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Question A: Abuse of a Dominant Position and Globalization

Overview

The concept of dominance (both single and collective) plays a significant role in the Ukrainian competition policy. According to the official reports of the national competition agency (the Antimonopoly Committee of Ukraine, hereinafter also – the AMCU), assessing dominance as well as abuse of dominance investigations constitute up to 42% of its overall activity.

This particular focus and constant attention of the enforcement shall be observed with understanding the susceptibility of the national economy to high concentration[1]. In general, high concentration measures must not be a presumption for dominance, as the economic concept of significant market power provides a more extensive framework for the respective analysis, which shall not rely solely on shares-related data. The enforcement practice shows, however, that sometimes much importance is erroneously given to structural characteristics and market shares data, which is not equilibrated with other important considerations. This is to say that a conservative approach based on structural assessment lacking tools for dynamic analysis still prevails.

Fundamentally, the national competition law, in particular, its part relating to the dominance issues, can already create a platform for efficient and consistent competition policy, sound with economic logic and respectful for potential efficiencies of market players possessing significant economic power. However, there is still considerable room for improvement.

Institutionally, the relevant regulation includes: the concept of dominance (reference to the applicable share measuring); the procedure for determining a dominant position (market definition, assessment of market power); abuse of a dominant position and an indicative list of prohibited practices; basics of defense arguments.

The major issues, which are subject to revision in the national policing of concerns arising from dominance (and consequently, abuse thereof), shall be identified as follows: market definition approach (more flexibility, economics-based understanding and proactive analysis in a dynamic dimension would be welcomed); development of analytical tools for the assessment of excessive pricing as a form of market power exploitation (in this context, the key role, in our view, shall have that of modeling the counterfactual); providing practitioners with guidelines or other document, which would communicate the model framework for competition assessment of the respective conduct of dominant companies (currently, practitioners rely on the respective Guidelines of the EC and the EC's published working and discussing papers in observing the allegations, which can be raised by a competition authority)[2].

[1] The markets reported to be monopolized – 12%; with oligopolistic structure - 16; with the signs of dominance – 25%; meanwhile markets considered to have competitive structure constitute 47 % (the AMCU official report, 2014).

[2] Due to 256 of Chapter 10 of the Association agreement between the European Union and its member states, of the one part, and Ukraine, of the other part (as ratified by Verkhovna Rada of Ukraine, i.e. national parliament, as well as by the European Parliament on 16.09.2014, the Law Of Ukraine № 1678-VII) Ukraine, *inter alia*, Ukraine shall approximate its competition laws and enforcement practices to the part of the EU acquis, namely, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty; Council Regulation (EC) No 139/2004

We believe that given the lack of revision in the said issues, the risk of interventions on the part of competition authorities remains arbitrary from the viewpoint of economic grounding and positive effects.

Introduction

The introduction of the legal concept of dominance traditionally referred to in regulation together with "monopoly" (e.g. "monopolistic (dominant) position") was one of the primary steps to establish regulation for commercial relations based on structural independence, self-risk compensation and entrepreneurship within a free market run by economic competition. The Law of Ukraine On restriction of Monopoly and Resistance to Unfair Competition dated 18.02.1992 passed shortly after the Independence Act in August 24, 1991 and provided for the an exhaustive list of practices, which were considered as abusive, while the notion of abuse of dominance was not addressed literary and was instead defined as "monopolistic activity", i.e. activity (omission) aimed at the exclusion, significant restriction or elimination of competition.

With further development of competition law and replacement the cited Law with the Law of Ukraine On Protection of Economic Competition of 11.01.2001, the notion of dominance (monopoly) was revised. In particular, the definition of abuse of dominance was presented with the categories of abusive practices set out in the *open* list.

In our opinion, the regulation of abuse of dominance strictly in its proper sense in the context of competition law and policy shall not be regarded as isolated from the conceptual understanding of abuse of the individual rights for reaching and satisfying interests considered by law. In the context of civil law, we normally regard an abuse [of right] as exceeding the limits of an individual right for reaching the observable interest, which otherwise [without the abuse element] would be legitimate[3].

Legal studies of competition relationships undertaken by national researchers tend to interpret the right to compete as a measure of commercial freedom which can be exercised unless it comes into the conflict with the fair competition balance, which, in turn, constitutes the subject of individual rights of third persons (other market players, i.e. competitors, consumers)[4].

We consider such approach in the competition analysis to be highly proactive in terms of approximation of the competition law to the demands of the economic concept of *rule of reason*. In our opinion, there is a need to establish a clear *legal* framework to observe the abuse *in the dynamics of its distorting effect* influencing the market equilibrium [supported by fair practices] in striving to win in the economic competition [which by itself is not illegal] by excluding the competitors or limiting their ability to compete through exercising the possibilities non-accessible for other market players.

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of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation); Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices; Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81 (3) of the Treaty to categories of technology transfer agreements.

[3] The Civil Code of Ukraine addresses the problem of abuse of civil rights through the framework of their exercise [Article 13 of the Civil Code of Ukraine].

[4] O.O. Bakalinska Execution of right for fair competition and abuse of the individual right in commercial activity// Scientific review of Herson State University. Legal Sciences. 2014 - # 1 – P. 215-218

The above by no means denies the importance of the economic analysis framework. On the contrary, we emphasize that the legal analysis, with its inherent criteria of certainty and equity, shall encourage economic reasoning in the assessment of behavior associated with market power issues.

Definitions and regulation

The effective Ukrainian legislation defines abuse of dominance with a reference to a dominant (monopolistic) position on the market and characteristics of the market outcome as a result of the respective incumbent's unilateral conduct or omission by contrasting it to the one which would likely take place in conditions of *significant* competition. Such market outcome implies the harm to other market players or enterprises' interests as well as to those of consumers. Therefore, the theory of harm to be deducted in the respective type of cases implies two possible [sometimes independent and self-sufficient, sometimes integrated] directions: harm to other market players' welfare or/and harm to consumers' welfare. In the meantime, the basic economics prove that a competition policy focusing on either dimension of harm would be questionable. Therefore, it needs to be proven that the harm to a particular undertaking is the consequence of market power abuse and not of fierce competition, which equally can lead up to exit from the market of not-efficient player. The outlined approach follows from the respective provision (provided below) establishing general delict of the abuse of dominance:

> *Abuse of a monopolistic (dominant) market position shall mean actions or omissions of an undertaking enjoying a monopolistic (dominant) market position, which has lead or may lead to the exclusion, elimination or restriction of competition, or infringe on the interests of other undertakings or consumers, which would not be possible under significant competition on the market [part 1, Article 13 of the Law of Ukraine On Protection of Economic Competition]*.

Obviously, the key element of competition assessment in abuse of dominance cases relates to defining whether the incumbent has significant market power, i.e. whether it possesses dominant or monopoly position. The prevailing approach outlined in law and applied by the competition authority is based on market share analysis.

Respectively, the law [*Article 12 of the Law of Ukraine On protection of economic competition*] provides for the following criteria, which are based mainly on market shares data:

> *An undertaking shall be considered as a monopolist (dominant), if the following conditions are fulfilled:*
>
> *there are no competitors for it on the market occupied;*
>
> *it is not constrained by significant competition as a result of other undertakings' restricted access to essential inputs, materials and product sales; there are entry barriers for others, benefits or other circumstances* [part 1].

In principle, though not mentioned directly in the above provision, the expansion barriers are also the subject to consideration. In particular, the potential competition by supply substitution as a market power constraint is implied in *the Methodology of the AMCU for establishing the monopoly (dominant) position of undertakings on the market:*

The list of sellers (suppliers, producers), buyers (consumers) of the product (product group) – the potential competitors, buyers, which can sell (supply, produce), purchase (consume, use) a similar or equivalent product (product group) on the market [para 2.1.9][5].

Further, the burden of proof is shifted to the incumbent possessing more than 35% of market obliging him to prove that it is constrained by competition:

Monopolistic (dominant) is considered as a position of the incumbent whose market share exceeds 35%, unless it proves to be constrained by considerable competition [part 2].

It is also possible for that incumbent to possess a 35% or smaller market share to be considered as dominant, unless it is constrained by competition:

Monopolistic (dominant) may also be held by an undertaking which possesses a 35% or smaller market share, unless it is constrained by significant competition, in particular as a result of relatively small market shares of the other competitors [part 3].

In our understanding, the aforementioned provision shall be interpreted in the way that the burden of proof rests within the antimonopoly authority, and the standard of proof shall be established on the highest level with due regard to the dynamic factors affecting the market structure and interactions between market players.

Further, the law provides for the criteria to establish collective dominance, respectively:

It is considered that each of the two or more undertakings enjoys a monopolistic (dominant) position on the product market, if they do not compete or compete non-significantly with regard to a certain type of product; and they are jointly subject to the conditions envisaged in part 1 of Article 12 [part 4].

The market position of each of the undertakings is considered to be monopolistic (dominant), if they are jointly subject to the following conditions:

- *The joint market share of no more than three undertakings possessing the largest market shares exceeds 50%;*
- *The joint market share of no more than five undertakings possessing the largest market shares, exceeds 70%; -*

[…] [part 5][6]

[5] Though supply substitution seems disregarded in the context of market definition, being an integral part of overall case assessment, it is an initial step of analysis and shall integrate all potential market power constraints itself. We are addressing this issue in more detail below.

[6] Literarily, part 5 is terminated by reference to part 4 pointing out that "unless they prove no to be subject to the conditions established in part 4".

and if they fail to prove that they face constraints to market power and are constrained by mutual competition or by other market players.

Consequently, if the given shares are achieved within a certain market,[7] the burden of proof automatically shifts to the respondents.

In this context, we cannot but mention the great deal of attention paid to tacit collusion (i.e. coordinated/non-unilateral effects), which is considered beyond the legal framework due to the provision of part 3 Article 6 of the Law of Ukraine On Protection of Economic Competition:

> *Anticompetitive concerted actions can also constitute the resembling conduct (or omission) on a product market, which leads or can lead to the exclusion, elimination or restriction of competition, unless the analysis of the market situation proves that such conduct (omission) is due to objective reasons.*

In analyzing part 3 of Article, for instance, the lack of price competition (absent undercutting strategy and softening competition between major players in the price dimension) on an oligopolistic market or a market with few players, which would evidently lead to setting higher prices than those on a market with intense competition, may raise the question of prosecution for collective dominance only based on the allegation of its mere existence.

The observed trade-off in policing coordinated effects and collective dominance adds to legal uncertainty and ambiguity of enforcement in the respective areas of competition law. As the evil of the lesser kind, the standard of proof for the competition authority may be found unreasonably low.

Meanwhile, it is generally recognized that possession of significant market power (dominance or monopolism) is not a violation, whereas abusive behavior is prohibited.

The law provides for a **non-exhaustive list of practices** by dominant (monopolistic) companies, which are considered as abuses of a market position [part 2 of Article 13]:

> *1) establishing prices or other selling or buying conditions for products, which would be impossible with significant competition on the market[8];*
> *2) applying different prices or other conditions to equivalent agreements with contractors, sellers or buyers without any objective reason;*
> *3) conditioning the entry into contracts by obliging the contractor to bear additional obligations which by their nature or due to trading and other good faith practices are not relative to the subject of contract;*

[7] Market definition is conducted with regard to the Methodology for establishing of monopoly (dominant) position of the companies on the market (the Regulation of the AMCU as of 05.03.2002 # 49) and traditionally has three dimensions: product, geography and time. The product dimension (the pool of the substitutable products) is defined on the basis of substitution: 1). On the consumption level with regard to the characteristics of consumption, physical, technical, qualitative features, prices, and 2). on the production level with regard to the ability of suppliers to offer new products instead of the product in question. Though the assessment of demand side substitution always prevails over the considerations of potential competition and supply side substitution in enforcement decisions, it does not mean that there is no room for more proactive and economic grounded arguments, which can be raised by the parties.

4) restriction of the production, markets or technical development, which cause or can cause harm to other companies, buyers or sellers;

5) partial or total refusal to buy or sell product, if there are no alternative sources of selling or buying;

6) significant restriction of other companies' ability to compete on the market without any objective reasons;

7) establishing entry barriers (barriers to exit) or market exclusion of sellers, buyers or other market players.

It should be noted that in the Law of Ukraine On Protection against unfair competition (as of 07.06.1996 # 36) the following violations are indicated as follows: persuading of a market player to boycott in different forms against another market player [article 10] and persuading of the market player to discriminate against his contractor [article 11].

The forms of these practices may very much resemble the one of the abuse of dominance, but the essential distinction with the unfair competition is that the persuading is not realized by means of market power exercising. Otherwise there would be a risk of the simultaneous [cumulative] application of the respective provisions of the Laws (On protection of economic competition, Article 13, and On protection against unfair competition, Articles 10 and 11).

Though there is no exact legal classification of the abusive practices into exclusionary and exploitative ones it is implied in the said list. On the other hand, in our opinion, sometimes there are no objective reasons and/or arguments to provide for an explicit distinction between the exclusion of competitors and exploitation of market power, as these effects can be interrelated and inseparable. Meanwhile, we should recognize that in prosecuting the respective behavior and shaping a convincing theory of harm, such division can be helpful.

The classification of abusive behavior into price-based and non-price based can be derived from the wording of the above practices. The price-based abuses case take normally above 30% of all cases on abuse of dominance (statistics is provided in pages 7-8). It should be also mentioned that significant part of price-related abuses statistically are classified to the group of the general delict (i.e. cases prosecuted under part 1 of Article 13) and thus the object of the behavior is not reflected.

As it follows from the definition of abuse of dominance set out in part 1 of the Article 13 and part 2 with its non-exhaustive list of abusive practices, abusive behavior practices are determined either by their nature or by their effects rather than by form, which implies that the respective analysis of their economic impact and related efficiencies are required.

In some industries, in particular in natural monopoly markets, the stereotyped approach is sometimes applied, i.e. some practices are considered *per se* abusive by its form and thus illegal. In our understanding, a simplified assessment of practices performed by strong market players risks to lead to the decisions that are contrary to economic logic of commercial dealings requiring case-by-case study as a guaranty of cautious interventions of the competition authority. On the other hand, it would be erroneous to deny that the theory of hardcore restrictions

applicable to the dealings involving a dominant partner can be helpful, while it serves as a filter, which implies that further analysis is carefully conducted, in particular, the arguments of the efficiency defense are subject to objective and non-prejudiced study.

Enforcement

Competition policy, including the dominance-related issues, is exercised solely by the Antimonopoly Committee of Ukraine. Consequently, no other institution has powers to define market for the purpose of abuse of dominance investigation and *a fortiori* to establish dominance.

However, the competence of the AMCU is limited strictly to competition concerns; In other words, regulatory issues, such as tariffs and other pricing instruments (for the regulated industries) as well as technical issues which relate to contract terms (e.g. energy, water supply, public services). The respective functions are entrusted to sectoral regulatory authorities and to some extent to local governmental agencies.

Statistically, the cases on abuse of dominance can be presented in the following table combined on the basis of the official reports of the AMCU for the respective years:

Year/Criterion	percentage of cases on abuse of dominance in respect of the other cases considered by the AMCU	aggregated sum of penalty in respect of the other cases considered by the AMCU	price-based abuses	applying different terms for similar contracts	prosecution on the basis of part 1 of the Article 13 (general delict)	other forms of abuses
2014	42% - abuse of dominance; unfair competition 12%; anticompetitive concerted practice – 8%; anticompetitive actions of public authorities – 31%	61%	30%	2%	66%	2%
2013	42% - abuse of dominance; unfair competition 18%; anticompetitive concerted practice – 9%; anticompetitive actions of public authorities – 25%	39%	30,5%	3%	62,8%	2%
2012	44% - abuse of dominance;	42%	50%	9%	38%	3%

	unfair competition 10%; anticompetitive concerted practice – 8%; anticompetitive actions of public authorities – 22%					
2011	43% - abuse of dominance; unfair competition 10%; anticompetitive concerted practice – 8%; anticompetitive actions of public authorities – 22%	not mentioned	49%		47%	4%
2010	32% - abuse of dominance; unfair competition 12%; anticompetitive concerted practice – 30%; anticompetitive actions of public authorities – 18%	not mentioned	35%		61%	4%

Court practice

There is no exclusively designed jurisdiction for considering disputes arising from competition enforcement and abuse of dominance cases, in particular. The decisions of the AMCU shall be challenged within the commercial courts system, which consists of three instances (first, appeal, cassation), and the Chamber on commercial cases at the Supreme Court of Ukraine.

Though the national judicial system is not operated through precedents in the strict sense of this term, the major approaches adopted by the Highest Commercial Court and Supreme Court of Ukraine are followed in the forthcoming cases of the same essence and subject matter. It should be also recognized that notwithstanding the fact that stable court practice is an essential element of legal certainty principle and rule of law standard, certain inflexibility of courts' viewing the competition cases is not appreciated. The feature referred to concerns the problem of the limits of the AMCU's decisions revisions. More precisely, the courts tend not to verify the methodology of the competition assessment and stick mainly to procedural issues. It can be explained by the fact that the practice of considering economic evidence is not widely developed. Furthermore, there is no efficient

procedural mechanism to present it. This is to say, commercial jurisdiction does not provide for an opportunity for any testimonies beyond the court-authorized expertise. In its turn, economic analysis, which can be potentially presented as an economic expertise conclusions, is not formalized and is addressed in the respective regulations concerning court expertise[9]. Thus, it is an extremely challenging mission for attorneys to argue about the economic merits suggested in a disputed decision of the AMCU. By economic merits we mean the market definition, market power constraints analysis, and efficiency defense considerations.

Ukrainian courts have established some general approaches and thus created the framework for revision of the competition authority's decision in dominance matters, which are delivered in the Resolution of the Highest Commercial Court on Hearing the cases about economic competition (26.12.2011 № 15).

Further we deliver major points, which are essential in considering cases of dominance:

- the burden of proof to substantiate that a dominant incumbent had reasonable grounds to differentiation mentioned in para 1 of part 2 of Article 13 rests with the respondent [The same approach is applied in investigations normally and the burden of proof is rather high];
- performing contractual obligations in no case gives a ground to release the party from liability for violation of competition law [bearing in mind that hardcore restrictions and thus per se prohibitions in the context of vertical restraints imposed by the dominant firm are rather questionable from the economic point of view, there should be no presumption of the contrary either];
- though the AMCU has no jurisdiction over pricing as a matter of regulation policy, para 1 of part 2 of article 13 provides the Committee with the powers to investigate whether there are competition concerns in the non-regulated prices and tariffs established [in this context, we would like to emphasize that there is no benchmark established to be the proxy of the prices "produced" by effective competition. This is true both for court and administrative practices in cases regarding excessive prices allegations];
- the cases prosecuted under part 1 of the Article 13 envisage proving that the consequences or the plausibility that the consequences [restriction, elimination, exclusion of competition] could arrive; the cases prosecuted under part 2 of the Article 13 demand that the practice of the provided character was used by the undertaking which is dominant [the last approach which is mentioned only in general features and was not developed extensively enough in the official communication of the national competition authority results in many cases into formal assessment both within investigation procedure and within litigation.]

Author's remarks

In legal terms the phenomenon of "abuse" and "limits of the right execution" is one of the most disputable. In competition law this phenomenon can be translated into the question "does the market power obliges?" and "what are the limits of these obligations?" The answer with high extent of reasonability can be provided with economic analysis tools. The legal (and specifically political) framework needs to accept and respect this reasoning.

[9] For example, the expertise of the objects of intellectual property rights, technical expertise, accounting (financial) expertise are addressed and regulated in details, while the economic analysis which can be conducted for the aims of competition issues studies is not specified. Procedurally it can be an issue of acceptability of the evidences and ultimately of the appointment of such type of the expertise by the court.

It is undisputable how highly important is to maintain effective competition policy on abuse of dominance. However, it also obviously means that the respective interventions by the competition authority shall be grounded objectively and conducted cautiously.