

## **EFFECTS ANALYSIS IN ABUSE OF DOMINANCE CASES IN EUROPEAN UNION**

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**Abstract:** *Abuse of a dominant position is a threat to the functioning of the free market. This is the reason why we have proposed to highlight the impact of this particular anti-competitive practice in the European Union area. The aim of this paper is to present, from a theoretical and practical approach, the implications and the effects of this type of behavior and also to highlight the main actors in this process. In order to achieve these goals, we will use historical method to emphasize the historical origins of the concepts and institutions involved. The comparative method will be used to nominate specific features, concepts or institutions that we will analyze and also it will help us to analyze the evolution that have occurred over time in terms of their development and to highlight certain advantages or disadvantages in terms of choice of competition policy on the abuse of a dominant position. In this paper we will notice that both the companies and the market itself are facing with companies that use anti-competitive since 1900. These kind of practices are harmful both for competition and for consumers, so that should not be allowed to expand. In this context, the European Commission imposed a set of rules that all operators must comply in order to protect, maintain and stimulate competition in the Single Market and to promote fair competition.*

**Keywords:** competition, anticompetitive policy, abuse of dominance.

### **1. INTRODUCTION**

Competition is considered the quintessential element of a market economy. It offers a choice of several alternative services and products. Fair competition entails a better allocation of resources by the fact that the producer permanently supervise the ratio between them and expenses. Of course the producer cannot influence the market alone, but through all the competitive relationship that they have with other producers. These ratios will lead to a prices decrease but in the same time the market grows by stimulating buyers. Sometimes the desire to strengthen a dominant market position, to attract many more potential clients and to eliminate their competitors, the traders are using a variety of actions and illegal acts that have as consequences adverse environmental effects. These effects have a negative impact on other competitors and consumers, which is the reason for which the European Union (EU) established a legislative framework in the field. Abuse of dominance is one of the most common forms of illegal practice. It is very

important to know that not the dominant position it is an illegal practice but the abuse of it. This kind of attitude is way incompatible with the proper functioning of the Single Market and if it affects the proper functioning of trade between countries it is prohibited. We refer here to the situation where a company has a position that gives it a great economic power, it is able to create obstacles and restricts the access to the EU market to other smaller firms.

The objective of this paper is to provide a comprehensive and timely feedback regarding the abuse of dominance position. We will try to answer questions such as: what is meant by the concept of abuse of a dominant position? Which are the main elements of abuse of dominance? Which are the main forms of manifestation regarding abuse of dominance? Which are the policies to combat this practice that EU resorted to? What institutions are involved? What the effects are?

Answering to these questions will we be able to formulate a proper opinion regarding the abuse of dominant position and also to identify the limits of the anti-competitive policy.

The paper is structured as follows: the second section presents the current state of knowledge regarding the abuse of a dominant position. The third section is dedicated to EU anti-competitive policy and institutions responsible for implementing these policies, and in the fourth section we will highlight the effects of the abuse of dominant position by presenting few cases. Finally, we present our conclusions.

## **2. LITERATURE REVIEW**

The concept of the dominance position was defined and clarified by the Court of Justice in 1978 through the United Brands case (27/76 February 1978). The Court considered that a dominant position it is “a position of economic strength owned by a company that has the power to restrict the competition, being able to have an independent position compared to other competitors and customers” (case 27/76, 1978 ECR 207).

Even if in practice, the cases of abuse of dominant position are quite common, we cannot say the same thing about the number of the research papers dedicated exclusively to this topic. Both, the numbers of papers from foreign and domestic literature dedicated exclusively to this issue are quite limited. At least, at international level the papers are quite often and are dedicated more to aspects like the implementation of competition policy in the EU.

Among the first papers that discuss abuse of dominance and which have first appeared in USA, one of the most important is that of Arthur Jerome Eddy, “The New Competition”, which was published in 1913 in Chicago. In his paper, Eddy (Arthur Jerome Eddy, 1913) performed for the first time an analysis of the conditions that led to the radical change of trade and industry, focusing on the transition from a competitive to a cooperative economy and combating abusive behavior, this being the cornerstone for most of the scientific papers that followed.

Subsequently, the literature began to appear in Europe too, in a relatively short distance from the introduction of the relevant regulation in the early 1950s. One of the first specialized article of the time was “Competition, Oligopoly and Profits” by Muchlup

Fritz (1966), where appears for the first time the term of “enlightened competition”. The expression refers to the fact that in a competitive economy none producer has the right to be in a position the can offer him the possibility to choose between a policy of high prices and restricted production or a policy of a low prices and high production, in this kind of economy he has no choice in this matter (Machlup Fritz, 1966, 13).

Regarding the first specialty volume, it first appeared in the early '70s, one of the most relevant one “Competition: Deal it from Start to Finish” by Mireille Messier and Steven Murray (Mireille Messier & Steven Murray, 1971). This volume is considered as one of the most representative works from the '70s in the name of abuse of a dominant position because it is the first volume in which the authors address both specialized readers and children. This volume included fun images and easy language digest, focusing on the “fun” part of the competition and leaving in the background the negative reputation of the unfair competition (abuse of position, concentration).

Other references regarding the concept of abuse of a dominant position can be found in works that deal with European Union Law. Relevant in this case is the book “European Union law”, by Paul Craig (2009). This book is considered the “book of books” regarding Community Law, being the international best-seller in 2009, including the most comprehensive review of EU legislation (including legislation on abuse of position). Other important book that we want to mention is “Community law of business” by Deleanu Sergiu in 2002 where the focus is on understanding the importance of freedom of movement and practicing fair competition (rules, exceptions clause, sanctions) from the perspective of Romania's EU position, interests and obligations of administrative and judicial authorities from Romania, as a result of EU accession.

The works that include both legal and economic approach are few and are generally represented by publications relatively recent, like that of Damian Chalmers “European Union Law: Cases and Materials” (2010) and that of Dabbah Maher “International and Comparative Competition Law”(2010) which are capturing abuse of dominant position both in terms of economic and legal approach. The importance of these papers on abuse of position is given by approaching the subject from a contemporary perspective and economic and legal as well, an approach that is not so common among the works that deals with this particular subject. From this point of view, the work highlights both the economic impact of the practice of abuse position and developments in the law regarding the regulation of the practice.

### **3. EUROPEAN UNION POLICY IN THE FIELD OF ABUSE OF DOMINANCE POSITION**

Before analyzing EU policy regarding abuse of dominance, we consider important to mention the primary institution that are involved in this policy, namely:

- European Commission is responsible for the implementation of competition policy at Community level. It takes formal decisions by a simple majority. The Commission may be announced by a problem in terms of competition either through a notification, either through a complaint or either by their own initiative.

- European Court of Justice decides if the Commission's action was undertaken within legally established.
- The European Parliament assesses the Commission's actions through an annual report and comment about the level of developments in this area.
- National authorities acting by the Commission side in the competition policy. The role of national competition increases significantly in the past few years.

Even if Community competition policy is determined by economic considerations, the constraints to which it is dependent are primarily legal. The legal basis of competition policy rests on three pillars. The first pillar refers to the stipulations of the EU Treaty with reference to the following articles: article 81 on restrictive practice; article 82 on dominant market position; article 86 on public firms; articles 87-89 on state aid.

The second pillar refers to the secondary legislation adopted by the EU Council and the European Commission which can be found in the form of Regulations and Directives. Under this pillar, we are referring to Council Regulation 17/1962; Council Regulation 4064/1989, merger control, amended by Regulation 1310/1997; Regulations and block exemptions, granted in the case of agreements relating to well-defined situations, such as technology transfer, research and development, distribution vehicles.

The third pillar relates to the growing number of instructions that are not formally mandatory but which are offering essential information on how to interpret the mandatory rules or ways of action of the Commission. With these guidelines, the Commission aims to increase the predictability of its actions. Beside these instructions can be added and decisions of the Court of Justice of the European Union and the Court of First Instance.

Regarding strictly the abuse of dominance position, the legal framework that is governing it relates to article 82 of the Treaty Establishing the European Community (TEC) and Council Regulation 1/2003 of 16 December 2002 on the application of the competition rules provided in Article 81 and 82 of the European Community Treaty (Official Journal of the European Communities (OJEU) L1 4 January 2003).

Article 82 (previously Article 86) includes that any abuse either by one or more firms that are in a position of dominance in the common market or in a substantial part of it, is strictly prohibited if it has negative repercussions on trade between Member States.

Abuse of position may result in:

- directly or indirectly imposing selling prices or purchase prices or other trading conditions discriminatory;
- application of ceilings that are limiting production, markets or technical developments possible, ceilings likely to disadvantage clients;
- practicing dissimilar conditions to equivalent transactions with other traders, conditions liable to cause disadvantage in competitive position;
- forcing partners to conclude acceptance contracts that are containing certain clauses that are stipulating the practice of supplementary obligations which by their nature are unrelated to the contract.

Article 82 is the main tool in the control of monopoly positions in various markets. This tool involves the choice of two directions:

- identifying the entity with a dominant position;
- identifying that behavior that has the effect of affecting competition in the market.

It is important to note that Article 82 (former art. 86) it refers only to the prohibition of abuse of dominant position and not to the existence of a dominant position. If that wording is quite clear regarding the abuse of a dominant position, however there is a problem regarding power that has the Commission regarding merger control. Using the article 82 imposed two conditions: first situation refers to controlling abusive behavior on the market due to the restriction of freedom of choice for consumers because an operator has a dominant market position, and the second case concerns the way in which the EEC provide to the Commission both the power to prohibit abuse dominance and its prior control.

In the absence of abuse of dominance, article 82 does not apply, which is why the Commission's task is to prove the existence of such situations of abuse and to show the negative effects in terms of consumer welfare and overall competition. While the Commission must prove those things the trader investigated must prove the opposite, namely that there are not a dominant position and if he has a dominant position, must prove that he is not abusing of it.

The Commission's analysis in this area is hampered by the fact that there is no statutory definition of dominant market position, which makes regulating monopolies to be a problem from the start, which is why many economists agree that “economic theory provides little guidance regarding the concept of dominance in a manner to be a substantial help to achieve a legal definition”(Cini Michelle., 2008, 83).

When is making an assessment, the Commission takes into account two elements:

- relevant market, selecting the parameters between the Commission may make a decision on the position of that company;
- market power, established both in qualitative and quantitative terms, with which the Commission will determine whether or not the operator has a dominant market position.

In terms of defining the relevant market, this process is very complicated because a firm which has a dominant position defined on a market in a strict way, may have a position similar to other businesses in a market defined in a more wide way, which is why analyzes made by the Commission have been quite criticized by businessmen who have argued that the reference markets were considered too strict.

Some authors (Nicolae Sută *et al.*, 1999) considers that article 82 raises three major issues in terms of defining the concepts that we referred earlier:

- When we are dealing with a position of dominance on the market?
- What relationship is established between the existence of a dominant position and an abuse of a dominant position?
- How to define the relevant market?

Two of those three questions are solved by using practical cases, the answer to the first question is found in United Brands Case C 27/76 from 1978 which defined that

dominance is determined in relation to the company's ability to harm competition and consumers.

The second issue is defined by the Continental Can case in 1972, when initially it was considered that the existence of a dominant position is illegal. After the confrontation with this case the Court defines abuse as “an objective concept” more recently being made and the distinction between “dominant position” and “abuse” In terms of defining the relevant market, this can be made by determining:

- the relevant product market, which involves an investigation of classes of products, the relevant market representing all similar products or substitutes;
- the relevant geographic market, identifying the territory where the conditions of competition are homogeneous (different conditions of competition from other geographical areas);
- temporal market, which refers to the structural changes undergone over time by a certain market.

Even if the European Court of Justice requires that all three elements to be considered, in practice the Commission focuses more on the first criteria, otherwise said the main criteria is determined by how much the market for a particular product it is different from other markets that are containing the same product.

Regarding the market power, it has been defined for the first time in 1971 in *Eda vs Mermaid* case and it represents “the ability or capacity to prevent the manifestation of effective competition in a substantial part of the market”. Usually, it is considered that a company has a dominant market position if it holds over 40% of it. To a better understanding of these elements, in the next section, we will consider several cases of abuse of dominant position, cases that had a strong impact on both consumers and competitors.

#### **4. EFFECTS OF ABUSE OF DOMINANT POSITION**

In this section we will analyze three of the most popular and controversial cases of abuse of dominant position, *United Brands*, *Microsoft* and *CFR Marfa*. Each case has features that make it unique compared to the other, which is why we select it. *United Brands* is the first major case of abuse of dominant position, following its settlement have made important progress in defining the concept of abuse of position, *Microsoft* is distinguished by the fact that it is the case of abuse of a dominant position being sanctioned with the highest penalty ever received (497.196 million euros) and *CFR Marfa* is the most significant event in terms of abuse of aggressiveness in Romania.

One of the most important cases where article 82 it was used is the *United Brands* case. This is a US manufacturer and distributor of bananas and other products. The company operates under a number of subsidiaries brand names, including flagship *Chiquita* brand and fresh salads *Express*. *Chiquita* is the most important distributor of bananas in the United States. In 1978 it had a market share of about 40-45%, being considered to have a dominant position. This dominant position as a banana tender in different countries was conducted under the *Chiquita* brand that helped both in

production and in distribution. Refrigeration facilities available, allow to the company to control the movement of these goods in the market. Besides these facilities, the company also had its own ships and carry huge investment in terms of banana plantations. So in terms of the European Commission, the company benefit from some strategic advantages compared to other competitors, through the benefits of economy of scale, but also from 23 other investments made. The next competitor had a market share of 9%. The effect of the abuse of dominant position was manifested by imposing discriminatory towards to other competitors in the market, by imposing a ban on the sale of fresh fruit registered in the general sales conditions, that clause was aimed at wholesalers who buy bananas for resale after the process of baking in special facilities existing in their deposits. The Court considered this clause as abusive one that limit production, trade and technical development to the detriment of consumers. The hardest task of the Commission was to identify the relevant market for bananas. There have been long discussions on the following issues: “banana is a fruit itself within a market of its own, or is just a fruit on a market fruits” as the company said. Also following the call made by United Brands, the ECJ was conducting further research in order to clarify the law and concluded that “the dominant position of a company is dependent on its economic power which enables it to prevent effective competition and act so as to ignore the other competitors and, ultimately, even the consumers” (Case 27/76, 1978 ECR 207). Therefore, the European Commission rejected the company's arguments, concluding that “bananas are not interchangeable with other fruits, these having their own market”, market of which United Brands owns almost half. If it would not have made this distinction probably establish the market share of this company it would have been much more difficult, the more its dominant position.

Regarding Microsoft, the European Commission investigated this case for a period of five years. This investigation had as relevant market the operating systems market and was triggered by a complaint lodged by a competing company called Sun Microsystems. The complaint specifies that Microsoft abused by its own dominant position with Windows products and that they do not provide information that would allow to the other network software computers to run on this platform. Commission decision about Microsoft`s sanction was supported unanimously by all the experts of competition in EU countries. Commission Decision states that Microsoft violated the provisions stipulated in article 82 by abusing the position which it held on the market, this nominating two major problems:

- refusal to give competitors information needed to ensure interoperability between the Windows operating system for personal computers and operating systems used computers in central networks (work group servers - WGS), which operates in Windows, thereby restricting competition in the market operating systems.
- Adding the Windows Media Player (WMP) product in Windows operating system installed on personal computers, for which there is competition in the market. This practice has affect companies that are working in the media and produce media software, resulted in a significant reduction of competition on the media player products.

The Commission considered that this infringement by Microsoft is very serious in terms of the impact and consequences it has caused on market, slowing the technological progress and forcing consumers to deal with a smaller offer and higher prices for five and a half years, for which it was fined with EUR 497.196 million. This is the largest fine in the history of the EU executive, the amount representing 1.62% of the annual turnover of the company.

In addition to this fine, Microsoft was forced to provide all to documentation regarding the Windows interface. Regarding Windows Media Player, the company was forced to make a version of Windows that does not contain this application.

Another relevant case concerning abuse of dominance is CFR Marfa. So, in 2006, the Competition Council sanctioned the company CFR Marfa around 7 million Euros for abuse of dominant position. Following investigations by the Council, it demonstrated abuse of the position of the company CFR Marfa in terms of the relationship with private operators for parking services and rest of the staff. CFR Marfa has applied rates much higher for private operator, practicing this price discrimination, the private operators were injured, and those high prices imposed by CFR Marfa had a major impact on the railway transport charges. Initially, the state owned and provided everything (depots, rest places), the market being split between CFR Marfa and CFR Persoane. Following the issuance of the Order of the Ministry of Public Works, Transportation and Housing to move the depots and rest places from the patrimony of the state in patrimony of CFR Marfa, the market has become a monopoly. From this new monopoly, CFR Marfa abused and resorted to anti-competitive behavior that was manifested in two directions:

- Higher tariffs imposed on private beneficiaries (private railway operators rates were 5 to 20 times higher);
- Refusing to deal with certain beneficiaries and blocking the access to depots, rest spaces etc.

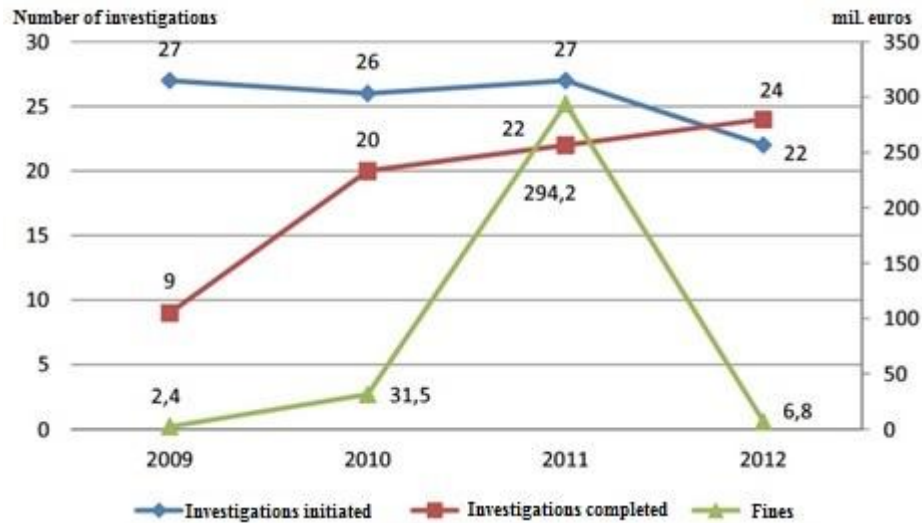
Abusing of its dominant position, CFR Marfa was sanctioned by the Competition Council with a fine of about 7 million Euros, this amount representing 2% of the turnover of the year. Although that is a substantial fine, this is not the biggest fine that the Competition Council applied, which is why we will analyze the fines for 2009-2012 in parallel with the evolution of investigations opened and closed in this period.

So, in the reference period was recorded an increased activity of the competition authority both in terms of number of investigations initiated and completed respectively in terms of increasing the amount of fines imposed and collected as revenue in the state budget. As can be seen in Figure 1 the highest amount of fines given by the Competition Council was registered in 2011 when the council completed the investigation on Eco Premium where they were fined 200 million and the related companies Orange and Vodafone where fines have reached 63 million Euros. This high level of fines has led to a decrease in the investigations opened (due to a decrease in cases of abuse of dominant position) and an increase in investigations completed.

Reflecting this trend, we can say that the high level of fines has led to a decrease of this kind of behavior, which is why we believe that restrictive attitude of the Competition Council had a positive impact in terms of encouraging the practice of fair competition both the domestic market as and internationally.



**Figure 1. Evolution of the number of investigations initiated, investigations completed and fines imposed by the Competition Council, 2009-2012**



Source: Author's calculations after <http://www.consiliulconcurentei.ro/ro/docs/50/decizii/page22.html>

## 5. CONCLUSIONS

This paper reveals that society and market are facing companies resorting to anti-competitive practices for the past one hundred years. These practices are harmful both for competition and for consumers, so that should not be allowed to expand. In this context, the European Commission imposed a set of rules that all operators must comply in order to protect, maintain and stimulate competition in the Single Market and to promote fair competition.

As we highlighted in the paper, abuse of dominant position is a practice which we find increasingly more often in modern society, this prompting the European Commission to consolidate as much policies to reduce this type of behavior.

Dominance position is a “dangerous” position for a trader, which can easily abuse of this privilege by denying the consequences that may occur. Since the abuse of a dominant position has very serious consequences Commission intensified control over these companies, promoting a more restrictive policy and applying meaningful sanctions.

The effects of this restrictive policy are felt in our country, practicing a restrictive behavior by giving higher fines will cause the trader to have an aversion to this type of anticompetitive behavior, which will result in a better functioning of Single Market.

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