the identification of a dominant position and combat abuse of dominant position are basically based on European competition law and the European Court of Justice. The main European legal provision regarding the abuse of dominant position are those of art.102 from the Treaty on the Functioning of the European Union and are implemented at national level through art. 6 of Romanian Competition Law, no. 21/1996. In competition law, the abuse of dominant position is considered to be an anti-competitive practice, which distorts competition. In practice, it is sufficient that the competition authority declare that an organization is abusing its dominant position on the relevant market, to order the cessation and sanction of the illegal behavior. Nationally, the Competition Council had investigated and had sanctioned more anti-competitive behavior that took the form of an abuse of a dominant position, which allowed the restoration of a healthy competitive environment.

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