DOMINANT MARKET POSITIONS AND ABUSES OF DOMINANCE

ENSURING THE BENEFITS OF FAIR COMPETITION

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DOMINANT MARKET POSITIONS AND ABUSES OF DOMINANCE

What is a dominant position?

Under the Law on the Protection of Competition (as amended)[1], an enterprise has a dominant market position if, in relation to the supply or purchase of specific goods or services, it is not subject to fair competition on the market and it has significant power in the market compared to its existing or potential competitors[2]. This is sometimes known as a "*monopoly*" or near-monopoly position. In such circumstances, the key concern in the Law is to ensure that an enterprise with a dominant market position behaves with a high standard of fairness in regard to its competitors and customers (i.e. it does not abuse its dominant market position).

Under the Law, there is a presumption of a dominant market position when one enterprise has more than a 25% share of a particular market in Kosovo. Moreover, two or more independent enterprises may be in a dominant position (joint-dominance) if, they operate jointly on a particular market in Kosovo and if together they have more than a 40% share of that market.

To establish the dominant market position of one or several enterprises, the Kosovo Competition Authority (KCA) normally has regard to several considerations in specific cases, including:

- Its (or their) share of a particular market in Kosovo;
- The sustained nature of a high market share;
- The financial power of the enterprise/s;
- Its (or their) supply and market activities;
- Its (or their) connections with other enterprises;
- Barriers to entry (legal or otherwise) into the particular market in Kosovo;
- Actual or potential competition with enterprises established inside or outside Kosovo.

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[1] Law on the Protection of Competition (No.03/L-220) of 2010 as amended by the Law amending and supplementing the Law on the Protection of Competition (No.04/L-226) of 2014.

[2] Law on the Protection of Competition (as amended), Article 10.1.

While this involves a case by case market analysis, it is nonetheless very clear that dominance requires that a dominant enterprise has the ability to act to an appreciable extent independently of its customers, suppliers and competitors. This means that the enterprise has the capacity to increase its profits by increasing its prices substantially and sustainably.

In addition, an enterprise or enterprises can refute the presumption of a dominant market position (even with market shares of a particular market in excess of 25% or 40%) if they can disprove market dominance on the basis of the above considerations.

Joint dominance

Under the Law on the Protection of Competition, two or more independent enterprises may be in a dominant position (joint-dominance) if, they operate jointly on a particular market in Kosovo and if together they have more than a 40% share of that market.

In respect of joint dominance, it has been observed 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-a-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 licences, a technological lead affording them the power to behave to an appreciable extent independently of their competitors, their customers and ultimately of their consumers."*[3]

[3] European Court of Justice in Case 85/76 Hoffmann-La Roche v Commission and the Court of First Instance in Case T-68/89 Italian Flat Glass, para. 358

For joint dominance to exist, two or more enterprises must, from an economic point of view, present themselves or act together in some manner on a particular market as a collective entity. This can happen in what is known as *oligopoly* market conditions. It is not necessary that the enterprises concerned adopt identical conduct on the market in every respect. What matters is that they are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers. For practical purposes, in order to establish the existence of such a collective entity on the market, it is necessary to examine the factors that give rise to a connection between the enterprises concerned. Such factors may flow from the nature and terms of an agreement between the enterprises or from the way in which it is implemented, provided that the agreement leads those enterprises to present themselves or act together as a collective entity. This may, for instance, be the case if enterprises have concluded cooperation agreements that lead them to coordinate their conduct on the market. It may also be the case if ownership interests and other links in law lead the enterprises concerned to co-ordinate their commercial activities.

At the same time, the existence of an agreement or of other links in law is not indispensable to a finding of a joint dominant position. This may be based on other connecting factors and depends on an economic assessment and, in particular, on an assessment of the structure of the market in question.

Although enterprises in oligopolistic markets may sometimes be able to raise prices substantially above the competitive level without having recourse to any explicit agreement or concerted practice, coordination is more likely to emerge in markets where it is relatively simple to reach a common understanding through coordination. The simpler and more stable the economic environment, the easier it is for undertakings to reach a common understanding. Indeed, they may be able to coordinate their behaviour on the market by simply observing and reacting to each other's behaviour. In some markets, the most likely coordination

may involve directly coordinating on prices in order to keep them above the competitive level. In other markets, coordination may aim at limiting production or the amount of new capacity brought to the market. Enterprises may also coordinate by dividing the market, for instance by geographic area or other customer characteristics, or by allocating contracts between themselves in bidding markets. The ability to arrive at and sustain such co-ordination depends on a number of factors, the presence of which is carefully examined in each case:

- Each undertaking must be able to monitor whether or not the other enterprises are adhering to the common policy. It is not sufficient for each enterprise to be aware that inter-dependent market conduct is profitable for all of them, because each enterprise will be tempted to increase its share of the market by deviating from the common strategy. There must, therefore, be sufficient market transparency for all undertakings concerned to be aware, sufficiently precisely and quickly, of the market conduct of the others.
- The implementation of the common policy must be sustainable over time, which presupposes the existence of sufficient deterrent mechanisms, which are sufficiently severe to convince all the enterprises concerned that it is in their best interest to adhere to the common policy.
- It must be established that competitive constraints do not jeopardise the implementation of the common strategy. As in the case of single dominance, it must be analysed what is the market position and strength of rivals that do not form part of the collective entity, what is the market position and strength of buyers and what is the potential for new entry as indicated by the extent of barriers to market entry.

What is meant by "in a particular market"?

In competition law, market power is assessed on the basis of commercial activity in a "relevant market". This means a market for certain products in a certain geographic territory. In other words, the relevant market is a combination of the relevant *product market* and the relevant *geographic market*. The relevant product market is the market for all goods and/or services which are regarded as interchangeable or substitutable by the consumer based upon the products' characteristics, their prices and their intended use. In turn, the relevant geographic market constitutes the area in which the undertakings concerned are involved in the supply of and demand for products or services in which the conditions of competition are sufficiently homogeneous and may be distinguished from neighbouring areas because the competition conditions are significantly different in those areas[4].

For example:

(i) The rental market for farm machinery in a particular locality may constitute a relevant market due to the cost of transporting rented machinery from another locality. A single renter of such machinery in one locality may, therefore, have a significant dominant position in that product and geographic market.

(ii) A single theatre may hold a dominant position if it can charge any ticket price it chooses without a significant reduction in demand for tickets.

(iii) Two beer suppliers may hold a position of joint dominance if they agree to each supply only certain regions of the country.

[4] See also Administrative Instruction No. 02/2011 (Relevant Market) related to the mode and criteria for concluding the relevant market, which partially transposes the European Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ/C 372 of 9 December 1997).

Because enterprises can be involved, in practice, in several markets (supplying different products or services) and concentrate their commercial activity at national, regional or local levels, the concept of market dominance needs to be assessed in regard to an exactly specified "relevant market".

Abuses of dominant positions in a particular market

The existence of dominant position of one or more enterprises in a particular market is perfectly legal in Kosovo. However, if that market power is abused, strong sanctions can be imposed by the KCA. As noted above, this is to ensure a high standard of behaviour by dominant enterprises so that fair competition is not disturbed and consumers are not harmed by the strong market power of certain enterprises.

Market abuses by dominant enterprises can take many forms. These include (but are not limited to) the following behaviours set out in the Law on the Protection of Competition:

- The direct or indirect setting of unfair purchase or sale prices or other unfair trading conditions;
- The limitation of production, markets or technological development to the prejudice of consumers;
- The imposition of discriminatory conditions on other enterprises thereby placing them in a disadvantageous competitive position;
- Agreeing contracts on the condition that the other contracting party or parties accept additional obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;
- Setting prices or other conditions, the objective or effect of which is to prevent entry or to exclude certain competitors or one of their products from the relevant market;
- Blocking market entry by other enterprises by refusing access for a reasonable charge to the network or infrastructures of the enterprise with dominant position, if this refusal to allow use of the network or

infrastructures prevents the other enterprise to act as a competitor of the enterprise with a dominant position.

Consistent with these examples, the primary concern is market foreclosure or forcing out a competitor or blocking the market entry of new competitors. Market foreclosure results in less competition and higher prices and lower quality goods and services for consumers. Moreover, it is not necessary for there to be an intention to abuse dominance as it is the actual or potential restriction of competition that establishes an infringement of Law on the Protection of Competition.

Competition rules on abuses of dominant market positions in Kosovo derive from European Union law. The European Court of Justice has defined "abuse" in the following terms:

> *"An objective concept relating to the behaviour 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 transaction 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."*[5]

This definition implies that the conduct in question must have the capability, by its nature, to foreclose competitors from the market. To establish such capability, it is in general sufficient to investigate the form and nature of the conduct in question. Secondly, it implies that, in the specific market context, a likely market distorting foreclosure effect must be established.

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[5] Case 85/76 Hoffmann-La Roche v. European Commission.

Abuses may be both price based and non-price based. Examples of non-price based abuses are contractual tying, single branding contracts, “naked” refusals to supply and refusal of reasonable access by a competitor to essential facilities (e.g. networks or infrastructures controlled by a dominant enterprise). In these situations it is clear that some “foreclosure” takes place and that such actions can be considered to be anti-competitive.

Some specific types of abuses by dominant enterprises

Predatory pricing. While low prices are usually good for consumers, if a dominant enterprise applies prices so low that they do not cover its costs, this may lead to the elimination of competitors that are as efficient as the dominant enterprise but cannot compete on this basis. This can in turn lead to higher prices in the long term. Predatory pricing (sometimes known as *below-cost selling*) may thus constitute an abuse of a dominant position.

Single-branding agreements arise from a requirement that the distributor buys products only from the dominant enterprise and cannot obtain supplies from other sources, which are in competition with the dominant firm. In effect, this involves a dominant enterprise tying in buyers (even if at their request) via an obligation or promise on their part to obtain all or most of their requirements exclusively from the dominant enterprise.

Tie-in agreements involve the conclusion of contracts which depend on the acceptance by the other parties of supplementary obligations which, by their nature or according to the commercial usage, have no connection with the nature of such contracts. This form of anti-competitive behaviour consists in essence in the transfer of the market power of the dominant undertaking on one market (the tying product) to the market where the undertaking is entering (the tied product). By tying the products together, there are at least two negative effects:

a) Consumers do not have the choice to buy the products separately; and

b) Competitors on the market of the tied product are forced to compete with the entire market power of the dominant undertaking, which in effect generates their elimination.

Some examples of this include:

- tying one or more products with the entire range of products using across the board rebates, meaning that the rebates are available for the entire group of products only if purchased together[6].
- refusal to supply the tying product unless the customer purchases the tied product.
- annulment of the guarantee for the tying product unless the customer purchases the tied product.

Refusals to supply or threats of refusals to supply by dominant companies may constitute anti-competitive abusive behaviour by a dominant enterprise. Examples include halting supplies to punish buyers for dealing with competitors and refusing to supply buyers that do not agree to exclusive dealing or tying arrangements. Such practices are normally not aimed at excluding the buyer but rather a competitor of the dominant company. The following four conditions normally have to be fulfilled in order to find the termination of a supply relationship abusive:

- the behaviour can be properly characterised as a termination;
- the refusing undertaking is dominant;
- the refusal is likely to have a negative effect on competition; and
- the refusal is not justified objectively or by efficiencies.

Denial of essential facilities - Related situations can arise where a dominant company denies a buyer access to an input in order to exclude that buyer from participating in an economic activity (this is sometimes known as "vertical foreclosure"). Although the excluded buyer could be only a customer, typically competition

[6] Case 85/76 Hoffmann-La Roche v Commission.

problems arise when the harmed firm is also a rival to the dominant company in the economic activity for which the input is needed. This type of exclusion may cover a broad range of practices, such as the termination of an existing commercial relationship, the refusal to supply products, to provide information, to licence intellectual property rights or to grant access to an essential facility or a network. Some of the most important cases pursued by the European Commission and various national competition authorities concerning the denial of essential facilities have focussed on the telecommunications sector, where the incumbent firm had a dominant position (sometimes a monopoly) in the copper and/or cable network to connect internet or other services to clients' homes. In many of these cases, the incumbent has either simply refused access to the network or charged access prices that were higher than the retail prices that they themselves were charging (margin squeezing), in order to exclude competitors. Practices such as delaying tactics in supplying, imposing unfair trading conditions and charging such prices that it is not economically viable for the buyer to continue its activity may also, in reality, amount to a refusal to supply.

The KCA and abuses of dominant market positions

Under the Law on the Protection of Competition, the KCA may, following an investigation, take a decision finding that one or more enterprises have a dominant market position in Kosovo and have abused that market power by means of abusive activity prohibited by the Law. This refers, in particular, to the list of potential abuses considered above but may also refer to other forms of conduct. These KCA investigations can be initiated by the KCA on its own initiative or in response to complaints received from the business community or from consumers.

The KCA is empowered in such cases to order a termination of any confirmed abusive conduct and to impose fines of up to 10% of the

total turnover of the previous year of the enterprise or enterprises concerned.

In regard to proposed concentrations of enterprises which must be notified and approved under the Law, the KCA may also prohibit these if they may significantly damage competition, especially when a concentration would result in the strengthening of a current dominant position or the creation of a new dominant position.

Further information

For further information on competition policy in Kosovo, see the other brochures in the KCA series "***Ensuring the benefits of Fair Competition***" and visit our website at: https://ak.rks-gov.net/

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