

A COMPARATIVE OVERVIEW BETWEEN THE ABUSE OF A DOMINANT POSITION IN THE ALBANIAN LAW AND IN THAT OF THE EUROPEAN COMPETITION LAW

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Abstract

The paperwork will conduct an analysis on the discipline of abuse of a dominant position in the Albanian and European legislation. The discipline of abuse of a dominant position is one of the key sections of the Competition Law which causes lots of interpretation problems. In the Treaty on the Functioning of the European Union, the provision which prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it is article no. 102, whereas at the national level, the Albanian Law has dedicated two separate provisions in the law no. 9121/2003 “On the protection of competition”, respectively articles 8 and 9. Article 9 defines the criteria for assessing the dominant position, whereas article 9, in line with article no. 102 of the TFEU, deals with the abuse with the dominant position by also listing several behaviors in which the abuse can be manifested. This paperwork will analyze these provisions. Both disciplines have been reviewed recently: the Albanian law has been amended by law no. 10317, dated 16.09.2010 “On some amendments to the Law no. 9121, dated 28.07.2003 “On the Protection of Competition” and article 102 of the TFEU has been reviewed by the European Commission through the guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.

This paperwork will point out how the Albanian legal framework has not only been developed based on the European Law model on competition, but it still continues strives to be in full compliance with it.

Key words: Abuse of a dominant position, Article 9, article 102 TFEU, the anti-trust domestic law, competition.

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1. Introduction

In the Treaty on the Functioning of the European Union, the provision which prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it is article no. 102. The first paragraph of this provision defines: “Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States”. The provision further continues by listing a number of behaviors which may result in such abuses, such as (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;(b) limiting production, markets or technical development to the prejudice of consumers;(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts”.

This is the only provision in the treaty specifically dedicated to the dominant position.

Meanwhile, at the national level, the Albanian legislation has dedicated two specific provision to the abuse of a dominant position – law no 9121/2003, respectively articles 8 and 9. Article 8 defines the criteria for assessing the dominant position, while article 9, in compliance with article 102, the TFEU treats the abuse of a dominant position by also listing several behaviors on this abuse. These will be the provisions to be analyzed in this paper.

First, at the national level, I would like to stress out that one of the most important innovations of the new law worth mentioning as compared to the previous law on the protection of competition (law 8044/1995), is the punishment of the abuse of a dominant position. This shows not only a separation from the past legislation discipline, but also an approximation with the EU discipline.

We should also consider that the communitarian discipline is one of the main factors in drafting the current law on competition protection and this is due to the obligations imposed by the SAA.

Both disciplines have been reviewed recently: the Albanian law has been amended by law no.10 317, dated 16.09.2010 “On some amendments to the Law No. 9121 dated 28. 07. 2003 “On the Protection of Competition”, and article 102 of the TFEU has been reviewed by the European Commission through the

guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings³.

The amendments in the Albanian Law start with the definition of the dominant position.

The Justice Court of the EU has defined the dominant position as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers"⁴ (United Brands, Hoffman La Roche).

The European Commission considers that an undertaking which is capable of profitably increasing prices above the competitive level for a significant period of time does not face sufficiently effective competitive constraints and can thus generally be regarded as dominant. In the guidance⁵ the expression 'increase prices' includes the power to maintain prices above the competitive level and is used as shorthand for the various ways in which the parameters of competition — such as prices, output, innovation, the variety or quality of goods or services — can be influenced to the advantage of the dominant undertaking and to the detriment of consumers.

The existence of a dominant position means that the competitive pressures are not effective enough and as a result the undertaking in question enjoys a considerable market power during a certain period of time⁶. While in the Albanian law, the dominant position was defined in the article 3, 4 of the law 9121/2003 "On the protection of competition", before the amendments took place, as "the position of one or more undertakings which allows them to be able to act regarding the *offer or request, independently form the other participants in the market, such as the competitors, customers, or clients*". This definition was far from the definition of the European Court of Justice because by not referring to the possibility of the undertaking in a dominant position to prohibit the competition in the market, it left aside all the abusive exclusionary conducts and this is an unacceptable situation for a country aspiring to join the European market. The abusive exclusionary conducts are the most frequent and most important in the European space, as stated by the European Commission in its guidelines on the implementation of article 82 of the EC Treaty⁷.

We should also take into consideration that since 2004, any country aspiring to join EU should ensure the existence of legislation on the protection of competition in line with the EU discipline. On the other hand, the Albanian Government should fulfill the obligations of the SAA⁸.

³Modernization of the communitarian competition law, understood as an implementation of provisions in the Treaty on Functioning of the EU, based on the classical economic theory has started since in the '90 with the Communication of the European Commission on defining of the market respectively in 1997, and later with the Regulation of the Concentrations in year 1998, Management Lines on the Agreements, year 2000, Regulation of Concentrations year 2004, and last the Communication on the priorities of the Commission following the implementation of article 102 of the TFEU.

⁴Translation of the author. Justice Court, 14.12.1978, case 27/76, *United Brands* case 85/76, *Hoffman La Roche*.

⁵ Communication from the Commission - Guidance on Commissions enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, Official Journal of the European Union, 24.2.2009, C 45/7.

⁶This means that the decisions of undertakings are mainly non-emotional towards the actions and reactions of competitors, consumers and clients.

⁷ As mentioned above in the text.

⁸For further information see article 70 and 71 of the SAA between Albania and EU and member states.

Being aware of the above mentioned deficiencies, the Albanian legislation has been improved in line with the Justice Court that “*Dominant position is that economic strength held by one or more undertakings, which gives them the chance to hinder the effective competition in the market by making them operational regarding market rules, regardless of other participants in the market, such as competitors, customers and clients*”. Object of the Albanian Law are considered both the abuses having excluding character and those having exploiting character.

2. Dominant position in the two disciplines

With regards to the existence of the dominant position, the Justice Court states that a dominant position comes as a result of a combination of a number of factors, which if analyzed separately are not that important⁹. These factors in the Albanian discipline are listed in the article 8 of the Antitrust Law: 1) the part of the respective market of the undertaking in question and its competitors; 2) obstacles to join the respective market; 3) potential competition; 4) economic and financial power of the undertakings; 5) economic dependency of suppliers and buyers; 6) counter-reaction power of buyers; 7) development of the undertakings distribution network and possibilities of utilizing the sources of products; 8) economic connections with other undertakings; 9) the other characteristics of the respective market such as the homogeneity of products, market transparency, cost uniformity and dimension of the undertakings, sustainability of request or the free producing capacities.

While at the European level, the factors to verify the existence of the dominant position are not defined in a specific provision, but they have derived from a consolidated practice of the European Commission and the European jurisprudence. We have to stress out that the factors listed by the Albanian legislator are in line with the European ones even though there are much more European factors. But on the other hand it is worth mentioning that the Albanian factors are never drained out, which is also confirmed by the discretion of the Authority in their assessment.

The European Commission has proposed the listing of factors for the verification of the dominant position¹⁰ for the first time in a document which is the “guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings”. In this Communication, unlike the diversity of factors defined by the jurisprudence, there are only three criteria being analyzed: 1) position in the market of the dominant undertakings and its competitors, 2) expansion and introduction into the market 3) counter reaction strength of the buyers”.

Despite the analyzing of the three factors, it does not mean that the other criteria of the European jurisprudence are less important because the Communication does not prejudge the interpretation of article 82 of the EC Treaty (article 102 of the TFEU) by the EU Courts. Through listing of the above criteria, the Commission conducts a kind of selection by making us aware of its orientation that these three factors are the most important ones in the assessment process regarding the dominant position. Nonetheless, it will be able to develop a thorough analysis of other factors while examine a concrete case, should they be considered important.

⁹Justice Court case 27/76, *United Brands Company and United Brands Continentaal/European Commission*.

¹⁰Guidance of the European Commission on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJEU, 24.02.2009, C 45.

On the other hand, the Albanian Authority in its first decision states that several factors such as the position in the market of undertakings, the barriers in joining the market and the potential competition are the criteria which play an important role in analyzing the dominant position¹¹. The Authority does not list the counter reaction power of buyers among the most fundamental factors (competitive pressure to be exerted by the buyers) because in its practice, in all cases examined, it reached the conclusion that it is not such an important factor¹².

3. Abuse with the dominant position in the Albanian system

With regards to the abuse of a dominant position in the Albanian system, the provision which marks the essence of the discipline is article 9 of the Anti Trust Law, a provision which has been amended recently¹³. It is now made of two paragraphs, the first, which is in line with the article 102 of the TFEU, defines that "*It is prohibited any abuse of a dominant position by one or more undertakings which posses this position in the market.*"

The second paragraph of article 9 refers to the typology of behaviors which are considered abusive. In line with the paragraph 2 of article 102 of the TFEU, there are four behaviors which are forbidden: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage and (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations" which have no connection with such contracts.

We should point out that there is a change in reality between the two dispositions: with regards to the second behavior "*limiting production, markets of technical development*". In the Albanian provision it is missing the addendum "*to the prejudice of the consumers*" which we consider as very important because it points out the purpose of the provision which is the guarantee so that the undertakings in a dominant position do not hinder the effective competition, by closing down the market for their competitors, by bringing negative consequences for the welfare of the consumers, as stated in the Orientation of the European Commission¹⁴.

The inclusion of the above addendum, envisaged by the respective European provision, will enable not classifying as abusive even those behaviors which although they exclude from the market a non-efficacious competitors, they improve the wellbeing of the consumer, both by reducing the price and improving the quality.

4. The abuse of a the dominant position in the European system

As mentioned above, article 102 of the TFEU has been reviewed by the European Commission through the guidance on the Commission enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.

¹¹ Albanian Competition Authority, decision n. 59, 09.11.2007, case Amc-Vodafone, point VI/26, Journal n. 2, 2007.

¹² See the decisions of the Albanian Competition Authority: decision n. 59, 09.11.2007, case Amc-Vodafone, Journal n. 2, 2007 and Decision n.150, case Armo, 20.07.2010. Journal n. 6, 2010.

¹³ From law no.10 317, dated 16.09.2010 "On some amendments to the Law No. 9121 dated 28. 07. 2003 "On the Protection of Competition", published in the Official Journal n. 135, 07.10.2010. The law entered into force in 23. 10.2010.

¹⁴ Guidance of the European Commission on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJEU, 24.02.2009.

A new policy has been defined in the Communication which is based on the consequences of behaviors in the market and the well-being of the consumer according to which the verification of an abusive exclusionary conduct will be conducted by the European Commission through a structured process split into three phases: 1) verification of the existence or non-existence of the dominant position 2) verification of the exclusionary abuse or non-abuse 3) verification of the existence of the objective or efficiency justifications which can exclude the abusive character of the behavior.

The innovation in the communication is related to the second and the third phase of the implementation. For the first time it is defined that for a behavior to be forbidden the consequences in the market should be taken into consideration: it is in fact requested the undertaking to be able to influence the indicators of the competition to its own interest and to the damage of the consumer (indicators of the competition such as prices, quantity produced, innovation, variety and quality of products).

Another important innovation is related to the introduction of *efficiency defense* in assessing the existence of an abusive conduct. For the first time it is stated the possibility of the undertaking in question to prove the existence of the positive competitive consequences of its behaviors. The Commission considers that a dominant undertaking may justify conduct leading to foreclosure of competitors on the ground of efficiencies that are sufficient to guarantee that no net harm to consumers is likely to arise. In this context, the dominant undertaking will generally be expected to demonstrate, with a sufficient degree of probability, and on the basis of verifiable evidence, that the following cumulative four conditions are fulfilled: a) the efficiencies have been, or are likely to be, realised as a result of the conduct. They may, for example, include technical improvements in the quality of goods, or a reduction in the cost of production or distribution; b) the conduct is indispensable to the realisation of those efficiencies: there must be no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies; c) the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets d) the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.

It is worth mentioning here that the Albanian legislator does not define any possibility to justify the abusive conduct as for the reasons listed above.

5. Conclusions

In this paperwork, we analyzed the ways through which the abuse of a dominant position is regulated in the Albanian and European competition law. With regards to the text of the respective provisions, the orientations of the Justice Court and the European Commission, we should state that in general, the Albanian provision has been acquainted with the European one. This is due to the amendments made to the Albanian Law in 2010. Still, some differences remain pending. It is worth mentioning the fact that the Albanian Legislation strictly punishes the abuse of a dominant position because it does not accept any exclusion from the prohibition, unlike the European Commission which accepts an abuse behavior by an undertaking in a dominant position for as long as it brings some efficiencies which go beyond the negative consequences on the competition and consumer in the markets in question.

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