

## **THE NOTION AND THE CRITERIA OF DOMINANT POSITION\***

### **DOMINANT POSITION**

Article 86 of Treaty Establishing the European Community ( TEEC ) has banned the misuse of the dominant position in common market or in an important part of it, by one or more enterprise, to the extent that it effects the trade between the member countries. It is obvious from this expression that, three basic factors are emphasizing. These are; dominant position, misuse and the affect of trade between member states.

The stabilizing of the dominant position from the matters expressed in the Article 86 is fairly important in competitive law. Being dominant in “ *common market or in it’ s important part* ” that is expressed in the article text, could only be possible with a felicious determination of the geographical market. Simultaneously, in order to determine the dominant position, the determination of the product market in which the said enterprise displays activity – the determination of product market – is also needed.

#### **I.) Definition and Factors**

Dominant position expresses – in the most general definition – the power that the enterprise has in a definite market. As to Smith and Herzog, it means *one firm’ s ownership of power to break, prevent or limit competition with it’ s unilateral behaviours*<sup>1</sup>. European Court of Justice ( ECJ ) and Commission generally define the dominant position as “ *power of preventing effective competition by behaving in an independent way from the rivals, vendors ( suppliers ) and customers*.”

As to another definition, *in order an enterprise to be accepted in the statute of dominant position, before all else; by basing on economic advantages such as market share, technical information, raw material and capital supply – convenience; without taking into consideration his rivals, buyers or suppliers, to limit the effective competition with his independent behaviours*<sup>2</sup> is needed.

The Court establishes the dominant position upon three basic factors. These crystallize as *economic power – continuity and independence*.

#### **A. Economic Power**

In order an enterprise to be in dominant position, the necessity of having a definite economic power is obvious. Together with a definite criteria could not been brought in respect to the degree of this power, a general consensus of opinion exists between lawyers. This economic power should cover the enterprise to move independent without taking into consideration of the other subjects in the market.

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<sup>1</sup> Smith, H. – Herzog, P.E., *The Law Of The Economic Community, A Commantory On The EEC Treaty*, New York, 1976, s. 253

<sup>2</sup> İktisadi Kalkınma Vakfı: *Avrupa Birliğinde İşletmelere Uygulanan Rekabet Kuralları*, İstanbul 1995, s. 73.

As to this definition, it is obvious that the said power is an economic power in qualification of monopoly power. However it is possible for an enterprise to effect the market significantly without being monopoly or removing competition in that area, to provide the market conditions consist in the direction of his wills, in another words, to manage the market<sup>3</sup>.

If an enterprise could determine the behaviours of the other enterprises effectively – even his market share is relatively small – the commission tends to accept that enterprise is in the dominant position<sup>4</sup>. In such a case the economic power that article 86 requires is an economic power in the qualification that provides the reach of an enterprise to the bans of article 85 with his unilateral behaviours.

## **B. Continuity**

Even an enterprise is master of the market alone; as long as new entries to the market are possible, this temporary monopoly situation does not show the existence of the dominant position. Namely, very short term dominant position does not been evaluated in the scope of article 86. However a clarification about how this term should be has not been provided. But this term should at least be a term that will cover the enterprise to fix the market share of him.

## **C. Independence**

As to the decisions of ECJ and Commission, in order an enterprise to be in dominant position, he should be in a position of independence movement from his rivals, customers and suppliers. This position gives the enterprise the ability to determine the prices, control the production or allocation in an important part of the relevant market, by combining the other superiorities such as Market share, Know – How, convenience of raw material obtaining, capital and brand ownership<sup>5</sup>.

A point that independence is important is relation of controlling – subsidiary enterprise. If the enterprise that realizes the misuse behaviours, has been taking the power to realize these behaviours from the connected controlling enterprise, the enterprise that will be investigating if it is in dominant position or not, is the controlling enterprise. The important thing is not the independence of the subsidiary enterprise, it is whom does he take the economic power to realize the misuse actions.

## **II.) Dominant Position Types**

When special structure of each market combines with it' s economic specialties, different dominance types occur. Anyway in consideration of this, in article 86 of TEEC, the dominant positions of one or more enterprises have been mentioned. It is possible to analyze the dominant position types upon four types as certain and partial monopoly and again certain and partial oligopoly.

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<sup>3</sup> Tekinalp, Ünal, *AET Rekabet Hukukunda Piyasaya Egemen İşletme Kavramı ( II )*, İktisat-Maliye 1980, C. XXVI, S. 12, s. 496.

<sup>4</sup> Aslan, İbrahim Y., *AT Rekabet Hukuku*, Ankara 1992, s. 188

<sup>5</sup> Ibid

Certain monopoly could be defined as a market form that in the market of a product, total offer is met by a single enterprise. It is obvious that an enterprise in monopoly position would be dominant.

Because of such enterprise could determine the market price by determining production amounts, in order to maximize his profit, he could control the market in a definite production cost, just by taking the price flexibility of the claim into consideration.

In case of in a product market, one of the firms which join production is much bigger against the other firms, it is possible for the other small firms to avoid competition with the big firm and to adopt the conditions which have been determined by the big firm. In such a case, despite there are many firms in the market, actually a partial monopoly position is said.

The price tactic of any firm that shows activity in oligopolystic market, effects the market share of the others. In such markets, rivals are few and equal power. In this consideration, they know that from the behaviours which they will realize to increase their market share gives damage to themselves too. So in these type markets, naturally, without an agreement between, parallel behaviours start.

If the market share of the few big enterprise which shows activity in the market, is high against the other enterprises, the other small enterprises might have to behave compatible with the big enterprises which constitutes an oligopoly between each other. In such a case it could be mentioned that dominance form of a partial oligopoly market that is effective and gets close to the oligopolystic market conditions is validity.

The Commission in the Hoffman – La Roche<sup>6</sup> decision did not accept together dominant position despite the partial oligopoly situation in vitamin A market. ECJ used the expression of “ *despite the relevant market – in accordance with it’ s qualification - carries specialties those are specific for oligopolystic market that the competition is weak, the market share of Roche that is equal to the market share of his other two big rivals, is big enough to determine completely independently the attitude that he will take when he will face competition,*” against these market specialties. Namely, with accepting there is partial market the Court accepted; he accepted that Roche is in distinguished position with it’ s market share and has independent movement power and in consideration of that, he is single dominant.

Another sample the Commission determinates together dominance position is in the sector of petrol. The Commission analyzed the behaviours of the petrol companies for the process that is from October 1973 until March 1974 and submitted that as a report<sup>7</sup> to European Parliamentary.

## **DETERMINATION OF THE DOMINANT POSITION**

Before determining the dominant position, it is important that in which market the dominance position’ s existence will be investigated. The answer of this question will be given with the relevant market determination. The concept of relevant market should be analyzed in itself in two main parts; relevant product market and geographical market.

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<sup>6</sup> Commission Decision on Hoffmann-La Roche ( Vitamins ), OJ. No L. 223, 16.08.1976, p. 27.

<sup>7</sup> Report by the Commission on the Behavior of the Oil Companies During the Period from October 1973 to March 1974, Commission Document, Com/75/675 of 10.12.1975

## I.) Relevant Market

In article 86 of TEEC the expression of “ in common market or in an important part of it ” has been used instead of the term relevant market. What is understood from here is it is needed to *have the dominant position in common market or in an important part of it ( the question of where is it dominant [ = geographical market ] comes up. )*

Another question that should be asked when the relevant market is determined is the one upon what is it dominant. The answer of this question will take the analysts to relevant product market.

### A. Relevant Product Market

It generally shows the activity subject of the enterprise, namely, in which goods and service market he works. In other words, it determines for that enterprise, which product or service market is “ market ”.

Relevant product market is a product that consists of a definite product and the other products which have high replacement with it. However, theoretically the replacement of one product to another product is not enough for two products to be included to the same market.

Commission and the Court uses the criteria of “ replacement ” while determining the product market. For example in Hugin V. Commission Case<sup>8</sup> “ In the event Hugin is in dominant position and the relevant market is the spare part market of the Hugin brand cash register. Because, the broken parts of Hugin brand cash registers could not be changed with another brand’ s cash register spare parts. In case of trying producing of these spare parts, when the obligation that it will bring is considered, it will be seen that, it is impossible. Under these conditions, Hugin is in monopoly position in EU market and it is undiscussable that he is in dominant position<sup>9</sup>.

As it seen, in Hugin decision, the Court used the criteria of replacement. One of the decisions the Court made the most detailed across claim flexibility and replacement product investigation, is *United Brands V. Commission Case*<sup>10</sup>.

ECJ and Commission used the criteria of production ( offer ) replacement together with exhaustion criteria. One of the decisions he gave by using production replacement criteria belongs to *Commercial Solvents V. Commission Case*<sup>11</sup>.

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<sup>8</sup> Hugin Kassaregister AB and Hugin Cash Register Ltd. V. Commission, C. 22/78, 31.05.1979, E.C.R. [ 1979 ], p. 1869

<sup>9</sup> Gijlstra, D.J. – Murphy, D.F., *Leading Cases and Materials on the Competition Law of the EEC*, Third Edition, Denver-Netherland, 1985, s. 234

<sup>10</sup> United Brands V. Commission, C. 22/76, 14.02.1978, E.C.R. [ 1978 ], p. 207

<sup>11</sup> Commercial Solvents V. Commission, C. 6-7/73, 06.03.1974, E.C.R. [ 1974 ], p. 223

## **B. Geographical Market**

The areas that included geographical market should have homogenous competitive requirements. The ascertainment of the geographical market depends on some factors like; national boundary of a specific goods, carriage costs, the scope and the efficiency of the distribution system, consumer preferences, even traditional habits and palate of the customer. Also, the products - that comes from out - entering the homogenous competition area without any obscuring and the potential competition opportunities must be analyzed. For example, ECJ counted only 6 ( six ) member states to the geographical market when determining the geographical market on the *United Brands V. Commission Case*<sup>12</sup>. The ECJ - that adopted the Commission's verdict which was determined by the Commission after a study - determined Germany – Denmark – Ireland – Holland – Belgium and Luxembourg as geographical market.

According to the application of the Article 86 of TEEC , also the one of the member states might constitute geographical market. For example, the geographical market that is dominant position of Michelin is territory of Holland in *Michelin V. Commission Case*<sup>13</sup>. Again, in the *General Motors V. Commission Case*<sup>14</sup>; the geographical market is determined as only Belgium. Moreover, Commission and ECJ took a further step and determined the specific part of territory of a member state as geographical market<sup>15</sup>.

## **II-) The Criteria That Will Be Analyzed On Determination of the Dominant Position**

### **A. Market Share**

It is not possible to say certain numbers about the acceptance as dominant position in how much it' s market share will be and how much point will be between him and his rivals. So, there are no fixed percentage values that are adopted Commission and the ECJ.

Some legislation determined itself that how much market share is required for dominant position. English Monopolies and Limiting Applications Code dated 1948 accepted that being dominated in  $\frac{1}{3}$  of the market share is sufficient for the dominant position. On the other hand, article 84 of The Code of Inspection of the Agreements Limiting Prices, Profits and Competition, had accepted the ratio of  $\frac{1}{4}$  sufficient for the same subject.

### **B. Vertical Integrity**

Vertical integrity could compose a threat for both existing rivals and potential market entry barriers. Because an enterprise that has vertical integrity will not be in commercial activity in the milestones from the taken of the product as raw material until it is submitted to the market. This situation will complicate the entry of the potential rivals - which try to enter the market of the product – to the market.

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<sup>12</sup> United Brands V. Commission, C. 22/76, 14.02.1978, E.C.R. [ 1978 ], p. 207

<sup>13</sup> Nederlandse Banden-Industrie Michelin NV V. Commission, C. 322/81, 09.11.1983, E.C.R. [ 1983 ], p. 3461

<sup>14</sup> General Motors V. Commission, C. 26/75, 13.11.1975, E.C.R. [ 1975 ], p. 1367

<sup>15</sup> Hugin Kassaregister AB and Hugin Cash Register Ltd. V. Commission, C. 22/78, 31.05.1979, E.C.R. [ 1979 ], p. 1869..... Divan bu kararında, ilgili coğrafi pazarı sadece Londra sınırları olarak belirlemiştir.

For example in United Brand V. Commission Case, the Court did not accept the % 40–45 market share of United Brands is sufficient in order to determine that he is in dominant position, he also needed to analyze vertical integrity of United Brands.

### **C. Technological Superiority**

As in the clause of completion of vertical integrity, technological superiority has also a kind of qualification that prevents the potential market entries.

The criteria of technological superiority and being ensured the vertical integrity are generally confused with each other. In fact the reason of being accepted either criterion as a criterion of dominant position is that they make market entries difficult. However it has to be said that, all of the enterprises which have technological superiority, do not mean that they have ensured vertical integrity.

### **D. Performance and Idle Capacity**

In possible conditions to have been made the hostile act by the dominant enterprise, such acts of the enterprise would be qualified as a criterion of the dominant position. This theory grounds on a prejudgment which is, the acts could be considered as misuse would be realized by only an enterprise that holds an important market power.

### **E. Financial Power**

The capital stock, equity capital and the other financial resources of an enterprise, especially to hold a convenience of access to the financial markets like loanable and capital markets, gives him a liberty to make a decision and to behave easily.

For example ECJ has considered the liaising of an enterprise to the capital markets as one of the factors to have dominant position in *Continental Can V. Commission Case*<sup>16</sup>.

### **F. The Properties Related to the Product**

The dominant enterprise would have some advantages related to the products that have been produced by him. For example, producing more species than his competitors, the need for a product by consumers or interagents, etc... is ensuring advantages to the related enterprise for dominant position.

If the product differentiation has been made artificially by reason of advertisements, do not ground on a real quality difference, it could be accepted as a barrier to entry. However, the product differentiation that grounds on quality difference does not constitute a barrier to entry.

### **G. The Properties Related to Sale and Discount System**

This criterion includes the production, transport of goods, sale and skills to organize the after sales services, management experience and aggregation in marketing technique and in a technical expression “*promotion*” of an enterprise.

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<sup>16</sup> Europemballage and Continental Can V. Commission, C. 6/72, 21.02.1973, E.C.R. [ 1973 ], p. 215

Providing the preference by the customers in any subject or momentum of sales of an enterprise – which means administrating the action – are considered as a criteria of dominant position by Commission. Just as Commission adopted this administrative action as a proof of behaving independently and making decision by ignoring his competitors and customers in *Eurofix-Bauco and Hilt Decision*<sup>17</sup>. ECJ deemed this decision fit and proper and approved.

Finally this should be emphasized, price concession – which means to sell the same product to some buyers with low price and to some buyers with high price without any reasonable and probable causes – is a result of a marketing technique and it could be counted only with the other criteria.

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<sup>17</sup> Commission Decision on Eurofix-Buco and Hilt, OJ. No L. 65, 22.12.1988, p. 19.