

№ 1 (2017)

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Prohibition of abuse of dominant position: Comparative analysis of Georgian, Armenian and EU competition laws



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giz Deutsche Gesellschaft
für Internationale
Zusammenarbeit (GIZ) GmbH



The paper is published with financial support of Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH (GIZ). The findings and conclusions expressed in this paper are entirely those of the authors and do not necessarily reflect the views of the GIZ.



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**PROHIBITION OF ABUSE OF DOMINANT POSITION:
COMPARATIVE ANALYSIS OF GEORGIAN, ARMENIAN AND EU COMPETITION
LAWS**

Hasmik Tigranyan

Sophio Kurtauli

Yerevan-Tbilisi

2017

PREFACE

For over 20 years now the German Federal Ministry for Economic Cooperation and Development (BMZ) has been supporting legal and judicial reforms in the South Caucasus. From the very beginning this support was implemented by the German public-benefit federal enterprise for international cooperation services for sustainable development “Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH”. Initially, this support was not provided to individual countries on a bilateral basis. Rather, GIZ provided its advisory services with a regional project, administered from the University of Bremen and covering Moldova, the South Caucasus, Central Asia and Mongolia. After additional bilateral projects were conducted in the South Caucasian and Central Asian countries, regional programs were established. Taking into account the different pathways and speed of the related reforms in these countries, options for synergies had to be developed, enabling peer to peer cooperation and establishing a regional dialogue on the Rule of Law. A flagship initiative in that regard were the Regional Academies (Formerly (2008 – 2014) called „Winter Academy“) “Transformation Lawyers – Legal Dialogue for Legal Transformation”, which were carried out 8 times in cooperation with the Hertie School of Governance and the Bucerius Law School from Hamburg to Berlin. These three-weeks academies were the kick-off for vivid dialogue and a lasting engagement between the South Caucasian countries. The participants of these academies form the Alumni Network “Transformation Lawyers” and are the great treasure of the initiative itself. Given their outstanding role as ambassadors for cross-border cooperation, we are very pleased to present the outcomes of the ongoing cooperation in this Alumni Network. Providing an inspiring forum to learn from each other and to realize joint research were major aims of this network. This very comparative analysis on the Prohibition of Abuse of dominant position proofs, that beyond the facilitation of regional cooperation, the network contributes to high quality research on legal reforms in the South Caucasus. The topic chosen for this research study is of great relevance to the further development of market-oriented economies.

In future, the importance of the Alumni Network will even increase. In our next programme phase we will accelerate the support of common comparative research projects, like we do present with this research.

Dr. Thomas Meyer
Program Manager

Legal Approximation towards European Standards in the South Caucasus (LAtEst)
Commissioned by the German Federal Ministry on Economic Cooperation and Development
Implemented by GIZ

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ABBREVIATIONS

EU – European Union

CJEU – Court of Justice of the European Union

GC – General Court

Commission – European Commission, which is meanwhile EU competition authority

EUMR – EU Merger Regulation

TFEU – Treaty of the Functioning of the European Union

SCPEC - State Commission for the Protection of Economic Competition of the Republic of Armenia

Agency – Competition Agency of Georgia

RA- Republic of Armenia

AA - Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part

Article 102 - Article 102 TFEU (Treaty of the Functioning of the European Union)

INTRODUCTION

In Armenia and Georgia, similar to other democratic states with market economies, competition is the basic cornerstone of the economic system. Economic competition plays an imminent and important role in promoting economic growth in the South Caucasus. Competition also stimulates innovation and adaptation to changing environments as well as competitiveness and productivity; it thus contributes to an effective business environment triggering foreign and national investments. Competition on the market of goods and services gives incentives to enterprises to propose lower prices and greater choice, and to improve services, thus generating customer welfare. In view of the importance of free and fair competition for liberalization of markets, economic growth and reduction of poverty, the role of the State in the regulation of economic competition is of major importance.

For these very purposes Armenia and Georgia have set up competition protection agencies and have adopted relevant laws for protection of economic competition.

In particular, the State Commission for the Protection of Economic Competition of the Republic of Armenia (hereinafter SCPEC) was established in 2001. RA Law “On Protection of Economic Competition” was adopted in 2000.

In Georgia, Legal Entity of Public Law - Competition Agency (hereinafter the Georgian Agency) was established in 2014 as an independent authority that implements State policy on competition. At the same time, in 2014, the law “On Competition” was adopted. Prior to establishing the legal entity, competition and free trade issues were regulated in different laws adopted in the 1990s.

Like many other states having market economy, in both, Armenia and Georgia, competition law has following dimensions:

- ✓ Prohibition of cartels, control of collusion, other anti-competitive agreements
- ✓ Prohibition of abuse of dominant position;
- ✓ Prohibition of unfair competition;
- ✓ Merger control (control of proposed mergers, joint ventures and acquisitions).

Thus, prohibition of abuse of dominant position is one of the dimensions of competition law, which was established as one of its fundamental directions. The aim is to prevent companies with dominant position in their economic sector from abusing that position and thus from distorting competition in the respective country in detriment to other undertakings and consumers. Specifically, this prohibitive mechanism is established to protect free and fair

competition on the markets by controlling market power of both, single and collective dominant undertakings, and thus to not allow those undertakings distort competition and harm consumers by triggering higher prices and decreasing choices, restricting economic activities of other undertakings, applying discrimination and other anti-competitive practices.

It should be stated that many markets are highly concentrated both in Armenia and Georgia. In order to effectively oppose these concentrations, strong competition legislation is necessary for effective implementation of prohibition of abuse of dominant position.

Besides, legal consciousness on the issues of competition law among undertakings, lawyers, advocates and judges is fairly low; this results in many violations, in low quality of legal assistance and in the rulings and decisions of the courts which disregard peculiarities of competition law¹. To overcome this problem and raise awareness on the matters of competition law, it is necessary to develop competition law as a separate branch of law, both in Georgia and Armenia, and to conduct more research in the field of competition law.

Considering the above-mentioned, and the importance of improvement of competition legislation regarding abuse of dominant position in both, Georgia and Armenia, *the aim of this study* is to conduct a comparative analysis of the legal mechanisms for prohibition of abuse of dominant position under Armenian, Georgian and European Union competition laws and for implementation of those mechanisms. This comparative analysis reveals the gaps and shortages existing in the law and in practice, highlighting advantages of each system and criticizing their disadvantages. Consideration of EU best practices gives opportunity to suggest improvement mechanism for refining Armenian and Georgian competition laws. EU competition law has been chosen for this research taking into account its best practices in the field, great coherence of both Armenian and Georgian competition laws to EU law and a huge input of the EU in establishing competition agencies in Armenia and Georgia.

In view of the above, this research includes comparative analysis of competition legislations and case law of Georgia/Armenia/EU. By providing guidance for Georgian and Armenian competition authorities, the research aims to contribute to legal approximation towards European standards in the field of competition law, particularly with respect to prohibition of abuses of dominant position.

¹ These conclusions have been drawn from personal experiences of the authors and from the interviews with officials of the relevant competition agencies, namely with the head of Methodology and Competition Assessment Department, Arman Manaseryan, November 20, 2016 and with the head of Legal Department, Hayk Karapetyan, November 25, 2016.

The study provides guidance to Georgian and Armenian lawyers on the issues of competition legislation of both Georgia and Armenia, thus enabling them to better protect their clients' interests in the neighboring country.

Finally, the study aims to contribute to the development of competition law both in Armenia and Georgia.

For the fulfillment of the aforementioned goals, this study has researched and analyzed the following:

- ✓ Relevant articles of RA Law on Protection of Economic Competition and bylaws related to prohibition of abuse of dominant position;
- ✓ Relevant case law of SCPEC and Armenian courts regarding abuse of dominant position;
- ✓ Relevant articles of Georgian Law on Competition 2014 and legal acts of Georgian Agency related to methodological guidelines of market analysis;
- ✓ Relevant case law of Georgian Agency regarding abuse of dominant position;
- ✓ European Commission notice on the definition of the relevant market for the purposes of Community competition law;
- ✓ Communication from the Commission-Guidance on the Commission's Enforcement Priorities in Applying Article 85 (now Article 102 TFEU) of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [C (2009) 864 final];
- ✓ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, (2006/C 210/02);
- ✓ Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty;
- ✓ Case law of European Commission and EU courts related to abuse of dominant position.

This study consists of an *introduction*, *three chapters* and a *conclusion*. *Introduction* lays out the purpose of writing on this topic, notes its importance and relevance and outlines the main issues being considered in this study. *The first chapter* discusses fundamentals of competition law in Armenia, legal basis and definition of the relevant market, determination of dominant position, forms of abuse of dominance, establishment of abuse of and responsibility for abuse of dominant position under Armenian competition law. It also analyzes cases of the SCPEC and Armenian courts regarding the abuse of dominant position. *The second chapter* starts with a brief remark on the development of Georgian competition law; the chapter then discusses legal basis and definition of relevant market, determination of dominant position, forms of abuse of

dominance, establishment of and responsibility for abuse of dominant position under Georgian competition law. Thereafter, the cases of Georgian Competition Agency are discussed. *The third chapter provides* general remark on EU competition policy directions; it then outlines the definition of relevant market, determination of dominant position, forms of abuse of dominance, establishment of and responsibility for abuse of dominant position under EU competition law at the same time providing the analysis of EU case law in this regard. *The conclusion* presents a brief summary, illustrates similarities and differences among different models of prohibition of abuse of dominant position, identifies the gaps and shortages of Armenian and Georgian competition laws and practices, considers EU best practices in the field of competition law, and provides solutions for filling gaps and developing new mechanisms for effective enforcement of competition laws in Georgia and Armenia.

To accomplish this task the available academic works, articles and books of the world's famous universities and best competition lawyers have been studied. To fully and comprehensively assess protection of economic competition and identify the peculiarities of prohibition of abuse of dominant position under Armenian, Georgian and EU competition laws, the authors use the method of comparative research and case study. Then, the method of analogy is applied to find out general directions in competition law regarding prohibition of abuse of dominant position, and to suggest practical and real solutions to the issues revealed. Considering the urgency and importance of the topic and that there is much more to learn from experts in the field than from the books, the method of field research is also used. Specifically, the study considers expert opinions, particularly of employees of the SCPEC and of the Georgian Agency, responsible for identification and analysis of cases of abuse of dominant position.

CHAPTER I - PROHIBITION OF ABUSE OF DOMINANT POSITION UNDER ARMENIAN COMPETITION LAW

Hasmik Tigranyan

In Armenia, like in other market economies, competition is the cornerstone of the economic system. Armenian Competition law is rooted in the Constitution (2015) of the Republic of Armenia. Specifically, Article 11 of the Constitution promulgates free economic competition as a constitutional principle and the foundation of the economy, while Article 59 ensures economic competition by prohibiting abuse of dominant position, anticompetitive agreements and unfair competition. Armenian civil and criminal codes also provide remedies for the protection of competition by prohibiting limitation of competition and abuse of dominant position via the use of civil rights², and by stipulating criminal liability for anticompetitive agreements³.

In Armenia, the State Commission for the Protection of Economic Competition of the Republic of Armenia (hereinafter SCPEC) implements the RA Law on Protection of Economic Competition (hereinafter the Law) and other laws that comprise part of competition protection legislation. It should be noted that the Law was adopted (in 2000) and SCPEC (in 2001) was created after the Partnership and Cooperation Agreement between the European Union and Republic of Armenia (1999) was signed and due to the European Union requirements.

Currently, SCPEC protects competition by implementing the following dimensions of competition law:

- Prohibition of cartels, control of collusion, other anticompetitive agreements;
- Determination of dominant position, prohibition of abuse of dominant position;
- Prohibition of unfair competition;
- Mergers' control (control of proposed mergers, joint ventures and acquisitions involving companies that have a certain, defined amount of turnover);
- State aid limited control.

Thus, one of the directions of competition law is prohibition of abuse of dominant position. The purpose is to prevent companies with dominant position in their economic sector from abusing this position and thus distorting competition in the country.

² Article 12, RA Civil Code, www.arlis.am

³ Article 195, RA Criminal Code, www.arlis.am

For determination of abuse of dominant position, it is first necessary to define the relevant market (commodity market), which identifies the boundaries of the competition between firms. Article 4 of the Law provides the definition of the basic concepts of the commodity product market and geographical boundaries of commodity market. In particular, Article 4 provides as follows:

"Product market means the field of circulation of a product and its mutually substitutable products in a certain territory, defined by the decision of the SCPEC, the boundaries whereof are determined upon the economic opportunities and expediency for the acquisition of a product by a buyer in a relevant territory. Product market is characterized by product type and geographic boundaries, the composition and volume of its subjects;

Product type boundary of product market means the integrity of a given product and its mutually substitutable products as defined by the decision of the Commission;

Geographic boundary of product market means a certain geographic territory (including road, air, water and overland route, etc.) as determined by the decision of the Commission, within which it is economically possible and expedient for the buyer to acquire the given product and its mutually substitutable products, and such possibility and expedience is not available beyond the given territory. The geographic boundary of a product market may cover the entire territory of the Republic of Armenia or part thereof, or the territory of the Republic of Armenia (or part thereof) together with the territory of another state (or part thereof)".

The *Procedure on Defining the Commodity Market Boundaries*, adopted by SCPEC's decision No 190-N of 23 May 2011 (hereinafter Decision 190-N)⁴, provides procedure for defining commodity market boundaries, composition of market participants and volumes. Decision 190-N specifically notes that commodity market is characterized by product boundaries of commodity market and geographical boundaries of commodity market. The Decision 190-N further states that the determination of product boundaries of commodity market is based on mutual substitutability of products or probable behavior of buyers based on the purpose of product use, application, qualitative, technical, price or other properties. The Decision also stipulates that the relevant market can be determined by consideration of classification of relevant commodity: CPA (Classification of Products by Activities), FEACN (Foreign Economic Activity Commodity Nomenclature), or can be determined by consideration of information from other sources such as data given by other state bodies, economic entities, by consideration of

⁴ The State Commission for the protection of Economic Competition of the Republic of Armenia (SCPEC) <http://bit.ly/2se6tcO>

expert reports, inquiries, the results of previous studies, etc. For geographical boundaries of commodity market, Decision 190-N repeats the definition provided in Article 4 of the Law noted above.

It is worth to note that the Law and Decision 190-N consider only supply (buyer) side substitutability and mutual substitutability, whereas competition legislation of the USA, the EU, Canada, Australia and other developed states also consider supply side substitutability and potential competition⁵. Meanwhile it is worth to mention that consideration of classification of the relevant commodity provides flexible approach for SCPEC in definition of the relevant market boundaries.

The study and analysis of SCPEC decisions show that commodity product market has been determined by mutual substitutability of products using FEACN and other classifications. Moreover, the language of the Decision 190-N repeats the wording of Article 4 of the Law. It should further be noted that the Decision mainly provides definition of terms, lacking regulation of enforcement mechanism and definition of a clear methodology. It is for this reason that this Decision is not fully enforced. This creates difficulties for the SCPEC in regulating competition in those commodity markets, which are small or which are too big and cannot be defined using classification methods. Therefore, in the process of defining the market the application of proper and differentiated approaches, the availability of comprehensive elaboration methods and enforcement mechanisms in Decision 190-N, in my opinion, would not only help to regulate any kind of market, but would also avoid later disputes regarding determination of the relevant market.

The next step after definition of the relevant market is determination of whether a particular economic entity has dominant position in the defined relevant market. Article 6 of the Law stipulates the criteria necessary for assessing existence of dominant position. Particularly, it states⁶:

"1. Within the meaning of this Law, an economic entity shall be considered as having monopolistic position on product market if it has no competitor as a seller or acquirer.

2. An economic entity shall be considered as having dominant position on product market if:

(1) it has a market power on the given product market, in particular, does not encounter any significant competition as a seller or acquirer, and (or) based on its financial standing or other qualities has the opportunity to have a decisive influence on the general product turnover in the

⁵ Jones/ Sufrin: EU Competition Law Text, Cases and Materials, 2016, pp. 44-50

⁶ RA law on protection of economic competition, <http://bit.ly/2tcFLG4>

given product market and (or) oust other economic entity out from the given product market and (or) impede the entry into the given product market; or

(2) as a seller or acquirer it captures at least one third of the given market in terms of sale or acquisition volumes; or

(3) each of two economic entities having the largest sale or acquisition volumes on a product market shall be considered as having a dominant position on the given product market if as sellers or acquirers they jointly capture at least one second (one half) of the given market in terms of sale or acquisition volumes; or

(4) each of three economic entities having the largest sale or acquisition volumes on a product market shall be considered as having a dominant position on the given product market if as sellers or acquirers they jointly capture at least two thirds of the given market in terms of sale or acquisition volumes.

3. Economic entity (entities) shall be considered as having dominant position on one of the grounds provided for in points 2, 3 or 4 of part 2 of this Article, taking into account the peculiarities of the structure of the given product market with respect to the allotment of segments of economic entities operating in that market.

Economic entity (entities) referred to in this Article may provide evidence proving that they do not possess dominant position in the respective product market.

4. The monopolistic or dominant position of an economic entity, as well as the procedure and criteria for determining market position of an economic entity shall be defined by the Commission.

5. A trade network shall be considered as having dominant position, if it is a cluster of four or more trading entities".⁷

Thus, Article 6 of the Law stipulates the criteria necessary for establishing dominant position, which are: existence of market power or existence of single (one economic entity has 1/3 market share) or collective dominance (2 economic entities together 1/2 of market or 3 economic entities together have 2/3 market share). The Article at the same time stipulates necessary criteria of cluster of 4 and more trading entities for establishment of dominance of trade networks.

In this regard, it is worth to add, that scientific literature on competition law suggests "direct" and "indirect" methods of assessing existence of dominant position⁸. The "direct" method

⁷ See *ibid.* Article 6

⁸ *Jones/Sufrin: EU Competition Law Text, Cases and Materials*, 2016, p. 55.

involves determination of dominant position using economic methods - residual demand curve (this is a demand curve that a single economic entity faces). However, the data required by this method is often difficult to obtain. “Indirect” method of market power determination considers structural approach involving assessment of a quantitative indicator (market share) and/or of a qualitative indicator (structure of competition on the market, particularly, market position of the dominant economic entity/entities and its/their competitors, countervailing buyer power, expansion or entry). For this reason, “indirect” method of assessing market power is the one that is used by competition authorities around the world. The analysis of Article 6 of the Law shows that Armenian competition protection legislation applies indirect method with consideration of quantitative and qualitative indicators of dominance.

The procedural details of application of Article 6 of the Law are prescribed in the bylaw “On approving the procedure and criteria for defining the monopolistic or dominant position, also market power of an economic entity” (SCPEC decision 194-N, May 23, 2011)⁹. Decision 194-N prescribes criteria for assessing dominant position, at the same time outlining situations when an assessment is not conducted. The latter are the cases when an economic entity has 100% market share in the relevant market and thus is deemed as a seller (vendor) who does not have competitors. In such cases monopolistic position is determined without conducting a study.

Afterwards, 194-N decision stated that in cases, when dominant position is assessed based on market share of economic entities, SCPEC determines share by conducting a study based on information given by those economic entities, by states bodies and by other sources of official information. It meanwhile stipulates how market share will be calculated, taking into account peculiarities of each market.

In this regard, it is interesting to note that decision 194-N states that market power is considered only when it is impossible to assess dominant position by consideration of market share.

However, decision 194-N just enumerates criteria necessary for assessment for the determination of market power, stating that it is assessed by consideration of the following: degree of centralization of relevant market, financial capacities of economic entity, and barriers to entry or other factors (regulatory, by virtue of agreements, etc.) preventing entry to that market, centralization degree of relevant market and share correlation for the undertaking concerned in relation to the relevant market, stability of the relevant market, influence of

⁹ [On establishing the procedure and criteria for identification of monopolistic or dominant position of an economic entity, including market power](http://bit.ly/2tM08ai) (SCPEC decision 194-N, May 23, 2011) <http://bit.ly/2tM08ai>

dominant economic entity on other connected markets; it does not provide description for each of the above-mentioned criteria and does not clarify details of their application.

In view of the above-mentioned analysis, a conclusion can be drawn that decision 194-N is the procedure for defining dominant position by consideration of only a quantitative criterion-market share consideration; however, for consideration of a qualitative criterion-market power, this bylaw provides only the criteria, but no guidance on the procedure. Meanwhile, the analysis of all SCPEC decisions¹⁰ rendered up till now, shows that the dominant position of an economic entity was defined by consideration of the market power criterion only in one case. That was the case of abuse of dominant position *SCPEC vs. Armentel* decided in 2011 (this case will be analyzed in the part on the abuse of dominant position of this study).¹¹ In all the other cases SCPEC has considered the criterion of the market share of economic entities. It is worth to mention, however, that consideration of the market share criterion is very important as it enhances the efficiency of the enforcement of the competition authority and gives entrepreneurs legal certainty by establishing *prima facie* dominance. However, consideration of solely the market share limits SCPEC in determination of real dominance. For example, in dairy product market, in many other markets there are economic entities¹², that alone or together with their related companies have market power and determine prices and rules for market participants, in the meantime affecting consumers. However, these economic entities have less market share (less than 1/3) that is required by Law to establish dominance. Besides, in cases of collective dominance of 3 economic entities (2/3 market share and more), it is possible that one of these entities has less than 10-15 % market share, and in reality no market power to have influence on the market. For the above-mentioned cases, it is necessary to also assess market power, in order to fully assess competition and the degree of centralization of the relevant market. To sum up, it can be said, that the approach used by SCPEC creates the risk of overemphasizing and/or underemphasizing market share in certain cases, thus leading to over-enforcement or under-enforcement. For this reason, the USA and the EU competition laws do not irrefutably define that an economic entity has a dominant position when it reaches certain market share thresholds¹³.

Finally, when dominant position in the relevant market is established, the next step is consideration of whether a dominant undertaking has abused its dominant position. The

¹⁰ SCPEC Website <http://bit.ly/2u8pizt>

¹¹ Interview with the Head of Methodology and Program Planning Department Arman Manaseryan

¹² The information about these economic entities is a trade secret and cannot be revealed.

¹³ *Graham/ Richardson*: Global Competition Policy, 2007, pp. 335-344

activity or inactivity, considered as an abuse of dominant position, is enshrined in Article 7 of the Law, which prohibits the abuse of dominant position and states as follows:

"... Abuse of dominant position shall be considered the following:

(a) establishment or application of unjustified, discriminatory sale or acquisition prices or direct or indirect binding of other trade conditions conflicting the legislation;

(b) restriction of trade or modernization of production or investments of another economic entity;

(c) unjustified contraction or termination of product imports or production to the prejudice of consumers' interests or creation or maintenance of deficit in a product market by means of keeping, spoiling or/and destroying the products;

(d) application of discriminatory conditions towards other economic entities or consumers;

(e) binding additional obligations to a contract party or a person willing to enter into a contract, including trading entities, which in their nature or implementation aspect are not related to the subject of the contract;

(f) forcing economic entities to restructure, liquidate or break economic relations;

(g) the action or conduct aimed at impediment to the market entry (restriction of market entry) of other economic entities, or ousting them out from the market, as a result of which the economic entity did not enter the market or was ousted out from the market or made additional expenses not to be ousted out from the market or as a result whereof another economic entity might have failed to enter the market or ousted out from the market or made additional expenses not to be ousted out from the market;

(h) offering or application of such conditions that create or may create unequal competitive conditions in a case, when similar conditions have not been offered to other economic entities operating on the given product market;

(i) establishment, change or maintenance of discounts or privileges of sale or acquisition prices, if they are targeted at the restriction, prevention or prohibition of competition;

(j) unjustified increase, decrease or maintenance of a product price;

(k) setting or applying other terms or behavior which leads or may lead to restriction, prevention or prohibition of economic competition".

It should be noted that the Law distinguishes the following general categories of abuses: (1) abuses by pricing policy; (2) abuses by applying discounts and rebates; (3) abuses by restricting/limiting innovation, production, technical development; (4) abuses aiming to oust competitors from market and create obstacles for entering that market; (5) abuses by

conducting unfair pricing policy or imposing unfair trading conditions; (6) tying and bundling; (7) abuses by refusal to supply; (8) margin squeeze abuses; (9) exclusivity abuses; (10) abuses of prejudicing consumers; (11) forcing economic entities to restructure, liquidate or break economic relations.

Responsibilities for abuse of dominant position are prescribed in Article 19 and in Article 36 of the Law. In particular, Article 19 of Law states that in cases of violation of the Law (including the abuse of dominant position) SCPEC is authorized to issue a warning with an assignment to eliminate violations and (or) exclude them in the future, impose fines with an assignment to eliminate violations and/or exclude them in the future and to pay the fine by determining a time period for the execution of the assignment. Meanwhile, Article 36 provides details regarding the fine stating the following:

"Abuse of dominant position shall entail imposition of fine in the amount from five million to two hundred million drams in the amount of up to ten percent of the proceeds of the economic entity from the year preceding the infringement. In case of having conducted activities in the previous year for a period less than 12 months, the amount of the fine to be imposed for the infringement provided for in this part shall be up to ten percent of proceeds of the economic entity earned in the period, not more than 12 months, preceding the infringement."

As the article stipulates, the profit (income) earned by the economic entity through unjustified increase of prices by abusing its dominant position shall, upon the decision of the SCPEC, be subject to collection in the State Budget of the Republic of Armenia.

During imposition of measures of liability on the offender economic entities, SCPEC takes into account the following factors: nature and duration of the offence, potential or actual effect of the offence on competition environment or on the interests of consumers, the extent of deliberateness of the economic entity concerned, repetitiveness of violations of competition law by the concerned economic entities, the possible effects of fines on the concerned economic entities and the sphere of activities of the economic entity concerned¹⁴.

In this regard, it should be noted that SCPEC is authorized to decide on disaggregation (division, separation, alienation of shares or assets) of economic entities that have abused their dominant position twice or more within a year.¹⁵

¹⁴ Article 31, RA Law on the protection of economic competition

¹⁵ *Ibid.* Article 19

It's worth mentioning that Article 195 of RA Criminal Code considers criminal liability (criminal fine and imprisonment for up to 8 years) for abuse of dominant position, specifically for increase, decrease and maintenance of illegally high or low monopoly price¹⁶.

For full and comprehensive understanding of abuse of dominant position, this study has considered application of Article 6 and Article 7 in practice. Specifically, the following major cases of abuse of dominant position have been considered¹⁷:

- Abuse of dominant position by Natali Pharm LLC

In 2010 SCPEC received an application of complaint from the leader of Heritage party of RA National Assembly, where the complaining party stated that Natali Pharm LLC ousted out Szni LLC, its competitor in public procurement procedure, from the market of drug Ceftriaxone. Specifically, the complaint stated that Natali Pharm LLC and Szni LLC both participated in public procurement procedure for drug Ceftriaxone declared by one of the Armenian hospitals. Szni LLC was declared as the winner and should have provided Ceftriaxone to the health organization. However, Natali Pharm LLC donated Ceftriaxone to that hospital, thus, the hospital no longer needed the drug and turned down the contract of supply of Ceftriaxone from Szni LLC. SCPEC initiated administrative proceedings and conducted thorough investigation which lasted 2 years studying all the public procurement procedures in 2010-2011 organized by 134 state regulated hospitals and medical institutions. As a result of the study it turned out that Natali Pharm LLC gave donations in many other public procurement tenders for Ceftriaxone (only in those tenders where Szni took part) or offered unjustified low price for Ceftriaxone. In this regard, it is interesting to add that Natali Pharm LLC participated in 322 public tenders for other drugs, but made donations only for Ceftriaxone public tenders. Applying classification method, and analyzing the information on classification of drugs received from the Scientific Center of Drug and Medical Technologies Expertise, SCPEC defined the relevant market as the market of "Ceftriaxone and its substitutes", and geographical market—as the territory of the Republic of Armenia. Then based on the study results, the information received from state bodies, the economic entities of the relevant market, and applying the quantitative method (market share consideration) for defining dominance, the collective dominant position of Natali Pharm LLC and Alpha Pharm LLC (2 economic entities have more than 1/2 of market) was

¹⁶ Article 195, RA Criminal Code

¹⁷ All these cases are available on the website of SCPEC: <http://bit.ly/2se6tcO>

defined for this relevant market. The actions of Natali Pharm LLC, in particular the donations of Ceftriaxone made during public tenders on Ceftriaxone and thus eliminating demand for that drug, as well as making offers of Ceftriaxone for the price below reasonable net cost of the product, as a behavior eliminating competition in the relevant market was considered as the abuse of dominant position. In 2012, for the abuse of dominant position, in particular for violation of Article 7 part "1" and "2" of the Law, SCPEC fined Natali Pharm LLC with 20.000.000 AMD (about 40.000\$). In this decision SCPEC considered also violation of Article 7.2, which states all the attributes of abuse of dominant position. However, the analysis of factual circumstances of this case shows that there were violations prescribed by Article 7.2 sub-section "a" (establishment or application of unjustified, discriminatory sale or acquisition prices), "g" (the action or conduct aimed at ... ousting other economic entities out from the market...) and "k" (setting or applying ... or behavior which leads or may lead to restriction, prevention or prohibition of economic competition). Review of factual circumstances provided in the above-mentioned decision on abuse of dominant position shows exactly which attributes were present in the violation of Article 7.2; however, for better legal certainty it would have helped to specifically mention exactly which subsections of Article 7.2 were violated. It should be added that Natali Pharm LLC has appealed against the decision to the administrative court, and the case currently is still pending in the court.

- Abuse of dominant position by Gavar-Trans LLC (2011)

Considering reports in mass media regarding unjustified high prices of public transport in the direction Yerevan-Gavar, Gavar-Yerevan in 2011, the SCPEC conducted a study in the field of public transportation. Taking into account results of this study and considering information received from relevant state bodies, the relevant market was defined as "Regular transportation of passengers from Yerevan to Gavar and from Gavar to Yerevan directions". Dominant position of Gavartrans LLC was established in light of Article 6.1 of the Law (an economic entity shall be considered as having monopolistic position on product market if it has no competitor as a seller or acquirer). The fact that exclusive license provides this company an opportunity to be the solo economic entity in the relevant market was considered as a proof of existence of monopolistic position in the relevant market. The study found that Gavartrans LLC participated in public tenders for regular chargeable transportation of passengers from Yerevan-Gavar-Yerevan (tender 1) and Yerevan-Saruxan (village near Gavar, where the only

road passes through territory of Gavar)-Yerevan (tender 2) and with the quote of 500 AMD price was announced as the only winner for these 2 tenders. However, Gavartrans LLC provided regular transportation services only in the direction Yerevan-Saruxan-Yerevan, for which passengers paid 500AMD. Whereas the passengers of Yerevan-Gavar-Yerevan, being deprived of public transportation for their direction, had to use public transportation for the direction of Yerevan-Saruxan-Yerevan, being forced to pay twice as much sum of 1000AMD. Thus, Gavartrans LLC applied unjustified high price forcing passengers of Yerevan-Gavar-Yerevan to pay 1000 AMD. At the same time, Gavartrans LLC restricted other economic entities to enter the relevant market by participating in public tender with reasonable price and conditions. SCPEC considered the mentioned above activities of Gavartrans LLC as abuse of dominant position, particularly as violation of Article 7.2 subsection "a" (application of unjustified, discriminatory sale or acquisition prices) and Article 7.2 subsection "g" (the action or conduct aimed at impediment to the market entry (restriction of market entry) of other economic entities, or as a result whereof another economic entity might have failed to enter the market or ousted out from the market or made additional expenses not to be ousted out from the market) of Law, and fined Gavartrans LLC in the amount of 10.000.000 AMD (about 20.000\$). Gavartrans LLC was also instructed to stop violation of Law and start providing regular public transportation in the direction Yerevan-Gavar-Yerevan at a price of 500 AMD per passenger. Gavartrans LLC appealed SCPEC decision through administrative procedure stating that it was obliged to raise price from 500 AMD to 1000 AMD, as the bus station had been changed, passengers did not know the place of the new station, and the demand for Gavartrans LLC buses in the direction Yerevan-Gavar-Yerevan had decreased. The SCPEC, however, rejected the appeal of Gavartrans LLC, as the statements of the appellant were not well grounded; in fact, originally under the contract Gavartrans LLC was to start operation already with the changed bus station. Gavartrans LLC did not appeal further through the judicial procedure¹⁸.

- Abuse of dominant position by Mokonat LLC (2011)

In 2011 SCPEC conducted a study in the field of instant coffee to assess competition in that field. Based on the study results, relevant market of instant coffee was determined taking

¹⁸ Interview with the head of Legal Department Hayk Karapetyan, November 25, 2016

into account technological peculiarities of production of this type of coffee. Geographical market was defined as the territory of Republic of Armenia. Based on information received from RA State Revenue Committee and economic entities of the relevant market, collective dominance of three economic entities, in particular, dominant position of Mokonat LLC, New Force LLC and Marseral LLC as acquirers, was established. Then, a later study and inspections of SCPEC showed that Mokonat LLC had abused its dominant position in the relevant market of instant coffee. It turned out that Mokonat LLC used to import and sell both high and low quality instant coffee. The results of SCPEC investigation showed that Mokonat LLC acquired low quality instant coffee with low price and sold it as high quality instant coffee with high price, thus applying unjustified sale prices. Meanwhile, Mokonat LLC sold the same low quality instant coffee to different economic entities (retailers) with different high or low prices, thus applying discriminatory sale prices. For the abuse of dominant position, in particular, for violation of Article 7.2 "a" of the Law, SCPEC fined Mokonat LLC with 20.000.000 AMD (about 40.000\$). It is interesting to note, that in the present case collective dominance in the relevant market was defined in January 2011, though the abuse of dominant position was established in September 2011. Mokonat LLC appealed SCPEC decision through administrative procedure stating that dominant position is established by the decision of SCPEC, and at the time when Mokonat LLC conducted abusive activities, it did not know that it had dominant position, as there was no decision of SCPEC on its dominance. This appeal of Mokonat LLC was rejected by SCPEC, which stated that Mokonat LLC, like other entities applying their right to free economic activity, was obliged to comply with restrictions provided by legislation, including the restriction on competition and prohibition of abuse of dominant position by use of civil rights (including right to free economic activity). Afterwards, Mokonat LLC appealed through juridical procedure to the Armenian Administrative Court and later to the Administrative Court of Appeal of Armenia. Both courts rejected the appeal stating that SCPEC decision merely stipulated existence of dominant position, whereas an economic entity was obliged to consider restrictions during application of its right to free economic activities, particularly an obligation not to abuse its dominant position.

- Yandex taxi case of possible abuse (2016)

In view of the articles published in mass media and complaints from taxi services and individual taxi drivers regarding the activities of Yandex taxi (online taxi service provider), SCPEC studied

the field of online taxi services, specifically the behavior and activities of Yandex taxi in 2016. The results of this investigation showed that starting conditions have originally been extremely beneficial for Yandex taxi: the company did not pay taxes, neither the licensing fee for the company or for taxi drivers cooperating with it; all these charges are compulsory for offline companies providing the same service. SCPEC found out that Yandex offered much cheaper price per km-100 AMD without demanding any minimal base price, whereas other taxi service providers demand minimal base of 600 AMD (which is for the first 3 km) and after the first 3 km-100 AMD for each km. Meanwhile it turned out that already for several months Yandex taxi had been working with no profit, and even more, it was at loss: it appears that Yandex taxi does not get dividends from taxi drivers; to the contrary, it itself pays partner taxi drivers extra 400 AMD (nearly 0.8 \$) per order, which is irrational from business point of view. SCPEC did not define relevant market and dominant position in this market, given the current methodological and legislative gaps in defining electronic markets; however, in October, 2016 SCPEC came to conclusion that the above-noted activities of Yandex taxi contained elements of anticompetitive competition, which could oust competitors of Yandex taxi from taxi service market. SCPEC gave warning to Yandex taxi instructing it to stop the practice of extra payment to taxi drivers. At the same time, SCPEC applied to the relevant state bodies, proposing legislative changes, suggesting to subject online taxi service providers to licensing and assuring equal conditions and equal obligations for offline and online taxi services providers.

- Abuse of dominant position by Armentel CJSC (2011)¹⁹

In 2011 U-com LLC, which was a new participant in the fixed telecommunications market, where 99% of costumers were Armentel CJSC' costumers, filed a complaint to SCPEC against Armentel CJSC. The application-complaint stated that Amentel CJSC applied discriminatory tariffs for calls from mobile phones to fixed home phones, in particular by charging 99 AMD for 1 minute for U-com LLC fixed home telephone calls, and only 29.99AMD, 39 AMD and 59 AMD (depending on a tariff plan) for Armentel CJSC's fixed telephone calls-. These activities caused complaints among actual and potential customers of U-com LLC and limited free competition by forcing the mentioned above costumers to refuse services of U-com LLC. Based on the filed complaint, SCPEC initiated administrative proceeding and conducted investigation. On the basis

¹⁹ <http://bit.ly/2sTj9HV>

of the information provided in RA Government decision on Global System of Mobile Communication Services dated November 4, 2004 and results of the investigation, SCPEC defined relevant primary and secondary markets as market of "Global System of Mobile (GSM) Communication Services"²⁰. Meanwhile, it turned out that there are three economic entities in this market: K Telecom CJSC (64.48 % market share), Armentel CJSC (23.5% market share) and Orange Armenia CJSC (11.99%) market share. SCPEC determined that Armentel had market power and thus a dominant position in the relevant market of "Global System of Mobile (GSM) Communication Services". For determination of market power, SCPEC considered Decision 194-N and took into account the following factors:

1. Financial capacities (output, assets, liquidity or other resources) of Armentel CJSC: this company for many years operated in the wide range of electronic communication markets; historically it had monopoly power and thus had huge infrastructure;

2. Degree of centralisation of the relevant market and the share of Armentel CJSC in the relevant market: in the relevant market of Global System of Mobile (GSM) Communication Services the market is centralized; there are 3 participants, one of them is Armentel CJSC which has 23,5% market share.

3. Impact of the economic entity on the related commodity markets or their participants (economic entity is a participant of an interrelated commodity market or may otherwise influence transactions or behaviour of the other economic entities within the market): Armentel CJSC has detrimental influence on fixed telecommunications field. In particular, according to the data provided by Public Services Regulatory Commission of RA, income of Armentel CJSC in the fixed telecommunications field is 98% and the number of customers reaches 99%. Besides, according to Article 2 of RA Law "On Electronic Communications", Armentel Telephone Company and its successor (now Armentel CJSC) are considered as historically dominant operators. Besides, Armentel CJSC has *de facto* dominant position on other telecommunications markets as well.

4. Sustainability of the relevant market (changes in the number and share of economic entities within the examined commodity market over at least one year, as well as stability of

²⁰ Global system of mobile communication (GSM) services are public mobile services that are provided "in the range of 900MHz and 1800MHz radio-frequencies (or any of them) through international cellular radio-communication system with functional and consumption characteristics (physical, technical, practical, qualitative, price)". Thus, they were not mutually substitutable with other telecommunication services provided in the territory of Armenia. Available at: <http://bit.ly/2tdBNNS>

market turnover or its insignificant change): Global System of Mobile (GSM) Communication Services market is considered as a sustainable and closed market, since entering to this market requires consideration of legislative requirements and standards, investments of infrastructure which are expensive, and it takes long time to enter the market.

Taking into account the above-mentioned considerations, SCPEC concluded that Armentel CJSC has a capacity to have detrimental influence in affecting general conditions for turnover of the product and services in Global System of Mobile (GSM) Communication Services market.

Based on the results of the investigation SCPEC considered that the activities of Armentel CJSC of conditioning the price for fixed home telephone calls upon tariff plan as price fixing, and defining 99 AMD price for 1 minute for U-com LLC fixed telephone calls (in the case when for other fixed telephone calls this price was lower) is application of a discriminatory sale price, which also creates unequal competition conditions in the relevant market. Besides, Armentel CJSC can ouster U-com LLC from fixed telecommunications market where Armentel CJSC has detrimental influencing power by having 98% of income in that market, and 99% of customer. SCPEC decided that the above-mentioned activities and behavior of Armentel CJSC is an abuse of dominant position, specifically, violation of Article 7 and subsections "a", "d", "g" and "h" of Article 7.2 of the Law. For the abuse of dominant position Armentel CJSC was given a warning with an assignment to eliminate violations in 14 days and avoid them in the future.

It should be noted that this case is the single case when dominant position was established considering market power of Armentel CJSC in the relevant market.

- Abuse of dominant position by Lusakert Breeding Poultry LLC (2011) ²¹

In view of the deficit, even more, of the absence of hen eggs, and for these reasons the high prices for hen eggs in Armenian retails markets in December 2010, SCPEC conducted investigation in hen eggs market field to find out reasons of the deficit. SCPEC defined relevant market for this field in July 2010, when relevant market was defined as the market of "Hen egg in shell" considering certain functional, consumption differences and peculiarities of shelled eggs from other types of eggs (from egg mélange and powered egg). In the meantime, in July 2010, SCPEC determined that Lusakert Breeding Poultry LLC (with 26.06% of the market share) and a group of persons (Araqs Poultry CGSC and Yerevan Poultry OJSC) had dominant position

²¹ <http://bit.ly/2tdBNNS>

(collective dominance of 2 economic entities) in the "Hen egg in shell" market. In 2011 SCPEC once again reviewed market shares or participants of this market. It turned out that during December 2010, when there was a deficit of hen eggs on the retail markets for consumers, Lusakert Breeding Poultry LLC had already 36% market share. It also turned out that during December 23-27 (2010), the time when there was high demand for the upcoming New Year holiday, Lusakert Breeding Poultry LLC, having huge amount of hen eggs, decreased and stopped the supply of hen egg to retail chains (shops), thereby creating an artificial deficit, as a result of which the price for hen eggs significantly increased. These activities and behavior of Lusakert Breeding Poultry LLC was considered as an abuse of dominant position, for which SCPEC decided to fine this company in the amount of 2 percent of the proceeds of Lusakert Breeding Poultry LLC from the year preceding the infringement (100.000.000 AMD (200.000\$)), at the same time instructing the company to avoid violation of the Law in the future. Id. Lusakert Breeding Poultry LLC brought the complaint to the Administrative Court, challenging determination of the relevant market, and calculation of the huge amount of surplus hen eggs. The court rejected the complaint. Then Lusakert Breeding Poultry LLC appealed to the Administrative Court of Appeal of RA, which also rejected the claim.²²

- Abuse of dominant position by Coca Cola Hellenic Bottling Company Armenia CJSC (2016)

In 2015 Jermuk International Pepsi Cola Bottler LLC (hereinafter Pepsi Cola Company) brought application-complaint to SCPEC stating that Coca Cola Hellenic Bottling Company Armenia CJSC (hereinafter Coca Cola Company) obstructs its entry into the market. It mentioned that 11 food service providers in the territory of Dalma Garden Mall shopping and entertainment complex without any justification refused to sell Pepsi Cola, and sold only Coca Cola. SCPEC initiated administrative proceeding on the basis of this complaint and investigated activities and behavior of Coca Cola Company on the whole territory of Armenia. For this antitrust case, the relevant market was defined as per SCPEC's decision 111N (dated September 14, 2005). According to that decision, relevant market was defined as a relevant (commodity) "Carbonized and Sweetened (carbonized) Drinks", which "product market is a unity of bottled carbonized and sweetened drinks (including lemonade, containing cola drinks etc.) which both by their functional and consumption features (physical, technical, practical, qualitative, price) are

²² Court case VD/2356/05/1, available in Armenian (ՎԴ/2356/05/1), <http://bit.ly/2tMA8vA>

mutually substitutable. Bottled carbonized and sweetened drinks are sold all over the territory of the Republic of Armenia, and within these frames they are economically affordable, expedient and equally available for buyers, whereas this possibility and expediency is lacking beyond the boundaries of the stated territory".²³ The territory of the Republic of Armenia was considered as geographical boundary of this market. Afterwards, on the basis of information provided by state bodies and by economic entities, SCPEC found Coca Cola Company as having dominant position in "Carbonized and Sweetened (carbonized) Drinks". The results of the study showed that by applying discounts and making other offers with quite favorable conditions, Coca Cola Company compelled dozens of stores and food service providers to sell only its products. One of the described above activities was free supply of energy saving refrigerators, which was very favorable for shops which would not have to buy or rent the refrigerators. In exchange, Coca Cola Company demanded those shops not to put even a few bottles of other carbonized and sweetened drinks in these refrigerators, otherwise it would exercise strict measures. SCPEC also found out, that Coca Cola Company had given out significant amount of money to economic entities, labeling it as marketing expenses, as if for presentation of some panels and tablets and for similar other things: providing such huge amounts of money for this purpose is very unreliable, even in the case when in dozens of cases economic entities had presented different products (cups, table napkins etc.) with Coca Cola trademark. Thus, it can be said, that paying money for marketing purposes was just a formality. Investigation conducted by SCPEC also discovered that Coca Cola used discriminatory and subjective practices in its discount policy and in setting different payment terms for different economic entities for the drinks supplied. Thus, the above-mentioned discrimination and subjectivity directly and indirectly forced economic entities to sell only products of Coca Cola Company refusing to sell products of Coca Cola Company's competitors. SCPEC considered that the described behavior by the dominant economic entity creates unequal competition conditions among competitors in the relevant market. Based on the results of this study, SCPEC considered that Coca Cola Company had abused its dominant position, by violating Article 7.1 and subsections "a", "d", "g", "h" of Article 7.2 of the Law, and imposed a fine on Coca Cola Company in the amount of 50.000.000 AMD (about 100.000.000 \$). Coca Cola Company appealed against this decision to RA Administrative Court. Currently, the case is pending in this court. In the meantime, SCPEC took into account the decision of the European Commission on the abuse of dominant position

²³ <http://bit.ly/2sln2ks>

by Coca Cola (2005)²⁴, where clear regulation was suggested for similar cases, providing that Coca Cola Hellenic Bottling Company is obliged to provide 20% place in its refrigerators for its competitors' products. SCPEC prepared similar regulation and sent it to the relevant state body suggesting changes and amendments to RA Law "On Trade and Service" by stipulating requirements for dominant undertakings to provide 20% place in their refrigerators and stands for their competitors' products. The case is pending in the court.

To sum up, SCPEC has defined dominant position nearly in all cases by consideration of market share criterion only. It should be stated that consideration of the criterion of market power will not only enlarge possibilities for consideration of relevant markets which are too small and too big, but will also help find real dominant economic entities in those markets where there are quite a number of competitors, but in reality, one economic entity dictates the market rules.

²⁴ <http://bit.ly/2s8NNQt>

CHAPTER II - PROHIBITION OF ABUSE OF DOMINANT POSITION UNDER GEORGIAN COMPETITION LAW

Sophio Kurtauli

Georgia doesn't count many years of having a competition policy but several stages of development of antimonopoly legislation can be outlined. On 17 March 1992 Cabinet of Ministers of the Republic of Georgia adopted decree "On some measures of de-monopolization of economic activities in the Republic of Georgia". *"This was first competition legal framework that regulated economic freedom of first economic units (factories, firms) in the process of reorganization of public economy."*²⁵ After this, in 1992 State Council of the Republic of Georgia adopted another Decree "On the Restriction of Monopoly Activity and Development of Competition in the Republic of Georgia" that *"defined organizational and legal grounds of development of competition, restriction and avoidance of monopoly activities and unfair competition. Ministry of Economic of the Republic of Georgia was responsible for implementing antimonopoly policy with the Antimonopoly Office."*²⁶

This abovementioned decree was amended in 1996 and transformed into the law On Monopoly and Competition. On the basis of this legal act an entity of public law, State Antimonopoly Office, was established under the control of the Ministry of Economy, Industry and Trade of Georgia. This law, in the definition of terms, defined monopoly position as dominant position and in Article 13 of the Law prohibited abuse of monopolistic position by an undertaking. As it was mentioned, "That legal framework, attempting to create the Western-like antitrust regime (with variable success), was scrapped in 2005, during the wave of legal simplification and administrative reforms. Due to then-prevailing strictly libertarian policies, competition regulation vanished from Georgian legal order until 2012, i.e. the period immediately preceding the conclusion of the EU-Georgia Association Agreement in 2014. Therefore, it is safe to say that modern Georgian legislation resulted, at least partially, from the EU's soft, norm-diffusion power."²⁷

²⁵ Miminoshvili: The Mechanism of Relationships between State and Business and Perspectives of its Development, p. 43, <http://bit.ly/2sHUzvn>

²⁶ *Ibid*, 44

²⁷ Zukakishvili: Two Years after Legal Transplantation in Georgia the Best is yet to Come, p. 43; Sofia Competition Forum (SCF) Newsletter, <http://bit.ly/2tLMY6W>

Law of Georgia On Free Trade and Competition was adopted in 2005 and is considered to have demolished the Antimonopoly Office of Georgia. "Competition policy stemming from 1992 was rejected and the work on a new competition policy was launched based on a fundamentally different vision. This process finished on 3rd of June 2005 by adopting Law of Georgia On Free Trade and Competition which repealed all pre-existing legal acts regulating competition together with abolishing the relevant institutions and gave rise to operation of legal provisions fundamentally different from those of the EU and the USA."²⁸

Current law On Competition (hereinafter – Georgian Law) entered into force in July 2012 and Competition Agency (hereinafter referred as the Agency) was established as an independent legal entity under public law. Article 16 in paragraph 4 defines that *"The main objective of the Agency is to implement the competition policy, create an environment conducive to the development of competition in and for this purpose identify, eliminate and render inadmissible all types of anti-competitive agreements and actions."*

Opinions differ on whether the current competition law is based on the EU competition law or the US Antitrust law. Some scholars consider that *"Alongside the striking similarities with the EU rules, vigilant observers of Georgian competition legislation will notice obvious local adaptations, notably, in the parts on fines and penalties. Exemptions from the restrictive agreements, state aid provisions, expanded control over the competitive effects of state agencies' actions and policies, mandate against unfair competition, etc. Georgian antitrust procedure also has its particularities, among others, very restrictive timeline and limited possibility of on-spot inspections."* Finally, in the regulated sectors jurisdiction of the Agency is limited to the cooperation and advisory functions only,²⁹ On the other hand, others believe that the current Competition Law has some similarities with US Antitrust law. Prof. Mary Kreiner Ramirez³⁰ in her report³¹ pointed three key similarities: *"The first is the restriction on unilateral activity that would create a dominant position in a relevant market, or tend toward monopolization as that term is understood in US law. The second is the prohibition against horizontal agreements, known as conspiracies in restraint of trade in the United States. The third*

²⁸ Miminoshvili: The Mechanism of Relationships between State and Business and Perspectives of its Development, p. 45; <http://bit.ly/2sHUzvn>

²⁹ Zukakishvili: Two Years after Legal Transplantation in Georgia the Best is yet to Come, p. 43; Sofia Competition Forum (SCF) Newsletter, <http://bit.ly/2tLMY6W>

³⁰ Professor Ramirez teaches Antitrust Law at Washburn University School of Law in Topeka, Kansas, USA

³¹ Kreiner Ramirez, Mary: A Comparative Approach to Competition Law in the United States and Georgia, <http://bit.ly/2s8pIJw>

similarity, an enforcement mechanism, is the proposed Cooperation Program in the Draft Law that is similar to the US Department of Justice Antitrust Division Leniency Program."

It also should be mentioned that the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, on the one part, and Georgia, on the other part (hereinafter - AA)³² sets an obligation upon the parties to ensure *"comprehensive competition laws, which effectively address anti-competitive agreements, concerted practices and anti-competitive unilateral conduct of enterprises with dominant market power and which provide effective control of concentrations to avoid significant impediment to effective competition and abuse of dominant position."*³³ Under this regulation parties are obliged to maintain effective enforcement of competition laws.

In conclusion, it should be stated that in transitional countries like Georgia, strong enforcement mechanisms of competition law is a guarantee of enhancement and development of business environment and transparency and health of free market.

- Definition of the relevant market, the dominant position and establishment of the abuse of dominant position

Constitution of Georgia³⁴ declares that the State shall be bound to promote free enterprise and competition. Monopolistic activity shall be prohibited, except as permitted by law.

Article 2 of Georgian Law establishes principle of support of liberalization of the Georgian market, free trade and competition, in particular to:

- ✓ prevent the imposition of administrative, legal and discriminative barriers to entry into the market by state authorities, authorities of the Autonomous Republics and/or local self-government authorities;
- ✓ ensure proper conditions for free access of undertaking to the market;
- ✓ prevent unlawful restriction of competition between undertakings;
- ✓ safeguard the principle of equality of undertakings in their activities;
- ✓ prevent the abuse of a dominant position;

³² Official text is available at <http://bit.ly/2tixa4Z>

³³ Article 2014 of the AA

³⁴ Article 30 of the Constitution of Georgia

- ✓ prevent state authorities, authorities of Autonomous Republic's and/or local self-government authorities from granting to undertakings such exclusive powers that unlawfully restrict competition;

- ✓ ensure maximum publicity, fairness, non-discrimination and transparency of an authorized body in the decision-making process.

Georgian Law defines “competition”³⁵ as the “rivalry between actual or potential undertakings in the relevant market to gain advantage in the market”; “competing undertaking”³⁶ – as actual or potential economic agent operating in the relevant market, and “potential competing undertaking” – as an interested undertaking which has a substantiated intention to enter the relevant market³⁷. It should be mentioned that dominant position should be determined between the actual undertakings.

“Competition” and “undertaking” have already been defined as the main prerequisites before determining relevant market. According to Georgian Law, “relevant market” is defined as an area of circulation of goods, substitutable goods or services within a defined territory the borders of which are established according to the economic opportunities and feasibility of the purchase of the goods/services and may cover the entire territory of Georgia, any of its parts or the entire territory of Georgia, or its part, together with the territory of another country, or its part.³⁸

Identification of the relevant market shall be ensured by using following parameters:

- ✓ Product boundaries of product/service market;
- ✓ Geographic (territorial) boundaries of market;
- ✓ Time frames (particular period) of product/service market.

The Order of the Chairman of the Agency “On approval methodological guidelines of market analysis”³⁹, prescribes the following parameters:

Product boundaries of product/service market. The criterion of Product boundaries of product/service market is established by consideration of the level of inter-substitutability. Substitutability criterion is considered to include characteristics of the product/service, prices and objectives of their usage, productive, territorial boundaries of the goods; this criterion should be discussed from the perspective of consumers as well as suppliers/producers.

³⁵ Article 3, p. “b”

³⁶ Article 3, p. “c”

³⁷ Article 3, p. “d”

³⁸ Article 3, p. “g”

³⁹ This relevant act is The Decree of the Head of Competition Agency №30/09-3 adopted in September 30, 2014

- ✓ From consumers' perspective, substitutability depends on the definition of consumer's choice regarding quality, novelty level, conditions of product usage (exploitation), level of comparative prices, also on any such characteristic, from that is relevant in the process of defining consumer's choice. These can be identified by sociological surveys, expert conclusions, special interviews, sociological observations on consumer behavior, experiments and/or other methods, which give opportunity to define these characteristics and do not at the same time contradict the legislation and the principles of market analysis defined by these guidelines. The Substitutability criterion may also be determined by the cross-elasticity index of prices.
- ✓ From producers'/supplier's perspective, criterion of substitutability is the degree of simplicity of switching from one product's production to another. It may be determined by means of monitoring/observation, expert conclusions, experiments or on-spot inspection, as well as by using other methods, which do not contradict Georgian legislation.

Geographic (territorial) boundaries of the market. It is the territory, on which selected groups buy or have economic, technical or other kind of opportunities to buy the given product/service. For the determination of the boundaries of relevant geographic market following should be considered: *a) Opportunity of supply and demand of the goods, free movement/transportation on the territories of the relevant market geographic boundaries; b) Opportunity to transfer/move product on the territories of geographic boundaries of the relevant market (including specifications of natural-climate, social-economic and political conditions; peculiarities of demand and consumers' behavior, particularity of business rules and habits); c) Particularities and peculiarities of the territories belonging to the relevant geographic market.*⁴⁰

In terms of defining homogeneity of territories in terms of prices, when the price of product/service received from one or another territory, exceeds the average weighed price of the same product by 10% on marked boundaries of product market, than such territories shall not be considered as homogenous. United geographic market for the given product should be determined when consumers consider product realized in one region as the substitute of the product realized in another region. Definition of geographic boundaries of relevant market for the natural monopolies in the economically regulated spheres is different. In market conditions, product/service market's geographic boundaries are defined by considering the allocation of

⁴⁰ Article 11 of the Guideline

technological infrastructure (networks) and purchasers' availability of infrastructure /to switch to networks/ opportunity.

Time frames (particular period) of product/service market. Time frame for the relevant market is the period of market functioning of a particular product within a geographical boundary. Time frame for the relevant market should be a season. Considering this, a season is any substitutional time period, a substitution cycle not exceeding two years, and is repeated minimum twice. Time frame helps in case of coincidence of comparable product/service and geographical boundaries. Relevant market is identified together with the product market, its geographic extension area and the time during which the market is functioning. Markets having homogenous product and geographic boundaries functioning at different seasons are different markets. Determination of time frames is ensured via observation of the market, or on the basis of official, obtained or submitted material, according to the expediency of the monitoring and investigation, by means of expert conclusion, interviewing market subjects or other relevant methodology.

When undertakings or potential undertakings act/intend to act on a relevant market, they are competitor players. Fair competition is a legally allowed activity, while unfair competition is not; likewise, dominant position is a legal term, but abuse of dominant position is expression of restriction of competition.

In the contemporary economy in general, as well as under Georgian Law, having dominant position on the relevant market is not illegal. For the purposes of Georgian Law, dominant position on the market is defined as a position of an undertaking/undertakings operating on the relevant market, which allows it/them to act independently from competing undertakings, suppliers, clients and final consumers, and to substantially influence the general conditions of circulation of goods on the market and restrict competition.

Unless there is any other evidence, an undertaking/ undertakings shall not be deemed to hold a dominant position if their share of the relevant market does not exceed 40% .

Each out of two or more undertakings shall be considered to be in a dominant position if it does not encounter any significant competition from other undertakings, taking into account the limited access to their raw materials and the sales markets, market entry barriers and other factors, and at the same time: the joint market share of not more than 3 undertakings exceeds 50 % , and, at the same time, the market share of each of them is at least 15% ; the joint market

share of not more than 5 undertakings holding the most significant market share exceeds 80 % , and, at the same time, the market share of each of them is at least 15%.⁴¹

Article 5 paragraph 1 of Georgian Law defines that the dominant position of an undertaking is determined on the basis of its share of the relevant market, financial status of competing undertakings, barriers to market entry or to production expansion, buyer market power, availability of raw material sources, degree of vertical integration, network effects and other factors determining market power. The criterion of its determination is set by the Competition Agency using methodological guidelines of market analysis approved by the relevant legal act issued by the Agency.

Article 6 of Georgian law (hereinafter Article 6) stipulates that *"any abuse of a dominant position by one or more undertakings (in the case of joint dominance) is prohibited. "The 2nd paragraph determines what type of practices might be regarded as the abuse of dominant position:*

- imposing, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with specific trade parties, thereby placing them at a competitive disadvantage;
- entering into contracts subject to acceptance by other parties of supplementary obligations that have no connection to the subject of the contract, etc.⁴²

It should be stated that Georgian Competition Agency has adopted an action plan for 2014-2017 where in the first place about it lists activities that promote, protect and develop free trade and competition. It further states that the Agency must expose and prevent cases on abuse of dominant position. Below we will see that the Agency hasn't exposed any case of the abuse of dominant position.

In this regards it's worth reviewing methodological guidelines and emphasizing some key points from it. As it was already stated, the aim of the guidelines is assessment of methodological provision and the use of the issues regulated by the competition legislation in the following cases: (1) during the process of assessing the structure of the relevant market;(2) the degree of concentration, share of economic agent in a dominant position, determination of

⁴¹ Article 3, p. "1"

⁴² Compare: *Kreiner Ramirez, Mary: A Comparative Approach to Competition Law in the United States and Georgia*, <http://bit.ly/2s8pJw>

group dominance and market power; (3) during the process of discussing cases related to infringement of competition legislation.⁴³

For the purposes of exposition of abuse of dominant position according to these guidelines, the relevant market analysis is deemed to be determination of the relevant goods' market by the competition authority, determination and assessment of the goods' market structure, the level of concentration, dominant position, group dominance and anti-competitive actions⁴⁴, while relevant market monitoring is defined as analysis/evaluation of the relevant commodity market by the agency, determination of the market structure, market concentration, market power, market barriers and/or the valuation of other conditions prescribed by Georgian Law with the evaluation of individual mark/parameters.⁴⁵

Georgian Law prohibits abuse of dominant position and declares it a punishable action. Article 33 of Georgian Law establishes responsibility for abuse of dominant position, declaring that in case of abuse of dominant position, undertakings (except for undertakings of a regulated sector of the economy) shall be subject to a fine, which must not exceed 5% of the annual turnover for the previous financial year of the undertaking(s) concerned. In case of failure to eliminate the legal grounds of the violation or repeated violations, the Agency may impose a fine on the undertaking, which must not exceed 10% of the annual turnover for the previous financial year. The measures of calculating the amount of fine should be the damage caused by the violation, the duration of the violation and its gravity.

Thus, the abovementioned analysis presented prerequisites for assessment and description of abuse of dominant position in the relevant competition market.

According to article 33² of the Georgian Law, a court has jurisdiction to consider and resolve the dispute if undertakings or other interested parties do not agree with the Agency's decision. As the decision of the head of the Agency is an individual administrative act and legal nature of this dispute is administrative, competent court should be an administrative court. Thus, if the Agency issues a decision that there isn't a possible violation of article 6, undertakings and interested parties have the right to appeal it in court. No court judgement was found as a result of a thorough research by the authors of the present study.

⁴³ Article 1st(b), (c) of the Order № 30/09-3 of the Chairman of LEPL Competition Agency on approval methodological guidelines of market analysis (hereinafter – the Order), Tbilisi, 30 September, 2014

⁴⁴ Article 2(i)

⁴⁵ Article 2(j)

Since there is no court practice in Georgia in relation to Article 6, we will review decisions of the Agency on this matter. None of them considered abuse of dominant position, but this does not mean that there was no abuse of dominant position in the relevant market.

- Hypothetical dominant position of JSC Tobacco of Tbilisi

Duty Free Georgia LLC applied to the Agency against JSC Tobacco of Tbilisi on possible breach of the Article 6 of the Georgian Law. The complaint was about possible unequal/discriminatory treatment. Duty Free Georgia LLC referred to the unilateral suspension of the agreement from its counterparty JSC Tobacco of Tbilisi who entered into an exclusive agreement with its competitor company - LLC Duty Free Alliance. The undertakings operate at the same free trade area (Tsiteli Khidi, Sadakhlo and Sarphi).

The group of investigators requested information from the relevant economic agent, from other interested parties; they processed and analyzed relevant documents and materials, held hearings and processed the relevant international practice. The group also interviewed customers in Duty Free areas to determine interchangeability, whether the Georgian filter cigarettes established separate product market and if there were substitute filter cigarettes imported from other countries.

The Agency developed final decision, in which the above-mentioned Free Trade area was considered as a separate geographical market where undertakings operate. Each of the Free Trade areas was recognized as isolated geographical market taking into account territorial boundaries and high barriers to entry to the market. However, Georgian filter cigarette doesn't establish separate product market and the filter cigarette market was considered as the product market. Taking into account the specificities of the business and undertakings who are the same on the market, the Agency summed up their market shares. The Agency determined that JSC Tobacco of Tbilisi didn't have dominant position on the market.

According to Article 6, to establish abuse of dominant position, two cumulative conditions must be met: 1) confirmed dominant position of the undertaking/undertakings and 2) abuse of this dominant position. In this case, the first condition was not fulfilled. That is why the Agency found that there was no abuse of dominant position from Tobacco of Tbilisi JSC side.

The Agency further preventively and hypothetically assessed the action of JSC Tobacco of Tbilisi and determined that had the dominant position been established, the abovementioned circumstances would have amounted to partner selection. In particular, Tobacco of Tbilisi JSC

supplied its products as a single undertaking from vertically connected two undertakings. This action should have been qualified as a discrimination of two equal undertakings. So, if Tobacco of Tbilisi JSC had had dominant position this action should have been considered as violation of Article 6.

The Agency also took attention of and analyzed the exclusive purchase agreement between JSC Tobacco of Tbilisi and Duty Free Alliance LLC. Taking into account the clauses of the contract from civil law perspective and competition law principles, this agreement should have been considered as a vertical agreement. However, an exclusive agreement can restrict competition if the counterparty has dominant position. As it was mentioned above, Tobacco of Tbilisi JSC was not found to have a dominant position on the market and this exclusive agreement couldn't have been considered as abuse of dominant position.

- Binding recommendations to the undertaking and relevant state authorities

The case is about possible violation of Article 6 paragraph 2 sub-paragraphs “b” and “c”. The applicant, JSC Health submitted a claim to the Agency against Balneo Service JSC on possible monopolization of Tskaltubo thermal-mineral waters (Tskaltubo is a resort where these waters are used for special treatments) by Balneo Service JSC. Claimant considered that JSC Balneo Service violated competition law: being the only undertaking who had license on extraction of thermal-mineral waters in Tskaltubo, it rejected the proposal of Health JSC to transfer part of the water, while the water was being spilled and wasted since Balneo Service JSC couldn't fully absorb the available resource. The Agency examined not only the subject matter but also licensee's compliance with license terms and conditions and in general, competitive environment on Tskaltubo thermal-mineral water market.

The Agency estimated the relevant market and concluded that thermal-mineral water does not have any substitute. The undertaking operating in this market, JSC Balneo Service, has a dominant position on the relevant market. However, the Agency noted that JSC Balneo Service refused the proposal of the undertaking that was not its competing or potential competing undertaking; therefore, there was no abuse of dominant position under Article 6, paragraph 2 sub-paragraph “b”. Likewise, there was no abuse of dominant position under Article 6, paragraph 2 sub-paragraph “c”, taking into account the scope of this sub-paragraph: 1) Potential infringer has minimum two partners and different conditions is proposed to each of them; 2) Potential infringer makes a public offer and it concludes the agreement only one of

the parties, in spite of the possibility to conclude the contract with the other as well. These prerequisites were not present in this case.

However, under Article 18 paragraph 2 sub-paragraph “c” of the Georgian Law, the Agency proposed binding recommendations to the undertaking (JSC Balneo Service) and to the relevant state authorities (Ministry of Environment and Natural Resources Protection of Georgia, Revenue Service).

- Investigation of activities carried out in Georgian Black Sea Ports’ Oil Terminals in terms of their compliance with Competition Law

In this case the Agency started investigation based on the joint complaint of a branch of a foreign enterprise Vibro Diagnostics FZE and LLC Lukoil Georgia who alleged that Batumi Oil Terminal LLC violated Article 6 of the Law.

Facts of the case were following: according to the agreement between Lukoil Georgia LLC and MG LLC, MG had to purchase fuel in Batumi Oil Terminal. In order to fulfill the terms of the contract, LLC MG needed access to the railway on the territory of Batumi Oil Terminal by railway carriages, and for this reason needed to become a counterparty of the Terminal. For these purposes, Lukoil Georgia and the branch of a foreign enterprise Vibro Diagnostics FZE applied to Batumi Oil Terminal and requested to consider MG as a counterparty, which request was refused. Accordingly, the applicants state that there was a selective approach from the side of Batumi Oil Terminal in refusing to give consent on access to the rails by the railway carriages. Thus, applicants considered that this action was abuse of dominant position under Article 6.

In view of the applicants’ statements and on its own initiative, the Agency started investigation in the field of services provided by Georgia’s Black Sea Ports generally, to ensure compliance with Georgian Competition legislation. In the course of the investigation the Agency took a decision to terminate investigation in part. Pursuant to Article 182 paragraph 1 sub-paragraph “b” of the General Administrative Court of Georgia, an administrative agency shall refuse to review an administrative complaint if a case related to the dispute between the same parties over the same matters and with the same evidence is pending in court. In view of this, the Agency terminated investigation based on the complaints of a branch of a foreign enterprise “Vibro Diagnostics FZE” and Lukoil Georgia LLC and continued it only in the part that refers to the territory of Black Sea Ports operating generally in Georgia.

In this case, the Agency assessed the abuse of dominant position according to Article 6 in two dimensions: 1. determination of dominant position; 2. determination of compatibility of action with Georgian Law if dominant position would be confirmed. The Agency analyzed that Batumi Oil Terminal LLC had a dominant position in the relevant market (loading and unloading of oil products market) however the abuse of such dominant position was not proved.

- Georgian Trans Expedition LLC v. Trans Caucasus Terminals LLC (Daughter Company of Georgian Railway JSC)

Georgian Trans Expedition LLC applied to the Agency alleging Trans Caucasus Terminals LLC possible violation of Article 6 of the Georgian Law.

According to the complaint, a subsidiary company of the Georgian Railway - Trans Caucasus Terminals owns the terminal, which is the only one in the capital and its surroundings. In addition, the company carries out forwarding service and has announced a combined tariff (for various services). The tariff includes the railway service (which, pursuant to JSC Georgian Railway tariff policies, all undertakings must have the same) and the cost of terminal services. The applicant alleged that the tariffs announced by the company Trans Caucasus Terminals didn't cover the fare of forwarding services. In addition, the applicant explained that if the undertakings didn't want to use a combined tariff and used container shipping of Georgian Railway JSC, the containers had to stay in the terminal, consequently, they would get terminal services from Trans Caucasus Terminals. The complainant alleged that the sum of railway services and terminal services together was greater than the combined tariff announced by Trans Caucasus Terminals.

In the process of investigation, container shipping market was defined as commodity market which is implemented by railway and road transport administrations. However, the Agency calculated shares of the container shipping market as well as of the container rail transport market, and determined that railway transit didn't have dominant position on commodity market of container shipping. At the same time, the Agency mentioned that in the last years, the ratio of Georgian Railway's shipping volume in comparison with the total volume of container shipping had reduced, the cause of which should have been the fact that Georgian Railway JSC calculated tariff policy on the basis of US dollar currency.

The Agency determined that Trans Caucasus Terminals did not occupy dominant position on the commodity market (in 2012 - 16.2%, 2013 - 19.9%, in 2014 a year as 16.8%, 2015 - 20.1%).

Despite the fact that Trans Caucasus terminals was not found to have had a dominant position on the relevant market, the Agency continued the analysis of the complaint and assessment of the action. In doing so, the Agency found that Trans Caucasus terminal LLC and Georgian Railway JSC did not establish discriminatory conditions for other undertakings (Poti-Tbilisi and *vice versa*, and Batumi-Tbilisi and *vice versa* including "block-train" container shipping). In particular, based on company's decision, any customer could have used this tariff.

The Agency decided that Trans Caucasus terminals LLC did not violate Article 6 of the Georgian Law on Competition.

Moreover, the Agency presented its obligatory recommendations to the Trans Caucasus terminals LLC and the Government of Georgia. In its recommendations for Trans Caucasus terminals LLC, the Agency noted that taking into account the fact that the company was a key player on the market, it would be advisable if the company provided information on free capacities of the company on its official website which would be constantly updated. The Agency proposed some improvements to the Government of Georgia regarding the tariff policy on container shipping market.

- Association Globalagro v Azerbaijani company Karat Holding

Association of wheat and wheat products of Georgia Globalagro applied to the Agency on possible violation of Article 6 of the Georgian Law on Competition. The applicant complained stating that since 2009 Azerbaijani company Karat Holding has occupied privileged position on the market after merger/ownership transfer of the following companies: Agrosistems LLC (capacity 600 tons/day; Power saving - 80 000 tons), Former Mzekabani (capacity 200 tons/day; Power Saving - 50 000 tons), Carmen LLC mill enterprise of Gori Forte (capacity 350 tons/day; Power Saving - 42 000 tons), Carmen - K LLC - mill enterprise of Kachreti (capacity 200 tons/day, Power Saving - 120 000 tons). At the same time, the applicant claimed that Karat Holding Company was charging unfair prices from time to time. Accordingly, the applicant stated Karat Holding violated Article 6 of the Georgian law on Competition and there was a risk of setting up strategic reserves of wheat in the hands of one of the companies, which would be reflected on the price of flour (flour would be taken on the market for sale for an unfair low price).

The Agency started investigation. In this respect undertakings Agrosistems LLC, Carmen LLC and Carmen – K LLC were considered as related parties and the Agency analyzed market share and market power as for one undertaking.

The Agency determined the territory of Georgia as the relevant market considering the fact that wheat market is the primary market, and flour market – secondary.

The Agency assessed: 1) wheat import and local production in Georgia; 2) flour import in Georgia; 3) flour selling equity indexes; 4) Comparative analysis of selling prices of manufacturers possessing significant share of wheat flour; 5) mills' and elevators' capacity in the domestic market and comparative analysis of undertakings of elevators and production capacity.

During the investigation, it was determined that in 2013-2014 the market share of the related parties was close to 40%. However, considering that this circumstance would be insufficient for determining dominant position, the Agency concluded that defendant undertakings had market power on the relevant market taking into account other indicators; in particular, it stated that production capacities and elevators' capacities, gave the power to the undertakings to act independently of competing undertakings, suppliers, customers and final consumers and to restrict/distort the competition. Accordingly, the Agency concluded that the related parties had dominant position on the commodity market of wheat flour.

After affirming dominant position, the Agency evaluated that these circumstances determining dominant position of the related parties gave them opportunity to produce flour with less cost (per unit) and consequently, to sell it at a lower price than the rest of undertakings; the Agency noted that this was not incompatible with profit maximization principle, which can be achieved by a variety of conditions such as high margin and small turnover, as well as high turnover and small margin. The Agency found that there were other undertakings selling flour at lower prices than the defendants and according to investigation, the related parties' market share had been reduced dramatically and it was approximately equal of 30% of the total market share in 2015. The Agency concluded that this further weakened the assumption that in some cases, low-price operation was directly aimed at strengthening dominant position on the market and the consolidation of market concentration.

In view of all of this, the Agency couldn't find violation of article 6 of the Georgian law on Competition. The important part in this decision was a recommendation letter to the actors in which the working group proposed some improvements of the market and control of the mechanisms that do not encourage monopoly.

In conclusion, we would like to add that Georgia is a country of young democracy that strives to establish democratic values and principles in every area and tries to enhance economic development of the country. On this way, strong monitoring and controlling mechanisms are

important and the role of the Competition Agency and its competence is becoming more and more interesting and valuable.

CHAPTER III - PROHIBITION OF ABUSE OF DOMINANT POSITION UNDER EU COMPETITION LAW

Sophio Kurtauli

Hasmik Tigranyan

In the EU and its Member States competition is the fundamental base and an essential characteristic of economy. Competition ensures a high level of economic welfare, ultimately high consumer benefits and international competitiveness. Competition law and its strict application are needed in order to ensure that destructive tendencies which are inherent to the market economy system will not succeed.

To ensure free competition on the markets and their well-functioning, EU and Member states have implemented competition policy by:

- Prohibition of cartels (Art. 101, 103, 106 TFEU)⁴⁶;
- Prohibition of the abuse of dominant position (Art. 102 TFEU)⁴⁷;
- Merger regulation and prohibition of those mergers, which impede or will impede competition (EU Merger Regulation)⁴⁸;
- State Aid Control (Article 107 TFEU)⁴⁹

As has been noted, one of the directions of competition policy is prohibition of abuse of dominant position. The purpose of this prohibition is prevention of abuse of dominant position by dominant economic entities in their economic sector. In this regards it should be noted, that holding a dominant position is not prohibited: it is the abuse of that position that is prohibited. Competition Law of EU and its Member States also addresses the enforcement of the prohibition of abuse of dominant position: "*The aim is to prevent companies with a dominant*

⁴⁶ The Treaty on the Functioning of the European Union (TFEU) <http://bit.ly/2rTeB2Y>

⁴⁷ TFEU, <http://bit.ly/2thl2kU>

⁴⁸ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), (hereinafter - EUMR), <http://bit.ly/2tMh7cM>

⁴⁹ TFEU, <http://bit.ly/2rTeB2Y>

*position in their economic sector from abusing this position and from distorting competition in intra-Community trade. This aim requires preventive intervention to investigate company mergers, since these may create dominant positions".*⁵⁰

Article 102 of TFEU prohibits any abuse of one or more undertakings of a dominant position within the internal market or in a substantial part of it and declares as incompatible with the internal market in so far as it may affect trade between Member States. "Article 82 of the EC Treaty does not prohibit dominant positions as such, merely the abuse of such a position in a specific market when it is likely to affect trade between Member States".⁵¹ Thus, the law prohibits any abuse of dominant position and not a dominant position itself and states that this abuse must have happened in internal market or in a substantial part of it. Therefore, it is important to determine the relevant market, which is sometimes complicated; there are some tools which we will describe below, that ease this task, define whether an undertaking concerned has a dominant position in that relevant market, followed by determination of an abuse of dominance.

Determination of Relevant Market

The importance of market definition is recognized by the Court of Justice of the European Union (hereinafter - CJEU) itself. CJEU "*has adopted a definition of a relevant market which describes the market as consisting of products which are interchangeable with each other but not (or only to a limited extent) interchangeable with those outside it*".⁵² As relevant market for EU Competition law confines EU internal market, interchangeability should exist in this internal market with products that encompass both products and services. Relevant product market and interchangeability was challenged in *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*⁵³ where CJEU stated: "The definition of the relevant market is of essential significance, for the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products."

⁵⁰ European Parliament Fact Sheets on Abuse of a dominant position and investigation of mergers, <http://bit.ly/2sddP03>

⁵¹ Ibid.

⁵² Jones/ Sufrin: EU Competition Law Text, Cases and Materials, 2016, p. 57

⁵³ Case 6/72, *Europemballage Corporation and Continental Can Company v Commission*, [1973], para 32

One of CJEU cases that confirmed the importance of relevant market definition was *Hoffmann-La Roche & Co. v Commission*,⁵⁴ where Commission found La Roche to have abused its dominant position in the market for vitamins A, B2, B3, B6, C, E and H. Roche challenged Commission's decision in several points, including the definition of the market.⁵⁴ The Court noted that "The concept of the relevant market in fact implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned."⁵⁵

The importance of determination of the relevant market was challenged in the case *NV NederlandscheBandenIndustrie Michelin v Commission of the European Communities* where CJEU once again stated that „for the purposes of investigating the possibly dominant position of an undertaking on a given market, the possibilities of competition must be judged in the context of market comprising the totality of products which, with respect to their characteristics are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products. However, it must be noted that the determination of the relevant market is useful in assessing whether the undertaking concerned is in a position to prevent effective competition from being maintained and behaves to an appreciable extent independently of its competitors and customers and consumers".⁵⁶

The approach of the Commission to the definition of market is transparent in Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law (hereinafter - Notice), "which is a guideline of economic principles how to define market for the purposes of EU Competition Law".⁵⁷ It should be noted that the Notice describes a process for defining the relevant market which was not evident in previous decisions of the Commission and judgments of EU Court.⁵⁸

According to the Notice, paragraph 2, "*Market definition is a tool to identify and define the boundaries of competition between firms. ... The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those*

⁵⁴ *Ezrachi*: EU Competition Law, an Analytical Guide to the Leading Cases, 2016, p. 38

⁵⁵ Case 85/76, *Hoffmann-La Roche v Commission*, [1979], para 28

⁵⁶ C-322/81 - *Michelin v Commission*, [1983], para 37

⁵⁷ *Weatherill*: Cases and Materials on EU Law, 2010, p. 529

⁵⁸ *Szyszczak/ Cygan*: Understanding EU Law, 2nd edition, London, 2008, p. 226

*undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible inter alia to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance".*⁵⁹

The main idea doing it *"is to identify which products are such close substitutes for one another that they exert competitive pressure on the behavior of the suppliers of those products".*⁶⁰ The Notice differentiates relevant product market⁶¹ from relevant geographic market.⁶²

In defining the relevant product market, the Notice states that it “comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.” As it is clear, interchangeability is an important feature of the relevant market definition. It is not always easy to define which products/services have substitutes because “it is often difficult to decide which products or services are in the same market.”⁶³

In defining the relevant geographic market Commission notes that this is “the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area.” Thus, relevant market is defined by relevant product and geographic markets.

When defining market, the Notice “identifies three main competitive constraints which undertakings are subject to: supply substitutability (concerned with the ability of product users to switch to substitute product), demand substitutability (the ability of similar product producers to produce the product), potential competition. Demand and, to a more limited extent, supply substitutability are relevant to the determination of the market. Potential competition is relevant when considering the allegedly dominant undertaking's position on the relevant market.”⁶⁴

It is clear that substitutability is measured with two criteria: supply and demand. But the Notice is mainly focused on demand-side substitution.⁶⁵ Measurement of demand substitution

⁵⁹ Official Journal of the European Communities, para 2, <http://bit.ly/2tbz51a>

⁶⁰ *Jones/ Sufrin*: EU Competition Law Text, Cases and Materials, 2016, p. 56

⁶¹ Official Journal of the European Communities, para 7, <http://bit.ly/2tbz51a>

⁶² *Ibid.* para 8

⁶³ *Jones/ Sufrin*: EU Competition Law Text, Cases and Materials, 2016, p. 56

⁶⁴ *Ibid.* 291

⁶⁵ *Ibid.* 60

depends on some factors such as: the homogeneity of product (perfect and imperfect substitutes), customers behavior (how they adapt), usability of product (asymmetrical substitution⁶⁶).

Interchangeability is defined by consideration and measurement of "cross-elasticity" of demand. Notice provides that the primary method used by Commission for measuring this is the hypothetical monopolist test (HMT) (used as SSNIP⁶⁷ test)⁶⁸.

The SSNIP test is a tool used for product market definition, in which "a minimal possible subset of products is taken for analysis of finding out relevant product market"⁶⁹. The test is used by competition authorities around the world (in USA, New Zealand, Canada, Australia ...). This test is an economic approach for market definition. SSNIP test applies as follows: 5-10 % (a small %), but non-transitory rise of a product/service (A) price is assumed. Then it inquires whether this increase in price would cause the customers of product A to buy product B, or to buy product A from another area, to such extent that the increase in price is unprofitable. A practical example of this test is provided in the Notice (Appendix 2, part 18), which helps to understand the application of the test better: " ... An issue to examine in soft drink bottlers case would be to decide whether different flavors of soft drinks belong to the same market. In practice, the question to address would be whether consumers of flavor A would switch to other flavors when confronted with a permanent price increase of 5 % to 10 % for flavor A. If a sufficient number of consumers would switch to, say, flavor B, to such extent that the price increase for flavor A would not be profitable owing to the resulting loss of sales, then the market would comprise at least of flavors A and B. The process would have to be extended in addition to other available flavors until a set of products is identified for which a price rise would not induce a sufficient substitution in demand"⁷⁰.

The main problem in SSNIP test is Cellophane Paradox/Fallacy⁷¹ because it could be inappropriate in the absence of competition and when the undertaking has market power. Along with this test, the Commission also uses other quantitative tests for market delimitation, such as elasticity estimates, price correlation analysis, analysis of price convergence and

⁶⁶ *Ibid.* 61

⁶⁷ Small but significant non-transitory increase in price

⁶⁸ *Jones/ Sufrin*: EU Competition Law Text, Cases and Materials, 2016, p. 61

⁶⁹ *Sharma*: A Useful Tool, Not A Panacea, <http://bit.ly/2tcOliQ>

⁷⁰ *Jones/ Sufrin*: EU Competition Law Text, Cases and Materials, 2016, p. 62

⁷¹ "Cellophane Paradox/Fallacy" was given after subject-matter in *United States v El Du Pont de Nemours* when the Supreme Court accepted the argument of Du Pont that cellophane does not constitute a separate market as it closely and directly competes with other packaging materials. Though the SSNIP test has considered it as a separate market.

causality calculations (Appendix 2, part 39). The Commission also considers supply-side substitutability for market definition. It takes into account the following situation: would producers of product B enter the market of product A in case of a price increase for A. For this purpose, the likelihood (risks, costs) and timeliness of access is considered (Appendix 2, part 20-23).

Determination of relevant geographic market requires analysis of market shares of all market participants in different regions, analysis of shipping costs, views of customers and competitors, analysis of distribution/service system, basic demand characteristics, past evidence of diversion of orders to other areas, regulatory barriers (tariffs, regulation, technical standards, environmental law, access to distribution networks, access to infrastructure, etc.), current geographic pattern of purchases (Appendix 2, parts 44-52).

The relevant market, thus, is reviewed in its two dimensions: relevant product and relevant geographic markets.

In academic literature, third dimension of the relevant market might be a temporal one which is defined with reference to time.⁷² *"The temporal dimension may be particularly relevant when considering transport markets"*.⁷³ Regarding this, in the case of *European Night Services and Others v Commission* the Court of First instance of the European Community annulled Commission's decision where its *"statement in its defense, that ENS's market share should be measured in relation to early morning and late evening flights rather than by reference to all the flights available round the clock on a given route, is, in the applicants' submission, a redefinition of the relevant market, made without any probative evidence in support"*.⁷⁴

Determination of Dominant Position

The next step after determination of the relevant market is finding out whether undertaking(s) concerned has (have) dominant position in the relevant market. EU competition law defines dominance "as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market, by affording if the power to behave to an appreciable extent independently of its competitors,

⁷² *Dabbah*: EC and UK Competition Law, Commentary, Cases and Materials, 2004, p. 59

⁷³ *Jones/ Sufrin*: EU Competition Law Text, Cases and Materials, 2016, p. 79

⁷⁴ T-374/94, *European Night Services and Others v Commission*, [1998] para 84

customers and its consumers. The concept of dominance reflects the notion of market power and requires a preliminary consideration of the relevant market and its characteristics." As it is shown dominant position expresses undertakings' economic, market power in the relevant market which (power) aims to prevent competition between other market actors.

Dominant position is defined by assessment of the market power. As it is defined in literature market power is a key concept in competition law and it aims to individually or collectively restrict output, raise price above competitive level and earn monopoly profits.⁷⁵ In their study Posner and Landes considered that the standard method of proving market power involved first, defining relevant market, then computing market share and then deciding whether it was large enough to support the inference of the required degree of market share. *Id.* at 938

Today there are two ways of measuring market power: direct and indirect.

- "The direct method involves estimating the market power by using econometric methods, particularly the residual demand curve (the demand curve facing a single firm). "

⁷⁶ It requires information and data that sometimes are not available but from the economic point of a view it seems considerable.

- Indirect method considers structural approach. It involves assessment of market share (quantitative indicator) and competition structure-market position of the dominant undertaking and its competitors, expansion or entry, in conjunction with countervailing buyer power (qualitative indicator).⁷⁷ It assesses relevant market and then power on the market is defined using market share and "barriers to entry" analysis.⁷⁸ "Barriers to entry are vital to the determination of market power by this method since it is these which enable a firm to enter that market."⁷⁹ The "indirect" method is the one that is used by competition authorities around the world including EU countries.

In the EU, there is no single act, regulation or directive establishing when an undertaking can be considered holding a dominant position. Dominant position is established by well settled case law (CJEU and General Courts) and by the *Guidance on the Commission's enforcement priorities in applying Article 82 [Article 102 TFEU] of the EC Treaty to abusive exclusionary conduct by dominant undertakings [C (2009) 864 final, [2009] OJ C45/7]* (hereinafter - Guidance).

⁷⁵ Compare: Jones/ Sufrin: EU Competition Law Text, Cases and Materials, 2016, p. 937, <http://bit.ly/2sh56tX>

⁷⁶ Jones/ Sufrin: EU Competition Law Text, Cases and Materials, 2016, p. 55

⁷⁷ Bilal/ Ollareaga: Regionalism, Competition Policy and Abuse of Dominant Position, 1998

⁷⁸ Jones/ Sufrin: EU Competition Law Text, Cases and Materials, 2016, p. 55

⁷⁹ *Ibid.*

Dominant position is a process when undertaking's economic strength could be measured with economic and legal features. In this regard, court practice has a vital importance in providing explanations case by case. In the case *United Brands v Commission*, in determining whether UBC had a dominant position for bananas, the court stated that "Dominance must be determined having regard to the strength and the number of the competitors operating in the market (in this case UBC had two competitors Castle and Cooke). ... An undertaking does not have to have eliminated all opportunity for competition in order to be in a dominant position. ... An undertaking's economic strength is not measured by its profitability; a reduced profit margin or even losses for a time are not compatible with a dominant position, just as large profits may be compatible with a situation where there is effective competition. ... The finding that, whatever UBC may make, the customers continue to buy more goods from UBC, which is the dearest vendor, is more significant and this fact is a particular feature of the dominant position and its verification is determinative in this case."⁸⁰

An important finding mentioned above was customers' behavior to continue to buy more and more UBC goods; that became determinative of its strength on the banana market that put UBC in dominant position.

In this case CJEU widely considered that undertaking didn't have to have eliminated all opportunity to be in a dominant position. In the case *Hoffmann-La Roche & Co. v Commission*, it was further added that "such a position does not preclude some competition, which is where there is a monopoly or a quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment."⁸¹

The Guidance on this matter continues providing that "*... this notion of independence is related to the degree of competitive constraint exerted on the undertaking in question. Dominance entails that these competitive constraints are not sufficiently effective and hence that the undertaking in question enjoys substantial market power over a period of time. This means that the undertaking's decisions are largely insensitive to the actions and reactions of competitors, customers and, ultimately, consumers. Commission may consider that effective competitive constraints are absent even if some actual or potential competition remains.*"⁸²

⁸⁰ C-27/76, *United Brands v Commission* [1978], para 126, 128

⁸¹ Case 85/76, *Hoffmann-La Roche v Commission* [1979], para 39

⁸² Case 27/76 *United Brands v Commission*, [1978], paragraphs 113 to 121; Case T-395/94 *Atlantic Container Line and Others v Commission* [2002], para 330

Generally, dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative ..."⁸³ Afterwards, the Commission notes in the Guidance that an undertaking can generally be regarded as holding dominant position, when the undertaking does not face sufficiently effective competitive constraints and is capable of increasing price⁸⁴ profitably above competitive level for a significant amount of time.

According to the Guidance, the Commission will consider competitive structure of the market during the assessment of dominance. Particularly, the following factors will be taken into account:

- Constraints imposed by the existing supplies from, and the position on the market of, actual competitors (the market position of the dominant undertaking and its competitors),
- Constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors (expansion and entry),
- Constraints imposed by the bargaining strength of the undertaking's customers (countervailing buyer power).⁸⁵

The following Guidance on market power assessment could be taken into account:

- Market position of the dominant undertaking and its competitors. In this section, Commission's first and foremost indicator is market shares that play a big role in formation of the market structure. Commission considers that "*low market shares are generally a good proxy for the absence of substantial market power. The Commission's experience suggests that dominance is not likely if the undertaking's market share is below 40 % in the relevant market. However, there may be specific cases below that threshold where competitors are not in a position to constrain effectively the conduct of a dominant undertaking, for example where they face serious capacity limitations. Such cases may also deserve attention on the part of the Commission*".⁸⁶ One important thing from this section is on the importance it attaches to higher market share and length of period of time. Commission states that "*the higher the market share and the longer the period of time over which it is held, the more*

⁸³ Case 27/76 United Brands v Commission [1978], para 65, 66; C-250/92 *Gøttrup-Klim and Others Grovwareforeninger v Dansk LandbrugsGrovvareselskab* [1994], para 47; T-30/89 *Hilti v Commission* [1991], para 90

⁸⁴ In the Guideline the expression "increase prices" includes the power to maintain prices above the competitive level and is used as a 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.

⁸⁵ Guidance on the Commission's enforcement priorities in applying Article 82 [Article 102 TFEU] of the EC Treaty to abusive exclusionary conduct by dominant undertakings [C (2009) 864 final, [2009] OJ C45/7]

⁸⁶ *Ibid.* p. 14. Authors' remark: for the purposes of this analysis "p" expresses the sections numbering from the Guidance

likely it is that it constitutes an important preliminary indication of the existence of a dominant position and, in certain circumstances, of possible serious effects of abusive conduct, justifying an intervention by the Commission under Article 102 (82)".⁸⁷

- Expansion or entry. Guidance further notes that "Competition is a dynamic process and an assessment of the competitive constraints on an undertaking cannot be based solely on the existing market situation."⁸⁸ The potential impact of expansion or entry is also relevant. With this intention, an undertaking can be deterred from increasing prices if expansion or entry is likely, timely and sufficient. When assessing sufficiency, following must be taken into account: barriers to expansion or entry, reactions of the allegedly dominant undertaking and other competitors, the risks and costs of failure, not simply small-scale entry. The expansion or entry must be sufficiently swift to deter or defeat the exercise of substantial market power.⁸⁹ Guidance further clarifies barriers, that might be legal (ex: tariffs or quotas), advantages specifically enjoyed by the dominant undertaking (e.g. economies of scale and scope), privileged access to essential inputs or natural resources, important technologies or an established distribution and sales network, etc. In this section, Commission underlines that barriers to entry could be created by the dominant undertaking on its own. Persistently high market shares may be indicative of the existence of barriers to entry and expansion.⁹⁰
- Countervailing buyer power. *"...the essence of dominance is defined as the independence of an undertaking from, inter alia, its customers"*⁹¹who have sufficient bargaining strength. Commission defines that *"If countervailing power is of a sufficient magnitude, it may deter or defeat an attempt by the undertaking to profitably increase prices. Buyer power may not, however, be considered a sufficiently effective constraint if it only ensures that a particular or limited segment of customers is shielded from the market power of the dominant undertaking."*⁹²

In Conclusion, it should be stated that determining whether an undertaking holds dominant position requires complex assessment of a number of elements, including the market position of undertakings operating on the relevant market, barriers to entry and expansion in the market, the countervailing buyer power, the power which undertakings have on that market

⁸⁷ *Ibid.* p. 15.

⁸⁸ *Ibid.* p. 16.

⁸⁹ *Ibid.* p. 16.

⁹⁰ *Ibid.* p.17.

⁹¹ Case 85/76, *Hoffmann-La Roche v Commission* [1979], para 38

⁹² *Ibid.* p.18

(market power). EU case law identifies the following criteria as necessary for the estimation of the abovementioned three elements:⁹³

(a) For market position of undertakings operating in the relevant market, one or several of these criteria are considered:

Factors: market share, resources.

- Criteria: (1) market shares of leading undertakings in the relevant market, correlation of shares; (2) financial power; (3) deep pockets; (4) cross subsidization; (5) engineering capacities; R&D capacities; (6) access to capital markets.

Factors: Access to Customers/Suppliers/Inputs

- Criteria: (1) secure or integrated access to inputs; (2) access to machines; (3) access to logistics/means of transport; (4) access to sales channels/local distribution network; (5) supply of systems/range of products high reputation/strong brands/advertising/ product differentiation; (6) foreclosure strategies; (7) integration/efficiencies (horizontal integration with competitors); (8) cost reduction; (9) vertical story (vertical integration with suppliers/customers).

(b) For barriers to entry and expansion in the market, one or several of these criteria are considered:

- Criteria: (1) access to key inputs; (2) access to technologies; (3) access to customers; (4) spare capacities; (5) timeliness of access; (6) sunk costs/reversibility; (7) market phase.

Factors: Access to Customers/Suppliers/Inputs

- Criteria: (1) secure or integrated access to inputs; (2) access to machines; (3) access to logistics/means of transport; (4) access to sales channels/local distribution network; (5) supply of systems/range of products high reputation/strong brands; (6) foreclosure strategies; (7) integration/efficiencies (horizontal integration with competitors); (8) cost reduction; (9) vertical story (vertical integration with suppliers/customers).

(c) For countervailing buyer power, one or several of these criteria are considered:

- Criteria: (1) size of customers; (2) dependence on buyers; (3) size and frequency of sales; (4) market transparency; (5) strategic buyer behavior.

The Court and the Commission also consider other factors indicating dominance, such as the undertaking's own assessment of its position (*Tomra Systems v. Commission*, where several documents of the company that were found during the Commission's dawn raid, referred to

⁹³ *Jones/ Sufrin*: EU Competition Law Text, Cases and Materials, 2016, pp. 319-346

the company's dominant position),⁹⁴ profits (*United Brands* case, *Michelin* case, where the Court considered the ability of companies to absorb temporary losses), overall size and strength and range of products (Portfolio power) (*Hoffman-La Roche* case, also in *Michelin* case, where the CJEU considered the advantages that Michelin derived from belonging to a group of economic entities that operate in Europe and in the world),⁹⁵ intellectual property rights (*Hilti AG v Commission* case, *Tetra Pak I* case, *Volvo v Veng*),⁹⁶ secondary markets (aftermarkets) - whether a firm has dominance in other markets (*Hilti* case, etc.).⁹⁷

These cases also provide the way how each of these factors was assessed. Besides, as a general rule, high market shares held over a long period of time were considered to be important preliminary indicators of the existence of a dominant position.⁹⁸

The case law of the European Courts establishes a presumption of dominance where an undertaking has a market share of 50% or more. However, as a general rule, the Commission will not come to a final conclusion as to whether or not a case should be pursued without examining all the factors which may be sufficient to constrain the behavior of the undertaking.⁹⁹

In the case of *British Airways v Commission*, the undertaking was found to have a dominant position having the lowest market share (39.7%). Here the Court looked into the whole circumstances of the case, particularly considering the following factors: 1. Market share of British Airways is more than twice more (39.7%) than the cumulative shares of its five main competitors (together these five companies have 17.9% share in the UK market for air travel agency services); 2. Travel agents in UK substantially depend on the income that they receive from British Airways in consideration for their air travel agency services; 3. For travel agents, established in the UK, British Airways is an obligatory business partner; 4. in comparison to its main five competitors, British Airways offers more frequent flights and a wider choice of routes; 5. Due to its economic strength British Airways occupies world rank in terms of international scheduled passenger-kilometers flown, its hub network and the extent of its transport services; 6. British Airways is in a position to reduce or increase number of travel agencies in the UK.¹⁰⁰

⁹⁴ T-155/06, *Tomra Systems v. Commission* [2010]

⁹⁵ *Jones/ Sufrin*: EU Competition Law Text, Cases and Materials, 2016, pp. 332-336

⁹⁶ *Anderman/Schmidt*: EU Competition Law and Intellectual Property Rights: The Regulation of Innovation, 2011, pp. 58-64

⁹⁷ *Jones/ Sufrin*: EU Competition Law Text, Cases and Materials, 2016, p. 302

⁹⁸ *Chalmers/ Davies/ Monti*: European Union Law, Cases and Materials, 2010, p. 999

⁹⁹ *Jones/ Sufrin*: EU Competition Law Text, Cases and Materials, 2016, p. 327

¹⁰⁰ C-95/04 P, *British Airways v Commission* [2007]

Importantly, regardless of the form of the behavior in question, its likely effect on competition will depend on the circumstances at hand and will be assessed on a case-by-case basis.

Nowadays, in new economy, dominant position tends to be temporary and fragile¹⁰¹ and "*a better test of market power is contestability. If the market is contestable, as new economy markets often are...a firm with a high market share does not enjoy a position of dominance because potential entry imposes an effective competitive constraint on its conduct; i.e., it cannot act independently of its (potential) competitors.*".¹⁰² In *Microsoft* case Microsoft had acknowledged that it held a dominant position in the PC operating system market. In this case, the dominance was characterized by market shares (since 1996 (90 % + in recent years)) and very high barriers to entry. In this case Commission considered that the infringement constituted by its nature a very serious infringement of Article 82 of the EC Treaty and Article 54 of the EEA Agreement. Commission found that "*Microsoft infringes Article 82 of the Treaty by tying WMP with the Windows PC operating system (Windows). Commission bases its finding of a tying abuse on four elements: (i) Microsoft holds a dominant position in the PC operating system market; (ii) the Windows PC operating system and WMP are two separate products; (iii) Microsoft does not give customers a choice to obtain Windows without WMP; and (iv) this tying forecloses competition. In addition, the Decision rejects Microsoft's arguments to justify the tying of WMP.*"¹⁰³

Determination of Collective Dominance

Article 102 TFEU prohibits dominance by one or more undertakings. When two or more undertakings have economic or documented links, we might face collective dominance. It became clear from practice article 102 that TFEU covers oligopolistic and non-oligopolistic collective dominance. Collective dominance will be established by consideration of the following 3 factors, namely whether: (1) "*each firm knew how other members were behaving (they could monitor the market to see if they were adopting a common policy)*"; (2) "*tacit co-ordination was sustainable over time, (i.e., there was no incentive to depart from the common*

¹⁰¹ Jones/ Sufrin: EU Competition Law Text, Cases and Materials, 2016, p. 344

¹⁰² *Ibid.* 345

¹⁰³ Case COMP/C-3/37.792 — Microsoft [2004], para 24

policy on the market); and (3) the foreseeable reactions of competitors (actual and potential) and customers would not jeopardize the results expected from the common policy."¹⁰⁴

In practice *"their joint policies or activities subsequently enable them together to behave to a considerable extent independently of their competitors, customers and consumers."*¹⁰⁵ General Court in *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission of the European Communities* considered that *"There is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market. This could be the case, for example, where two or more independent undertakings jointly have, through agreements or licenses, a technological lead affording them the power to behave to an appreciable extent independently of their competitors, their customers and ultimately of their consumers (judgment of the Court Hoffmann-La Roche ... paragraphs 38 and 48)"*¹⁰⁶.

Although Commission's earlier decisions subsequent to *Flat Glass* concerned cases of non-oligopolistic collective dominance (where the undertakings were linked by express agreements), the concept of collective dominance, however, has been developed more broadly through EU case law on EU Merger Regulation (EUMR) and Article 102.¹⁰⁷

CJEU in *Compagnie Maritime Belge Transports and Others v Commission* case mentioned that *"the expression 'one or more undertakings' in Article 86 of the Treaty implies that a dominant position may be held by two or more economic entities legally independent of each other, provided that from an economic point of view they present themselves or act together on a particular market as a collective entity. That is how the expression 'collective dominant position'."*¹⁰⁸ *"This statement reflects the understanding that in some instances market conditions would give rise to collective dominance even absent structural links between the undertakings."*¹⁰⁹ In this case court considered examination of "economic links or factors which gave rise to a connection between the undertakings concerned."¹¹⁰ In this judgment court clearly stated that existence of collective dominance involves two-stage process: first is

¹⁰⁴ *Jones/ Sufrin: EU Competition Law Text, Cases and Materials*, 2016, p. 704; Cases: T-193/02 - *Piau v Commission*, T-342/99 - *Airtours v Commission*;

¹⁰⁵ *Ezrachi: EU Competition Law, an Analytical Guide to the Leading Cases*, 2016, p. 315

¹⁰⁶ T-68/89 - *SIV and Others v Commission* [1992], para 358

¹⁰⁷ *Jones/ Sufrin: EU Competition Law Text, Cases and Materials*, 2016, p. 703

¹⁰⁸ C-395/96 P - *Compagnie Maritime Belge Transports and Others v Commission* [2000], para 36

¹⁰⁹ *Ezrachi: EU Competition Law, an Analytical Guide to the Leading Cases*, 2016, p. 315

¹¹⁰ *Ibid.* para 41

establishment of the existence of collective dominance and then examination that this collective entity holds a dominant position.¹¹¹

It should be stated that the concept of collective dominance was primarily developed under the European Merger Regulation¹¹². *"In the context of collective dominance, this difference in analysis means that cases dealing with collective dominance under the European Merger Regulation are primarily concerned with establishing that market characteristics following the merger transaction would give rise to a position of collective dominance."*¹¹³ As it was mentioned in the above cases, assessing collective dominance depends on economic links between the undertakings. In the case *Bertelsmann and Sony Corporation of America v Impala* CJEU stated that the determination of the existence of a collective dominant position should be done by consideration of *"a series of elements of established facts, past or present, which show that there is a significant impediment of competition on the market owing to the power acquired by certain undertakings to adopt together the same course of conduct on that market, to a significant extent, independently of their competitors, their customers and consumers."*¹¹⁴

On oligopolistic markets, the undertakings try to sustain collective dominance with joint policies and activities called "tacit collusion" or "conscious parallelism".¹¹⁵

Establishment and prohibition of abuse of dominant position

Prohibition of abuse of dominant position is prescribed in Article 102 TFEU, which specifically states that *"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"*. Then this article enumerates methods of manipulation of abuse, particularly, stating that abuse consists of: *"(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*

¹¹¹ Jones/ Sufrin: EU Competition Law Text, Cases and Materials, 2016, p. 705

¹¹² Council Regulation (EC) No 139/2004, <http://bit.ly/2tLHXBj>

¹¹³ Ezrachi: EU Competition Law, an Analytical Guide to the Leading Cases, 2016, p. 316

¹¹⁴ C-413/06 P, *Bertelsmann and Sony Corporation of America v Impala* [2008], para 104

¹¹⁵ Ezrachi: EU Competition Law, an Analytical Guide to the Leading Cases, 2016, p. 317

the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts". In this regard, it should be stated that the mentioned above list is not final: manifestation of methods of dominant position has been enlarged by case law.

The fundamental case in the development of EU competition law was *Continental Can* case (1972)¹¹⁶. In this case Continental Can Inc., a metal packaging manufacturer, acquired 85, 5 % share of German manufacturer of metal cans; afterwards, through its subsidiary company in Belgium, it acquired another metal can manufacturer in Belgium-TDV company. Commission found out that Continental Can Inc. had abused its dominant position in metal can production market by fully acquiring TDV through its subsidiary company, as by this transaction competition in the relevant market was eliminated. In this case, the abuse of dominant position had its peculiarity; specifically, the dominant undertaking did not use its dominant position, rather, the strengthening of its dominant position was considered as an abuse. The above-mentioned activities of Continental Can Inc. are not included in the list of abuses provided in Article 102; however, the Commission, and later EU Courts, considered it was an abuse of dominant position. This case is considered to be the foundational judgment on Article 102, as it demonstrated that the list of abuses provided in Article 102 is not exhaustive.

Another fundamental case was *Hoffman La-Roche Co AG v Commission* case¹¹⁷, where CJEU introduced the definition of exclusionary abuse. CJEU specially stated that "*...for the purpose of rejecting the finding that there has been an abuse of a dominant position the interpretation suggested by the applicant that an abuse implies that the use of the economic power bestowed by a dominant position is the means whereby the abuse has been brought about cannot be accepted. The concept of abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition*". Then CJEU stated that "*since the course of conduct under consideration is that of an undertaking occupying a dominant position on a market where for this reason the structure of competition has already been weakened, within the field of*

¹¹⁶ Case 6/72, *Europemballage Corporation and Continental Can Company v Commission*, [1973]

¹¹⁷ Case 85/76, *Hoffmann-La Roche v Commission*, [1979]

application of Article 86 (current Article 102) any further weakening of the structure of competition may constitute an abuse of a dominant position".¹¹⁸

In *Post Danmark v Konkurrencerådet II* case¹¹⁹, CJEU stated: "*since the structure of competition on the market has already been weakened by the presence of the dominant undertaking, any further weakening of the structure of competition may constitute an abuse of a dominant position*".¹²⁰

Another, *Football World Cup* case (IV/36.888/1998), established the abuse of dominant position even in the circumstance when the dominant undertaking did not get any advantage from the abusive conduct¹²¹.

In this regard, it's worth mentioning that EU courts have many times underlined in the range of cases that dominant undertakings have special responsibilities towards the competition process in the market where they have dominant position, and reasonability not to distort competition by their activities¹²².

The list of such cases is not exhaustive, and all of these cases have come to evidence living nature of EU competition law and framed new list for forms of abuse of dominant position, which were not considered by Article 82 of the Rome Treaty (current Article 102 TFEU).

It should be stated that EU case law not only enlarged practices which can be considered as an abuse of dominant position, but also provided standards for assessment of an abuse. Particularly, in determining the legitimacy of abusive behavior, CJEU distinguished two criteria: "anti-competitive behavior" (such as predatory pricing) and "competition on the basis of performance". The assessment of each of these criteria is important for determination of whether an abuse is *per se* established (when abuse is established by the fact of existence of a conduct) or effect analysis (when capability of competition restriction should be established by determination of influence of the abusive conduct on competition and on the structure of the market concerned) should also be considered.¹²³ Of course, dominant undertakings can bring justifications for their abusive conduct, however, the study of case law shows that in order for those justifications to be considered by Commission, they should be objective and the principle of proportionality should be kept. Though, sometimes the above-mentioned preconditions are

¹¹⁸ *Ibid.*

¹¹⁹ C- 23/14, *Post Danmark A/S v Konkurrencerådet*, [2015]

¹²⁰ *Ibid.*

¹²¹ Case IV/36.888 - 1998 Football World Cup, [1999], where French relevant authority distributed the tickets in discriminatory manner.

¹²² *Jones/ Sufrin*: EU Competition Law Text, Cases and Materials, 2016, pp. 357-358.

¹²³ *Ibid*, 361-373.

not enough for EU courts. For example, CJEU applied a stricter standard in the case of *Post Danmark s v Konkurrencerådet* ¹²⁴, stating that the dominant undertaking can present 2 types of justifications: (a) objective necessity (such as public policy considerations) and (b) efficiency. In particular, CJEU considered public policy considerations for objective necessity, and stated that acceptable justification for abusive conduct will meanwhile be the efficiency of dominant undertaking concerned, if the factual circumstances of the case concerned applied all the conditions of the following test: "*(a) the likely efficiency gains counteract any likely negative effects on competition and consumer welfare; (b) the gain have been, or likely to be, brought about as a result of the conduct; (c) the conduct is necessary for the achievement of the efficiency gains; (d) the conduct does not eliminate effective competition by removing all or most existing sources of actual or potential competition.*"¹²⁵ In this regard it should be noted, that in a range of cases CJEU stated that not the undertakings, but public bodies are responsible for public policy protection,¹²⁶ thus diminishing the importance of objective necessity. Later, in its communication on "Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings" (2009)¹²⁷ (hereinafter the Guidance Paper) Commission applied similar test as mentioned above by CJEU. In this regard, it is worth stating that Article 102 TFEU considers no exceptions and all these are mitigating factors that Commission and Court will consider in deciding the case of abuse of a dominant position.

The development of Article 102 case law meanwhile has created two categories of abuses of dominant undertakings: exclusionary (towards competitors) and exploitive (towards costumers or suppliers). Exclusionary abuse is a conduct when effective competition is impeded or hindered by foreclosing activities of dominant undertaking concerned, as a result of which its competitors are excluded.¹²⁸ Exploitive is a conduct when the dominant undertaking takes advantages by is market power by exploiting costumers or suppliers.¹²⁹ It should be noted that Article 102 (c) prohibits distortion of competition by discrimination: this means that discrimination is the third kind of abuse, when the dominant undertaking applies discriminatory

¹²⁴ C-209/10, *Post Danmark A/S v Konkurrencerådet*, [2012]

¹²⁵ *Jones/ Sufrin*: EU Competition Law Text, Cases and Materials, 2016, pp. 372-373

¹²⁶ T-30/89 *Hilti v Commission* [1991] and C-333/94 P, *Tetra Pak International SA v Commission of the European Communities*, [1996]

¹²⁷ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009), <http://bit.ly/29Ohnx0>

¹²⁸ *Lorenz*: An Introduction to EU Competition Law, 2013, p. 9.1. (Cambridge University Press, 2013)

¹²⁹ *Jones/ Sufrin*: EU Competition Law Text, Cases and Materials, 2016, pp.351-380

conditions or prices to its suppliers and customers thus placing them in competitive disadvantageous situation.¹³⁰

In order to provide full and comprehensive overview of what constitutes an abuse of dominance under EU competition law, following part of the paper will analyze all forms of conducts that have been considered as a violation both under Article 102 and through the development of case law.

Price discrimination

Generally, abuse by price discrimination is considered the situation, when a dominant undertaking sells the same commodity to different customers at different prices. It should meanwhile be added that in *Post Danmark I* case CJEU clearly stated, that the existence of just price discrimination is not enough to state that exclusionary abuse exists.

In this regards it is worth mentioning that this type of abuse rarely exists alone: usually it is accompanied by wide range of practices, including predatory prices, rebate policies, etc.

From the above-mentioned analysis of price discrimination, it can be stated, that this conduct is not an abuse of dominant position *per se*: consideration of all circumstances of the case concerned will show whether there was anti-competitive conduct establishing the abuse of dominant position.

Price discrimination, in its turn, has two levels of injury: (a) primary line injury and (b) secondary line of injury. Primary line injury is the situation, when the abuse of dominance impairs the competitors of the dominant undertaking concerned. An example of this kind of injury was revealed in the case of *Irish Sugar v Commission*, where selective (discriminatory) low price policy of the dominant undertaking excluded its competitors from the relevant market.¹³¹ As it was stated, the second level was secondary line of injury when price discrimination by the dominant undertaking prejudices its trading partners; specifically, it is the situation when a dominant undertaking sells the same good/service cheaper to company L than to the competitors of company L, thus giving economic privilege to company L among its

¹³⁰ Jones/ Sufrin: EU Competition Law Text, Cases and Materials, 2016, pp. 351-352.

¹³¹ Case T-228/97, *Irish Sugar v Commission* [1999] and Commission decision on a case IV/34.621, 35.059/F-3 - *Irish Sugar plc* [1997]

competitors, and thus distorting the competition. In this regard, it is interesting to invoke the case of *British Airways plc. v Commission*¹³², when discriminatory pricing policy by British Airways company caused injury both at primary and secondary levels.

Another case in which dominant economic entity abused dominant position by price discrimination with secondary line injury, was *United Brands Continental B.V. v Commission* (1978)¹³³; in this case the company sold bananas to its costumers (trading partners) in Rotterdam and Bremerhaven 2,38 times cheaper than to its trading partners in Denmark. In this case Commission blamed this company for the abuse of dominant position in banana market, particularly, for placing the other trading partners at a competitive disadvantage by applying dissimilar conditions to equivalent transactions with them.¹³⁴ It is interesting to note in this case that though Article 102 (c) states that there should be competitive disadvantage to other trading partners when other trading partners are competitors, however in this case the distributors (other trading partners) were not competing with each other: nevertheless, Commission and CJEU found that discriminating price policy of United Brands Company created obstacles for free movement of goods.¹³⁵

In *Clearstream Banking AG and Clearstream International SA v Commission* (2009) case¹³⁶ Commission found that Clearstream Banking AG had abused its dominant position in the relevant market by applying discriminatory prices and by refusing to provide to Euroclear Bank SA cross border settlement and clearing services. It should be noted that here again Commission applied point "c" of Article 102, however in this case as well the caused competitive disadvantage was not established by the evidences of the case concerned.

In *Aéroports de Paris v Commission* case¹³⁷ (2000), Commission accused Aéroports de Paris for abusing its dominant position in the relevant market by setting high fees for ADP management services to third party handling services compared with the price for the same management services for self-handling services. With respect to this case it is interesting to note that General Court found that very low fees for ADG management's services for self-handling services may encourage airlines to refuse third-party services and choose self-handling services.

¹³² Case C-95/04 P, *British Airways v Commission* [2007]

¹³³ C-27/76, *United Brands v Commission* [1978]

¹³⁴ Frenz: Handbook of EU Competition Law, 2015, pp. 699-700

¹³⁵ *Ibid.*

¹³⁶ Case T-301/04, *Clearstream Banking AG and Clearstream International SA v Commission of the European Communities* [2009]

¹³⁷ Case T-128/98, *Aéroports de Paris v Commission* case, [2000]

The analysis of the above-mentioned last three cases show that Commission has gone beyond the manifestations of dominant position abuse provided by Article 102, and has considered other types of abuses of dominant position.

Predatory pricing

Predatory pricing is the practice, when an undertaking imposes such low prices that the competitors of this entity cannot compete anymore and thus are indirectly pushed out from the relevant market. When competitors are expelled from relevant market, this undertaking, thus, strengthens its monopoly position and increases prices to recoup its losses. The result of predatory pricing will be exclusion of even such competitors which are as effective as the dominant undertaking concerned. In this regard, it should be added that predatory pricing is considered anti-competitive, thus as abuse of dominant position *per se*, and no justification is accepted for predatory pricing.¹³⁸ It should be noted that predatory pricing can be a barrier to entry to the relevant market, as it will economically be ineffective for new undertakings to enter that market. Thus, the strategy of predatory pricing is short term sacrifice of profits in order to get rid of the competitors, strengthen monopoly position and get lots of profit in the long term.

A landmark case in this regard was *AKZO v Commission*¹³⁹, where Commission set a test for determination of existence of predatory pricing. A multinational chemicals producer company AKZO, who was specialized in benzanol peroxide production for plastic sector, decreased benzanol peroxide prices and suggested large discounts to the best clients of its single competitor, ECS, in the plastic sector. Commission found in this case that AKZO infringed Article 102 TFEU by conducting a range of predatory activities to oust its competitor ECS from the plastic sector.¹⁴⁰ Commission established that price decrease is considered as predatory pricing when: (a) the price is below average variable cost or (b) the price is above average variable cost but below average when the plan of elimination of the competitor is proven (by consideration of all circumstances of the case).¹⁴¹

¹³⁸ Jones/ Sufrin: EU Competition Law Text, Cases and Materials, 2016, pp. 385-386; O'Donoghue/ Padilla: The Law and Economics of Article 102, TFEU, 2014, 6.1.- 6.6.

¹³⁹ Case C-62/86, AKZO v Commission [1991]

¹⁴⁰ O'Donoghue/ Padilla: The Law and Economics of Article 102, TFEU, 2014, 6.3

¹⁴¹ *Ibid.*

In *France Télécom SA v Commission* (2009)¹⁴² the participant of France Télécom group Wanadoo Interactive SA, which is internet service provider, charged predatory prices for several of its services. France Télécom SA brought justification, stating that Wanadoo Interactive SA had to do so in order to align its prices with the prices of its competitors. Commission, however, considered that France Télécom group had dominant position in the relevant market and as a dominant undertaking, Wanadoo Interactive SA did not have any right to align prices.¹⁴³

As it can be seen, in the above-discussed cases the question of the possibility or likelihood of recoupment was not considered in determining the existence of predatory pricing; the same was however considered in *Tetra Pak II* case¹⁴⁴. In this case, the CJEU stated that the possibility of recouping is a constitutive element for determination of predatory pricing. The CJEU stressed that the possibility of elimination of competitors is detrimental factor for definition of predatory pricing.

In the Guidance Paper, it was stated that "*Commission will generally intervene where there is evidence showing that a dominant undertaking engages in predatory conduct by deliberately incurring losses or foregoing profits in the short term (referred to hereafter as 'sacrifice'), so as to foreclose or be likely to foreclose one or more of its actual or potential competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm*". It is interesting to note that in the Guidance Paper Commission notes that it will not intervene if the conduct by the dominant undertaking includes increase of prices, neither when there is the conduct that can delay or prevent lowering of prices. At the same time, Commission considers cases when the dominant undertaking uses its legal monopoly in one market to impede competition in the related another market by implication of predatory pricing.

The analysis of the above-mentioned cases and of the case law, in general, shows that predatory pricing is *per se* considered to be a violation.

Margin Squeeze

Margin squeeze violation is the type of abuse of dominant position when vertically integrated dominant undertaking which has dominant position in the upstream market uses its

¹⁴² C-202/07 P, *France Télécom SA vs Commission* [2009]

¹⁴³ *Ibid.*

¹⁴⁴ C-333/94 P, *Tetra Pak International SA v Commission of the European Communities*, [1996]

position to set such prices, that in the downstream market its competitors can no more compete with in the supply of services or goods to the customers¹⁴⁵. Margin squeeze occurs in the form of rising or decreasing of prices or combination of these two activities. Margin squeeze can happen in all kinds of markets, including regulated markets.¹⁴⁶ However, the study of EU case law shows that margin squeeze violations are conducted mostly in regulatory fields.

One of the first famous decisions of Commission on the matter of margin squeeze was in the case of *British Sugar SA v Commission*.¹⁴⁷ In this case Commission decided that British Sugar Company, which is industrial sugar producer and at the same time the retailer of sugar, had abused its dominant position in industrial sugar market by establishing such a low price for sugar in retail market: its competitor in retail market Napier Brown, which was dependent on the supplies by British Sugar, was not able to compete viable, as sugar price set by British Sugar in retail market was so low, that it did not include prices of packaging and selling.

A landmark case of margin squeeze violations was *Deutsche Telecom v Commission* (2003)¹⁴⁸. In this case Commission found that Deutsche Telecom had abused its dominant position by effecting margin squeeze in the form of charging high prices from its competitors for access to local loop in retail market, which is an equipment and a network connecting system giving opportunity to its competitors to provide fixed public telephone network. The problem was that Deutsche Telecom itself provided fixed public telephone network in retail market and high charges of its competitors deprived its competitors an opportunity to compete with Deutsche Telecom by providing competitive prices for end-user customers. It should be noted that the price by Deutsche Telecom was affirmed by German regulatory authority. Here Commission described margin squeeze, stating that "*the differences between retail prices charged by a dominant economic entity and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product –specific costs to the dominant operator of providing its own retail services on the downstream market*"¹⁴⁹. At the same time, Commission stated that there was no necessity to assess effects of competition once margin squeeze has been established, as in establishing the latter Commission had done enough for determination of abuse of dominant position. In this case, EU General Court also stated that in

¹⁴⁵ Østerud: Identifying Exclusionary Abuses by Dominant Undertakings Under EU Competition Law, 2010, p. 103-105

¹⁴⁶ Jones/ Sufrin: EU Competition Law Text, Cases and Materials, 2016, pp. 407-408; Østerud: Identifying Exclusionary Abuses by Dominant Undertakings Under EU Competition Law, 2010, pp. 106-107

¹⁴⁷ Case No IV/30.178 Napier Brown — British Sugar [1988]

¹⁴⁸ Ezrachi: EU Competition Law, an Analytical Guide to the Leading Cases, 2016, pp. 264-266

¹⁴⁹ Case C-280/08 P, *Deutsche Telecom v Commission* [2010]

this case margin squeeze was established as separate form of abuse of dominant position, independent from predatory pricing. However, this court stated that Commission cannot establish abuse only by establishing margin squeeze: Commission had to demonstrate competitive effects. This case was also discussed by CJEU¹⁵⁰, which in its turn confirmed that margin squeeze was an independent form of violation of Article 102; it established the following criteria necessary for establishing margin of squeeze: (a) approval of prices by national regulatory authority does not mean that those prices can not constitute abuse of dominant position; (b) margin squeeze is established by consideration of AEC test: whether downstream activities of a dominant undertaking in downstream market can trade profitably in case when pricing regime is the same for these activities and for the ones of its downstream competitors; (c) anticompetitive exclusionary effects on competitors should be considered, particularly, whether such kind of pricing policy can create obstacles or impossibility for entering the relevant market and whether it can serve as a method to strengthen market power to the detriment of interests of consumers. CJEU also established in this case that Deutsche Telecom should have refused to apply margin squeeze, even if it would have to raise prices for final-end consumers.

Later, in case *Konkurrensverket v Telia Sonera Sverige AB*¹⁵¹, however, CJEU stated that the existence of affected competitors or new consumers for the dominant undertaking is not important: the possibility of anti-competitive effect may still be able to create an anti-competitive effect.¹⁵²

The mentioned above analysis shows, that margin squeeze is not always considered as an abuse of dominant position, as possibility of anti-competitive effect should anyways be shown. Besides, dominant undertakings are entitled to justify their abusive conducts on the basis of efficiencies. Besides, dominant undertakings can bring justifications as the basis of efficiencies. Thus, it also should be stated that margin squeeze is not *per se* considered to be the abuse of dominant position.

Bundling and tying

Tying and bundling are the forms of abuses of dominant position and generally are considered as one type of abuse. Article 102 (d) specifically prohibits an abuse that consists of

¹⁵⁰ Jones/ Sufrin: EU Competition Law Text, Cases and Materials, 2016, pp. 409-416

¹⁵¹ C-52/09, *Konkurrensverket v Telia Sonera Sverige AB*[2011]

¹⁵² *Ibid.*

"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"¹⁵³. Alison Jones and Brenda Sufrin in their book "*EU Competition Law: text, cases and materials*" (2016) describe tying/bundling as practices when the dominant undertaking supplies 2 things together, or produces in a way that 2 or more products work only together, or dominant undertakings supply products to the constitution (tying) customers for them to buy another product of the undertaking. It should however be stated, that tying/bundling is not always bad for customers: sometimes the offer for a package by the dominant undertaking is more attractive, than in case of buying the products separately. In any case, EU courts and Commission consider that tying/bundling is used by dominant undertakings to use their position in one market to strengthen their market power in another market.

Tying and bundling are also described and explained in the Guidance Paper, where Commission states that "tying usually refers to situations where customers that purchase one product (the tying product) are required also to purchase another product from the dominant undertaking (the tied product). Tying can take place on a technical or contractual basis. Bundling usually refers to the way products are offered and priced by the dominant undertaking. In the case of pure bundling the products are only sold jointly in fixed proportions. In the case of mixed bundling, often referred to as a multi-product rebate, the products are also made available separately, but the sum of the prices when sold separately is higher than the bundled price"(Id. Para 48). Thus, it should be stated that Commission distinguishes the following types of tying and bundling:

✓ Contractual tying: This tying occurs when the dominant undertaking sells the concerned product while demanding to also buy its other product, otherwise refusing to sell the product or to provide a guarantee. For example, when a dominant undertaking refuses to supply x product if "a" product is not bought with "b" from the same company, or refuses to provide guarantee for product "a", if "b" is not bought, etc. Landmark cases in this regard were *Hilti Aktiengesellschaft v Commission*¹⁵⁴ and *Tetra Pak International SA v Commission*¹⁵⁵, in which Commission found that Hilti and Tetra Pak had abused their dominant positions in the relevant markets by tying aftermarket to a primary product. Particularly, in Hilti case, Hilti had dominant position in nail guns market (Hilti patent) which is used for construction

¹⁵³ Article 102, TFEU

¹⁵⁴ Case IV/30.787 and 31.488—*Eurofix-Bauco v. Hilti* [1987], T-30/89 - *Hilti v Commission* [1991]

¹⁵⁵ C-333/94 P, *Tetra Pak International SA v Commission of the European Communities*, [1996]

industry, in cartridge strips market (Hilti patent) and in nails markets. In the latter-nail market, Hilti had a competitor. In order to make its customers of cartridge buy its nails, instead of the others', Hilti used the following practices: (1) made the purchase of the cartridge strips conditional upon purchase of complement of nails; (2) in case of not ordering nails, the discounts on cartridges were decreased; (3) compelled its distributors not to supply cartridges to those customers who were independent sellers; (4) refused to sell cartridges to those suppliers who were capable of selling them to independent nail sellers; (5) refused to provide guarantees to those nail guns where its nails were not used; (6) deliberately delayed permissions for licensing the rights for the strip technology for cartridges. Commission found that Hilti, which had dominant position in nail guns market, in cartridge strips market and in nails market, had abused its dominant position by tying its nails to its cartridges and thus preventing or limiting the entry of new independent producers. Next important case of contractual tying was Tetra Pak case, where Swiss base company Tetra Pak, the world's largest liquid packaging machinery and cartons supplier, had near-monopoly position aseptic liquid and a considerable market share in non-aseptic packaging market. Group of Tetra Pak International SA abused its dominant position in the relevant markets, where one of the abuses of dominant position in cartons and liquid and semi-liquid packaging markets by Tetra Pak was tying its non-aseptic machines to the cartons that were necessary for filling the machines. The customers, therefore, were not only obligated to buy cartons only from Tetra Pak, but also to get repair and maintenance services, and to buy spare parts from Tetra Pak. Tetra Pak brought justifications stating that the mentioned above practices were for public health safety purposes and for technical reasons. Commission however stated that Tetra Pak had seriously violated Article 102. The conclusion that can be made from the analysis of Tetra Pak and Hilti cases is that once tying is established, no justification is acceptable.

✓ Technical tying: This is a tying abuse, when product "a" of the dominant undertaking is designed so that it cannot work without product "b", or "a" and "b" products are physically integrated with each other. One of the fundamental cases in this regard was *Microsoft v Commission*¹⁵⁶, where Commission found that Microsoft Corporation had abused its dominant position (90% market share) in the market of PC operating systems. In particular, Commission stated that Windows Operating Systems and Windows Media Player are different products being in different markets, and by bundling the mentioned

¹⁵⁶ T-201/04 *Microsoft v Commission* [2004]

above products together (Windows Media Player was preinstalled in Windows Operating System), Microsoft Corporation abused its dominant position: by using its monopoly position in Windows Operating Systems market Microsoft Corporation wanted to strengthen its market power in Windows Media Player market, which was quite competitive market with many participants. Commission imposed a fine on Microsoft Corporation of about 147 billion Euros, and also ordered it to offer Windows Operating Systems version without Windows Media Player. Microsoft Corporation claimed that customers were not obligated to use Windows Media Player; that they could leave it as it was and download another player from another manufacturer. However, both Commission and EU courts stated that that was irrelevant, as the mentioned above-described practice of Microsoft Corporation had caused significant threats to the structure of competition.

✓ Pure bundling: This is type of abuse when "a" and "b" products are sold together in one package or "a" product and "b" service are sold together in fixed proportions.

✓ Mixed bundling: This type of tying is a conduct when the dominant undertaking suggests buying 2 or more other products with the main product concerned in order to get discount for the main product bought: for example, if "a" product costs 7 Euro and "b" costs 12 Euro, if customer buys 2 products together, he/she is suggested to pay 14 Euro for both of the products. One of the famous cases was *Coca Cola Company Italia* case¹⁵⁷ in which Commission found that Coca Cola Italia had abused its dominant position in the relevant market by suggesting conductional discounts on sellers/retailers buying non-cola products, compelling them to buy cola at the same time or sell only Coca Cola products.¹⁵⁸ Another famous case of mix bundling was by undertakings in digital markets, where the dominant undertakings proposed to computer suppliers quite attractive package if they would buy software support and hardware maintenance services together with the computers. Commission found the mentioned above conduct as an abuse, because the activates of dominant undertakings impeded competition in aftermarket of hardware maintenance services, as it was no more economically convenient for suppliers to buy those services from the third parties.¹⁵⁹

In this regard, it should be stated that for tying or bundling abuses Commission differentiates markets where an undertaking should have dominant position. Specifically, if the conduct is bundling abuse, an undertaking should be dominant in one of the bundled markets, and if the

¹⁵⁷ *Jones/ Sufrin*: EU Competition Law Text, Cases and Materials, 2016, pp. 480

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

conduct is tying abuse, an undertaking should have dominant position in tying product market (in ties product market existence of dominance is not important). However, in cases, when abusive conducts include also aftermarkets, dominant position should be established either/both in tied or/and in tying markets.

Thus the analysis of EU case law and of the Guidance Paper show that tying/bundling are considered as an abuse of dominant position if the following elements are present: (a) tied and tying products are different and separate products; (b) the dominant undertaking has dominant position in tying product market, or both in tying and tied products markets; (c) customers are deprived of the opportunity to buy tying product without buying also the tied product; (d) competition is eliminated by the tying practice(s).

Refusal to supply

Refusal to supply or refusal to grant access to the facilities of the dominant undertaking is another form of abuse of dominant position and thus violation of Article 102 of TFEU. In this regard, it should be noted that refusal is "constructive": the dominant undertaking makes such an offer which it knows is unacceptable and unreasonable for the customers, or when the dominant undertaking unduly delays the supply¹⁶⁰. Dominant undertakings are not always obligated to supply to all suppliers. However, their dominant position in markets obligates them not to distort competition; that is why in certain situations refusal to supply can constitute as an abuse of dominant position. EU competition law is specifically concerned of situations, when dominant undertakings in upstream markets refuse to supply to undertakings in downstream markets, thus distorting competition in downstream markets.

Prohibition of the abuse of refusal to supply generally contradicts principles of freedom of contract and freedom of property, which establish freedom of undertakings to have contract with everyone they want, and to use their property as they want. Prohibition of the abuse of refusal to supply sometimes conflicts with intellectual property rights (hereinafter IPR), for this reason Commission and EU courts have limited cases when refusal to supply concerns IPR.

It is also worth stating that refusal to supply and tying are related to each other and usually are met together. Such practices were present in *Centre Berge* case, where this company

¹⁶⁰ Jones/ Sufrin: EU Competition Law Text, Cases and Materials, 2016, pp. 496 497

provided advertising time on television on the condition that customers must buy their own tele sales agency services¹⁶¹: this case included tying and refusal of supply violations.

The first case of refusal of supply was *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission*¹⁶². In this case Commercial Solvents provided its subsidiary company Italian Institutio aminobuthanol (raw material from which ethambuthanol could be produced), which in its turn sold aminobuthanol to Zoja (pharmaceutical company producing ethambuthanol based drags).When Zoja refused to buy from Institutio as the other independent distributor supplied aminobuthanol cheaper than Institutio, Commercial Solvents provided upgraded product- dextroaminobuthanol to Institutio, which in its turn would convert into ethanbutanol to itself produce ethanol-based drugs. Commercial Solvents meanwhile refused to supply aminobuthanol to anyone in the territory of the EU. In this situation Zoja, unable to find any other aminobuthanol supplier, brought complaint to Commission against Commercial Solvents Corporation and Institutio.¹⁶³ Commission found that Commercial Solvents Corporation abused its dominant position in raw material market.¹⁶⁴Commission found the following fundamental facts of the case evidencing existence of the abuse of dominant position: (1) Commercial Solvents Corporation used its dominant position in raw materials market to have influence on competition on the market of derivatives; (2) Commercial Solvents Corporation refused to supply the product concerned to an existing customer to compete with that customer in downstream market; (3) refusal to supply created a risk of elimination of Zoja from downstream market.

As it can be noted, there was refusal to supply the full product in Commercial Solvents Corporation's case. However, there are cases, when dominant undertakings refused to supply fundamental parts of the products or refused to provide access to their essential facilities. One of such cases was *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission* case¹⁶⁵. In this case Commission found that Hugin had abused its dominant position by refusing to supply services and spare part for its product, even though Hugin had dominant position in its own spare parts market.¹⁶⁶ In *Sea Containers v. Stena Sealink* case¹⁶⁷ Commission provided description of essential facilities stating that essential facilities are "*facilities or infrastructure*

¹⁶¹ *Ibid*, p. 497

¹⁶² **Cases 6 and 7/73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* [1974]**

¹⁶³ *Ibid*.

¹⁶⁴ *Jones/ Sufrin*: EU Competition Law Text, Cases and Materials, 2016, pp. 498-499

¹⁶⁵ **Case 22/78, *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission*[1979]**

¹⁶⁶ *Ibid*.

¹⁶⁷ **IV/34.689 - *Sea Containers v. Stena Sealink* - Interim measures [1993]**

access to which competitors cannot provide services to their customers". Prohibition of dominant position in the form of refusal to provide access to essential facilities got importance after liberalization of regulated markets, where services were provided mostly via essential infrastructures, which were mostly constructed with public money. Specifically, previous natural monopolies, which after liberalization became dominant undertakings, used different methods of refusal to essential facilities to keep and strengthen their market power. In *Oscar Bronner GmbH & Co. KG v Mediaprint tZeitungscase*¹⁶⁸ CJEU set a test for determination of the abuse of dominant position in case of refusal to supply/provision of access to essential facilities. Particularly, CJEU stated that the following factors should be considered when determining abuse of dominant position in the form of refusal to provide access to essential facilities: (a) competition in the downstream market should have been eliminated because of refusal to provide access, for the access requested economic entity; (b) there is no objective justification for the refusal; (c) customer's business is impossible without the access; (d) there is no potential or actual substitute to the facilities.

As it was already stated, another form of refusal to supply concerns IPR. Essential facilities test cannot be applied in such cases, as the protection of intellectual property rights is essential. For this reason, generally, refusal to provide license for IPR is not a violation, however in some circumstances it can be a violation. In *Volvo v Veng case*¹⁶⁹ CJEU held that only in case of existence or possibility of abusive conduct IPR licenses can be a violation¹⁷⁰. However, the test for determination of abuse of dominant position was provided by CJEU in *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG case*¹⁷¹, which case was the delicate balance between IPR and competition law. Specifically, CJEU ruled that the following three cumulative conditions should apply: (1) whether new product was involved; (2) access to the protected material (IPR) is irreplaceable in a way that competition fully or partly would be distorted/excluded in the secondary market; (3) refusal was not justified. It should again be noted that CJEU once again underlined that refusal to grant a license cannot itself be considered as a violation.

¹⁶⁸ Case C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* [1998]

¹⁶⁹ Case 238/87, *AB Volvo v Erik Veng (UK) Ltd* [1988]

¹⁷⁰ *Anderman/Schmidt*: EU Competition Law and Intellectual Property Rights: The Regulation of Innovation, 2011, pp. 111-119

¹⁷¹ C-418/01 - *IMS Health* [2004]

Important case in this regard was *Microsoft Corporation v Commission* case where one of the violations was refusal to supply.¹⁷² Specifically, in this case Microsoft Corporation, after entering the relevant market, refused to provide indispensable information on interface to other server producers, which would allow these producers to create working server operating systems. In this regard it should be added, that Microsoft Corporation previously had provided the concerned information to server producers. Commission found in this case, that Microsoft had dominant position in the 2 markets- market of PC operations systems and market of working servers operating systems, and by refusing to supply/provide interface information to the other producers it had abused its dominant position. In this case again, CJEU applied 3 cumulative element tests, discussed above, and went into details of each of the 3 elements.

The Guidance Paper also discusses refusal to supply violation. In particular, the Guidance Paper provides a test with 3 cumulative conditions, which Commission will consider for determination of the priorities to intervene. The elements of the test are the following: (a) the dominant undertakings refused to supply/provide service or product which is objectively (indispensably) necessary for other economic entities to be able to compete on downstream/secondary markets; (b) there is possibility that competition will be eliminated in downstream market because of the refusal; (c) there is possibility that the refusal could harm consumers.

Rebates and discounts

Rebates and discounts are commonly accepted form of commercial practices by economic entities for competing in markets. However, when undertakings have dominant position, implementation of discounts and rebates practices by them is limited by Article 102 TFEU.

Guidance Paper has established efficient competitor test (AEC) for determination of existence of anti-competitive effect, thus of abusive rebates and discounts. However, in case law this approach is not reflected yet.¹⁷³ Rebates are generally perceived as refunds granted retrospectively and discounts - as deduction from the listed price.

Famous competition lawyers Alison Jones and Brenda Sufrin in their book “EU Competition Law: text, cases and materials” (2016) suggest specific terminology for different types of rebates. Particularly, the authors describe the following rebates:

¹⁷² *Anderman/Schmidt*: EU Competition Law and Intellectual Property Rights: The Regulation of Innovation, 2011, pp. 111-119

¹⁷³ *Jones/ Sufrin*: EU Competition Law Text, Cases and Materials, 2016, p. 434

- ✓ *quantity rebates* (reduction of prices for purchaser who buys certain amount of goods/services);
- ✓ *exclusivity/loyalty/fidelity/ rebates* (rebates that are given to purchaser for exclusivity, for example to buy only or most of the product/services from one supplier);
- ✓ *target rebates* (rebates that are given to purchasers/ customers when they buy goods/services more than the target (threshold)) *with its following categories: retroactive rebates* (these rebates are given to customer, once the customer/purchaser reaches the threshold), *incremental rebates* (this rebate is given only when purchases are made above the threshold), *individualized rebates* (situation when rebates are given to different customers on different threshold for the same products), *standardized rebates* (when rebates are given to all customers on the same conditions);
- ✓ *aggregated (multi-product) rebates* (rebates that are given to customers who buy different products from the same buyer);
- ✓ *fidelity building or loyalty inducing rebates* (rebates that are given for building loyalty);
- ✓ *selective rebates* (rebates, that are intended for special group or class of customers, usually given for switching them from the competitors of buyers).

In the Guidance Paper Commission distinguishes *contestable portions of demand* (the amount customers/ purchasers will buy from the dominant economic entity in any event) and *non-contestable portions of demand* (the amount customers may prefer to buy if can find substitute products).

EU case law helps to better understand meaning of discount and rebate abuses. The research and analysis of the EU case law shows that rebates are divided in the following 3 categories: (1) quantity rebates; (c) exclusivity rebates and (d) other category rebates.¹⁷⁴ Below the paper will discuss the mentioned above 3 categories with supplementing case law.

- Quantity rebates: Quantity rebates are discount applied only to the quantity of purchases customers have bought from the dominant undertaking. Thus, detrimental is the quantity of products bought. However, in *Michelin II* case (*Michelin v Commission* (2003))¹⁷⁵ Commission stated that in cases of quantity discount schemes, which is loyalty motivating, the discounts should be treated as target rebates. In another case, *Post Danmark II*¹⁷⁶, Commission stated that in cases when rebates are given retroactively, on the basis of the aggregate orders that customers have done over a certain period of time, they are not

¹⁷⁴ Jones/ Sufrin: EU Competition Law Text, Cases and Materials, 2016, pp. 435- 437

¹⁷⁵ C-322/81 - *Michelin v Commission* [1983]

¹⁷⁶ C-23/14 - *Post Danmark* [2015]

considered as simple quantity rebates. It should be stated that not in all cases quantity rebates are considered as abuse of dominant position: in *Portugal v Commission*¹⁷⁷ it was stated that when simple quantity rebates are non-discriminatory, Article 102 will probably not be found to have been violated. It is worth's stating that EU case law distinguishes quantity rebates from loyalty rebates, stating that generally, quantity rebates are presumed to be legal¹⁷⁸. However, quantity rebates will be considered as the abuse of dominant position when the charged money is predatory.¹⁷⁹

Exclusivity rebates: Exclusivity rebates are considered loyalty or fidelity rebates. In order to get these types of rebates, customers must comply with the condition to buy all or most of the products of the dominant undertaking. It is not important for exclusivity to be in a written form: oral communications and behavior can be the evidence of exclusivity. The distinction between loyalty rebates and quantity rebates was made in *Suiker Uniev Commission* case (1975), where CJEU stated that quantity rebates are related to the volume of purchase from the dominant undertaking, however in cases when rebates grant financial advantage demanding the customer to buy from the dominant undertaking only, and not from its competitors, rebates are loyalty rebates¹⁸⁰.

A landmark case on exclusivity rebates is *Hoffman La Roche v Commission*, where the basis of treatment of exclusivity rebates was established. Specifically, CJEU stated that the concerned dominant economic entity cannot enter into exclusivity purchasing agreements and suggest exclusive rebates. The assessment of illegality of rebates does not necessarily, as a suggestion of exclusivity rebates, considers customers will not buy the products of competitors, which will harm competitors and competition. This approach was later restated in a range of cases by. One of those cases was *Tomra v Commission*¹⁸¹, which concerned retroactive target rebates; however, the same approached adopted in *Hoffman La Roche* case, was restated.

Another fundamental case for exclusive rebates is *Intel v Commission*¹⁸², which suggests 3 levels of categorization of rebates. In this case Commission found that Intel had abused its dominant position in the relevant market by giving rebates to computer manufacturer companies. Particularly, Dell and HP companies were given rebates (for microchips),

¹⁷⁷ Case C-163/99, *Portugal v Commission*[2001]

¹⁷⁸ *Jones/ Suftrin*: EU Competition Law Text, Cases and Materials, 2016, p. 437

¹⁷⁹ *Ibid*.

¹⁸⁰ *Ibid*, 437

¹⁸¹ Requires a reference

¹⁸² T-286/09, *Intel v Commission* [2009]

however these companies were obligated to buy 80-100% of their requirements from Intel. Though case law suggests that there is no requirement for rebates to establish anti-competitive effect, Commission in this case applied AEC test for justifying that conditional rebates provided by Intel, can cause, or there is possibility of causing, anti-competitive foreclosure (harm both to competitors of Intel and to customers). In this case EU General Court, referring to CJEU position in *Tomra* case that there is a requirement to show negative prices for target rebates, considered that there was no necessity to apply AEC test as that test was intended to show whether there is impossibility for new competitors to enter the relevant market. General Court stated that there was no necessity to show actual link between practices and the damage or no necessity to prove direct damage or actual anti-competitive effects to consumers. This court at the same time, stated that the amount of rebate was also irrelevant: what was important was the fact, whether exclusivity existed.¹⁸³

- Other category rebates: These types of rebates are rebates, which are neither quantity rebates nor exclusivity rebates. Review of the relevant case law shows that these types of rebates have a fidelity building (loyalty inducing) effect. These other categories were not discussed in *Post Danmark* case, where CJEU stated that standardized rebates are neither quantity nor exclusivity rebates.¹⁸⁴ The reasoning applied by CJEU in the latter case shows that these other categories of rebates are usually target rebates. Competition lawyers Alison Jones and Brenda Sufrin in their book “EU Competition Law: text, cases and materials” (2016) describe these other categories as rebates that enmesh customers to have deals only with the dominant undertaking, making them to believe that competitors of the dominant undertaking cannot suggest such a profitable offer for the product concerned, thus having foreclosing and exclusionary effect on the relevant market.

Michelin v Commission case (1983)¹⁸⁵ was the first case, when target rebates were an issue of abuse of dominant position. In this case, CJEU stated that Michelin had abused its dominant position in the relevant market by restricting or removing the buyers’ right to choose their source of supply. In particular, Michelin, a company supplying new replacement tires of heavy vehicles to the suppliers who sold both its and its competitors’ products, applied rebates (sales) for these suppliers stating that the rebates will be provided considering annual sales target (how much the dealer had sold Michelins’ products) of each dealer. In this case CJEU stated that the

¹⁸³ *Ibid.*

¹⁸⁴ C-23/14 - *Post Danmark* [2015]

¹⁸⁵ C-322/81 - *Michelin v Commission* [1983]

discussed rebates were fidelity building, as the dealers had to sell more products of Michelin during whole previous year. In *Michelin II* case (2003)¹⁸⁶, Michelin applied similar rebates, other rebates considering discounts on prices, and also created Michelin club, members of which could be largest suppliers, who meanwhile would get closer relationship building opportunity with Michelin. Commission found that Michelin had abused its dominant position in the relevant market, as the rebates made the dealers completely dependent on Michelin.

It is worth discussing *British Airways v Commission* case,¹⁸⁷ where Commission found, that British Airways company had abused its dominant position in the relevant market (travel agency services market) for providing commission schemes (extra payments for exceeding or meting their previous year's sales of tickets of British Airways) (retroactive rebates) to travel agents. Commission stated in this case that rebates schemes, provided by British Airlines, were discriminatory. EU General Court stated in this case that the aim of Article 102 TFEU was not a proof of harm to consumer, but to protect the structure of the competition. British Airways appealed this case to CJEU¹⁸⁸. This court confirmed the approach that rebates, whether exclusive or conditional or other type, should be judged by not only consideration of all the circumstances of the case concerned, but also taking into account the following two criteria: (1) whether rebates (bonuses, discounts etc.) can produce exclusive effect by making entry to the relevant market difficult or impossible, and thereby create difficulties for customer to choose other sources of supply; and (2) whether the concerned dominant undertaking has an objective economic justification for rebates¹⁸⁹.

Another case, concerning target rebates, is *Tomrav Commission*¹⁹⁰, where CJEU supplemented the criteria for assessing rebates provided in the *British Airways v Commission* case. Particularly, in that case it was stated that, the quantity of rebates (high or low) was irrelevant, and that capability of rebates for exclusion of competition should be considered.

Rebates and discounts are covered by the Guidance Paper, too. However, Commission has applied quite different approach compared to the one taken in the case law. Particularly, the Guidance Paper states that abuse of dominance are considered those rebates that are conditional rebates, i.e. rebate which are given to customers while expecting (demanding) from customers a particular purchasing behavior. The Guidance Paper also states that conditional

¹⁸⁶ Case T-203/01, *Michelin II* [2003]

¹⁸⁷ Case T-219/99, *British Airways v Commission* case [2003]

¹⁸⁸ C-95/04 P, *British Airways v Commission* [2007]

¹⁸⁹ *Jones/ Sufrin*: EU Competition Law Text, Cases and Materials, 2016, pp. 459-460

¹⁹⁰ T-155/06, *TomraSystems v. Commission* [2010]

rebates can have anti-competitive effect, however it is not a mandatory condition: abuse of dominant position can also be established even in cases when rebates do not require any sacrifice from the dominant undertaking's part. In such cases Commission will consider the price that a competitor of the dominant undertaking should pay to customers as compensation for loss of conditional rebates in cases when customers concerned stop buying products of the dominant undertaking concerned. In cases, if such price would be high, and it would be difficult for the competitor of dominant undertaking to equally compete with it, or it would be impossible to compete, Commission will find a violation. However, in cases, when the price will be considered reasonable, Commission will consider whether other factual circumstances of the case concerned provide evidence of potential restriction of competition or existence of barriers to entry to that market.

To concluded the analysis provided in this part (rebates and discounts), the following can be stated: (a) quantity rebates are generally considered as lawful if they are provided equally to all customers; (b) loyalty/fidelity or exclusivity rebates are considered by the object abuse of dominant position; (c) target rebates are loyalty compelling and are subject to the test of possibility of exclusionary effect; (d) retroactive rebates (standardized) are subject to actual or potential anti-competitive effect establishment test and are considered in the light of nature and application method of rebates concerned.

Exclusive obligations and exclusive dealing

The arrangements when the supplier obligates its customers to buy whole relevant product or most of it only from him, is also covered by Article 102, and are considered as exclusive dealings/exclusive purchasing. The Guidance Paper, provides one term for the above-described conduct-exclusive dealings. It should be stated that Article 102 covers not only contractual exclusivity when exclusive dealing is stipulated in the agreement, but also *de jure* exclusive dealing when there is no written stipulation of exclusivity.

One of the landmark cases of exclusive dealing abuses was *Van Den Bergh Foods Ltd v Commission* (2003).¹⁹¹ In this case, an ice cream manufacturer Van Den Bergh Foods Ltd, provided retail outlets with freezers to retailers, however prohibited to store products of any other supplier, except Van Den Bergh Foods Ltd.'s ones. Commission found that Van Den Bergh

¹⁹¹ Case T-65/98, *Van Den Bergh Foods Ltd v Commission* [2003]

Foods Ltd abused its dominant position by demanding exclusivity, as these exclusive dealings reduces competition intensity between other incumbent economic entities and created strategic barriers for the entry to the relevant market.

Another case on exclusive dealings, particularly on exclusive purchasing, was *Hoffman La-Roche Co AG v Commission*.¹⁹² In this case Commission stated that if the dominant undertaking ties purchasers even if it does so “at their request by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said economic entity, it abuses its dominant position within the meaning of Article 102”.¹⁹³

In *Coca Cola v Commission* case (2005)¹⁹⁴ Commission found that Coca Cola Company had abused its dominant position in the relevant market, among other abuses, by applying *de facto* and *de jure* exclusivity and exclusivity related practices. In particular, Coca Cola Company concluded exclusivity agreements with retailers and provided technical sales equipment arrangements with exclusivity conditions. Specifically, Coca Cola Company provided beverage coolers and fountain dispensers to retailers for free, however demanded to keep only brands of Coca Cola Company in those equipment arrangements. Commission stated that rent-free character of equipment arrangements removed any kind of incentive for the retailer to place any other cooler. Commission meanwhile underlined that the mentioned above activities of Coca Cola Company deprived final consumers the opportunity to buy other drinks, and the competitors of Coca Cola Company, thus were rejected the opportunity to have their products distributed and thus be sold, which in its turn hindered competition.¹⁹⁵

The Guidance Paper also covers the topic of exclusive purchasing violations, particularly stating that exclusive purchasing obligations result in anti-competitive foreclosures in cases when competition is restrained as the dominant undertaking becomes an unavoidable trading partner or competitors of the dominant undertaking are not able to satisfy the entire demand of individual costumer as there are capacity constraints as a result of exclusive dealings. Commission at the same time in the Guidance Paper states that “...if competitors can compete on equal terms for each individual customer's entire demand, exclusive purchasing obligations are generally unlikely to hamper effective competition unless the switching of supplier by customers is rendered difficult due to the duration of the exclusive purchasing obligation...”.¹⁹⁶

¹⁹² Case 85/76, *Hoffmann-La Roche v Commission*, [1979]

¹⁹³ *Ibid*, para. 89

¹⁹⁴ Case COMP/A.39.116/B2 – *Coca-Cola* [2005]

¹⁹⁵ *Ibid*.

¹⁹⁶ *Ibid*. para 36

In the Guidance Paper Commission highlights the role of duration of exclusivity: the longer exclusivity lasts, the greater its anti-competitive effect is. However, in cases when the dominant undertaking is an unavoidable trading partner for all retailers (customers) or most customers (retailers), even short time exclusive purchasing obligations can lead to anti-competitive effects. It should be stated in this regard, that Guidance Paper establishes that in all cases dominant undertakings can bring justifications for exclusivity. For example, in case of existence of strong justification, exclusivity for the purposes of relationship specific investments can be considered as applicable and permissible.¹⁹⁷

Misuse of IPR or other regulatory procedures

Research and analysis of EU case law shows that miscellaneous taking steps to exclude competitors by misrepresentation to regulatory authorities, or intentionally misusing other regulatory procedures, are also considered as abusive conducts under Article 102. One of such cases was AstraZeneca AB and AstraZeneca plc v Commission.¹⁹⁸ In this case Commission found that AstraZeneca, a pharmaceutical company, had abused its dominant position in relation to proton pump inhibitors, by (1); presenting false and misrepresented information to courts and patent offices to get supplementary protection certificates, which would ensure extra protection for its IPR Losec (capsule-drug) extra (2) using regulatory procedures for reregistering Losec capsule forms, which hindered competition. Particularly, deregistration did not allow competitors of AstraZeneca to sell generic drugs for Losec, as generics cannot be entered into markets unless capsule marketing authorization is in force, and preregistrations made the competitors to every time under long procedure in order to enter the market and sell the generics. AstraZeneca appealed this decision to EU General Court. This court upheld the decision of Commission, stating that although abuse of dominant position is an objective concept and does not require bad faith or deliberation to be established, in IPR cases of abuse of dominant position the intention is a relevant factor that should be considered when assessing existence of an abuse. The court also stated that in this case the relevant factor was the capability for restriction of competition (anti-competitive effect), which was established by Commission. Actual or likely effects were irrelevant. This court stipulated that though dominant undertakings are not obligated to assist their competitors, in present case AstraZeneca was

¹⁹⁷ *Ibid.*

¹⁹⁸ C-457/10 P, *AstraZeneca v Commission* [2012]

obligated not to deregister and keep marketing authorization in force enabling its competitors to enter the market.

Abuses naked restrictions

Naked restrictions term was suggested by Commission in the Intel case, which considered activities of dominant undertakings directed to delaying, restricting, canceling the marketing of competitors' products.¹⁹⁹ These kinds of restrictions are similar to conditional rebates; the difference is that naked restrictions include short duration and targeted activities against selected products/services of the targeted competitors. Naked restrictions activities are also described in the Guidance Paper, where Commission states: "there may be circumstances where it is not necessary for the Commission to carry out a detailed assessment before concluding that the conduct in question is likely to result in consumer harm. If it appears that the conduct can only raise obstacles to competition and that it creates no efficiencies, its anti-competitive effect may be inferred" (Id. para 22). Afterwards, Commission brings an example of the mentioned above conduct, that is when the dominant undertaking "prevents its customers from testing the products of competitors or provides financial incentives to its customers on condition that they do not test such products, or pays a distributor or a customer to delay the introduction of a competitor's product."²⁰⁰

Unfairly high pricing and unfair trading conditions

General prohibition of unfair pricing and unfair trading conditions are prescribed by Article 102 (a), which particularly prohibit practices of dominant undertakings which consider directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions. Considering the fact that low pricing generally includes predatory and exclusionary pricing discussed in this paper, this part of the study will consider unfair high pricing and unfair trading conditions.

Generally, it is accepted that high prices by dominant undertakings may be a signal of the necessity of new competitors to suggest cheaper prices. However, in markets where there are

¹⁹⁹ Jones/ Sufrin: EU Competition Law Text, Cases and Materials, 2016, pp. 557-559

²⁰⁰ Ibid.

obstacles for entry to that market, high prices will be an issue and cause detriment to consumers. Usually high pricing is applied in legal or natural monopolies in regulated sectors. There are also cases, when high pricing was applied in non-natural monopolies markets. One of such cases was *United Brands v Commission*, where Commission stated that this company sold bananas at higher price than banana prices of its competitor, and those prices were excessive in relation to the economic value of the product supplied. CJEU, however, annulled Commission's decision in this part, stating that Commission had failed to show unfair nature of the high pricing. The court at the same time, suggested a test, which should be considered by Commission in determining existence of unfair high pricing. CJEU stated that the following cumulative 2 factors should be considered: (1) whether the price is excessive; and (2) whether the price is unfair when compared with competing products or whether it is unfair in itself.²⁰¹

The approach towards unfair pricing in IPR cases is somewhat different. In a range of cases CJEU held that it is not always a violation when the price of patented (or other IPR) product is higher than that of competing products.²⁰² However in *Maxicar v Renault* case²⁰³ Commission stated that in cases when the dominant economic entity refused to provide licenses for its IPR or parts of its IPR, an abuse of dominant position will be established if unfair prices are charged for its own parts.

As it was already stated, Article 102 (a) prohibits also practices of dominant economic entities to impose unfair trading conditions. One of such cases was Commission's investigation in *Microsoft* case in 1994²⁰⁴, where Novell, world's largest networking company, complained that Microsoft Corporation ousted it from the market of PC operations system software by a range of antitrust activities. Commission started investigation and found out that Microsoft's licensing agreements contained conditional provisions requiring licensing manufacturers to pay royalties to Microsoft Corporation based on the quantity of shipped PCs' (royalty for each PC), and regardless of the fact whether the PC contained software of Microsoft, software of its competitor, or no software at all. Commission also considered excessive long duration of licensing agreements as distorting the competition. At the same time Commission noted that "minimum commitments" contained in the licensing agreements, were likewise issues, as they required licensees to pay "for a fixed minimum number of copies" of product concerned,

²⁰¹ *Ibid.*

²⁰² *Jones/ Sufrin*: EU Competition Law Text, Cases and Materials, 2016, p. 570

²⁰³ C-38/98 – Renault [1988]

²⁰⁴ Commission investigation in *Microsoft* case (1994), <http://bit.ly/2sWAIHl>

regardless of the fact whether the product was actually used or not. Microsoft Corporation accepted all recommendations of Commission, removed unfair trading conditions from licensing agreements, shortened duration of licensing agreements and removed per processor consideration clauses: in this situation Commission did not start an official procedure.²⁰⁵

Another case of unfair trading conditions and restrictive agreements was Tetra Pak II case²⁰⁶ (already discussed in this paper), where Tetra Pak abused its dominant position likewise by imposing binding conditions on buyers to get repair and maintenance services only by Tetra Pak, by limitation of use of Tetra Pak machines bought by buyers, and finally by reserving right for Tetra Pak to conduct inspection any time and impose fines for breaching of any point of the agreements.

In this regard, it is interesting to consider Duales System Deutschland v Commission case²⁰⁷, where Commission found that the mentioned German company had abused its dominant position (by IPR) by charging licensees fees for its "Green Dot" logo, which it did not actually use.

Production limitation

The last form of abuse of dominant position, which will be discussed in this paper, is production limitation, prohibition of which is stipulated by Article 102 (b): "limiting production, markets or technical development to the prejudice of consumers". Review of EU cases in this regard shows, that in most cases, this type of abuse is conducted by public authorities. One of such cases was *Merci convenzionaliporto di Genova SpA v Siderurgica Gabrielli SpA*²⁰⁸, where Commission found that Port of Genova had abused its dominant position (statutory monopoly) by refusing to use modern technology, and in such a way raising fees and applying delays. However, this type of abuse is also possible by private undertakings. Specifically, this was an issue in *P& I Clubs, IGA and No IV/D* case (concerns marine insurance providing associations)²⁰⁹, where Commission found no violation of Article 86 (102), however provided a test when it will consider limitation of production as violation. It noted that it will investigate the cases when

²⁰⁵ *Ibid.*

²⁰⁶ C-333/94 P, *Tetra Pak International SA v Commission of the European Communities*, [1996]

²⁰⁷ C-385/07 P, *Der GrünePunkt - Duales System Deutschland GmbH v Commission* case [2009]

²⁰⁸ Case C-179/90, *Merci convenzionaliporto di Genova SpA v Siderurgica Gabrielli SpA*. Case [1991]

²⁰⁹ Cases No IV/D-1/30.373, *P& I Clubs, IGA and No IV/D* case [1999]

there are "uncontroversial and clear evidences that a very substantial share of the demand is being deprived of a service that it manifestly needs".²¹⁰

Abuse of dominant position in collective dominance cases

Collective dominance can be determined not only for one or more independent undertakings tied by economic links, but for a single undertaking (group of persons being considered as one undertaking), too. There are few cases on this regard, as collective dominance is connected with cartels, with Article 101 generally, and is discussed in that context; it is important for EU merger regulation purposes and thus is discussed in that context, too. Similar to single dominance, collective dominance is not a violation: violation is the abuse of collective dominant position. Though cases on abuse of collective dominant position are few, this paper will discuss several important of them.

One of such cases was *Compagnie Maritime Belge Transports SA v Commission*.²¹¹ This company formed membership with its competitor companies and via cooperation agreement aimed to oust their independent competitor from the relevant market by selective price cuts. Commission found that the companies had a collective dominant position, and had abused their position (this companies had meanwhile violated Article 101, which concerns anti-competitive agreements and cartels). *Compagnie Maritime Belge Transports SA* appealed, but EU courts upheld the decision of Commission. CJEU stated that abuse of dominant position by collective dominance determination involves the following stages: (1) existence of collective undertakings should be established; (2) dominant position of collective undertakings in the relevant market should be defined; (3) abuse of dominant position should be established. The Court also added that existence of collective dominant position should be defined by consideration of economic links or other factors that create connection between these undertakings and by the analysis of the market concerned, and in cases when tacit collusion exist, dominant position can be established without analysis of other factors. Id. In *Atlantic Container Lines AB and other v Commission* case²¹² Atlantic Container Lines AB and other 15 shipping companies abused their collective dominant position in relevant market by concluding an agreement to provide transatlantic liner services between USA and Northern Europe and by concentrating their

²¹⁰ *Ibid.* para 128

²¹¹ C-395/96 P - *Compagnie Maritime Belge Transports and Others v Commission* [2000]

²¹² T-191/98 - *Atlantic Container Line and Others v Commission* [2003]

activities. Specifically, these companies abused collective dominant position by (1) making arrangements on placing restrictions on the content and availability of services contracts; and (2) by altering competition in the relevant market and strengthening their dominant position by making new competitors become member of their collusion. EU General Court upheld Commission's decision in the first part, but in the 2nd violation part considered that the facts provided by Commission, were not sufficient to prove the violation on the second part.

It is worth stating that economic entities can have collective dominant position being connected vertically. An example of such dominance was reflected in *Irish Sugar plc. v Commission* case²¹³, where Irish Sugar, sugar beet producing company, together with Sugar Distributors Ltd- the distributor of its products (where Irish Sugar has 51% shares), abused dominant position in the relevant market by applying discriminatory/selective pricing policy and ousted the competitors from secondary market.

In this regard, it should be stated that the Guidance Paper contains no reference to collective dominance; it only concerns abuse of dominance by a single undertaking.

Thus, to conclude the part on the abuse of collective dominance, it can be considered as a developing form of abuse of dominant position.

Responsibility for violation of Article 102

Under European Union competition law, Commission imposes fines for violation of Article 102²¹⁴. The starting point for calculation of the fine is up to 30% of the undertaking's annual sale of the product concerned, then this number is multiplied by the number of months and years the infringement continued. Repetition of offense or other attenuating circumstances may result in decrease or increase of the fine. The maximum amount of fine for cartels can reach up to 10% of the overall annual turnover of offender economic entity.²¹⁵

In case of violation of Article 102, Commission is also entitled to impose structural or behavioral remedies or interim measures.²¹⁶ Structural remedy includes the competence of Commission to break up (disaggregate) those dominant undertakings into several or many small

²¹³ *Ezrachi*: EU Competition Law, an Analytical Guide to the Leading Cases, 2016, pp. 322-323

²¹⁴ More information on Commission competences, investigation and decision-making procedure can be found in "Rules Applicable to Antitrust Enforcement – General Rule" Guidance provided by Commission, available at <http://bit.ly/2sMqvP7>

²¹⁵ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, (2006/C 210/02), <http://bit.ly/2tcJvYs>

²¹⁶ Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty <http://bit.ly/2rSNqFp>

undertakings, which for a long time had abused dominant position, and when there is a risk of *“lasting and repeated infringement that derives from the very structure”* of the economic entity keeping the principle of proportionality²¹⁷.

Behavioral remedy includes ordering an economic entity to stop violation, ordering not to violate law in the future or ordering specific binding commitments: sometimes it is much more important and effective than applying high amount of fine on economic entity.

In this regard, it should be noted that EU competition law considers administrative liability for violation of EU competition law rules, and a court procedure for getting the remedy for the damage caused.

CONCLUSION

In conclusion, this study is devoted to the research and analysis of one of the fundamental directions of competition law - prohibition of abuse of dominant position, the aim of which is prevention of distortion of competition in markets by stipulated activities of dominant undertakings.

To accomplish the goal of this study, the study analyzed legal basis and procedures for prohibition of abuse of dominance and responsibilities for the abuse under Armenian, Georgian and EU competition laws, as well as application of those legal norms in case law.

The study allows us to make the following conclusions:

Establishment of abuse of dominant position in Georgia, Armenia and EU includes the sequence of the following activities: (1) determination of the relevant market; (2) definition of dominant position of the undertaking concerned; (3) finding out whether conduct(s) of the dominant undertaking concerned constitutes a conduct(s) stipulated as an abuse by law.

Besides, under Armenian and EU legislations, determination of the relevant market includes determination of relevant product market and relevant geographic market. At the same time, Georgian competition law considers determination of relevant market by consideration of 3 cumulative parameters: (1) product market; (2) geographic market; and (3) time frame (particular period) of product/service market. Consideration of the latter as relevant market

²¹⁷ Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, <http://bit.ly/2rSNqFp>

definition criteria is suggested in academic literature²¹⁸, too, where authors, suggest consideration of possibility of temporal markets as independent criteria for specific fields (such as transportations field) and in conjunction with supply or demand substitutability. It is worth to note that even though generally, consideration of market time period is considered to be appropriate, consideration of this parameter cumulatively with other parameters (product and geographic markets) may create difficulties for Georgian competition authority in determination of the relevant market, since the timing factor is not relevant for all kinds of markets, rather only for specific markets, where timing can have an impact on substitutability on the demand side (for example, time for public transportation during working days, etc.).

It should also be stated that EU has applied wider approach for determination of the relevant product market by consideration of supply substitutability (concerned with the ability of product users to switch to a substitute product), demand substitutability (the ability of similar product producers to produce the product), in potential competition. At the same time, Georgian competition law has applied the approach of determination of the relevant product market by consideration of supply substitutability and demand substitutability. On the other hand, Armenian competition law considers only demand side substitutability and classification methods, which sufficiently restrict possibilities and flexibility of Armenian competition authority to protect competition in those markets, which are too small or which are too big and cannot be defined by consideration of demand substitutability. However, it should be stated that Armenian competition authority also defines relevant market by consideration of classification method, which in its turn enables to define such markets, which are difficult to define by consideration of supply substitutability, demand substitutability or potential competition.

General criteria for determination of abuse of dominant position provided under the discussed three legislations, however, differ a little bit from each other and at the same time contain general similarities. Specifically, EU competition law stipulates determination of the dominant position by consideration of market power of the dominant undertaking concerned, where market power components include: the market position of the dominant undertaking and its competitors, constraints imposed by the existing suppliers, constraints to actual and future expansion and entry to the relevant market, countervailing buyer power (constraints

²¹⁸ *Jones/ Sufrin*: EU Competition Law Text, Cases and Materials, 2016, pp. 375-376; *Lorenz*: An Introduction to EU Competition Law, 2013, p. 274; *Frenz*: Handbook of EU Competition Law, 2015, p. 685; *Dabbah*: EC and UK Competition Law, Commentary, Cases and Materials, 2004, pp. 73-74; *Kaczorowska*: European Union Law, 2013, p. 842; *Whish/ Bailey*: Competition Law, 2015, p. 42 etc.

imposed by the bargaining strength of the undertaking's customers). In cases, when undertaking have more than 50% market share, dominant position is presumed, however when the market share is 40%, dominant position is presumed when there is also an obstacle for entry to the relevant market.

Armenian competition law, on the other hand, defines dominant position when the undertaking concerned has market power (components are the degree of centralization of relevant market, financial capacities of economic entity, and barriers to entry or other factors preventing entry to that market, stability of the relevant market, influence of dominant economic entity on other connected markets) or when one economic entity has 1/3 market share or when two economic entities together have 1/2 of market share or when three economic entities together have 2/3 market share. Armenian competition law sets separate criteria for definition of dominance of trading networks, specifically stating that *trade* network shall be considered as having dominant position if it is a cluster of four or more trading entities. It should be stated that this approach is discriminatory towards trading networks; however, considering peculiarities of trading networks and difficulties in establishing their dominance, the criterion to be considered can be the evidence of market power for trade networks and included in the list of criteria for market power.

Georgian competition law undertaking/undertakings shall not be deemed to hold dominant position if their share of the relevant market does not exceed 40%. Each out of two or more undertakings shall be considered to be in a dominant position if it does not encounter any significant competition from other undertakings, taking into account the limited access to their raw materials and the sales markets, market entry barriers and other factors, and at the same time the joint market share of not more than 3 undertakings exceeds 50% , and, at the same time, the market share of each of them is at least 15% ; the joint market share of not more than 5 undertakings holding the most significant market share exceeds 80 % , and, at the same time, the market share of each of them is at least 15%. Under Georgian competition legislation dominant position is also defined by consideration of financial status of competing undertakings, barriers to market entry or to production expansion, buyer market power, availability of raw material sources, degree of vertical integration, network effects and other factors determining market power. Thus, it should be noted, that Georgian competition law differs from other regulations as it considers the possibility of dominance of 5 undertakings. However, consideration of market share alone for such dominance is not enough: market share

consideration should be in conjunction with consideration of other factors certifying abuse of dominance, including market entry restrictions.

EU law defines dominant position by consideration of market power, however Armenian and Georgian competition laws separate market share from market power, considering them as separate methods of defining dominance. It should be stated, that EU approach is the one that is accepted by competition authorities of developed states, and is considered as the approach accepted in academic literature and science, too, as all the mentioned above components of market power, including market shares, give an undertaking power in that market, and it, thus, becomes dominant.

The next step after definition of dominant position under the discussed competition laws is establishment of whether conducts of the dominant undertaking(s) constitute an abuse. In this regard, forms of abuse of dominant position, provided under EU, Armenian and Georgian competition laws, have many general similarities: Armenian competition law considers all the forms of abuses provided by EU competition law (both by Article 102 and through development of case law), except for abuses by IPR and through regulatory procedures. At the same time, Armenian competition law considers abuses via forcing other undertakings to restructure, liquidate or break economic relations, which in such form is not envisioned by EU law. While Armenian competition law is much concentrated on pricing abuses, such as considering unjustified high pricing as an abuse, EU competition law considers it as an abuse only if it is combined with barriers for entry to the relevant market. As for Georgia, it should be stated that Georgian competition law has incorporated manifestation forms of dominance abuse provided by Article 102 TFEU. However, Georgian Law does not prohibit the other and very important forms of abuse (margin squeeze, developed form of discriminatory pricing, refusal to supply, discounts and rebates, abuses by IPR and regulatory procedures, etc.), which are considered as abuse of dominant position through development of EU case law. Though Article 6 of the Law of Georgia On Competition states "etc." after listing the abusive conducts, it does not close the gap, as it is not correct to use reference to "etc." in a legal act, especially in the one which regulates restriction of freedom of undertakings to conduct their business as they want; the use of "etc." violates principle of legal certainty which is a necessary precondition for the legality of a legal act.

The final step after establishment of dominant position is discussion of measures of liability for the abuse of dominance. In this regard, it should be noted Armenian, Georgian and EU competition laws consider administrative liability for abuse of dominant position. Article 195 of

Criminal Code of Republic of Armenia also considers criminal liability (criminal fine and imprisonment) for dominance abuse, specifically for increase, decrease and maintenance of illegal high or low monopoly price. In this regard, both EU and Armenian competition authorities have the competence to decide on breaking up/disaggregation into small undertakings of those concerned dominant undertakings which have abused their position specified amount of times; however Georgian competition authority does not have such authority: it can only raise the issue of the forced division of the dominant undertaking with the relevant authorities.

Thus, considering the analysis provided in this study, and conclusions made above, it should be noted that generally, the criteria for determination of the relevant market, dominant position and abusive practices overlap, however, the methodology used for the application of the mentioned criteria differ a bit. In any case, an assumption can be made that legal mechanisms and application of those mechanisms for prohibition of abuse of dominant position have universal character in the discussed legislations.

Taking into account the fact that this study has revealed several gaps and issues both in Armenian and Georgian completion law and practice, the following improvements are suggested by this study:

For Armenia

- ✓ Make amendments and supplements to Article 4 of the Law and consider supply side substitutability and potential competition as criteria for relevant product market determination together with demand side substitutability;
- ✓ Amend and make changes to Article 6 of the Law, considering market power as the only criteria for defining dominant position, while considering market shares criteria and trading networks criteria as components of the market power;
- ✓ Amend and supplement Decision 190-N by considering methodology used by EU for determination of the relevant market;
- ✓ Amend and supplement Decision 194-N, and considering EU best practices discussed in this study, enlarge market power criteria and develop detailed methodology for assessment of market power;
- ✓ Amend and supplement Article 7 of the Law, considering misuse of IPR or other regulatory procedures as another type of prohibited abusive conduct and thus as an abuse of dominant position.

For Georgia

- ✓ Amend and supplement Article 6 of the Law of Georgia On Competition, by excluding "etc." word from point "d" of part 2 of Article 6 and by enlarging forms of manifestation of abuse of dominant position considering EU best practices discussed in this study; particularly by considering those forms which are a result of the development of EU case law (other than provided in Article 102);
- ✓ Adopt separate methodological legal acts for determination of the relevant market and for definition of the relevant market in order to ensure comprehensiveness, clarity and certainty by using EU best practices discussed in this study;
- ✓ Amend Methodological guidelines of market analysis, specifically, Article 5 of the Order N30/09-3, adding "or/and" after "b" criteria: this will enable to consider time frames only in cases, when it is necessary for determination of the relevant market;
- ✓ Presently Methodological guidelines are framed considering US and EU practices; however EU competition law and US antitrust law differ from each other in many respects; EU competition law is better applied by methodology used by EU, therefore, this study suggests to change Methodological guidelines and make them compatible mostly with EU competition law: this will provide great flexibility for finding the cases of abuse of dominance, as prohibited conducts under Georgian Law are the ones that are suggested by EU Article 102;
- ✓ In cases of definition of dominance of 5 undertakings, the market share should be considered together with the restriction to entry to the relevant market;
- ✓ Conduct more investigation and market studies by initiative of Georgian Competition Agency.

This paper presented an analytical comprehensive study, which can be an useful document for Armenian and Georgian competition authorities for improving competition law and practices both in Armenia and Georgia, and for the approximation of competition rules to EU competition law.

Furthermore, this paper can have a huge contribution to the developing competition law in Georgia and Armenia. Finally, this study is a guideline for Armenian and Georgian lawyers to assist their clients in the neighbouring country, and a guidance for everyone to have an understanding about competition law.

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