

THE ABUSE OF DOMINANT POSITION - RESTRICTING COMPETITION PRACTICE. CASE STUDY: ENI

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Abstract: *The abuse of dominant position along with cartel, merger and state aid are practices restricting competition strictly regulated at EU level. These practices can have a disastrous effect on the internal market harming both competition especially consumers. These practices can have a disastrous effect on the domestic market harming both competition and especially consumers. This paper aims to analyze how the abuse of a dominant position is regulated in the European Union. The research methodology used is the study of literature, analysis of legislation, case study, and the collection and interpretation of statistical data. The Competition Law at European level is harmonized among European Union member states. The competition authorities of the EU Member States work together to detect and sanction the practice that is restrictive for competition. Improving legislation that regulates the abuse of dominant position has been an ongoing concern of competition authorities, which is why the EU currently enjoys a very well established procedure. The procedure governing the abuse of dominant position consists of a series of steps that must be taken gradually to have the desired result, i.e. restoring fair competition on a given market. The case study presented in this paper is indicative and shows very clearly the next steps for referral to an abuse of dominant position, with special reference to the outcome arising when applying the procedure correctly. The analysis of statistical data regarding the number of investigations opened and the number of decisions made by competition authorities on abuse of dominant position is relevant, outlining the evolution of the work performed by competition authorities. Throughout the period of ten years analyzed (January 2004 - February 2013) there were 1583 cases of violation of antitrust laws at European level. The percentage of investigations opened by the competition authorities of the Member States is 86%, much higher than the number of investigations opened by the European Commission (14%). Both the activity of the competition authorities and especially the importance of competition policy as well as the guardian position for consumer protection assumed by the Competition Council in each Member State of the European Union have to be underlined.*

Keywords: *abuse of dominant position; competition policy; European legislation; procedure; case study*

JEL classification: K21; L41

1. Regulations on abuse of a dominant position

The abuse of dominant position was regulated at EU level by Article 82 of the *EC Treaty*, being currently replaced by Article 102 of the *Treaty on the Functioning of the European Union*. In Romania the abuse of dominant position is regulated by Article 6 of Law No. 21 of 2006. The Competition Law in Romania is harmonized with the European legislation.

The competition policy is closely monitored at EU level as anticompetitive practices can have a devastating effect on the domestic market. The dominant position of a company is not prohibited, but the abuse of a dominant position is considered illegal. Article 102 of the *Treaty on the Functioning of the European Union* prohibits the abuse of a dominant position on a market by one or more companies. According to present legislation, abuse of dominant position concerns: the price fixing, limiting production and marketing of products as well as limiting technical progress at the expense of consumers; imposing dissimilar conditions to equivalent transactions among trading partners, conditioning the conclusion of contracts by the existence of some additional benefits (Consolidated versions of the Treaty on the Functioning of the European Union, 2010).

The company or companies that are in a dominant position have a responsibility not to distort competition. If only one company is on a dominant position, we have to do with a unique dominant position, whereas if more undertakings are dominant we talk of collective dominance. Competition authorities consider it necessary to intervene when a company commits an abuse of a dominant position because it not only protects consumers but also competitors. At European level the abuse of a dominant position is defined as the situation where an enterprise has that much economic power that can act independently of both competitors, trading partners, and especially of consumers.

The analysis of the relevant market plays an important role for antitrust practices. Competition authorities are extremely thorough when settling both the relevant product market and the relevant geographic market. In order to clearly define the relevant geographic market from the relevant product market, the competition authorities have to collect a series of information. This information can be already in the possession of authorities or they may be required to companies. Based on the information gathered and applying tests, competition authorities are able to accurately determine the relevant product market and relevant geographic market.

The first issue considered by the European Commission is the market share held by the company in a relevant market. A market share exceeding 40% in the relevant market is a warning; nevertheless the period in which the respective market share is being held should not be neglected. Additionally, the impossibility of some competitors to enter and expand in that market is another signal to the competition authorities. The company holding a dominant position may impede competition to enter and expand in the relevant market through a variety of means: the existence of some contracts with suppliers and customers for very long periods of time, the existence of a very well organised distribution network, privileged access to the raw materials required and the benefits from the existence of economies of scale and possession of the latest technology.

Authorities in the field examine the power of pressure of clients on a certain company in a dominant position, because even if the company has a high market share, but its customers put a pressure that is able to influence the company

behaviour, then the abuse of dominant position of that company is unlikely. In addition to the factors mentioned above, when analysing the abuse of dominant position, the Commission considers a number of specific factors. These factors refer to: low selling prices of products, imposing certain exclusive supply contracts on customers, offering customers conditional discounts on the volume of products or services purchased, tying or bundling of products sold to customers and unjustified refusal to work with new customers.

When facing a possible abuse of a dominant position, European Commission considers both the general factors and the specific ones listed above, comparing them with the normal situation that should exist in a competitive market. The ultimate objective of the competition authorities, in terms of restricting the abuse of a dominant position is to protect competition and consumers in particular, by enabling the latter to choose from a variety of products in the quantities they want and benefiting of the optimal price performance ratio.

2. Overview on the Conduct of Proceedings for Abuse of Dominant Position

At European level the way of conducting proceedings for abuse of dominant position is regulated in the smallest details. In case of abuse of dominant position investigations are opened by the European Commission or the Member States' competition authorities ex -officio or following complaints lodged by other companies or individuals. Competition authorities of the EU Member States work closely with the European Commission throughout the investigation.

Before opening the investigation, there is an initial assessment. In the initial assessment the information is analyzed and, based on the knowledge available, there are two decisions that can be made: suspend the investigation if the complaint is not justified, because they do not infringe Article 102 or start further investigations and requests for further information. Also, at this stage, the authority in charge with the case is being set. The case can be assigned to the European Commission or the competition authority of a Member State of the European Union. If, following the initial assessment, further investigations is considered necessary, the decision on the opening of proceedings will be issued. This decision is communicated to stakeholders and later published on the website of the Directorate General for Competition, together with a press release.

After issuing the decision to open the proceedings, the competition authorities may require certain information. Requesting information does not only refer to the involved companies, but also to other persons or companies able to provide information relevant to the case. The requested information has a time limit enabling stakeholders to respond in a timely manner.

The communication between the competition authority and the investigated company can be carried out in one of the language acknowledged in the European Union, according to the preferences of the company performing the investigation.

During the investigation stage, there is a series of meetings aimed to help the investigation. During these review meetings, the parties may express their views. Also, during the investigation stage unannounced inspections at the headquarters of the companies involved can take place. Throughout the entire investigation the information is confidential.

The investigation stage may be concluded as follows: the competition authority considers that the allegations are substantiated and the investigation should continue; the parties propose a number of commitments aimed at ending the abuse

of dominant position; the Competition Authority stops the investigation as complaints are unfounded.

In case the investigation continues, stakeholders are heard. Throughout the oral hearings the companies have the opportunity to answer all objections made by the competition authority. This stage may have two results: the competition authority decides that Article 102 of the Treaty on the Functioning of the European Union has been violated, or they may decide to close the case on the grounds that the allegations were unfounded. Before issuing its decision of violation of Article 102, the Advisory Committee is also consulted. By means of this decision the abuse of a dominant position is prohibited.

If the abuse of dominance is found, the competition authority may impose a fine of an amount not exceeding 10% of the turnover of the previous financial year. Fines of 1% of the turnover of the previous financial year may apply to companies that do not wish to provide the requested information or provide incomplete information. Also, for each day of delay of information, the competent authority may impose a fine of 5% of the average daily turnover figure of the previous fiscal year (EU Competition Law Rules Applicable to Antitrust Enforcement, 2011).

If the company involved proposes a series of voluntary commitments to restore competition and to stop abuse of dominance, the competition authority should consider the proposals. Thus, the discussions regarding the commitments are initiated, followed by a preliminary evaluation. In the preliminary evaluation stage there is a series of meetings between representatives of the authorities and stakeholders.

This assessment can be completed by formulating certain commitments by the company involved. These commitments must be disclosed and made within one month from the completion of the preliminary assessment. Before these commitments become binding, the competition authority carries out a market test. Depending on the outcome of the market research those commitments become binding or they are improved, in which case the market test should be repeated. After the market testing, the opinion of the Advisory Committee is required, and subsequently the decision on commitments is issued.

The decisions made by the Commission or the competition authorities of the Member States are made public to the interested parties as soon as possible. The decision is made public through a press release and the summary of the decision is published in all official languages of the European Union in the Official Journal of the European Union. The complete decision and the final reports are published on the website of the competence Authorities.

The conduct of the proceedings for abuse of dominant position may be summarized as in the figure below.

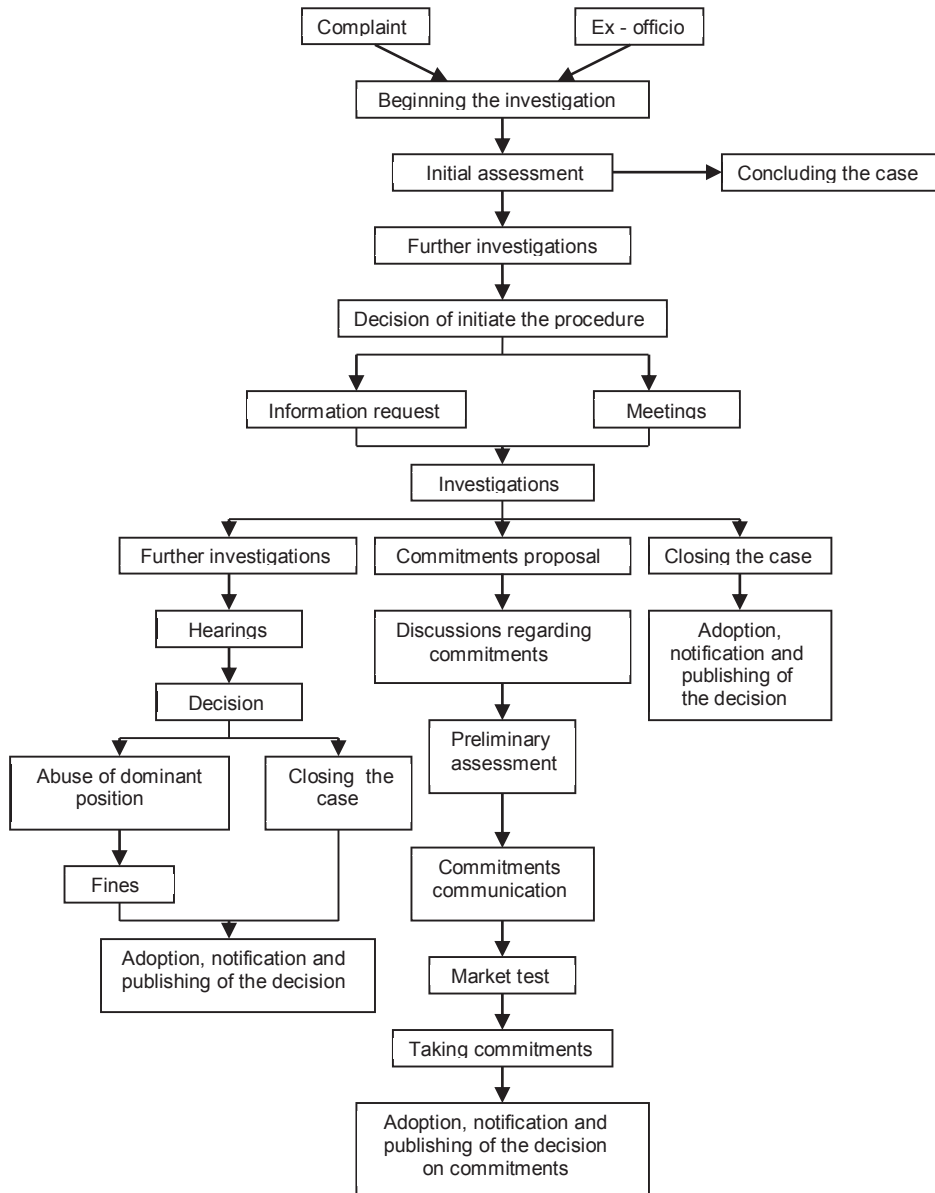


Figure 1: The conduct of the proceedings for abuse of dominant position
 Source: made by the author based on data from Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU

3. The Evolution of the Investigations and Decisions on Abuse of Dominant Position

In the European Union, between January 2004 and February 2013, a number of 1583 investigations of antitrust cases were opened (violation of Article 101 and Article 102).

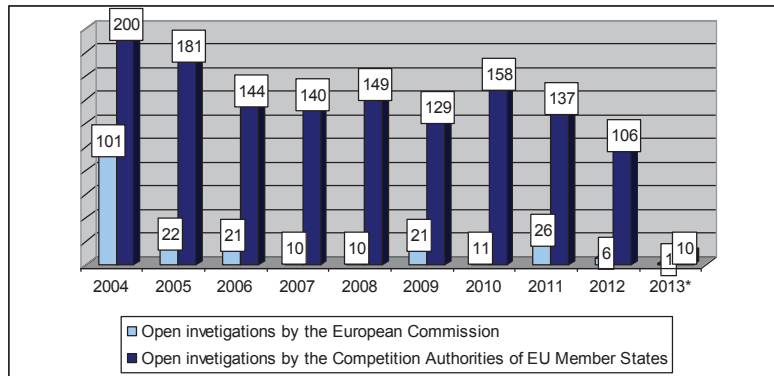


Chart 1: Developments in EU antitrust investigations in the period January 2004 - February 2013

Source: made by the author based on data from <http://ec.europa.eu/competition/ecn/statistics.html>

In Chart 1 we can notice the evolution of antitrust investigations opened by both the European Commission and the competition authorities of the Member States. The percentage of antitrust investigations opened by the competition authorities of the Member States (86%) is much higher than the share of the investigations opened by the European Commission (14%).

Most investigations were opened in 2004: 200 initiated by the competition authorities of the Member States, the European Commission initiated 101 respectively.

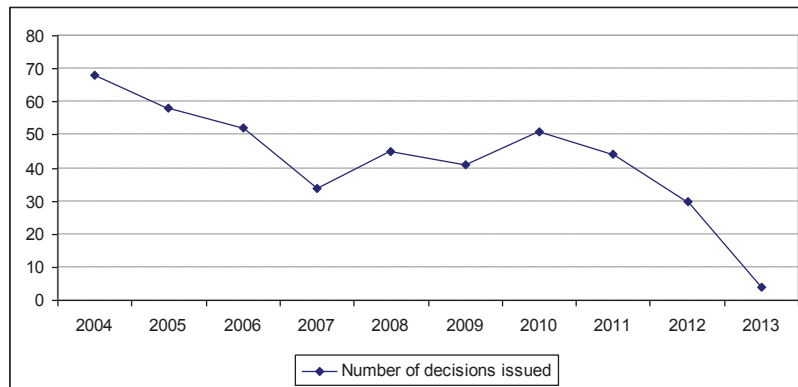


Chart 2: Developments in EU antitrust decisions in the period January 2004 - February 2013

Source: made by the author based on data from <http://ec.europa.eu/competition/ecn/statistics.html>

Analyzing Chart 2 we notice the evolution of antitrust decisions issued in the European Union, between January 2004 and February 2013. Most antitrust decisions were issued in 2004 and the fewest in 2012 (except for 2013 for which data are known only until February).

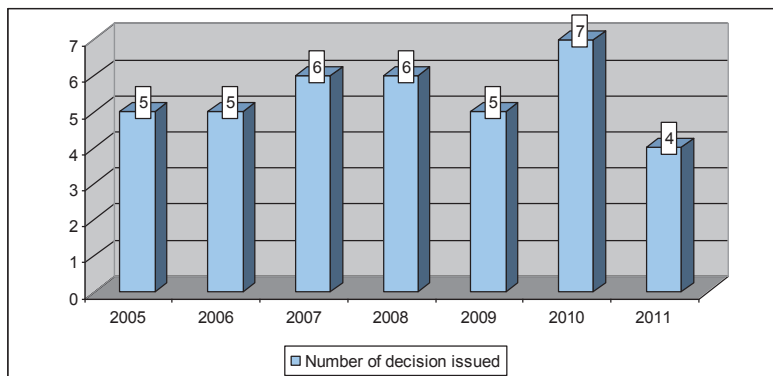


Chart 3: The evolution of abuse of dominance decision issued by the European Commission between 2005 and 2011. Source: made by the author based on data taken from the Annual reports competition

Chart 3 shows the evolution of decisions regarding the abuse of dominance issued by the European Commission between 2005 and 2011. The number of decisions made annually is approximately constant, the peak being recorded in 2010 (7 decisions).

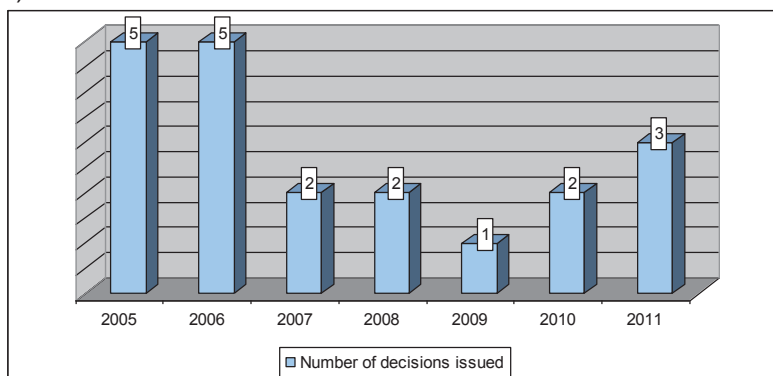


Chart 4: The progress decisions on the abuse of dominant position issued by the Competition Council of Romania between 2005 and 2011
Source: made by the author based on data taken from the Annual reports of the Competition Council of Romania

Chart 4 shows the evolution of decisions on abuse of dominant position in Romania, between 2005 and 2011. Most decisions were issued in 2005 and 2006 (5 decisions), and in 2009 a single

decision regarding abuse of dominant position was issued.

4. Case Study: ENI

ENI is a company operating in the energy sector in Italy. ENI is a state-controlled enterprise whose activity is related to generation, transmission and supply of natural gas in Italy (Case COMP/39.315 – ENI, 2010).

The European Commission started investigations on possible abuse of a dominant position regarding ENI ex-officio. In May of 2006 there were surprise inspections at ENI. The role of these inspections was to gather as much information as necessary for the initial assessment stage. In 2007 the European Commission issued the decision to initiate the procedure regarding the infringement of Article 102 of the Treaty on the Functioning of the European Union. The investigations continued until March of 2009. Throughout these investigations a series of information have been requested to ENI. ENI responded promptly to all inquiries.

The report of the European Commission of March 2009 found the company guilty of violating Article 102 that is of abuse of a dominant position. The report stated that Italy was dependent on imported gas and ENI controlled all gas pipelines across the country. In addition the company dealt with the distribution of these gases with long-term contracts with both industrial and small consumers. The report concluded that ENI had committed an abuse of a dominant position in terms of infrastructure control of the system for importing gas throughout Italy. The European Commission made its findings known to ENI.

ENI was dissatisfied with the conclusions of the report, but was willing to cooperate further with the European Commission, participating in hearings held thereafter.

Following these hearings ENI proposed a number of commitments designed to eliminate the abuse of dominant position. There have been a number of discussions between the prosecution and the European Commission on those commitments, and then they underwent a preliminary assessment. In February 2010 ENI communicated its commitments. These commitments were published, and the Commission invited interested parties to express their views. Although the Commission received some complaints about the commitments proposed by ENI, it considered that the complaints were not justified. After the market test, the commitments proved to be viable, so that the ENI was forced to take the proposed commitments. The commitments related mainly to the disposal of shares held in the infrastructure for gas import system and to the company's obligation of not concluding very long term contracts on natural gas distribution. The European Commission concluded that the above-mentioned commitments were sufficient to restore fair competition on the gas market in Italy, removing the threat of preventing other European competitors from entering the respective market.

In September 2010, when the Advisory Committee has already been consulted the procedure ended with the adoption, notification and publication of the decision on commitments. Since then the commitments have become binding for ENI. The decision was made public later in a press release. The summary of the decision was published in the Official Journal of the European Union in all official EU languages; the full –length decision together with the opinion of the Advisory Committee and the final report were published on the website of the Directorate General for Competition.

5. Conclusions

At European level competition is one of the most important policies because the integrity of the domestic market can be granted only under very strict competition. The abuse of dominant position is one of the restrictive competition practices. The dominant position of a company is not prohibited; it is only the abuse of dominant position that is punished.

The abuse of dominant position is contrary to the competition rules as it harms both competition and consumers equally. Accepting an abuse of dominant position on a market would gradually eliminate competitors, and the very existence of some poor-quality goods or services on the market, while maintaining high prices.

At EU level a constant attention was noticeable regarding the improvement of the legislation that regulates the restriction of the abuse of a dominant position over years. The procedure for the detection of abuse of a dominant position is well established, the steps are very clear.

Evidence of this concern is reflected by the evolution of the investigations and decisions on the abuse of a dominant position at European level. Within ten years (January 2004 - February 2013) no less than 1583 investigations of violations of Article 101 and 102 of the Treaty on the Functioning of the European Union were opened.

Thus we can assert that competition authorities have been, are and will be the guardian of consumers.

The analysis of the way a case of abuse of dominant position in Romania is instrumented as well as the analysis of the other restrictive competition practices shall constitute the topic of further research.

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