

The Dominant Power Abuse and State Aid in European Union

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Abstract: *The abuse of dominant power and State aid are two forms of anti-competitive policies regulated by the European Commission in the spirit of the Treaty on European Union functioning, Lisbon, 2007. They have adverse effects on the development of economic activity, distorting competition, favouring certain economic agents and affecting the consumers.*

Key words: dominant position, product position, geographic market, commercial advantage, refusal to supply, conduct abuse

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1. Dominant Power Abuse: Content and Forms

Free competition may be restricted, distorted or hindered by agreements or arrangements between independent companies or groups of companies. Negative effects on competition can also be produced by the actions of one company taking advantage of its monopoly position in order to restrict competition on a particular market using its own power without resorting to the help or participation of others.

Maximizing the consumers' welfare, an objective of the competition policy cannot be achieved without regulating the unilateral actions of companies enjoying a market power that can disrupt the balance of the market through its dominance on the market.

Establishing the dominant position requires the combination of the **legal criterion** mentioned by the European institutions - the independent conduct of the dominant undertaking towards the customers, competitors and consumers, in order to establish the market strategy, with the **economic criterion**, the market power, by means of which the dominant undertaking may have a business conduct that can negatively supply its consumers, customers and competitors.

The dominant position is that level of economic power that *allows a company to overwhelmingly influence the conditions under which competition manifests itself on the relevant market; at a large extent it behaves independently of competitors, customers and, ultimately, its consumers.*

Delimitation and characterization of dominant position must be determined in relation to the **relevant market**, concept closely linked to the objectives pursued within the Community competition policy. *The concept of relevant market is used in order to identify the products and economic agents that are in direct competition in business. Therefore the relevant market is the market where competition takes place.*

It would not be possible to apply the Competition Law no. 21/1996 without reference to the market on which competition takes place, that is the relevant market, which has two fundamental dimensions, namely **product market and geographic market**. Goods and services are described and traded on the product market, and the location of producers or sellers of a product takes place on the geographic market. The

relevant market on which a competition issue must be analyzed is therefore determined by combining the product market and the geographic market.

The product market includes the product and the entire range of products that prove to be substitutable or interchangeable, as alternatives, by consumers. The product market is thus defined in terms of demand or the product market includes the product and the range of products that can become substitutes for the product or products existing on the market. The product market is thus defined in terms of the supply. **In conclusion**, taking into consideration the two issues, the relevant market of a product is the reunion of the multitude of substitutable products, in terms of demand, according to the options, with the multitude of products substitutable in terms of the supply, according to the producers' possibility.

The relevant *geographic market* includes the area in which the undertakings concerned are involved in the supply and demand for goods and services in question, where the conditions of competition are sufficiently homogeneous and which can be distinguished from the neighbouring geographic areas, as the competition conditions are considerably different in these areas.

In defining the relevant market the viewpoints of authorities and companies are different: the authorities try to define the relevant market in the most restricted sense as possible, whereas companies advocate for a more comprehensive sense of the relevant market, the required market share size being higher.

The dimensions of the relevant geographic market can be a town, a county, a region or an area or the entire country. The relevant geographic market should not necessarily coincide with the territory of the EU State members or with the entire territory of the community; nevertheless the geographic market can be very small.

The dominant position on a relevant market may be held individually or collectively, in the situation where several undertakings jointly exercise the market power that brings prejudice to competition.

The main factor in determining the dominant position is represented by the size of the market shares. The European Commission states that a market share of over 75% is a strong indicator of a dominant position existence, and a market share of 50% is considered as a dominant position if other factors are present as well, for example, the existence of entry barriers. The Community jurisprudence states that a market share below 40% raises a presumption of lack of dominant position.

The European Commission takes into consideration in determining the dominant position other elements as well that act as barriers to competition: company size, financial resources, property over certain invention patents, intellectual property rights, predatory pricing, exclusive distribution contracts, technology development etc.

The Romanian Competition Law established a simple presumption according to which one or more undertakings are not in a dominant position if the share or shares cumulated on the relevant market, registered during the period under review, do not exceed 40%.

The policy of the European Union in the competition field does not incriminate the dominant position, *but the abuse of dominant power, the situations where those occupying dominant positions try or even succeed in abusing of the position they hold on the detriment of other economic agents and, ultimately, on the detriment of consumers, affecting competitive relations and can damage the trade between the EU Member States.*

The legal framework of the EU policy applicable to abuse of dominant power consists of the provisions contained in Article 102 of the Treaty on European Union functioning, the Regulations adopted by the EU Council and the European Parliament, the EU Communications, as well as no binding effect Standards containing orientations

and guidelines of the European Commission intended for the national competition authorities.

Article 102 of the Treaty on the EU functioning warns *It is incompatible with the internal market and prohibited, to the extent that it can affect trade between Member States, any abusive use by one or more undertakings of a dominant position held on the domestic market or on a substantial part thereof.* The abuse can consist of:

- imposing, directly or indirectly, the purchase or selling prices or other unfair trading conditions;
- limiting production, trading or technical development to the detriment of their beneficiaries;
- applying in relations with trading partners of unequal conditions to equivalent transactions, thereby creating for them a competitive disadvantage;
- conditioning the conclusion of contracts subject to acceptance by partners of certain supplementary transactions which, by their nature or according to commercial usage, have no connection with the subject of those contracts.

In Article 6 of the Competition Law no. 21/1996 apart the four groups of abusive practices provided for in the EU Treaty, are inserted two groups of abusive practices:

- the excessive pricing practicing or predatory pricing practicing, in order to eliminate competitors, or export sale below the production cost, with differences coverage by imposing higher prices to domestic producers;
- exploiting the dependence state of one undertaking against other undertaking or undertakings and which enjoy no alternative solution under equivalent conditions, as well as the severance of contractual relations for the sole reason that the partner refuses to obey some unjustified trade conditions.

We notice that compared to abusive practices set out in the Treaty, the Romanian competition law adds the following: export dumping, exploitation of dependence state, as well as the severance of trade relations with partners refusing unreasonable contract terms.

The provisions of Article 102 of the Treaty on EU functioning and the Competition Law refer to the economic agents abusively using their dominant position on a particular market. However, in the EU economy there are situations when large companies dominate the market or components thereof. This dominance cannot be considered anti-competitive if it is based on a superior competitiveness relative to competitors operating on the same market. Holding the market power due to the high competitiveness of the product is for the consumer's benefit and represents, at the same time, an important factor in acquiring high competitiveness at national, regional and even global level. The other companies, knowing this situation will proceed to improving technology of manufacturing processes, minimizing production and distribution costs, modernization of distribution networks and management in order to gain at their turn dominant positions. Therefore, market rules functioning takes place. This is how competitiveness leads to competition, and competition leads to increased competitiveness.

Understanding the abusive practices content specified in Article 102 of the Treaty and the Competition Law requires their detailed presentation.

When **sale prices** are imposed it means that their practice is not based on negotiation, but forcing the consuming customers to pay a price that is not related to the product quality or the ratio of supply and demand. Imposing unfair **trading** conditions requires the attitude of the dominant position company to force its customers to accept burdensome contracting conditions, conditions that would not be accepted if they were in equal positions.

Limiting production, trading and technological development of competitive undertakings is performed in various ways: **refusal to supply** products essential for the competitors' activity; **exclusivity** or excessive **loyalty** clauses; providing **commercial advantages** primarily through substantial discounts, provided that beneficiaries supply only from a particular supplier, etc.. The use of such practices restricts competition and creates barriers to potential competitors.

Applying in relations with trading partners certain conditions unequal to equivalent transactions leads to **discrimination**. Imposing **unequal conditions** to trading partners means the practice by the company holding the dominant position of differential treatments that may affect the economic situation of the clients, and in the case of **equivalent transactions** different customers are required to assume obligations of the same nature, creating additional advantages for some against the others.

The conclusion of contracts by obliging the partners to additional transactions unrelated to these contracts is done by the so-called **coupled or tied contracts**. There are situations when customers that purchase a product, called tying product must purchase as well another product from the dominant undertaking, called tied product. The sale of the tied product along with the tying product can have a technical basis when the tying product cannot adequately function except in conjunction with the tied product (technical tying), or on a contractual basis, if the customer purchasing the tying product undertakes to purchase the tied product as well, which has no connection with the tying product (contractual tying). The legislature estimates that tied sales are anticompetitive only when practiced by an economic agent that dominates the market, and there are no operating links between the tying and the tied products.

Practising **excessive prices** or **predatory prices** or the sale for export at **prices below the cost of production**, are considered **abusive** (anticompetitive) **practices** in Romania. Keeping the prices at a low level for a long period of time, with the intention to eliminate its competitors on the market, constitutes an abuse of dominant power in the form of predatory pricing practice. By practicing predatory pricing, competitors are excluded from the market, those who intend to enter the market give up, the buyers receive benefits during the practice period, so that for the next period the price to substantially rise in order to recover previous losses.

Export sales below the production cost covering the differences by practising higher prices to domestic consumers is a form of export dumping and is considered an anti-competitive practice only if accompanied by increases on the domestic market in order to compensate for the export losses.

Exploiting the **dependence state** in which there is an undertaking against the dominant undertaking is a form of manifestation of the abusive use of the benefit against the customers, who have no alternative solution under equivalent conditions, which means they do not find substitutable products on the market.

Breaking the trading contract relations on the grounds that the partner refuses to obey some unjustified trade conditions, considered by the client as an unfair trade treatment, unrelated to the contract object is considered by the legislator as anti-competitive practice and is therefore sanctioned.

As the examples of abusive conduct specified in Article 102 of the Treaty on the EU functioning and the Competition Law, are various, it is necessary their classification in **conduct abuses and structure abuses**. The conduct abuses bring direct prejudices to customers: excessive pricing, discrimination prices, exclusivity contracts, refusal to negotiate, whereas structure abuses affect market structure by excluding competitors of dominant undertakings: predatory pricing, discounts conditioned by exclusivity obligations, selective distribution, etc.

The abuse of dominant position in competition field should be treated and separately resolved at the EU level and at the national level. The abuse of dominant position within the meaning of the EU competition policy aims at affecting by means of the conduct the trade between the Member States. Apart this criterion remedying dominant power abuses remain in national authorities' competence.

2. State aid - economic and legal approach

A main component of competition policy is represented by the issue of the State aid, leading to several and difficult problems to solve. The general applicable rule is that considering that the State aid is forbidden, starting from the economic premise, that is specific to single internal market that a State member cannot help national companies in order to compete more effectively on the same market, with companies from other Member States.

On a common market there cannot exist a competition among economic agents in conditions of equality and loyalty, there cannot be ensured the success of internal market without a competition policy to impose restrictions in what concerns the market interventions of Member States. The intervention of States must be restricted or even hindered only when the State aids are assigned to ineffective economic agents in order to cover their losses, instead of undertaking measures for increasing effectiveness and improving the competition.

Justifying the aids can be made only in conditions that they serve to correcting the deficiencies of the market, they satisfy a common interest, promoting some structural changes in economy.

As a result, the intervention through competitive policy in the issue of State aid aims firstly to protect loyal competition and secondly achieving a balance between the need and legal framework of the intervention of the State on market.

The State aid, through its content and its nature affects free competition because:

- it does not exert an incentive role on the economic environment, neither through stimulation nor correction;
- it deters unsubsidized economic agents, their contribution to social-economic progress being in decrease;
- supports activities and companies with losses, disadvantaging in the end the consumers;
- generates inequalities between economic agents on administrative criteria;
- makes the redistribution of incomes and of the property out of economic criteria.

On this basis there can be drawn-up a first definition of the State aid *„financial transfer, in multiple forms, from the State, based on its resources or expenses, through which there is aimed the support of development or consolidation of the position of beneficiary undertaking of this transfer”*

The notion of „State aid” in economic literature and in community law is awarded a very large sense, even if this refers mainly to granting public funds or other measures of support awarded by central public authorities, local or regional, on which the State exerts directly or indirectly a strong influence.

In an existing definition in specialized literature it is appreciated that the State aid represents *„that interventionist means through which the State supports companies, regions or economic sectors, in the purposes of achieving some objectives of economic policy”*

The Treaty on the functioning of European Union does not define the State aid, it shows only the elements that allow its statements as being inconsistent with internal market (Article 107): „are ***inconsistent with internal market*** the aids granted by the State or through State resources, under any form, which distort or threaten to distort the competition by favoring some companies or the production of some goods in the extent that they affect commercial exchanges between Members States”.

The article predicts regulations on those State aids which are granted in such a manner that they can hinder or distort competition favoring some companies and leading to inconsistent situations with a good development of trade on Single Internal Market of European Union.

In accordance with article 107, par. 2, ***they are in accordance with internal market*** :

- ✓ the aids with social aspect granted to individual consumers, provided that they be awarded without discrimination depending on products origin;
- ✓ the aids intended for repairing the damages provoked by natural disasters or by extraordinary events.

They can be consistent with Internal Market:

- the aids intended to favor the regions development where the standard of living is abnormally low or where it exists a degree of occupying the work force being extremely low;
- the aids aimed to promote the achieving of an important project of common European interest or to repair serious disturbances of the economy of a Member State;
- aids aimed to facilitate the development of some activities in case they do not modify in an unsuitable way the conditions of some commercial changes;
- the aids aimed to promote the culture and heritage conservation;
- other categories of aids established through decisions of Council at the request of the Commission.

Economic international bodies defined in a different way the State aid. Therefore, through World Organization of Trade the definition of State aid sticks to its following characteristics: it represents a financial contribution: they are allotted by public authorities or by any public body from territorial jurisdiction of a State Member in: ***forbidden***: aids for export, subventions that can give rise to an action; ***subventions that can prejudice the interests*** of other members of OMC and ***subventions for agriculture*** granted on specific rules.

Organization for Trade and Economic Development (ODCe) defines the State help as being a set of specific measures of direct or indirect financial support, granted by a central or local administration, in favor of manufacturing industry and which represents a cost for the State. The aids granted by the State are considered to be: ***direct***: which ensure a financial transfer from a public budget to a company, without a form of equivalence and indirect, which represents a public expense for an equivalent service or good.

European Commission starting from provisions of article 1, paragraph 1 from the Treaty on the EU functioning considers that granting the State aid has as a consequence the fact that some sectors or economic activities benefit from a more favourable treatment than others and distorts then the competition game, leading to discriminations among companies that benefit from help and other companies. European Commission emphasize the need to distinguish the case where the State aid points some companies on the situation where the measures are applied in an even way on the whole territory of a Member State and aims at developing of the whole economy, situation when the measures adopted do not represent a State aid as it is foreseen in Article 107, paragraph 1 from the Treaty.

As the Court of Justice considers „the notion of State aid must be understood in a larger sense than the notion of subvention, as it encloses not only the subventions but also the interventions which, under different forms, can reduce the financial obligations enclosed in the budget of the economic agent and which have a corresponding sense thereof”.

In what concerns the conditions where a State aid can be declared forbidden, the opinions are different, even if they have the same end. Therefore, in order to be considered forbidden, the State aid can accomplish the following conditions:

- an intervention of the State through State resources;
- an economic advantage for the beneficiary granted through a selective measure;
- distortion or threatening with distortion of competition;
- the intervention threatens trade among Member States.

For Manolache O., in order that the State aid be considered inconsistent it is necessary to fulfil in a cumulative way the following conditions: to have a specific nature and not a general one; to grant an advantage to a company; to be granted by the State or from public resources; to distort the competition and to prejudice trade among Member States.

3. Conclusions

Starting from the provisions enclosed in art. 107 from the Treaty, the appreciations of European Commission, the Court of Justice and determinations encountered in specialized literature, we can conclude that, in what concerns us, the State aid, in order to be inconsistent with internal market, must achieve the following conditions:

- to be granted by the State, through central or local administrations;
- to be granted to a certain company, that is to be selective;
- to have a specific content, that is to lead to a certain economic advantage;
- to prejudice commercial relations among national economic agents or among community countries;
- to be easily detected, measured and sanctioned.

The State aids know in real life several forms and types:

- **grant** – representing amounts of money granted from the budget, at the request of public authorities in favor of some companies on a free basis and non-refundable;
- **debts prescription** – in general to public or even private companies on national interest;
- **obtaining the loans** from public sources in preferential conditions;
- **state warranties** for the loans contracted by private or public companies;
- **exemptions, reductions, postponements** to the payment of fiscal and social legal obligations;
- **direct and indirect aids** for export;
- **advantages granted for inferior prices** to those shaped through competition on the market for sold lands, leased or licensed;
- **granting some exclusive rights** to some operating companies;
- **participation to budget resources to covering** integrated losses by some companies.

From the enumeration of forms and types of State aids we state that they imply discriminatory measures that advantage some companies, affecting the community framework of the competition. The ways through which national States and local

collectivities can benefit from aids under different forms: subventions, including to export, exonerations or reductions of fiscal or social duties, credits warranties; credits with reduced interest; internal preferential prices for services and products; financial bonuses to privatization, shares purchase of some commercial companies being in financial difficulty etc.

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