Competition Investigations in Ukraine

Mariya Nizhnik
Partner, AEQUO

Over the past few years, the Antimonopoly Committee of Ukraine (AMCU) has investigated a number of cases related to alleged abuse of monopoly (dominant) position. For example, in 2019 the AMCU terminated 268 violations related to abuse of monopoly (dominant) position with the overall total of fines imposed for this type of violation coming to UAH 404 million. One of the biggest fines, UAH 107 million, was imposed on OSTCHEM Group. In the Ostchem case the authority not only imposed heavy financial sanctions but also decided to divest the respondent's business. The AMCU applied structural remedies for the second time in its practice and the decision is still being challenged in courts. Irrespective of judicial review of this particular case, it may serve as a signal that the AMCU is ready to apply structural remedies too.

In 2020 the overall amount of fines imposed by the AMCU for abuse of monopoly (dominant) position constituted UAH 712.6 mln. For example, DTEK Group with a fine of around UAH 275 mln and Zeonbud with a fine of UAH 25.7 million.

Below we'd like to provide a short overview on the concept of dominance and possible forms of its abuse.

General Criteria for Defining Monopoly (dominant) Position in Ukraine

To start with, the burden of proof is on the AMCU to establish both monopoly (dominant) position and its abuse by a company.

To claim alleged monopoly (dominant) position in a market, the market itself must be defined in the first place. This relates to definition of both product and the geographical boundaries of the market. A precise definition of the market is the cornerstone for further comprehensive and accurate assessment of the alleged monopoly (dominant) position of companies by the authority. The AMCU possesses exclusive powers to define product markets, while the companies concerned are welcome to submit their explanations/objections on this matter. In practice, companies often invoke an "incorrect" market definition as one of the grounds to invalidate the AMCU's decisions in courts.

Once the market is defined, the authority may proceed with an assessment on whether or not the company is dominant. A company has a monopoly (dominant) position on a relevant product market if its market share exceeds 35% provided that such company is not exposed to substantial competition. Thus, market share is one of the factors, but not the only one, to be reviewed by the authority to claim alleged monopoly (dominant) position. The AMCU has to analyze whether the company in question is exposed to substantial competition. For these purposes the AMCU should scrutinize the market structure and competitive environment with a special focus on such factors as: the list of competitors and their market shares; development of market shares over time; barriers to enter the relevant market; existence of countervailing buying power on the market; legal regulation that may govern a dominant's company behavior in specific markets; ability of alleged monopoly (dominant) company to dictate commercial terms to its customers, etc. Although the applicable regulations do not clearly prescribe that the AMCU should take into account countervailing buying power on the market, we strongly believe that assessment of dominance should include countervailing buying power on the market. Furthermore, such an approach is in line with the relevant practice of the European Commission.

To summarize, a "large" market share does not necessarily mean that a company occupies a monopoly (dominant) position. As evidenced by court practice, the authority shall analyze both structural and behavioral factors to claim alleged monopoly (dominant) position.

Please note that having a monopoly (dominant) position is absolutely legitimate, while abuse of a monopoly (dominant) position is prohibited and entails responsibility in accordance with legislation.

Concept of Abuse of Monopoly (dominant) Position

The Law of Ukraine *On Protection of Economic Competition* provides a statutory definition of abuse of monopoly (dominant) position (Part 1 Article 13) and non-exhaustive list of abusive practices (Part 2 Article 13). The AMCU may hold a dominant company liable for abuse of its dominance under Part 1 and/or Part 2 of Article 13 of the mentioned law.

Although a position exists that a dominant company's conduct under Part 2 of Article 13 is abusive *per se* and does not require assessment of anti-competitive effect, we consider that such suggestion is rather contentious and not in line with recent EU case law.

In general, abusive practices may be categorized as follows:

- Exclusionary conduct which excludes competitors and other players from the market or restricts their access to the market. For example, refusal to supply, exclusive dealing, etc.
- Exploitative conduct which is harmful to consumers. For example, setting prices or other trading conditions that would be impossible in the event of existence of substantial competition (unfair commercial terms).
- Discriminatory conduct. For example, applying dissimilar prices or other conditions to equivalent agreements without objective reasons.

In this article we will briefly outline EU case law and AMCU practice regarding excessive prices and discriminatory conduct.

Discriminatory Conduct

To qualify the actions of a dominant company as abuse of dominance by applying dissimilar prices or other commercial conditions to equivalent agreements without objective reasons, the AMCU shall prove that agreements are indeed equivalent and there are no objective reasons for alleged discrimination. In practice, the assessment of the equivalence of two agreements is a rather complicated and ambiguous issue. To claim equivalence of agreements the AMCU should analyze all applicable factors and not limit its review only to some of them. For example, even if two companies buy the same volume of goods they still may be non-equivalent from the perspective of competition law. There may be additional factors justifying the lack of equivalency (different sales channels, different payment terms etc.). In addition, a dominant company may argue that alleged discrimination is objectively justified.

In addition, EU case law tends to apply an effects-based approach to cases involving price discrimination. For example, the Court of Justice in the *MEO case* ruled that a dominant's company discriminative behavior may be qualified as abusive only if it tends to distort competition. The mere presence of an immediate disadvantage affecting customers who were charged more, compared with the tariffs applied to their competitors for an equivalent service, does not mean that competition is distorted or capable of being distorted. For these purposes it is necessary to examine all relevant circumstances, in

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Profile

Address: 32/2 Moskovska Street,
Kyiv, 01010, Ukraine
Tel.: +380 44 490 9100
Fax: +380 44 490 9102
E-mail: office@aequo.ua
Web-site: www.aequo.ua

particular, customers' negotiating power and duration and the amount of the tariffs charged. The Court also clarified that where the effect of a tariff differentiation on the costs borne by the customer or on the customer's profitability is not significant, it may be, in some circumstances, deduced that tariff differentiation is not capable of having any effect on the customer's competitive position.

Excessive Prices

The cases related to excessive prices are much more complicated than it might appear. There are a lot of problems to be solved by competition authorities investigating such types of abuse. It is argued that competition authorities should control prices in a limited number of cases. Such control might be required when: (i) there are high barriers of entry to the market and (ii) there is no sector-specific regulator. If the barriers to enter the market are low, high prices will encourage new players to enter the market or existing competitors to expand output and, consequently, prices would reach a "competitive level" without the need to intervene. Furthermore, dominant firms might be reasonably willing to cover their expenses and to have an incentive for further investments. Finally, it is, indeed, complicated to determine that a particular price is excessive. To do so, a competition authority must have a benchmark of "fair" price.

Given the above, the European Commission seems to be reluctant to intervene solely on the basis of prices charged, although a number of investigations have been completed to date. In recent cases the European Commission applied the two-step test laid down earlier in *United Brands* to establish the abuse of dominance. Following EU case law, a cost/price analysis is not itself sufficient to establish that prices are excessive. The regulator is also expected to examine whether the price is unfair in relation to the economic value of the product (unfair in itself, or when compared to competing products). For example, in *Scandlines Sverige AB v. Port of Helsingborg* the Commission stated that there was insufficient evidence to conclude that the port charges would have "no reasonable relation to the economic value" taking into account the port's unique location, which represented value to the customers. Hence, the Commission did not find that the prices charged were unfair in themselves.

Yevgen Blok
Senior Associate, AEQUO

In Ukraine there is no valid methodology to determine whether the price charged by a dominant company is excessive. Presumably, evolving case law would shed light on this issue in Ukraine. One of the recent landmark cases, where the AMCU charged DTEK Group for abuse of dominance by fixing excessive price for electricity in peak hours may, in this respect, be of interest. Notably, that the AMCU accused DTEK of charging excessive prices in the market where the sector-specific regulator established price caps. Furthermore, from the publicly available version of the decision, the AMCU did not apply the two-step test to excessive prices that is used in the EU. No evidence of price that would exist on the competitive market is produced by the AMCU (to compare with allegedly excessive prices of respondent). The said decision is likely to be challenged in a court, which may answer open questions related to excessive prices in Ukraine.

Conclusions

One should note that a "significant" market share is not equal to dominance (monopoly), while dominance (monopoly) does not entail any responsibility itself. Dominant (monopoly) companies are not prevented from conducting their business activity. Still, abuse is outlawed and, therefore, dominant companies should pay special focus on their conduct in the market.

Investigations on abuse are complicated proceedings that require in-depth analysis of the market, and parties are welcome to provide the authority with proper evidence (market research, expert opinions etc.) to ensure comprehensive review of a case. Proactive participation in proceedings may facilitate the AMCU to issue a grounded and objective decision.

The AMCU has shown itself to be improving its approaches on a permanent basis and seems to follow best European practice. Although there are some gaps, evolving practice is likely to bring more clarity to controversial issues on abuse of dominant (monopoly) position.