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# THE LAW AND ECONOMY OF THE ABUSE OF A DOMINANT POSITION

Pravo i ekonomija zloupotrebe dominantnog položaja

## Abstract

Fair market conditions are a precondition for the existence of a developed and free market, and the object of this paper is the protection of competition, i.e. the abuse of a dominant market position from the legal and economic points of view. Particular focus is placed on considering the objectives of prohibiting abuse of a dominant position by an enterprise, defining the relevant market as a key element in the process of determining competition rules violation and determining the dominant position. Particularly explained are examples from business practice that analyze various practices of abuse of a dominant position: refusal and termination of cooperation, predatory behavior, tying and bundling, defining excessive prices, inadequate rebate policy, imposing exclusivity and discriminating customers. In addition, the measures, which are available to the Commission for Protection of Competition, are presented in the paper with the aim of eliminating competition rules violations.

**Keywords:** *protection of competition, abuse of a dominant position, prohibited practices*

## Sažetak

Fer tržišni uslovi su predušlov postojanja razvijenog i slobodnog tržišta, te je predmet ovog rada zaštita konkurencije, odnosno zloupotreba dominantnog tržišnog položaja iz pravno-ekonomskog ugla. Poseban fokus je na razmatranju ciljeva zabrane zloupotrebe dominantnog položaja od strane preduzeća, definisanju relevantnog tržišta kao ključnog elementa u procesu utvrđivanja povrede konkurencije i utvrđivanju dominantnog položaja. Posebno su obrazloženi primeri iz poslovne prakse u kojima su analizirane različite prakse zloupotrebe dominantnog položaja: odbijanje i prekid saradnje, predatorsko ponašanje, individualno i asortimansko vezivanje proizvoda, definisanje prekomernih cena, neadekvatna rabatna politika, nametanje ekskluzive i diskriminacija kupaca. Pored toga u radu su predstavljene i mere, koje stoje na raspolaganju Komisiji za zaštitu konkurencije, za otklanjanje povreda konkurencije.

**Ključne reči:** *zaštita konkurencije, zlouporeba dominantnog položaja, zabranjene prakse*

## Introduction

The development of a market mechanism is the main institutional choice of market economies. It supports efficiency of market participants, encourages innovation, stimulates economic development and provides the highest level of perceived value for customers. Protection of competition becomes the dominant external factor in creating, improving and maintaining competitive dynamics in the market.

The universal idea behind protecting competition is to prevent unwanted behavior of market participants that leads to the restriction, prevention and/or distortion of competition. The result of anticompetitive practices are market inefficiencies, which cause direct damage to consumers in the form of higher prices, lower quality and a wider range of products. Relying on the above idea, the Law on Protection of Competition prohibits any behavior of business entities that brings about (consequence) or can lead to (intent) a reduction in the level of competition in the relevant market. Restriction of competition can be exercised by mutual agreements with competitors (horizontal agreements – cartels), by mutual agreements with buyers or suppliers (prohibited vertical agreements in both directions) or by the efforts of companies with a dominant market position to expel their competitors from the relevant market (abuse of a dominant position).

The Law on Protection of Competition of the Republic of Serbia relies heavily on the legal framework and the best practice of the European Union. It prohibits three groups of activities: 1) abuse of a dominant position, 2) restrictive agreements, and 3) excessive concentration of market power.

Certain practices used by companies may be allowed depending on whether the company has a dominant market position. Based on the practice of the European Commission and Serbian Commission for the Protection of Competition, the following abuses of a dominant position can occur, which will be explained in more detail later in the paper: 1) refusal and termination of cooperation, 2) predatory behavior, 3) tying and bundling, 4) defining excessive prices, 5) inadequate rebate policy, 6) imposing exclusivity, and 7) discriminating against customers.

In addition to the aforementioned abuses of a dominant position, this paper focuses on the goal of banning abuse of a dominant position, defining the relevant market as a very important component of the detection of abuse and remedying the violation of competition rules.

## The aim of prohibiting abuse of a dominant position

The main goal of the ban on the abuse of a dominant position (ADP) is to set standards of behavior for companies that have economic strength, based on which they have a certain degree of immunity in relation to the pressure of competition and other market conditions. In markets characterized by the presence of one or more enterprises with this type of economic power, ADP ban should prevent the use or abuse of market power and provide conditions in the market that would exist in the case of a high level of competition. ADP is prohibited in order to: 1) exert pressure to lower prices to the level that would exist in the conditions of a competitive market; 2) increase prices in a situation where low prices are part of the intention to expel competitors from the market and subsequently increase prices well above the competitive level, as well as 3) require companies with dominant market share to share key non-renewable assets with their competitors in certain situations. In addition, the prohibition of ADP requires companies with a dominant market position to refrain from specific actions and business practices that would be completely legal if they were carried out by companies that do not have a dominant position. This requirement imposed by the ban of ADP is also called “special responsibility” of dominant companies [8].

In order to determine the existence of ADP it is necessary to cumulatively fulfill the following conditions:

- 1) the company is a market participant in the sense of the Law on Protection of Competition, that is, a legal or natural person that directly or indirectly, permanently, occasionally or partially participates in the circulation of goods or services, irrespective of their legal status, form of ownership or citizenship or nationality,

- 2) the market participant must have a dominant position in a properly designated relevant market, which allows it to operate, to a significant degree, independently of actual or potential competitors, customers, suppliers or consumers,
- 3) an action, that is, the implementation of a practice by market participants with a dominant position constitutes an abuse.

According to Article 16 of the Law on Protection of Competition, the abuse of a dominant position in the market is prohibited, and the abuse of a dominant position shall be considered:

- 1) directly or indirectly imposing an unfair purchase or selling price or other unfair terms of business,
- 2) limitation of production, market or technical development,
- 3) application of unequal business conditions to the same deals with different market participants, which puts some market participants in a more unfavorable position than competitors,
- 4) conditioning the conclusion of a contract by the other party's acceptance of additional obligations which, by their nature or according to trade practices, are not related to the subject of the contract.

It can be concluded that the focus of the previous provision is the welfare of consumers and economic efficiency. In line with this, it promotes equitable business conditions for all market participants and ensures that small and medium-sized businesses are not unfairly hindered by others who have market power. If the market is not monopolized and if it is open and competitive, there will be more opportunities for small producers and workers. Broadly speaking, when a market is competitive, it has strong macroeconomic growth [16].

Theoretical competition models can be classified into following groups [1]: markets with conditions of perfect competition and markets with conditions of imperfect competition.

Perfect competition is the measure of an optimally competitive market. It is a theoretical model that presupposes the existence of homogeneous products, a large number of companies on the supply side, perfectly informed consumers

and excludes the existence of transport costs. Within the model of perfect competition, prices and production are at an optimal level.

Theoretically, it is possible to measure the degree of market power in relation to the state of perfect competition [17]. All companies that seek to maximize the profit function have a certain degree of market power in the short term to prevent the immediate departure of consumers from another supplier. This form of market power does not create anxiety from the point of view of competition protection policy. However, if market power is so significant and great that a company can, in the long run, profitably maintain the price above a competitive level or in some way limit or reduce production, innovation or product quality, such behavior can create anxiety from the aspect of competition policy. Market power should always be viewed as a function of the performance of an individual market.

Increasing prices above the competitive level, as a result of using market power, has a double negative effect on the welfare of consumers:

- 1) the wealth is transferred from consumers to enterprises through the purchase of offered products and services for which consumers pay more than they would pay under the conditions of effective competition,
- 2) consumers who are not ready to pay the price above the one that would exist in conditions of effective competition are expelled from the market.

These effects are presented in Figure 1. The first effect is presented in surface A, while the other effect is shown in the area marked with B. The sum of areas A and B measures the loss of consumer well-being caused by the placement of prices above the competitive level. In economic theory, area B is known as "monopoly loss". It represents the loss of total well-being, which includes consumer welfare and company profit, as the result of market prices set above the competitive level. Due to the existence of perfect competition, i.e. competitive prices in the market, there is also allocative efficiency, i.e. optimal allocation of resources so that all potential trade gains are maximized (the surface of the triangle PcCP is the largest). In that case, monopoly loss does not exist. One of

the goals of the modern competition policy is to encourage efficient resource allocation and economic growth which contributes to increasing the usefulness of all participants in the economic process and creating a new value [16].

The Law on Protection of Competition does not prohibit the dominant position per se. It is forbidden to abuse it in a way that companies holding a dominant position would carry out strategic actions aimed at excluding competition from the market in order to maintain or further strengthen their dominant position [12]. Companies that do not have a dominant position can legitimately carry out such strategic actions, since the effects of such practices cannot significantly affect the well-being of consumers over a long period of time. Therefore, it is of paramount importance to correctly determine the boundaries of the relevant market, as well as the dominant position of market participants.

### Defining the relevant market

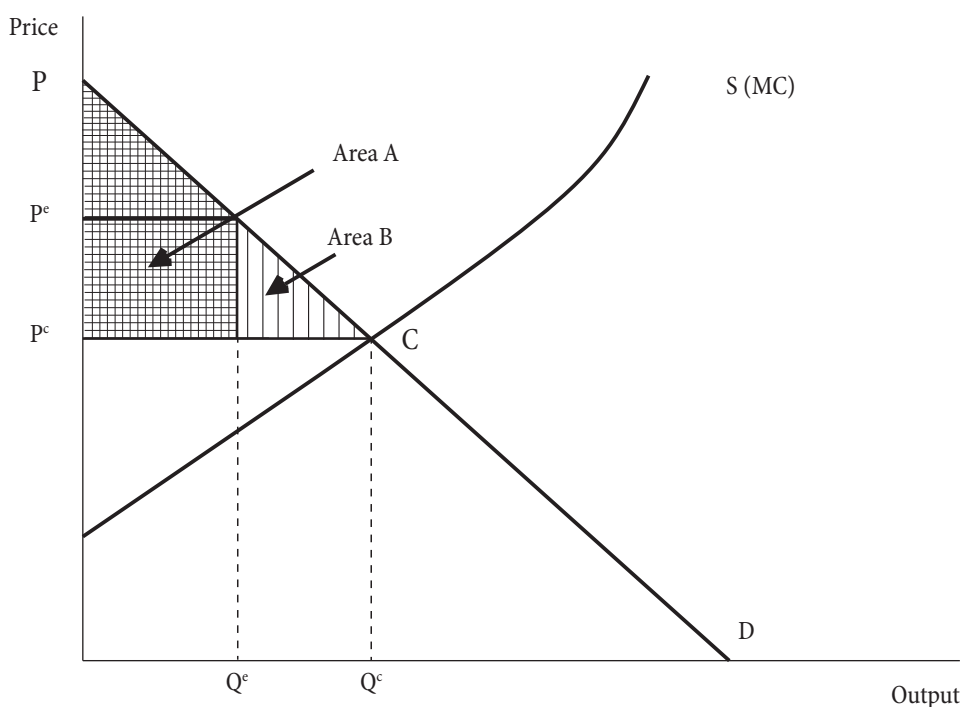
Defining the relevant market is the first and key step in revealing abuse of a dominant position [18]. A wrongly defined relevant market leads to wrong conclusions about the abuse of a dominant position.

The concept of relevant market can be viewed from two angles: from the angle of the relevant geographic market and relevant product market. The relevant market is determined by the type of product and/or service being sold in it and by the geographical area in which these products and/or services are sold and purchased.

In determining the relevant market, a decisive element is consumer’s assessment of whether the products in question are substitutable. A formal test to verify this is called SSNIP (Small but Significant and Non-transitory Increase in Prices), or a hypothetical monopolist test [10]. This test originally came from American competition protection practice, and is today widely accepted in Europe. It consists of determining the closest product market in which the supposed monopolist could profitably apply a small, but significant increase in prices (ranging from 5% to 10%) within a year. If this increase in prices, in combination with product types and geographical area, does not cause significant loss of profit due to the shifting of demand to relatively cheaper products or distant markets, a relevant market with a seller who possesses hypothetical monopoly power is revealed.

If, however, there is significant loss of profit, it is necessary to expand the product or area range and to

Figure 1: Monopoly loss



Source: [17].

see whether consumers can avoid the effect of relative price increase in a wider market. The procedure is of iterative nature and is carried out until a relevant market is determined, in which the increase in relative prices does not lead to a fall in profit. Hence, it starts from the narrowest market definition (both geographically and objectively) and in subsequent iterations extends in the form of concentric circles until the condition set by the hypothetical monopolist test is satisfied.

The relevant market, in terms of the Law on Protection of Competition of the Republic of Serbia, is the market that includes the relevant product market in the relevant geographic market. The relevant product market is a set of goods or services that consumers and other users consider substitutable in terms of their properties, common purpose and prices.

The relevant geographic market is a territory in which market participants are involved in supply and demand and where the same or similar conditions of competition exist, differing substantially from the conditions of competition in the neighboring territories.

### Determining the dominant position

After determining the relevant market in which a market participant is assumed to have a dominant position, it is necessary to approach the assessment of existence of domination. According to Article 15 of the Law on Protection of Competition, a dominant position is held by a market participant that, because of their market power, can operate in the relevant market to a significant extent in relation to actual or potential competitors, customers, suppliers or consumers. The market power of participants in the market is determined in relation to the relevant economic and other indicators, and in particular:

- 1) the structure of the relevant market;
- 2) the market share of market participants whose dominant position is being determined, in particular if it exceeds 40% in the relevant market;
- 3) real and potential competitors;
- 4) economic and financial strength;
- 5) degree of vertical integration;

- 6) advantages in access to supply and distribution markets;
- 7) legal or factual barriers to access of other market participants;
- 8) the power of the buyer;
- 9) technological advantages, intellectual property rights.

Two or more legally independent market participants may have a dominant position if they are linked by economic relationships so that in the relevant market they act together or act as one participant (collective dominance). The burden of proving the dominant position in the relevant market is borne by the Commission for Protection of Competition.

Determination of domination is essential [13]. If the existence of a dominant position has not been established, its abuse cannot be ascertained, even though the existence of anticompetitive practices carried out by an undertaking that is presumed to have a dominant position is not debatable. This is a fundamental issue in the process of determining the abuse of a dominant position, since there are jurisdictions in which, unlike Serbia and the EU, it is possible to punish companies that have applied anticompetitive practices, even in situations where they do not have a dominant position. For example, according to Section 2 of the Sherman Act of 1890 [19], if an enterprise that does not currently have a dominant position conducts anticompetitive actions and if it is likely that the effect of these anticompetitive practices will be to create a dominant position for that enterprise, in that situation the company can be sanctioned even if it does not hold a dominant position at that moment.

In economic terms, domination is broadly related to the concept of market power [17, p. 142]. A company has a dominant position if it has significant market power. Possession of significant market power in theory means that a company can set prices above a competitive level or limit production over a longer period of time. A company can have significant market power even when it cannot behave independently in relation to consumers, competitors and other stakeholders. This is the case where companies operate in an oligopolistic market. Their prices are, on the one hand, limited by the behavior of current

and potential competitors, and, on the other hand, in the event of increase in prices, customers could reduce consumption and stop purchasing their products. Strictly speaking, only companies operating in a market protected by instrumental entry barriers, where there is inelastic demand, can behave independently in relation to their competitors, customers and other stakeholders.

However, there are also situations in the market where a company that has market power competes with a larger number of smaller companies. These smaller companies act as followers and take over the prices set by the dominant player. The significance of market power for a dominant undertaking in that situation and the extent to which it can behave independently of its competitors and consumers depends on the ability of these small businesses to satisfy demand in the market [2, p. 111]. If their capacities are not sufficient to satisfy the overall market demand, there will always be a residual demand that will necessarily have to be supplied from a dominant undertaking [11, p. 10]. It is precisely the size of residual demand that determines the strength of market power, that is, the importance of the dominance of the observed participant in the market.

There are different types of domination: dominant position of one participant in the market and collective dominance. Dominant position of market participants cannot be assessed on the basis of one criterion. A comprehensive analysis of the specific market needs to be carried out. The degree of market power cannot always be determined in the same way, nor can a standard be established in this respect, because it depends on the circumstances of each individual case. Dominant market position is usually the result of a combination of several factors which individually do not have to directly determine domination [9].

Measuring the domination of a particular participant in the market cannot be done only mechanically. It is necessary to go through a few steps in detail [17, p. 143]. First, it is necessary to measure the relative strength of the observed participant in the relevant market. Relative strength is measured on the basis of market share. In the second step, it is necessary to evaluate the conditions in which the entry or expansion of competing companies in the relevant market is simple and easy so that they can

take over the market share from the leading company. Also, it is necessary to analyze the ability of customers to neutralize the power of the dominant seller. Finally, all these elements must be cross-analyzed with real evidence of competition in the market.

For the purpose of Article 14 of the Law on Protection of Competition, two or more independent participants in the relevant market may be dominant in the market, so that they act together as a single participant (collective dominance), taking into account shares of their competitors in this market, obstacles to entering the relevant market, the power of their potential competitors, and the possible dominant position of the buyer. Given that, in case of collective dominance, market participants act as one participant, dominant position is determined in a manner analogous to the determination of the dominant position of one market participant [3].

### Basic forms of abuse of a dominant position

As previously mentioned, perfect competition or pure monopoly are more theoretical cases that are rarely encountered in commercial practice. Until a participant in the market is guaranteed legal possession of monopoly power (natural monopoly), they face the threat of potential competitors' entering the market. Their entry would reduce the profit of such a market participant below the level of monopoly. Therefore, it is profitable for dominant market participants to implement business strategies and practices that increase the costs of potential competitors' entry into the market [15, p. 70]. Such practices can present abuse of a dominant position. These practices include [14]: refusal of cooperation, predatory behavior, product linkage, excessive pricing, imposing exclusivity, inadequate rebate policy and customer discrimination.

In Europe, there have been a number of cases where the European Commission suspected the abuse of a dominant position. Among the suspected practices was the unjustifiable refusal of cooperation with existing and current business partners. For example, chemical company Commercial Solvents (CS) produced chemical substance A and sold it to Zoya, which used that substance as an input for the production of chemical substance E.

When CS started producing chemical substance E, they were no longer willing to sell substance A to Zoya. The European Commission established that CS had a dominant position in the relevant market and concluded that the implementation of such a practice constituted abuse of a dominant position.

Predatory behavior presents the sale of products to customers at net selling prices below the cost price, with the aim of retaining or further increasing market share. The practice of predatory pricing, formation of prices below average variable costs, constitutes abuse of a dominant position. The dominant company, in principle, has no other business interest in employing price dumping, except to eliminate competitors from the market and subsequently raise its prices using the acquired monopolistic position in the market. The sale of products by the dominant undertaking at prices below the average total cost (total cost price) and above the average variable costs may also be considered abuse of a dominant position, if there is a visible intention to expel competition from the relevant market.

For example, the European Commission found that company Wanadoo charged ADSL services at prices below the average total cost. The analysis of the business found that from 1999 to 2001 prices were below variable costs, while in the period from 2001 to 2002 they were at the level of variable costs, but far below the total cost. The European Commission concluded that the above practice constituted abuse of a dominant position and imposed a fine in the amount of EUR 10.35 million.

Tying and bundling are prohibited practices for companies with a dominant market position. Tying products represents the sale of one product under the condition of purchasing another product. An example of tying could be the case of TetraPak, in which the European Commission found that the company sold its packing machines under contractual terms which included linking its other products and services to the sale of machines. Specifically, they required their customers to also buy cardboard. Additionally, TetraPak set out the condition for its customers that only TetraPak can service and maintain packing machines. The Commission imposed a fine of EUR 75 million for the abuse of a dominant position.

Bundling is very similar to tying. The difference is that the buyer is required to buy a precisely defined product assortment. As an example of bundling, the Microsoft case is highlighted. In one package, Microsoft sold two of its products – the operating system and Windows Media Player. The European Commission considered that the competition rules had been violated because the customers who purchased the Microsoft operating system were forced to buy the Microsoft Media Player without the possibility to choose. The Commission imposed a massive fine on Microsoft in the amount of EUR 497 million for abuse of a dominant position.

Tying of products and bundling are forbidden for companies with a dominant market position, while for other ones these practices are allowed.

The prohibited practices which lead to abuse of a dominant position also include excessive pricing. This practice is prohibited for companies with dominant market share, because its implementation leads to achieving enormously high profit rates. In the case of Napier Brown - British Sugar, the European Commission found that over a longer period this sugar producer applied prices that were not a real reflection of costs to bulk sugar in wholesale market and to packaged sugar in retail market. In this case, the Commission imposed a fine in the total amount of EUR 50.2 million.

Within the abuse of a dominant position, rebate policy is a very prominent topic. The principles on which the rebate policy of companies with dominant market share must be based are: transparency (buyers have an insight into seller's rebate policy), economic justification for the allocation of rebates and such allocation of rebates that does not cause customer loyalty. Transparency is achieved by securing that buyers have insight into sales policy so that they know in advance the conditions of cooperation and qualification for a certain level of rebates. Economic justification of rebates is achieved by a financial and factual justification of assigning a certain rebate to customers, i.e. avoiding arbitrary determination of rebates for customers. Customer loyalty is usually achieved by requiring that most or all of their needs are satisfied solely by the supplier who approves such a type of rebate. This type of rebate is approved in order to limit the opportunity of the buyer to

change the supplier, which ultimately leads to closing the market for competitive suppliers. In addition, it should be noted that excessive rebate is not allowed. Namely, approving rebates to the level in which the net selling price falls below the cost price leads to predatory pricing.

The case most commonly cited with regard to abusing rebate policy is the case of Michelin, a French tire manufacturer. The European Commission found that Michelin abused its dominant position by granting its dealers year-end rebates based on the realization of a predetermined sales plan. There was no economic justification for the amount of approved benefits. Due to the implementation of this commercial practice, Michelin was fined EUR 20 million by the Commission.

The abuse of a dominant position includes imposition of exclusivity. The classic form of imposing exclusivity is outlet exclusivity, i.e. imposing an obligation on the buyer to sell only the products of the dominant supplier within a particular product category in its retail facility. As an example of exclusivity, the European Commission identified abuse of a dominant position in the case of Unilever because it provided its customers with refrigeration appliances provided that only freezer exclusivity products are exhibited in them. The Commission determined, by conducting market research, that many retailers cannot or do not want to install another refrigeration appliance in their retail facility. When Unilever installs its cooling unit in one facility, there is little possibility that some other manufacturer will also install its cooling device in the same facility. For this reason, the Commission concluded that freezer exclusivity is at the same time outlet exclusivity, which leads to closing the market for other competitors.

Abuse of a dominant position also includes discrimination of customers manifested when an enterprise with a dominant market position applies different sales conditions to different customers, in case of the same or equivalent transactions, without a clear economic justification. It occurs when individual buyers are offered better sales conditions than other customers of the same category that, from the company's perspective, have the same commercial position, i.e. belong to the same category of customers in sales policy. By analyzing the operations of Proplin, the Croatian Agency found that the company

limited competition in the relevant natural gas distribution market by unequal application of rebate policy to its customers, or discretionary approval of rebates.

The Commission for Protection of Competition issued a decision stating that Inter Turs Plus d.o.o., as the manager of the only bus station in Topola, abused its dominant position. The Commission found that Inter Turs Plus abused its dominant position by imposing and charging an unfairly high price for the reception and dispatch of buses in intercity traffic at the bus station in Topola. Increasing the costs for all carriers that use the bus station in Topola led to the increase in the price of passenger transport in certain lines that run through the bus station in Topola and even to the cancellation of certain lines. The negative effects of imposing higher costs on carriers were also passed on to passengers as end users of transport services, in the form of the increase in the price of the bus ticket and of a reduction in the possibility of selecting departures and carriers to or from the bus station in Topola. This market participant was imposed with a measure for protection of competition in the amount of two hundred and thirty two thousand dinars that it was obliged to pay to the budget of the Republic of Serbia, as well as behavioral measures requiring the harmonization of its operations with the Law [7].

The Commission for Protection of Competition issued a decision stating that the Distribution System Operator EPS Distribucija d.o.o. Belgrade, as the only operator in the electricity distribution market of Serbia, abused its dominant position. This market participant was also imposed a measure for protection of competition in the amount of 330 million dinars, as well as behavioral measures aimed at equalization of business conditions in the market. During the proceedings, the Commission found that the aforementioned company abused its dominant position by placing certain commercial electricity suppliers, and in particular EPS Snabdevanje, in a more favorable position than other competitors. This behavior is, among other things, a consequence of the nontransparent business policy of EPS Distribucija. When contracting access to the electricity distribution system, EPS Distribucija imposed the obligation of depositing collateral on all commercial suppliers, with the exception of EPS Snabdevanje. At the



same time, the company EPS Distribucija made a difference in terms of the amount of collateral, since for some system users the amount was calculated on a monthly basis, and for others it was based on the quarterly value of the services provided. In addition, almost all commercial suppliers of electricity could deposit collateral only in one business bank chosen by EPS Distribucija. EPS Snabdevanje had, in a shorter period of time, significantly longer deadlines for payment of due debts, compared to all other commercial suppliers. All these actions resulted in the increase in the cost of electricity supplied by commercial suppliers to end consumers [6].

The Commission for Protection of Competition issued a decision finding that PUE “Pogrebne usluge” Belgrade abused its dominant position. The said public company restricted competition by charging an unjust price for the control of the installation of tombstones in cemeteries run by this company. The users of the cemetery, as consumers, were left no choice since the installation of a tombstone by stonecutters was only possible after the payment of the stated obligation, in which way they were harmed [5].

The Commission for Protection of Competition issued a decision establishing that the company Frozen Food Industry Frikom AD from Belgrade abused its dominant position in the relevant wholesale market of industrial ice cream in the territory of the Republic of Serbia. After the procedure had been initiated ex officio, it was established that this company committed violation of competition rules in such a way that, in its standard contracts realized in the 2008-2010 period, and in a number of contracts after 2010, concluded with customers – retailers, it imposed an obligation on retailers to fully and consistently apply the retail prices set out in Frikom pricelists in their further sale of Frikom products to end users - consumers. This company also imposed an obligation of exclusive purchase of the relevant product from Frikom, directly and/or indirectly prohibiting the sale of competing products, whereby exclusivity regarding refrigeration units and retail facilities was contracted. A developed system of incentives and stimulations for retailers decisively influenced their business decisions to choose Frikom as the only supplier of the relevant product. Furthermore, Frikom imposed an obligation on customers to pay to Frikom unjustifiably

high amounts as compensation of damage in case they do not comply with all contractual obligations, whereby the provisions regarding resale prices, the exclusivity of goods in refrigeration units and the retail facility are essential provisions of the contract whose breach results in such an obligation to Frikom. The company also contracted unsuitable and unjustifiably short deadlines in which Frikom could exercise its right to unilaterally terminate the contract in the event that the buyer-retailer fails to perform its contractual obligations, in particular those defined by the relevant provisions regarding the application of the prices in resale and exclusivity in refrigeration units and retail objects. Moreover, Frikom contracted and applied different business conditions to the same deals with different buyers-retailers, especially with regard to payment deadlines, return of goods in the event of poor sales results and the expiry date, as well as deadlines for termination of the contract. In accordance with the law, a measure for protection of competition was determined, in the form of the obligation to pay the amount of 4% of the total annual income realized in 2009, which amounts to 301,950,520.00 RSD. In addition to the measures for protection of competition, the same decision also imposed appropriate measures for elimination of the breach of competition rules in the form of behavioral measures, as well as the deadlines within which this company was obliged to implement all the imposed measures [4].

## Remedies related to abuse

The Commission for Protection of Competition, after determining the existence of abuse of a dominant position, imposes on the market participant a measure for protection of competition and/or a measure of elimination of infringement of competition rules. The measure for protection of competition is an integral part of the Commission’s decision establishing abuse of a dominant position. The right of the Commission to impose this type of measure is stipulated by Article 68 of the Law on Protection of Competition. According to this article, a market participant that abuses a dominant position in the relevant market will be imposed a measure for protection of competition in the form of payment of an

amount of up to 10% of the total annual income realized in the territory of the Republic of Serbia.

The measure for protection of competition cannot be determined upon the expiry of five years after the day of committing abuse of a dominant position. However, this statute of limitations is interrupted by each action of the Commission undertaken to determine the abuse of a dominant position by a particular participant in the relevant market. After each interruption, statute of limitations starts running again, but the procedure for examining the existence of abuse of a dominant position cannot be maintained for more than ten years.

By means of a decision establishing abuse of a dominant position, the Commission may also determine measures to eliminate the identified abuse of a dominant position, or to prevent the possibility of occurrence of the same or similar violation of competition rules. Measures for elimination of the identified abuse of a dominant position shall be carried out by issuing orders to undertake certain behavior or prohibit certain behavior. These measures are called behavioral measures and should be proportionate to the importance and severity of the identified abuse of a dominant position and in direct relation to acts that led to such abuse.

If, in the proceedings before the Commission, it is determined that there is a significant danger of repeating abuse of a dominant position as a direct consequence of the structure of the dominant market participant, the Commission may determine a measure whose aim would be to change that structure in order to eliminate such a danger, or to establish the structure that existed before the occurrence of the identified abuse. These measures are called structural measures and are determined if there is no possibility of determining an equally or approximately effective behavioral measure, i.e. if determining a behavioral measure would represent a greater burden for market participants than a concrete structural measure or if the previously imposed behavioral measure for the same abuse of a dominant position has not been implemented fully. The structural measure may stipulate the obligation to decompose the resulting structure of participants in the market, in particular through the sale of some of its parts or assets to other parties not affiliated to the market participant.

In addition to the previously described possibilities for imposing fines and determining structural and behavioral measures, the Commission may also issue a conclusion on the termination of the procedure for examining the existence of abuse of a dominant position. In order to terminate the procedure, it is necessary for the company against which the procedure is being conducted to submit a proposal of obligations, which it is willing to fulfill voluntarily, in order to eliminate possible violations of competition rules, along with the conditions and deadlines for the execution of these measures. The company under procedure proposes obligations based on the conclusion of the initiation phase of the procedure for examination of the potential dominant position abuse. The company may file the Statement of Objection no later than before the receipt of the notice regarding important facts, evidence and other elements on which the Decision will be based.

The Commission publishes the notice on the submission of proposals containing a brief description of proposals and important elements of the case on its website, inviting all interested parties to submit written comments, views and opinions within 20 days from the date of publication of this notice. If, on the basis of the market situation, the Commission determines that it is likely that the objective of remedying competition rules violation will be achieved based on the proposed obligations, it shall issue a conclusion that will terminate the procedure and determine the deadline for performing the obligations and delivering the evidence. A suspended procedure may be continued within a period of no more than three years from the date of the conclusion on termination in case: of essential change in the circumstances on which the conclusion on termination of the procedure was based, the party fails to fulfill the obligations within the deadline set for fulfillment or does not furnish relevant evidence and in case the Commission finds that the conclusion on termination of the proceedings has been issued on the basis of incorrect, false, incomplete or misleading information provided by the party in the proceedings.

## Conclusion

Ensuring fair market conditions for all market participants, on the one hand, depends on the activities of the Commission

for Protection of Competition and its human resource and financial capacities. The Commission is responsible for active monitoring of undertaken business practices and application of adequate anticompetitive measures. On the other hand, we must bear in mind that competition is a dynamic category based on innovation and permanent search for sources of competitive advantage. Therefore, an excessive level of intervention of regulatory bodies can lead to excessive regulation, and consequently have a partially negative impact on the freedom of market players.

Abuse of a dominant position by the company affects not only the market freedom of direct competitors, but also all participants in the chain and value system. Anticompetitive practices lead to lesser market disturbances, such as gaining a mild advantage in the market, or even substantially greater consequences, such as a market structure disorder. Therefore, the protection of competitive practices must at the same time be directed to the protection of all market participants – producers, suppliers, intermediaries and end consumers. Comprehensive functioning of the legal framework leads to prosperity for all stakeholders.

Regardless of whether the abuse of a dominant position is manifested through the elimination of competitors or the reduction of customers' welfare, in order to be qualified as abuse it must meet some fundamental requirements. Namely, anticompetitive behavior and proving thereof, or proving abuse of a dominant position, depend directly on the defined relevant market. If anticompetitive action does not appear in the relevant market, there is no abuse of the dominant market position. This means that the definition of the relevant market is the starting point, and at the same time a key precondition for proving the abuse of a dominant position.

It is often encountered in practice that companies commit violation of competition rules due to ignorance and lack of information. Although the right to competition has been institutionalized for more than ten years in the Republic of Serbia, additional efforts are needed in economics education and raising awareness of (un)allowed activities from the aspect of protection of competition. This way, all economic players become an additional barrier to abuse of a dominant position by companies with dominant market share.

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