

Abuse of dominant position in Albania based in jurisprudence

Assoc. Prof. Dr. PhD (Uni Graz) Endri Papajorgji

Vice Rector and Dean of the Faculty of Law of Tirana Business University

MSc Greta Alikaj

Ministry of Economic Development, Tourism, Trade and Entrepreneurship

Abstract

Competition law and cartel¹ is the basis of a modern economy. While in the US, competition law exists and is terminologically known and is part of legislation since 1890 (Sherman Law), in Europe, it has become part of the founding treaties of the EU since 1957 by the Treaty of Rome. However, at that time, “culture of competition” would be born in the member states of the EU, which traditionally favor cartel agreements, state aid and the promotion of national products. Some EU member states have included competition law in their national legislation in the early 90-s.² Rules were set for the first time on competition in the coal and steel market under Articles 65 and 66 of the Treaty of Rome, constituted a new terminology for member states. Albania has worked during these 24 years of democracy, to apply the basic principles of market economy and along with it the Lisbon Treaty, Regulations and EU Directives in the frame of competition.

Main purpose of this manuscript is to give an overview of the abuse of dominant position in the frame of the most important court decision of this legal institution in Albania.

Keywords: dominant position, competition, development, commercial law, Albania.

Introduction

Abuse of dominant position is regulated in Articles 8 and 9 of Albanian Law no. 9121 “On Protection of Competition”, as amended, which are in accordance with Article 102 of TFEU. In terms of Article 8 of this law, is assessed the dominant position of a particular society. When societies are under investigation, the evaluation of the society behavior in the Albanian domestic market is based in these articles. In terms of Article 9 of the same law, any abuse of dominant position is prohibited, in Paragraph 2 are indicated the causes of abuse of a dominant position and in paragraph 3 are defined exceptions, meaning that although an undertaking has aspects of a dominant position in the market, these are proven to have been committed for objective reasons, such as technical or legal and commercial.

¹ Cartel and Competition have different definitions in the international literature.

² Ireland and Italy in 1990, Netherlands in 1997 and Luxembourg in 2004.

“Competition Commission and AMC JSC in the legal analysis of this issue are referred to the relevant articles of the TEU and the case law of the ECJ, and the interpretation of Articles 84 and 85 of the TEU, in court cases examined by this court are referred to the Court in this decision, given the similarity almost identical that these articles have with the relevant Articles 8 and 9 of law no. 9121, dated 28.7.2003 “On the Protection of Competition”. In the case of Albanian Mobile Communication vs. Albanian Competition Commission of Competition Authority, the Court analyzed the dominant position of the company:

1.Share of the relevant market, considering that:

“The dominant position in the market is determined by market shares in the companies that own product market. Thus the market share is calculated based in the number of subscribers or revenue of any enterprise market. “

2.Administrative, technical and economic barriers on entering the market:

“Mobile telephony markets have high access barriers. Mobile telephony market in Albania has administrative barriers, because if a new operator wants to enter the market, it must be equipped with a license, in accordance with the applicable laws in power. Technical barriers consist in limiting the natural source of radio frequencies that has been provided to Albania by European telecommunications network and therefore opening up to competition in the classical understanding of the market is technically impossible. Entry into the mobile telephony market has a high economic barrier that is related with the licensing and investments that need to be done for the network establishment”.

3.Potential competition:

“Potential competition has been another element analyzed by the Competition Commission in terms of Article 8 of Law 9121, dated 28.7.2003 “On the Protection of Competition”. The third operator of mobile telephony has not conducted activity during the investigation period, so there is no competitive pressure on existing operators. For this lack of competition is not blamed AMC, but this is analyzed as an element that needs to be reviewed, in order to define the existence of a dominant position. Indeed, the existence of a licensed, but not active third operator constitutes a potential competition. To have an effective competition, the third operator has to be active. Thus, AMC’s claim, for potential competition must be analyzed as a barrier to entry in the market and is unfounded in law”.

4.Economic and financial power of enterprises:

“In the decision of the Competition Commission is not determined that the existence of economic power necessarily leads in dominant position. In this decision economic power is analyzed as a factor that proves the existence of a dominant position. The Competition Commission is referred to the annual revenues of claimant AMC to reach this conclusion”.

5.Counteractive power of consumers:

“Competition Commission Decision no. 59, dated 11.09.2007 has concluded that mobile telephony customers do not possess significant counteractive power. Consumers do not have many effective opportunities in the market. Competition Commission’s conclusion that the

existence of a high percentage of prepaid service is an indication of lack of counteracting power of consumers is correct”.

6. Other market characteristics:

“In the Competition Commission’s decision no. 59 dated 09/11/2007 are analyzed also other market characteristics. Thus, the Competition Commission concludes that the relevant product on mobile telephony market is homogeneous, demand in the market has been stable, and cost on mobile telephony market has been uniform. To evaluate whether there was a dominant position or not, the court has assessed these elements:

a. Higher pricing without reasonable relation to the economic value of the product / use of comparative method (benchmark)

In this case the court considers fair Competition Commission’s conclusion that the prices set by AMC are not reasonably related to the cost of the product. The economic value can be orientated by the cost of the product, the price of other similar products or the price of a similar product in another territory. In absence of the costs offered by the company, the Competition Authority is based on the termination prices applied by AMC and the effect they provide in the retail price.

b. Trade benefits, which would not be achieved in a presumed competitive market.

Another test that proves the abuse of a dominant position is the provision of commercial benefits, which would not be achieved in a presumed competitive market. For this test is assessed the high and growing level of norms of the EBITDA and profits for both companies. In markets with a normal competition profit margins will decrease. From the comparison of profits between AMC and Vodafone results that the corresponding revenues level of the two operators is in balance.

c. Comparison of tariffs with other geographic markets

The Competition Commission in the absence of the cost of detailed services that should have been submitted by the companies AMC and Vodafone, used as one of the main methods of investigation (benchmark), the relevant service fee to those services or similar services in the region. Comparison is made mainly with regional countries, which have an approximate level of development, where the respective costs and investments are comparable, considering the relatively standard technology of mobile telephony and almost parallel development of this technology in the these countries. From this analysis resulted that the two companies under investigation have applied higher tariffs that regional countries, which have a comparable level of domestic product (GDP) and per capita income with Albania”.

In this decision AMC JSC and Vodafone JSC were accused and fined for “Collective abuse of dominance”.

Conclusions

The changes of political and economic system in the late 80’s in Albania required a broader reform of the entire legal system by creating a functioning market based in the rules of free market and competition and the privatization of state enterprises. Roggemman (Roggemann 1993) describes the transformation as a transformation

from state institutions in Albania into western commercial companies such as JSC or limited partnership. In this sense this process was one of the main pillars of market economy in Albania. For more than 40 years, the Albanian citizens were faced with the communist ideology as the basis of state government regulation. This ideology stated that all citizens had contributed the same way and in the same extent during socialism for the construction of state and social property. After the fall of the communist regime, the Albanian state was nearly bankrupt. In addition the old inherited technology, the lack of investment (savings were in short supply) and especially competition from abroad (imported products) made it hard for state-owned firms to survive and grow in the industrial sector. Most of them changed their activities or ceased operation. These developments, in the first years of transition, reshaped the structure of the Albanian economies in favor of agriculture, trade and service sectors. As if the organizational and procedural problems were not enough, another one was added, that included the lack of government financial resources. The Albanian authorities were totally overwhelmed with the transformation - process. This is largely due to the fact that there were no prescribed legal structures and frameworks, that were able to ensure a proper procedure. Neither existed sufficient legal criteria's or a committed administration. To evaluate the process in organizational terms, the adequate word would be "confusion". The latest years have shown that developments towards the free market economy were made.

This manuscript showed that Albania is building a modern jurisprudence based in the Lisbon Treaty and especially its corresponding abuse of dominant position articles.

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