CRITERIA APPLIED IN DELIMITING PRACTICE OF DOMINANT POSITION ABUSE

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Abstract: Some undertakings enjoy such a strong position in a particular market and their actions may result in the elimination of competition.
This is why art. 82 (formerly 86) EC seeks to deal with such strong undertakings by prohibiting activities which could be regarded as an abuse of the undertaking’s dominant position in a particular market.
In order to see if we are speaking about dominant position, we must see the presence of all criteria (the relationship between the abuse and the dominant position, relevant geographic market, relevant product market).
After the Treaty of Lisbon, the art. 82 EC is art. 102 TFEU. Even in such a situation, it didn’t change too much in substance, like other provisions of the Treaty of Lisbon.

Keywords: European Union, Common Market, the relationship between the abuse and the dominant position, relevant geographic market, relevant product market.

1. General aspects
Upon analyzing the contents of Art. 82 (formerly 86) EC, several elements can be taken into consideration, leading to the configuration of the specific nature of the practice of dominant position abuse in the context of competition.
First of all, the existence of a dominant position on a common market or on an important part thereof is necessary.
The Court of Justice defined the concept of dominant position referred to in Art. 82 (formerly 86) EC as “a position of economic strength held by a company, enabling it to prevent actual competition from being maintained on a relevant market so that it acquires the discretion to behave independently of its competitors, its clients and eventually, its consumers”.

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Unlike the situation in which there is a monopoly or quasi-monopoly, “this position does not impede a certain competition, but rather it allows the company which takes advantage of such position if not to determine, then at least to have, a considerable influence on the conditions under which such competition develops and, in any case, to act by ignoring it as long as such conduct is not detrimental to the company”\(^2\).

It was considered that holding a market share exceeding 60 per cent constitutes sufficient evidence of a dominant position, without taking into consideration exceptional circumstances. Even a smaller percentage can have relevance in the case of a given significant difference, in respect of the share held on the market of major competitors.

In any case, the existence of a dominant position was not admitted (save for exceptional circumstances) if there is a share of 5 to 10 per cent held on the market of highly technical products\(^3\).

A company may hold a dominant position even when it holds a market share of 5 per cent, provided that the remainder of the market is occupied by much smaller companies.

At the same time, it was considered that a company does not have to be big in terms of its turnover; it is possible for fairly small-size companies, which operate on specialized markets, to hold a dominant position, and also for distinct companies, which by themselves are not dominant, to be placed in such position jointly.

The market share held by a distinct company does not represent a decisive criterion in order to have the market shares of some companies taken into consideration, while the market share considered in itself provides only an approximate clue to the market strength. It is necessary at the same time to establish barriers upon entry of competitors on the market.

As the Court of Justice will have it, Art. 82 (formerly 86) EC refers to practices likely to affect the structure of the market where the competition has already been restricted as a result of the presence thereon of the dominant company, and where, by using methods, other than those applied in the field of normal competition regarding products or services on trader performance basis, the consequence is the prevention of the preservation or development of the level of competition still existing on the market.

In addition to owning a large market share, there are other relevant factors as well, that prove the existence of a dominant position (the relation between the positions held on the market by the companies involved and by the competitors thereof, especially the competitors nearest to them, the fact that some companies


are ahead of their competitors from a technological point of view, the existence of a developed sale network, the absence of potential competition, the vertical integration of a company, an upgraded commercial network, the reputation of a trademark, membership in a group of companies operating all over Europe etc.)

Temporary lack of profit or even losses are not incompatible with the presence of a dominant position. The fact that a price imposed by a company does not constitute an abuse and that such prices are not higher does not support the statement according to which there is no dominant position. In the same way, the size, the financial strength and the diversity of the competitors of a company at worldwide level cannot be deemed to deprive the company of a privileged position, nor does this apply in consideration of the balance that may be generated by the fact that the consumers of that product are experienced commercial beneficiaries4.

A dominant position is not and must not be permanent, as the standing of a company can fluctuate from a regular position to a dominant one and vice-versa, in consistence with the changes on the relevant market or in the business structure.

It is Art. 82 (formerly 86) EC again that shows a geographical market must be defined in such a way so as to determine whether the respective company holds a dominant position within the Community or within a substantial part thereof. The defining of such geographical market implies an economic evaluation, namely that it is formed of the territory on which traders operate in the same or in fairly homogenous conditions of competition, to the extent it is concerned with relevant products.

As a conclusion, it may be stated that it is not the geographical size of the area, but rather its economic significance that is of relevance5.

The regional subdivision of a country may also be considered “a substantial share” of the common market. In the same sense, we can apply a quality criteria in considering this market or a substantial share of a market to be a competition area involving many connections, often surpassing the boundaries of a certain territory. Thus, the Court of Justice showed that when the holder of a dominant position impedes the access of competitors on the market, it makes no distinction, if such a conduct is limited to a single country or not.

A position held by a company that may be deemed as dominant can be examined solely after having determined that the relevant market of its products is distinct from other sectors of the general market. It is an idea that has also been accepted.

The defining of the product market must take into consideration the entire economic context, in such a way so as to make possible the evaluation of the

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4 See D. Chalmers, C. Haddjiemmanuil, G. Monti, A. Tomkins, op. cit, p. 1042.
5 See O. Manolache, op. cit, p. 140.
actual economic strength of that company. In order to appreciate whether a company is in the situation of conducting itself (to a considerable extent) independently of its competitors, clients and consumers, it is necessary at first to define the products which, though unlikely to be replaced with other products, are fairly interchangeable with the products of that company, not only in terms of the objective characteristics of such products but also in terms of the competition conditions and offer-and-demand structure on the market. 

On the other hand, jurisprudence has taken into consideration the consequences (outcomes) of a de facto monopoly on the Community market or on a part thereof. It was considered that television companies are placed in a dominant position when, due to a de facto monopoly over information regarding the registration of their programs (programs received in most families in a member country or in a substantial part of the number of families from an area located in the vicinity of a member country), they are in the situation of impeding the actual competition on the market of the weekly TV program magazines in the territories considered.

Art. 82 (formerly 86) EC does not define the concept of dominant position, unlike Art. 66, para. 7 CECO. 

In the United BRANDS case dated February 1, 1978, the Court of Justice showed “…that the concept of dominant position contemplated by this article refers to a position of economic power determined by a company which confers it the discretion to prevent an actual competition from being maintained on that market, making it possible for such company to conduct itself to a great extent independently of its competitors, clients and, eventually, its consumers. 

A company is in a dominant position even if it does not hold monopolies and even if a certain competition subsists on the market. According to the Community jurisprudence, when the market shares held by the company amount to 80 per cent or more, it is sufficient to prove the existence of a dominant position. When the market shares amount to 40-50 per cent or more, it is a serious indicator of the existence of a dominant position but in order to be sure of it, other factors shall have to be taken into consideration, such as number of competitors and the strength thereof. Criteria referring to conduct are used as a complementary means.

Art. 82 (formerly 86) EC regards the Common Market or an important part thereof. Even a country with a small area can constitute an important part of the Common Market.

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6 See A se vedea Chalmers, Haddjiemmanuil, Monti, Tomkins, op. cit., p. 1028.
8 See A. Guedj, Practique du droit de la concurrence national et communautaire, Publishing house LITEC, Paris, 2000, p. 76.
9 See Fuerea, op. cit, p. 274.
This situation applies also to a region, provided that it is divided into sections at this level. The Commission considers that the Brussels Airport, as a Community component of trans-European airports, represents an important part of the Common Market. The area is merely an element of assessment.

The market is the encountering point of demand and offer of products that are identical or replaceable in terms of their utilization.

Substitution exists when consumers can buy the respective product from different places because the quality and price of such products allow them to be substituted.

A dominant position is evident of course when there is a de facto or legal monopoly. It can also be the result of holding an important share of the determined market. A 50 per cent market share is considered of utmost importance. As a rule, structural criteria are being sought. This way a company can be studied in order to see whether it is in a position of economic strength that allows it to conduct itself independently of its competitors, clients and consumers.

A dominant position can be held by one or several companies. There are collective dominant positions. These are usually held by a group where the companies that are part thereof do not have an actual autonomy. They can be held by companies that are not part of a group but have economic relations. In the DIP Spa case dated October 17, 1995, the Court of Justice showed that “in order to draw the conclusion that there is a collective dominant position, the companies concerned would need to have sufficient relations with each other in order to adopt a line of action on the market.”

In the second place, the involvement of one or several companies would be required (in order to describe the dominant position abuse). The Court of Justice resorted to a comprehensive interpretation of the concept “company” as addressee of the competition rules, thus including therein any unit carrying out economic activities, irrespective of their legal form and funding nature.

When we are dealing with more than one company, a distinction must be made between the situations in which the companies have legal or factual obligations towards one another (object of an agreement or of an actually harmonized mutual conduct), and other situations that concern the parallel or additional conduct of companies placed within an oligopoly (which implies a small number of companies on the market and the existence of a parallel and occult conduct).

In the first case, the provisions of Art. 81 (formerly 85) EC apply, while in the second case the provisions of Art. 82 (formerly 86) EC shall apply (as there is a collective dominant position on the market). Since there is no

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10 See Fuerea, op. cit., p. 275.
11 See Guedj, op. cit., p. 77.
12 See Manolache, op. cit., p. 141.
coordination between companies and parallel actions, they are deemed abusive at individual level.

According to another assumption, when the conduct of two companies (of which one is the controlling entity of the other and exercises it in fact) is characterized by an evident unity of action in relation with third parties, then the two companies must be deemed as an economic whole and the indicted conduct is imputable thereto.

Third, there has to be a mutual relation between abuse and dominant position. Taking into consideration that a certain practice carried out by one or several companies is admissible because such companies do not hold a dominant position, the same practice can become abusive if it is promoted by one or several companies holding such position.

In the same way, exclusivity (a natural commercial practice on a competition market) can become an abuse of dominant position to the extent the company placed in the dominant position has a special responsibility of not impairing an actual and undistorted competition on the common market. At the same time, while the existence of a dominant position does not deprive the company placed in the dominant position of the right to defend its own commercial interests (when they are not threatened) and while the company has the capability (to a reasonable extent) of performing acts considered by it as appropriate for the protection of its interests, still, a conduct aimed to strengthen its dominant position and misuse such position are not admissible.

The situation in which a sale cooperative association in a dominant position changed its statutes in the sense that it forbade its members to take part in other cooperative organized forms competing with it, was not considered a situation of dominant position abuse as long as such statutes provision was limited to what was necessary in order to ensure proper operation of the cooperative society and preservation of its contractual strength in relations with manufacturers.

In other conditions, the concept of dominant position depends also on the abuse at stake, just like in the situation in which companies have shared influence on an important part of the product or service market. Similarly, in case certain companies resort to a selective reduction of prices, for the purpose of removing exorbitant prices from the market, such action is grounded on the financial strength sufficient to continue this practice in respect of competition, thus a dominant position being imposed.

There may be abusive price reductions or price increases (the Akzo Chemie case).

In the US, abusive price reductions or price increases were considered to be a form of antitrust liability by the 1945 judgment of the Court of Appeals for the

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14 See Guedj, op. cit, p. 77.
Second Circuit in *Alcoa*. In this opinion, Judge Learned Hand ruled that a price squeeze (abusive price reductions or price increases) infringes Section 2 of the Sherman Act\(^\text{15}\).

In 2007, the European Commission fined a commercial policy practiced by the Spanish company *Telefónica*. The Commission considered that a price squeeze strategy is “a clear-cut abuse”. The Commission said that the reason for the prohibition of price squeezes is the “disproportion between an upstream and a downstream price”.

In April 2008, in the *Deutsche Telekom* judgment, the Court of First Instance considered that price squeeze is a separate infringement of Article 82 EC.

Thus, a first approach characterizes abuse as a result abuse, *i.e.* it views abnormal conduct. In a second approach, there is a structure abuse (the Hoffman-La Roche case) whereby abuse is “an objective concept regarding the conduct of a company in a dominant position, meant to influence the structure of the market in which the extent of competition is already low as a result of the presence of that company, and resulting in the prevention, by resort to means other than those governing a normal competition of products and services based on the performance of then economic operators, of the preservation of the extent of competition still existing on the market or of the development thereof”.

In this case, the effect on the market is to be considered. Any additional restriction of the competition, reduced because of a dominant position, constitutes an abuse.

Abusive utilization can occur on a market other than the market that constitutes the object of domination.

The Community law does not specifically provide for situations of economic dependence abuse.

However, the Court of Justice admitted that television companies, due to the fact that they hold monopoly on the information referring to programs, are in dominant position and misuse this situation preventing the companies on the market from absorbing weekly TV guides, having access to programs (the Radio Telefis Eirean case of 1995)\(^\text{16}\).

\(2. \textbf{The relationship between the abuse and the dominant position} \)

The relation between abuse and a dominant position can be direct or indirect\(^\text{17}\). The relation is direct when the abuse occurs within the same market on which the dominant position is held (such as unjustified refusal to supply merchandise to competitors who cannot purchase it elsewhere).

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\(^{16}\) See Guedj, *op. cit*, p. 78.

\(^{17}\) See Manolache, *op. cit*, p. 134.
The relation is indirect when a company misuses its dominant position on the market for the purpose of obtaining competition advantages on another market (for instance, the purchase of certain goods is subject to the condition of purchasing other goods).

The issue of the cause relation existing between abuse and dominant position is not important because the strengthening of the dominant position of a company can constitute an abuse and can be prohibited by Art. 82 (formerly 86) EC, notwithstanding the means and procedure by which it is obtained, as long as the effect is the substantial diminishing of competition.

In other respects, there is the possibility that forms of abuse be associated with various interpretations of the concept of dominant position.

Thus, a company has, in a given situation, a dominant position if it is capable of committing the respective abuse only because of its position on the market, which could explain the necessity to show the prejudice elements caused to buyers and manufacturers in each single case presented by Art. 86 lett. a)-d). When the purchasers have alternatives to purchase from other competitors, we are not dealing with an abuse, and we can therefore conclude that the respective companies do not have a dominant position.

The concept of abuse may be constructed also from the perspective of the creation of a common market and implementation of a non-distorted competition system. The competition restriction permitted under the Treaty because of the necessity to harmonize its objectives is limited in certain conditions by the requirements of such legal regulations, and surpassing this limits presents the risk of an incompatibility between competition attenuation and the objectives of the Common Market.

Consequently, the abuse interdiction must guarantee the fact that companies in dominant positions must not distort the dominant position in the direction of obtaining certain advantages which could not be obtained by actual and workable competition.

Actual and workable competition shall ensure that all markets, irrespective of the number of participants, shall be subject to competitive action of existing or potential competitors. Such markets shall be placed between two defining models of the economic theory18:

- perfectly competitive market, where small companies compete in the supply of a single product and no company has enough strength to have an impact on the market price19;

- monopoly market, where one company alone, in charge of the supply of the entire product, has the discretion to control the price. The company shall maximize its profit up to the point in which, even in conditions of perfect

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19 See J. Tillotson, op. cit, p. 312.
competition, it shall be able to impose a high monopoly price, if the demand exceeds the offer\textsuperscript{20}.

Art. 82 (formerly 86) EC lists as examples such advantages, all of which represent elements detrimental to beneficiaries.

The concept of abuse is defined by the Court of Justice as “an objective concept referring to the conduct of a company in a dominant position, meant to influence the structure of the market on which the competition extent is attenuated as result of the presence of the respective company, and having as outcome the prevention of the preservation of the competition extent still existing on the market or of the development thereof, by resorting to methods other than those which condition normal competition regarding products and services object of transactions between commercial parties involved\textsuperscript{21}.

The Court of Justice pointed out that a company is forbidden to adopt a conduct that would have effects on the maintenance or increase of the degree of competition existing on a market, where competition is attenuated as a result of the presence of such company.

For this reason, the conduct of such a company can be classified and sanctioned in accordance with the provisions of Art. 82 (formerly 86) EC.

The outcome of an anti-competition conduct is the distortion and lack of a workable and efficient competition, as well as prejudices caused to beneficiaries and competitor suppliers.

Because the list of dominant position abuses is not comprehensive, Art. 86 refers not only to practices that are directly detrimental to beneficiaries, but also practices harmful to beneficiaries due to the impact thereof on the structure of efficient competition\textsuperscript{22}.

We are dealing with the latter category when a company in a dominant position strengthens such position, in such a way that the domination level attained substantially affects competition, which means that on the market shall remain companies the conduct of which depends on a dominant one.

The Court of Justice stated that when a company acquires an interest participation in a competing company, such can be deemed an abuse of dominant position solely when such participation results in the actual control of the other company or at least in a certain influence on its trade policy.

As far as the concept of abuse is concerned, the Court (Continental Can case) sees abuse not solely as a result of the conduct of dominant companies, but also as a result of the structural modifications that can reduce or eliminate the already threatened competition. Therefore, it can be established that there is a situation of dominant position intensification from the moment in which the domination commences to set obstacles standing in the way of competition.

\textsuperscript{20} See Manolache, \textit{op. cit.}, p. 135.

\textsuperscript{21} See Manolache, \textit{op. cit.}, p. 136.

\textsuperscript{22} See Manolache, \textit{op. cit.}, p. 137.
Abuse can be horizontal (referring to the competitors of the company) or vertical (referring to suppliers or users).

In the fourth and last instance, in order to assess the existence of a dominant position abuse, it is necessary to assert the possibility of trade between member countries being affected by an anti-competition conduct prohibited under the Treaty.

This element does not differ substantially from the one provided by Art. 81 (formerly 85), para. 1, EC., the only difference (without any application effect) lying in the use of the expression “to the extent it can affect…”.

The interdiction of dominant position abuse must be construed and applied in view of the provisions of Art. 2 and Art. 3 lett. g) of the Rome Treaty, with regard to a regime that will not distort competition on the internal market, and the promotion of a harmonic and balanced development within the Community overall23.

In order to estimate the possibility of trade being affected by such abuse, not only practices directly causing prejudices to beneficiaries must be taken into consideration, but also practices that affect them indirectly by alteration of the actual competition structure.

In a certain case, the Commission determined by way of decision that the La Roche company holds a dominant position on the market of vitamins, misusing such position and violating Art. 82 (formerly 86) EC. Such violation occurred as of 1964 whereby agreements were signed with 22 buyers. The agreements provided the obligation of the buyers to purchase the entire or the largest part of the necessary vitamin quantity exclusively or preferentially from this company in exchange for a loyalty discount that would offer them a stimulant.

In case the holder of a dominant position (established on the common market) tends to eliminate a competitor from the same market by abusively using such position, it does not matter whether such conduct refers to its export activities or to the activities carried out within the actual common market as long as it becomes evident that such elimination shall have persistent effects on the competition structure within the common market. No distinctions shall be made with respect to the consequences of the abusive practices dependent on the fact that an affected company exports mainly to third countries, as long as it is proven that such abuse affects the structure of competition inside the common market24.

It was also considered that the difference between prices, which can be paid by various clients of the company (by means of loyalty discounts) and which varies depending on the consent or lack of consent of such clients to procure from the company all they request, is of such nature that it places the clients at a competitive disadvantage. This means that a certain buyer is deprived of, or

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23 See Manolache, op. cit., p. 142.
24 See Manolache, op. cit., p. 143.
restricted in, its possibility to choose its procurement sources, while other producers are refused access to the market.

The conduct we are discussing here can be explained as the conduct of a company in a dominant position on a market where the competition structure has been affected and, as such, any additional impact on the competition structure may constitute a dominant position abuse.

On the other hand, it is not necessary to prove that an abusive conduct materially and significantly affected trade between the member countries but only that it is likely to produce this effect.

Finally, it was admitted that Community law applies to a transaction that influences the conditions of the market inside the Community, irrespective of the fact that the company is located on the territory of one of the member countries.

The procedure whereby offenses in cases of dominant position abuses are ascertained and ceased, is largely the same applied to covenants.

The possibility of the Commission to exercise its authority whereby it can take provisional measures or decisions is identical to that provided by Art. 85 of the Treaty, identical to that granted when a negative attestation is issued or a decision adopted in view of putting a stop to an offense. However, the Commission cannot grant exonerations from abusive utilization interdiction, which accounts for the lack of notification formalities.

3. The relevant market

The concept of relevant market should be analyzed. A relevant market represents the environment (framework) inside which commercial competition actually takes place.

The characteristics of the relevant market were defined for the first time by the courts of law in the USA. Later, the concept was debated within the doctrine of several countries, but a unity of opinion was not attained.

A French author (J. Azema) defined it as “the place of confrontation between demand and offer of certain products or services, that in the buyers’ opinion can be substituted one for the other but cannot be substituted with other goods or services offered.”

In its turn, OCDE (Organization for Economic Development and Research) adopted a similar description, which means that “the definition of the market takes into consideration both the demand and the procurement. In terms of demand, the products need to be substitutable from the buyer’s standpoint. In terms of procurement, the market includes solely sellers who make the relevant

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26 See Fuereea, op. cit., p. 272.
product or can easily modify their production in order to provide substitution products or related products”.

Taking into consideration such definitions, the concept of relevant market proves to be a complex character which includes two components (the product market and the geographical market).

The product market has two correlated sides, demand and offer39.

From the point of view of demand, a relevant market includes all products (services) considered by consumers as possible to be substituted or interchanged, because of characteristics, price and utilization.

The substitution possibility signifies the virtual existence of some alternatives available to consumers, The difficulty derives from the fact that there are seldom perfect substitutes. In practices, it is not necessary for alternative products (services) to have identical physical or functional features or identical prices.

In order to delimit a certain relevant market, merchandise composition and structure are used as indicators30.

Usually, products of same physical nature can be substituted with one another. In opposition, differences of material nature between products (services) show that they are not interchangeable, thus belonging to different relevant markets31.

In spite of the above, occasionally the criterion of final utility supersedes the material nature of the product. In this sense, the jurisprudence of the USA Supreme Court of Justice showed that metal recipients and glass recipients belong to the same relevant market, as they can be substituted with one another, although they are made of different substances.

In a report in 1992, the Competition Council of France showed that the technical analysis of product characteristics is not sufficient in determining the control of a relevant market. This is owed to the fact that such analysis does not reveal the potential conduct (reaction) of consumers (buyers)32.

The exclusive utilization of a purely technical examination has two disadvantages.

The first disadvantage is then abusive simplification, starting from the consideration of the product organic function alone.

The second disadvantage is that of excessive diversification.

The reaction of consumers towards the price differences of similar products can represent an important clue in the delimitation of the relevant market.

If the price differences of similar products are maintained for a longer period of time, it can be said that substitution does no longer apply. In this respect, the

30 See Căpățână, op. cit., p. 9.
31 See Chalmers, Haddiemanuul, Monti., Tomkins, op. cit., p. 1033.
32 See Căpățână, op. cit., p. 10.
French Competition Council stressed the fact that the price difference should reach a level of 5 per cent in order to be taken into consideration\textsuperscript{33}.

Another important influence is the one exercised by the consumer preferences\textsuperscript{34}.

In other words, the relevant market includes current sellers of the product as well as potential sellers thereof. Potential sellers can be convinced to offer substitute or related products if the product is attractive. The existence of potential sellers, capable of moving from one relevant market to another has benefic effects on the consumers, narrowing the maneuver margin of the already existing manufacturers who tend to increase prices\textsuperscript{35}.

The relevant geographic market comprises the location area of economic agents engaged in the delivery of products or performance of services offered on the respective relevant market.

In the process of defining the relevant geographic market it becomes imperative to take into consideration the type and characteristics of the products (services), the existence of barriers upon entry, consumer preferences, differences in the market shares of economic agents in neighboring geographical areas, as well as the level of expenditure determined by transportation.

If the transportation price exceeds a nominal threshold, the cost determines the separation of certain relevant geographic markets. Consequently, the relevant market of some products coincides, most of the times, with the national market.

The geographical unavailability of some products acts in the same way; due to their fragility, easily alterable character or very large volume, such products do not offer convenient access conditions to an area other than that of origin.

The relevant geographic market does not necessarily imply the manufacture of goods in the same locality or in neighboring localities. What matters is accessibility of all the concerned products (services) for the same buyers, so that each single one of them represents an actual economic alternative, as compared to similar offers within the relevant market\textsuperscript{36}.

Geographical delimitation must be based on objective criteria. In this respect, simple local specificity (for example the customs of buyers from a certain region) or local manufacturing traditions cannot constitute factors for the individualization of an independent relevant market.

In 1997, the Commission published for the first time a Notification regarding the defining of the market within community competition law (JOCE C no. 371 dated December 9, 1997)\textsuperscript{37}.

\textsuperscript{33} See Căpățână, \textit{op. cit.}, p. 11.
\textsuperscript{34} See Chalmers, Haddjiemmanuil, Monti., Tomkins, \textit{op. cit.}, p. 1031.
\textsuperscript{35} See Căpățână, \textit{op. cit.}, p. 12.
\textsuperscript{36} See Căpățână, \textit{op. cit.}, p. 13.
\textsuperscript{37} See Chalmers, Haddjiemmanuil, Monti., Tomkins, \textit{op. cit.}, p. 1037.
With regard to the market delimitation criteria, the Commission, though it acknowledges the necessity to make a distinction between the delimitation of product or service market and the delimitation of geographical markets, believes the principles are identical in both situations.

For the delimitation of a market, it is necessary to take into account, simultaneously, the substitutable character of the demand and of the offer as well as the potential competition.

If the utilization of potential competition has a determining character in the field of concentration control, the situation is not the same in cases of anti-competitive practice control, where there is an issue of assessing past conducts.

With regard to the delimitation of product or service market, the situation must be analyzed not only in respect of the respective product or service, but also in respect of the substitutable products or services.\(^{38}\)

Although the Commission refers to the preferences of the client and the way it perceives the respective product or services, they are hardly taken into consideration by the Commission. The Commission does not revisit the substitutable character of the offer, the necessity of this criterion being stressed by the Court of Justice.

Certain reservations can be formulated with respect to the criteria proposed for the purpose of the delimitation of the geographical market.\(^{39}\)

The Commission considers prices of utmost importance, referring also to the movement of orders towards other areas, the clients’ and consumers’ opinion as well as the localization of purchased products.

The notification lists a series of interesting ideas regarding evidence of market identity.\(^{40}\)

For example, because competition law is a quasi-repressive law, normally and logically who is assigned to give the proof task must also present proof of the grounded character of the market analysis, an analysis he uses in his reasoning.

The study of the notification shows that the Commission’s reasoning was based on the practice used for assessing operations subject to notification, both in situations of concentration operations and in the situation of certain applications for individual exemption.\(^{41}\)

The Commission underlines the fact that it particularly relies on information provided by the parties. At the same time, the Commission shows that it shall not


\(^{39}\) See P. M. Cosmovici, R. Munteanu, op. cit., p. 343.

\(^{40}\) See See P. M. Cosmovici, R. Munteanu, op. cit., p. 344.

\(^{41}\) See P. M. Cosmovici, R. Munteanu, op. cit., p. 344.
continue the analysis unless it is proven that different points of view on market delimitation can have an effect on the appreciation of the merits.

After the Treaty of Lisbon, it was adopted on 3 December 2008 a Guidance Communication on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (the ‘Communication’ or the ‘Commission’s Guidance’).

According to paragraph 20 of the Communication, the Commission must observe the position of the dominant undertaking, the conditions on the relevant market, the position of the dominant undertaking’s competitors, the position of the customers or input suppliers, the extent of the allegedly abusive conduct, and direct evidence of exclusionary strategy\(^\text{42}\).

The status of the final document as a statement of enforcement priorities, rather than guidelines on interpretation of art.102, reflects the tension between an approach focused on real competitive harm that is the hallmark of the paper and the traditional and more permissive approach to proving and finding abuse that is part of the existing case law of the courts\(^\text{43}\).

4. Conclusion

What should be pointed out with respect to the effect dominant position abuse or other anti-competition practices have on trade is that the market on which such commercial activity is carried out should be taken into consideration.

Taking into consideration the EU jurisprudence, it can be asserted that it was necessary to determine the areas where the conditions of competition are homogenous.

The 2008 Guidance Communication incorporates the “more economic approach” to art. 102 TFEU set out in the Commission’s 2005 Discussion Paper.

The legal regulation of dominant position abuse is the same after the Treaty of Lisbon.

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Criteria applied in delimiting practice of dominant position abuse


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