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Dominant Position and Concept of Abuse in the European Union

В статті досліджено проблему зловживання монопольним становищем підприємствами на ринку Європейського Союзу. Договір про функціонування Європейського Союзу забороняє будь – яке зловживання монопольним становищем одним чи більшою кількістю підприємств в межах внутрішнього ринку чи його значної частини, адже це може завдати шкоди торгівлі між державами - членами. Проте цей документ не наводить визначення домінантного положення та зловживання ним. Дана стаття прояснює визначення домінантного становища та шляхи його встановлення. Автор звертає увагу на основні та додаткові фактори відповідно до яких підприємство може бути розцінено як таке, що займає монопольне становище. Також вказується на те, що сам факт перебування підприємства у монопольному становищі не вважається антиконкурентною поведінкою. Проте, якщо суб'єкт господарювання використовує зазначене положення з метою усунення конкурентів з ринку чи для вчинення інших дій, які суперечать добросовісній конкуренції, він вважається таким, що зловживає домінантним положенням. Таким чином, у статті наводиться визначення поняття «монопольне становище» та розглядаються способи його визначення. Вказуються випадки у яких підприємство може займати монопольне становище на одному ринку, а зловживати останнім зовсім на іншому. Такі випадки, в основному, мають місце при експлуатаційних зловживаннях. Договір про функціонування Європейського Союзу наводить певні форми зловживання монопольним становищем. Але, перелік даних форм не є вичерпним. Відповідно до цього, дана стаття розрізняє горизонтальне та вертикальне зловживання домінантним положенням. Також вона відображає такі категорії зловживань як виняткові угоди, «зв'язування», бандлінг, хижацькі умови та відмова від постачання. Автор розглядає питання, що виникають у зв'язку з зазначеною проблемою у світлі практики Європейської Комісії та Суду Європейського Союзу.

Ключові слова: *монопольне становище, зловживання, антимонопольне право, ринок Європейського Союзу, добросовісна конкуренція, конкуренти.*

В статье исследована проблема злоупотребления монопольным положением предприятиями на рынке Европейского Союза. Приведено определение понятия «монопольное положение» и рассмотрено способы его определения. Установлено что именно подразумевается под злоупотреблением монопольным положением и в каких формах оно может проявляться в Европейском Союзе. Автор рассматривает вопросы, возникающие в рамках данной проблемы, опираясь на практику Европейской Комиссии и Суда Европейского Союза.

Ключевые слова: *монопольное положение, злоупотребление, антимонопольное право, рынок Европейского Союза, добросовестная конкуренция, конкуренты.*

The article deals with the issue of abuse of dominant position by undertakings in the European Union market. The Treaty on the functioning of the European Union prohibit any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it because it may affect trade between Member States. But it doesn't state about the definition of dominant position and abuse of it. It also doesn't make clear the situations when abuse of dominant position takes place. The article clarifies the meaning of dominant position and defines the way in which it can be established. The author makes an attention on the main and additional factors due to which an undertaking may be considered as in dominant position. There is also stated that taking by an undertaking a dominant position is not anti-competitive conduct. But if it uses this position to eliminate competitors from a market or to make other actions that contradict to the fair competition, it is

considered to abuse it. Thus, the article determines what is the abuse of dominant position and in which form it can appear. It also indicates the situations in which enterprise can occupy a dominant position in one market, but abuse of its dominant position may happen through actions in another market. Such situations usually appear during exploitative abuses. The Treaty on the functioning of the European Union provides some mods of abusive conduct. But the provided list is not exhaustive. Due to this the article also distinguishes the types of abuse of the dominant position – horizontal and vertical. It also reflects the categories of abuses such as exclusive dealing, tying, bundling, predatory conditions, refusal to supply. The author reveals the questions in the issue in the light of the practice of the European Commission and the Court of Justice of the European Union.

Keywords: *dominant position, abuse, antitrust law, European Union market, fair competition, competitors.*

Issue. For decades, the European Union receives positive results in the economic and in the social sphere thankfully to the functioning of the competition regime on the internal market. Competition is a necessary element of effective functioning of the market economy. It also is a tool of the development of production, of optimal redistribution of resources, and of technical progress. Legal regulation of competition guarantees the appropriate regime of the legitimacy of the benefits of trade liberalization. Antitrust regulation ensures fair competition, which may be undermined by anticompetitive actions of undertakings. Especially, it may be distorted by the actions of undertakings which occupy a dominant position in the certain market. These undertakings can abuse of their dominant position to eliminate their competitors from the market in different ways. And, if an undertaking abuse of its dominant position, it is not only make a harm to the functioning and to the development of certain market but it also violates the competition law of the European Union.

Analysis of recent research and publications. The issue about the antitrust policy and the antitrust legislation in the European Union was researched by T. Shvydka, V. Hrudnytskyi. A lot of attention regarding the competition law can be find in the researches of V. Muraviov, K. Smyrnova, O. Bakalinska.

Unsolved problems. One of the conditions for improving efficiency of activity of undertaking is the using of an effective mechanism for its protection from unlawful infringements from the side of other participants of market relations. Thus, it is necessary, for choosing an appropriate mechanism, to determine whether undertaking is in dominant position and if so - whether it executes its economic activity according to the law. In the case of dominant position of entity, it is also important to distinguished the abusive behavior of latter from normal competitive strategy.

Purpose. The article aimed to clarify such questions in the frame of the European Union:

- what is mean an undertaking in the dominant position;
- what is an abuse of the dominant position;
- in which way an undertaking may abuse its dominant position.

The main body. The term dominant position is not defined by the Treaty on the functioning of the European Union. Moreover, this term is not determined by other legal acts of the European Union. This situation was changed by the Court of Justice of the European Union. In the case of United Brands v. Commission, it is stated that dominant position is a position of economic strength that allows an undertaking to behave to an appreciable extent independently of its competitors and customers and ultimately of its consumers. [1] This definition is often used by the Court of Justice of the European Union and the European Commission in their decisions regarding the application of article 102 of the Treaty on the functioning of the European Union.

The possibility to behave independently of competitors, customers and consumers is a main feature of this definition. Beside this, the European Commission and the Court of Justice of the European Union during determination of a dominant position of certain undertaking put their attention on some other things. These institutions consider about how efficiently undertaking make obstacles for entry into the market of competitors for another undertaking; what is its market share and which economic potential does it have. [20, p. 240]

To determine if the company holds a dominant position, four consecutive tests should be performed:

1. To establish the relevant market (product, geographic, and possibly, time).

Under the relevant product market is understood certain goods (services), the production or distribution of which provides to company the dominant position. The main criterion for determining the relevant product market is the so-called method of "interchangeability", on the basis of which courts determine the extent to which goods (services) can be replaced by other goods (services), taking into account their characteristics, prices and purpose of use (as was in the Case - 85/76, Hoffman-La Roche).[2]

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products and services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area. [15, p.6] Nevertheless, under the relevant geographic market can be recognized as Community as a whole, as well as individual Member State, groups of Member States and, even, individual regions of one Member State.

2. To establish that this enterprise permanently owns an important part of this market.

There is no universal formula regarding the determination of the market share that is held by the enterprise in the case law. For example, in the case Hoffmann–La Roche (well known as a case about vitamins), the Court of Justice of the European Union has identified each vitamin in a separate product market, because none of the vitamins are could be replaced by another. So, after this the Court of Justice of the European Union also found that for some vitamins the market share that ranges from 75 to 87% for up to three years corresponded to a dominant position. For some others vitamins - market share between 63 and 66% over three years allowed to conclude that there is a dominant position, provided that the market share of the rest of the competitors ranged from 14 to 6%. In the same case, for other vitamins the Court of Justice of the European Union has decided that the market share of 47% on oligopolistic market, where the closest competitors controlled respectively 27%, 18% and 7% of the market, there is also a dominant position of this undertaking. But, in this case, the Court of Justice of the European Union did not come to conclude that there is a dominant position in the market for vitamin B3 only on the grounds that for three years the market share of La Roche has increased from 29% to 51% at the cost and from 19% to 51% at the volume. [2]

In the Michelin case the market share was in the amount of 57-65% and the share of the closest competitors was in the amount 4-8% and it was concluded that Michelin was in dominant position.[3] In the Case of United Brands, the European Commission decided that the part of market of 40-45%, which is in many times higher than the level of other competitors, has a significant impact on the decision-making process.[1] In the Case of AKZO the Court of Justice of the European Union established a presumption of domination if the company has a part of market of more than 50% over a period of more than three years.[4]

Practice shows that this issue is solved on the basis of the actual circumstances of the case and the specific market. The Court of Justice of the European Union constantly emphasizes that the stability of trade relations in the relevant market is an essential component of determining dominance.

In its Notice on the definition of the relevant market, the European Commission operates by methods of calculation of market share. [15] Thus, with a part of market of less than 30% it is difficult to make the decision about dominant position. If the part of market is between 30% and 40% there are still great doubts about dominance, and other aspects need to be taken into account to determine it, in particular, the stability of the part of market over several years, the nature of the market – oligopolistic or competitive, and the market shares of the closest competitors. If an enterprise owns 60% of the market for certain goods in a certain territory, then it will most likely be considered as dominant.

3. To establish a low probability that existing or potential competitors will be able to shake its position.

4. To establish that a dominant position exists within the common market or a substantial part of it.[20, p. 240]

In determining the dominance in the market, it is also taken into account barriers to market access. It can be legal barriers related to legislation or to intellectual property rights. In the case of Tetra Pack (I), the acquisition of an exclusive patent and the license on a know - how was considered as factor indicating dominance.[5] If says about copyright, in

some cases the Court of Justice of the European Union has established that the association, which accumulated copyrights, acquired a dominant position. In the «Magill» case, it was stated that using the copyright on weekly TV programs by owners of these rights were regarded as abuse of a dominant position.[6]

In determining the dominance in the market, other additional factors are also used:

- the most modern technology, which helps to weaken the dominant position of competitors (this factor is especially important in high-tech industries, in the traditional areas it is less important);
- participation of undertaking in a powerful economic group;
- the public nature of the enterprise (namely, the fact that article 106 of the Treaty on the functioning of the European Union proclaims the extension of article 102 of the TFEU to state enterprises and enterprises which have been granted with exclusive or special rights by member states);
- mass production.[20, p.241]

Despite the significant impact of dominant enterprise on the market, their existence does not contrary to the objectives of the European Union internal market. Only abusing a dominant position may affect trade between Member States and it is prohibited by the European Union competition law.

Article 102 of the Treaty on the functioning of the European Union does not give the definition of abuse of the dominant position. For the first time it was formulated by the Court of Justice of the European Union in the Case - Hoffmann-La Roche & Co. v. Commission. Regarding to this case, the concept of abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where the degree of competition is weakened and which, through recourse to methods different from those which are the condition of normal competition in products or services on the basis of the transactions of commercial operators, has the effects of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.[2] In the Case – 322/81, Nedelandsche Baden-Industrie Michelin v Commission (Michelin I) the Court of Justice of the European Union determined that despite the fact that the presence of dominant position is not in itself an offence, the enterprises occupying a dominant position have “special duty” to make sure that their actions do not worsen undistorted competition on the market of goods.[3]

In some situations, undertaking can occupy a dominant position in one market, but abuse of its dominant position may happen through actions in another market. Such situations usually appear during exploitative abuses. There are a few cases in which the Court of Justice of the European Union examine the same situations. The first one is a case Commercial Solvents v. Commission, where undertaking in a dominant position abused it on the market of raw material because of refusal to supply these materials to producer of medications. It happened because this undertaking planned to enter into the market of medications.[18] Another one and more important is Case – 311/84, Centre Belge d’Etudes du Marché-Télémarketing v. Companies Luxembourgeoise de Télédiffusion (CLT) SA and Information Publicité Benelux (IPB) SA (Télémarketing). This case was about promotion of goods, which consist of phone number for ordering these goods by consumers. Luxembourg television company CLT refused broadcast on its channel such promotion if the phone number listed in it for ordering, did not service by IPB company that provide communication services. The IPB was affiliated company of CLT. Center Belge provided telephone services and sold goods through television advertising. So, because of action of CLT, this company could not use its own phone number in such advertising. Company CLT occupied a dominant position in the television advertising market because at that time Belgium State Television Channels did not broadcast advertising. One of the main question in this case was whether an undertaking holding a dominant position on a particular market, by reserving to itself or to an undertaking belonging to the same group, to the exclusion of any other undertaking, an ancillary activity which could be carried out by another undertaking as part of its activities on a neighboring but separate market, abuses its dominant position. And the Court of Justice of the European Union said that an abuse is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighboring but separate market, with the possibility of

eliminating all competition from such undertaking.[7]

Article 102 of the Treaty on the functioning of the European Union state that abuse may, in particular, consist in:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- 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.[16]

And this list is not exhaustive.

Also, two types of abuse can be distinguished:

1. Horizontal abuse that characterized by activity that reduces or prevents competition by eliminating existing or potential competitors from the market.
2. Vertical abuse that characterized by the exploitation of a dominant position and consists in unfair or unwarranted treatment to those who depend on the monopolist in the supply or purchase of goods or services.

Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings distinguished the following categories of abuses:

Exclusive dealing. A dominant undertaking may persuade its competitors to exclusive obligations, including purchases or sales and rebates.

An *exclusive purchasing* obligation requires a customer on a particular market to purchase exclusively or to a large extent only from the dominant undertaking. [17, p. 12-13] The main idea of this type of abuse is to make an obligation or an incentive, which leads buyer to purchase goods or services from one undertaking that occupy a dominant position in certain market.

There is also a possibility to set up *exploitative prices* and *exploitative conditions* among this type of dealing. These are situations where prices can be too low (dumping) or to high (excess profit). In the Case of General Motors, the Court of Justice of the European Union abolished the decision of the European Commission, setting up insufficiency of evidence regarding high prices. The Court of Justice of the European Union stated that it must be a link between price of selling and economic value of certain good. If the price much higher than such value, it can be made an assumption about abuse. However, in this case, the European Commission did not justify such assumption. [8] This method also has been used in the Case of United Brands. The European Commission had found that United Brands had abused its dominant position by collecting excessively high prices for the Chiquita bananas in Germany, Denmark and the Benelux countries. But the Court of Justice of the European Union abolished the decision of the European Commission because the economic analysis of production and distribution prices of United Brands, that has been made by the European Commission, was not sufficiently precise for determining the fact of actual existence of high prices. [1]

If says about *rebates*, it is a common form of price competition. But, dominant undertakings may use such methods of discounts that can lead to distortion of competition. It can happen especially if a rebate granted on the term that the buyer must purchase all or most of its requirements from an enterprise in a dominant position. The aim of such rebates is to remove or restrict customers' freedom to choose the undertaking where they purchase goods (services) and to prevent competitors from entering the market. [17, p. 12-14]

In the Case of Hoffman-La Roche, the Court of Justice of the European Union prohibited loyalty rebates, the granting of which was tied to the condition that, for a specified reference period, the appropriate contracting partner would cover its entire need for vitamins and at any rate a major part of it by deliveries from Hoffmann-La Roche. According to the Court, the act of a dominant undertaking tying buyers – even if at their request – so as to commit them to buying or promising to buy from the said undertaking all the products they need or a majority thereof shall be considered abuse of dominant position, independent of whether the said obligation is imposed as such or whether discounts are obtained as a result of it. [2]

One more interesting case about rebate system was Michelin cases. There was issued two

decisions on the Michelin rebate systems. In the first case, the Court of Justice of the European Union, like the European Commission, found prohibited so-called target-discounts to retailers the size of which was based on the sales volumes of each individual retailer in the previous year. The discount percentages and sales targets were not confirmed in writing but they were orally negotiated in the beginning of each year. The discount system forced the retailers to remain loyal to Michelin particularly at the end of the year because not to achieve the objectives meant losing the rebate.[3] In another Michelin case, the Court of Justice of the European Union, like the European Commission, found prohibited the discount system directed at the Michelin retailers: the discount volumes were based on sales volumes realized, and they were counted only a year after the first purchases. The discount system caused uncertainty to the retailers on the volumes of the forthcoming rebates and tied the retailers to obtain their products from Michelin. [9]

Tying. Tying happen when a dominant undertaking sell goods (services) only on the term that the customer also buys another good (service) from this undertaking. The first product is called a tying product and the second one - tied product. [17, p. 15]

The tying effect can be achieved in many ways. The plainest way is the contract term where the enterprise requires the customer to buy the tied product as well, as a condition to the delivery of the tying product.

One of the example of tying is the Case T – 30/89, Hilti. Hilti AG is a tool manufacturer who had demanded that customers who purchase its patented nail guns also purchase their nails exclusively from Hilti. Although the company offered discounts on these two products, it refused to supply them to competitors and try to force the distributors to apply the same practice. Hilti also refused to perform after-sales warranty if nail guns were used with nails of other manufacturers. The European Commission considered this abuse of dominant position and imposed a fine of 6 million euros on Hilti. Hilti justified its behavior by safety considerations. The Court of Justice of the European Union did not agree with this argument and determined that this duty firstly lies on state bodies, so private enterprises do not have to deal with the danger that inherent to this type of goods, resorting to such measures. [10]

Another example of tying is the Case of Tetra Pak II. Tetra Pak had demanded that customers to whom it supplied equipment used for the packaging of liquid or semi-liquid food products also purchase from it the cartons which were required for manufacturing the liquid-packages. The European Commission found that it is not usual to tie the products in question to each other and no technological considerations can be found for it either. In the Court's judgement is the finding that although there may exist a natural connection between the products or they would appear together in commercial usage, their tied selling still may, depending on the context, imply an abuse of dominant position. [11]

Bundling. It is usually referring to the way products are offered and priced by the dominant undertaking. In the case of pure bundling the products are only sold jointly in fixed proportions. In the case of mixed bundling, often referred to as a multi-product rebate, the products are also made available separately, but the sum of the prices when sold separately is higher than the bundled price. Bundling as well as tying is common practice intended to provide customers with better products or offerings in more cost effective ways. However, an undertaking which is dominant in one product market (or more) of a tie or bundle (referred to as the tying market) can harm consumers through tying or bundling by foreclosing the market for the other products that are part of the tie or bundle (referred to as the tied market) and, indirectly, the tying market. [17, p. 15]

Predatory conditions. In this category it should be highlighted predatory and discriminating pricing.

Predatory prices are special prices below cost, directed against one or more specific competitors in order to force them out of the market. The Court of Justice of the European Union found in the Case of AKZO that a dominant undertaking has no benefit from the use of such prices, as each sales event produces loss, unless the purpose is to oust the competition in order to raise prices. [12] In the Tetra Pak (II) case, the European Commission found that there was a practice of predatory pricing during selling aseptic cardboard boxes. Sale of these things has been made on permanently loss – making price level for seven years. The only reasonable explanation for such behavior of undertaking was

existence of a strategy of crowding out from the market the competitors. [11]

Discriminating pricing is a permissible principle for setting different prices for the same goods based on commercial considerations (for example, trust of customers or the quality of the offered product). On the contrary, discrimination on the national basis of the buyer may constitute an abuse, as was established in case of United Brands. United Brands usually sold bananas to European purchasers. These bananas were delivered to Rotterdam and Bremerhaven at different prices. The products were sold on FOB terms, thus, the cost of delivery, customs duties and other tax payments did not affect the price. United Brands justify the difference in prices with unequal retail prices in different member countries. However, the Court of Justice of the European Union upheld the opinion of European Commission that such behavior violated the requirements of article 102 of the Treaty on the functioning of the European Union. Differentiation on the grounds of the nationality of buyers has strengthened the results of obstruction of free distribution of bananas in the common market. [1]

In the Case of Irish Sugar, it was found that the undertaking had sought to restrict the trade between the Member States to protect the high price level in the Irish market. Irish Sugar was found to have treated its own customers unfairly by granting special border rebates to the retailers located between the borderline area between Ireland and Northern Ireland. The purpose of the rebates was to decrease the import of cheaper sugar intended for retail sugar market from Northern Ireland to Ireland. Additionally, Irish Sugar granted import rebates to customers who imported sugar outside of Ireland and hence discriminated against customers who supplied to the Irish market alone. [13]

After analyzing the Irish Sugar case we can see that during deciding on the legality of discriminating (in other words selective) pricing, the European Commission and the Court of Justice of the European Union take into account the fact whether such policy was aimed at removing a competitor from the market. [19, p.1084] And such fact was also taken into account in the case of Campaigne Maritime Belge. In this case, the company was accused of abusing its dominant position due to the fact that it imposed unequal discriminatory prices for the use of routes to Africa. [14]

Refusal to supply. In general, this is abusive, except in the case of objective reasons for refusal. Abuse is also the fact of the dependence of supply on conditions that are aimed at ensuring control over the production or marketing of products.

Generally speaking, based on freedom of contract, business undertakings are free to choose their contracting partners and to use their property freely. In the case of a dominant undertaking, refusal to supply products may take the form of abuse of dominant position. Refusal to supply typically restricts competition in situations in which a dominant undertaking competes with the buyer in the aftermarket from whom it denies supply. The criteria for a prohibited refusal to supply may be fulfilled when a dominant undertaking ceases deliveries to a customer or refuses an agreement with a potential customer. [17, p. 18] Refusal to supply may take the form of a direct refusal or an indirect refusal when such demands are set regarding pricing or other terms that is already known that the opposing side cannot accept them.

The examples of such type of abuse of the dominant position of certain undertaking can be cases that have already been mentioned in this article. These are cases: Commercial Solvents v. Commission; Centre Belge d'Etudes du Marché-Télémarketing v. Companies Luxembourgeoise de Télédiffusion (CLT) SA and Information Publicité Benelux (IPB) SA (Télémarketing).

Conclusion. To summarize above – indicated, it should be noticed that the fact of dominant position of an undertaking does not prohibit in the European Union competition law, such situation can be achieved by lawful means. But, abuse of dominant position on the market is a violation of the competition law. Such abuse may consist in actions that may lead to the prevention, removal or restriction of competition. Undertaking that abuse of dominant position purports to restrict the competitiveness of other undertakings. Acted in such way an entity in dominant position neglecting by the interests of other undertakings or consumers. All actions that can be considered as abuse of dominant position create consequences that would be impossible under the conditions of significant competition on the market. Moreover, such actions distorted competition as in particular market as in whole European Union market.

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