THE NOTION OF RELEVANT, „SIGNIFICANT MARKET" IN THE SENSE OF EU LAW AND THE JURISPRUDENCE OF THE COURT IN LUXEMBOURG

Augustin FUEREA[*]

Abstract

Article 102 TFEU prohibits the abusive use of a dominant position in which an enterprise might find itself, at one time. It should be noted that the Treaty does not prohibit the dominant position in which a company might find itself, but it disapproves with its misuse. To fall under the incidence of the article, the enterprise must find itself in a dominant position „on the internal market or on a substantial part of it" and abuse of that position. What is important in the correct application of art.102 TFEU is to identify the „significant" and relevant character of the internal market. For this reason, we bring to the forefront of attention the meaning given by the Court of Justice in Luxembourg to the notion of „significant market", but also the meaning that the European Commission gives to the same notion. Thus, the analysis helps identifying those features that are necessary for the correct application of provisions of Article 102 TFEU in all Member States of the European Union.

Keywords: *Article 102 TFEU; significant market; the European Union; the jurisprudence of the Court of Justice of the European Union; the European Commission*

1. Introductory considerations

Pursuant to Article 102 TFEU, „any abusive use by one or more enterprises of a dominant position within the common market or on a substantial part of it is incompatible with the internal market and prohibited in so far, as it may affect trade between Member States".

Thus, the Article does not prohibit the dominant position in which a company might find itself, but it opposes to its misuse.

„The dominant position was defined (...) as a position of economic strength from which a company benefits and which enables it to prevent effective competition being maintained on a given market, giving it the possibility to behave, to an appreciable extent, independently of competitors, its clients and ultimately, consumers. This notion of independence is related to the degree of competitive pressure exercised by that enterprise. Dominance entails that these competitive constraints are not sufficiently effective and therefore that company enjoys power on a substantial market, for a certain period. This means that the company decisions are largely insensitive to the actions and reactions of the competitors, customers and to a final analysis, of the consumers. The Commission may consider that effective pressures of the competition are missing, although there is still some actual or potential competition. In general, a dominant position derives from a combination of several factors which, taken

[*] Professor, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: augustinfuerea@yahoo.com).

separately, are not necessarily decisive”[1].

To fall under the incidence of the Article, the enterprise must find itself in a dominant position „on the internal market or on a substantial part of it” and abuse of that position. What is important in the correct application of provisions of Article 102 TFEU is to identify the „significant” and relevant character of the internal market.

Article 102 TFEU „applies to companies holding a dominant position on one or more relevant markets. Such a position may be held by one company (*single dominance*) or by two or more companies (*collective dominance*)”[2].

2. The concept of relevant, “significant market”, in the sense of the European Commission[3]

According to the *Commission Notice on the definition of relevant market for the purposes of Community competition law*[4], „the market definition helps identifying and defining the perimeter within which competition takes place between companies. This allows the establishment of the framework where the Commission can apply the competition policy. The main purpose is to identify systematically, the competitive constraints faced by the companies concerned. Defining the market, both at the product level and geographically must allow the identification of real competitors of the companies concerned which are able to influence the behaviour of such enterprises and to prevent them from acting independently of the pressure of effective competition”[5]. In theory[6], it is appreciated that this Communication „is important from three points of view”, namely:

a. „The Commission states that the market definition should be dealt with differently, depending on the nature of the investigation undertaken: an investigation of a proposed concentration is essentially prospective, while other investigations may relate to the analysis of a past conduct”[7];

b. „The Communication has signalled a change in the Commission’s way of thinking regarding the market definition (...). The novelty is found in the Commission's detailed instructions on how to apply the fundamental principles[8] of the „market definition (competitive constraints; demand substitutability, supply substitutability and potential competition) and

c. „The Commission strays from some of the concepts used by the Court of Justice”[9].

The Commission’s Communication is the subject of *the Instructions regarding the defining of the relevant market*, implemented by Order of the President of the Competition Council no. 388/2010[10]. Under point 5 of the *Instructions*, „the concept of relevant market is different from other definitions of the market, often used in

[1] The Communication of the Commission:Guidelines on the Commission's priorities in applying Article 82 of the EC Treaty to the abusive exclusionary conduct by dominant undertakings, COM (2008) 832 final, Brussels, 5.12.2008, pt. 10 (available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/? uri = CELEX:52008DC0832 & from = RO, accessed on 9 January 2016).

[2] Ibid, pt. 4.

[3] For details about European Commission, see Augustina Dumitrașcu, Roxana-Mariana Popescu, Dreptul Uniunii Europene. Sinteze și aplicații, second edition, Universul Juridic Publishing House, Bucharest, 2015, p. 65 ff.

[4] Published in OJEU C 372, of 9.12.1997 (http://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri= OJ:C:1997:372:FULL&from=RO, accessed on 9 January, 2016).

[5] Ibid, pt. 2.

[6] Paul Craig, Grainne de Burca, Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină, edition IV, Hamangiu Publishing House, Bucharest, 2009, p. 1261 ff.

[7] Idem.

[8] Ibid, p. 1261.

[9] Idem.

[10] The Order is published in the Official Gazette of Romania, Part I, no. 553 of 5 August 2010.

other contexts. For example, companies use often, the concept of „market” to designate the area where they sell their products or to refer broadly, to the economic sector in which they operate. It is possible that the concept of market used usually by a company, and that of relevant market to overlap. However, it is always necessary to make an analysis of the relevant market from the point of view of competition, according to the information provided below”.

It results from the analysis of sections 8-10 of the Instructions that, for defining the relevant market, two aspects are considered, namely: the relevant product market and the relevant geographic market. „*The relevant product market* comprises all those products and / or services that the consumer considers interchangeable or substitutable, by reason of their characteristics, price and intended use. *The relevant geographic market* comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, where the conditions of competition are sufficiently homogeneous and which can be delineated from neighbouring areas because the conditions of competition differ appreciably, in those areas. Therefore, *the relevant market* within which a particular competition matter should be assessed is determined by analysis of both the relevant product market, and the relevant geographic market „.

At the same time, for defining the relevant market, one has to resort to the following *principles, considered fundamental*: the competitive constraints; the demand substitutability; the supply substitutability and the potential competition.

a. The constraints of competition. Under section 13 of the *Instructions*, „companies are dealing with three main sources of competitive constraints:

- demand substitutability;
- supply substitutability;
- potential competition.

From the economic point of view, to define the relevant market, *the demand substitutability* is the fastest and most effective disciplinary element that acts on the suppliers of a specific product, especially in terms of their pricing decisions. An undertaking or association of undertakings cannot have a significant impact on the existing sales conditions, e.g. on prices when its customers are able to orient themselves without difficulty to available substitute products or to suppliers located elsewhere. Therefore, the process of defining the relevant market consists mainly in identifying the effective alternative sources of supply to which the customers of firms in question may resort, both in terms of products / services offered by other providers and in terms of their geographical location”.

Regarding „the competitive constraints arising from the *supply substitutability (...)* and *potential competition,* they are not generally, immediate and require always the analysis of additional factors. Such constraints are not, generally, taken into account in defining the relevant market”[11].

b. Demand substitutability[12]. „The assessment of the demand substitutability involves determining the range of products considered by the consumer as interchangeable. To achieve this, the SSNIP[13] test can be used. The SSNIP test attempts to identify the narrower relevant

[11] Pt. 12 of the *Instructions*.

[12] Pts. 13-17 of the *Instructions*.

[13] "Hypothetical monopolist test (SSNIP test – the small, but significant and non-transitory increase in price), first used by the European Commission for the case Nestle / Perrier from 1992" (according to the *Instructions*).

market on which a hypothetical monopolist could perform profitably, a small but significant and non-transitory increase (usually, a price increase between 5% and 10% is considered) in the price, by evaluating the customer feedback to that increase. This test can provide information about the facts needed to define the relevant market.

Therefore, the starting point in defining the relevant market is to identify the type of products that companies involved are marketing and the geographical area concerned. Later, it will be tested whether other products and geographical areas have the ability to exert sufficient competitive pressure on the price policy of the enterprises involved and with immediate results in order to be included in the relevant market.

At conceptual level, the test of the hypothetical monopolist explores whether customers would be able to orient themselves toward substitutes, easily available, or to suppliers located in a different geographic area where a hypothetical monopolist would practice in that geographic area, a smaller, but significant and non-transitory increase in price for that (those) product (products). If the demand substitutability is sufficient to make unprofitable, due to lower sales, the price increase of the hypothetical monopolist, the closest substitute product or another geographic area will be included on the relevant market. The process will be repeated until the products and the geographic areas in question shall be such, that a small, but significant and lasting price increase practiced by a hypothetical monopolist would become profitable. The set of products and geographic areas so determined shall constitute the relevant market. An equivalent analysis is applicable in cases concerning the concentration of the buying power, where the starting point of the analysis is the supplier, and the price test allows the identification of alternative distribution channels for products of the respective provider".

c. Supply substitutability[14]. „In defining the relevant market, the supply substitutability could also be taken into account, in cases where it would have effects equivalent to those on the demand substitutability, in terms of effectiveness and achievement of immediate results. This means that, if a hypothetical monopolist practiced in that geographic area for that product, a small, but significant and non-transitory increase in price, suppliers who do not produce currently, that product, should be able to switch production toward that product and to market it on short term, without incurring significant additional costs or risks. When these conditions are met, the additional production brought on the relevant market will have a disciplinary effect on the competitive behaviour of companies involved. Such an effect is equivalent, in terms of effectiveness and immediate results, to that of the demand substitutability.

The above mentioned situations usually occur when companies sell products of various quality classes. Even if, in the view of a particular final customer or group of customers, the various quality classes of a particular product are not substitutable, they will be grouped into a single relevant product market, provided that most of the suppliers are able to provide these different quality products immediately and without incurring significant additional costs. In these cases, the relevant product market will encompass all products that are substitutable in demand and supply and sales of such products will be added together, in order to calculate the total market value and volume.

[14] Pts. 18-21 of the Instructions.

The same reasoning may lead to grouping different geographic areas".

d. Potential competition. „Potential competition, the third source of competitive constraint is not taken into account in defining the relevant market, since conditions, under which the potential competition is an effective competitive constraint, depend on the analysis of specific factors and circumstances related to the entry conditions on the market. Where appropriate, this analysis will be performed only in a later stage when the general position of the undertakings concerned, on the relevant market will have already been determined and when this position will have raised competition concerns"[15]..

3. The concept of relevant "significant market" in the sense of the Court of Justice

The following judgments of the Court of Justice are significant for defining the concept of "relevant market".

a. *United Brands Company and United Brands Continental BV*[16]. In this case[17], United Brands Company of New York was founded by the merger of United Fruit Company and the American Seal Kap Corporation. When filing the action, United Brands Company constituted the most important group on the global market of bananas, for which, in 1974, it provided 35% of the exports. Its European subsidiary, United Brands Continental BV from Rotterdam was responsible for coordinating sales of bananas in all Member States of the European Economic Community, except for the United Kingdom and Italy. Following complaints received from several European companies, the Commission decided to initiate the infringement procedure of the Article from the Treaty prohibiting the abuse of dominance. According to the Commission, United Brands Continental BV had abused its dominant position in that:

- it compelled distributors (from Germany, Denmark, Ireland, the Netherlands and the Belgo-Luxembourg Economic Union) not to resell bananas to the United Brands Company while still green;
- it practiced dissimilar charge prices for equivalent services in sales of Chiquita bananas in relations with its trading partners, distributors established in these Member States, except for the Scipio group;
- it practiced unfair selling prices for Chiquita bananas sales to customers established in Germany (except for the Scipio group), Denmark, the Netherlands and the Belgo-Luxembourg Economic Union and
- it ceased for a period of time to deliver Chiquita bananas to a company in Denmark.

Following that procedure, the Commission adopted a decision according to which United Brands Company received a fine of one million units of account and was ordered:

- to cease infringing the provisions of the Treaty;
- to notify all distributors established in Germany, Denmark, Ireland, the Netherlands and the Belgo-Luxembourg Economic Union, of the removal of the ban to resell bananas while still green;
- to inform the Commission about this and
- to inform the Commission twice a year for 2 years, of prices charged during the

[15] Pt. 22 of the Instructions.

[16] Judgement in the case *United Brands Company and United Brands Continental BV v. / Commission of the European Communities*, 27/76, ECLI:EU:C:1978:22.

[17] The text is processed after the text published on the website of the European Institute of Romania: http://ier.ro/sites/default/files/traduceri/61976J0027_rezumat%20IER.pdf (accessed on 9 January 2016).

previous six months to customers in Germany, Denmark, Ireland, the Netherlands and the Belgo-Luxembourg Economic Union.

United Brands Company and United Brands Continental BV brought before the Court in Luxembourg an action aimed, primarily, at the annulment of the Commission's decision and at ordering it to pay a unit of account for non-pecuniary damage and, alternatively at eliminating or at least reducing the fine if the principal judgment is preserved.

In the content of the action, the two companies[18]:

- challenge the analysis made by the Commission of the relevant market, and also of the product market and the geographic market;

- deny that it is in a dominant position on the relevant market within the meaning of article 86 of the Treaty;

- consider that the clause relating to the conditions of sale of green bananas is justified by the need to safeguard the quality of the product sold to the consumer;

- intend to show that the refusal to continue to supply the Danish firm was justified;

- take the view that it has not charged discriminatory prices;

- take the view that it has not charged unfair prices;

- complain that the administrative procedure**[19]** was irregular;

- dispute the imposition of the fine and, in the alternative, ask the court to reduce it.

In the analysis that it performed on the relevant market, the Court took into account the product market and the geographic market.

Thus, market delineation is made, both in terms of the product and geographically because „the conditions of competition (...) must be examined depending on the relevant *product features* and with reference to *a particular geographic area* where the product is marketed and where the conditions of competition are sufficiently homogeneous to appreciate the effect of the economic power of the undertaking concerned”[20].

Concerning *the product market*, the Court starts in its approach, from what the applicant claimed, namely that:

- „bananas are an integral part of the fresh fruit market, because they are reasonably interchangeable by consumers with other kinds of fresh fruit such as apples, oranges, grapes, peaches, strawberries, etc. or whether the relevant market consists solely of the banana market which includes both branded bananas and unlabelled bananas and is a market sufficiently homogeneous and distinct from the market of other fresh fruit”[21] and that

- “bananas compete with other fresh fruit in the same shops, on the same shelves, at prices which can be compared, satisfying the same needs: consumption as a dessert or between meals”[22].

According to the Court, „in order to consider that the banana is the subject of a market sufficiently different, the banana must be individualized by its special features that distinguish it from other fresh fruit, so to be less substitutable with these fruits and to be competition with them only in a less

[18] Judgement in the case *United Brands Company and United Brands Continental BV v. / Commission of the European Communities* (ECLI:EU:C:1978:22) pt. 7.

[19] See Elena Emilia Ștefan, *The topicality and the importance of the administrative agreement within the Romanian Law*, CKS-eBook, 2015, p.388- 394

[20] Ibid, pt. 11.

[21] Ibid., pt. 12.

[22] Ibid., p. 13.

obvious way[23]. The conclusion reached by the Court is that "a very large number of consumers having a constant need for bananas are not noticeably or even appreciably enticed away from the consumption of this product by the arrival of other fresh fruit on the market and that even the personal peak periods only affect it for a limited period of time and to a very limited extent from the point of view of substitutability. Therefore, (...) the banana market is a market is sufficiently different from that of the fresh fruit"[24]. However, the Court's reasoning is interesting, namely[25]:

- the ripening of bananas takes place the whole year round without any season having to be taken into account.

- throughout the year, the production of bananas exceeds the demand and can satisfy it at any time. Owing to this particular feature the banana is a privileged fruit and its production and marketing can be adapted to the seasonal fluctuations of other fresh fruit which are known and can be computed.

- there is no unavoidable seasonal substitution since the consumer can obtain this fruit all the year round.

- since the banana is a fruit which is always available in sufficient quantities the question whether it can be replaced by other fruits must be determined over the whole of the year for the purpose of ascertaining the degree of competition between it and other fresh fruit;

- the studies of the banana market on the Court's file show that on the latter market there is no significant long term cross-elasticity any more than - as has been mentioned - there is any seasonal substitutability in general between the banana and all the seasonal fruits, as this only exists between the banana and two fruits (peaches and table grapes) in one of the countries (West Germany) of the relevant geographic market[26];

- as far as concerns the two fruits available throughout the year (oranges and apples) the first are not interchangeable and in the case of the second, there is only a relative degree of substitutability[27];

- this small degree of substitutability is accounted for by the specific features of the banana and all the factors which influence consumer choice[28];

- the banana has certain characteristics: appearance, taste, softness, seedlessness, easy handling, a constant level of production which enable it to satisfy the constant needs of an important section of the population consisting of the very young , the old and the sick[29] and

- as far as prices are concerned two FAO studies show that the banana is only affected by the prices - falling prices - of other fruits (and only of peaches and table grapes) during the summer months and mainly in July and then by an amount not exceeding 20%[30].

As regards the *geographic market*, based on the assessment of the European Commission according to which Germany, Denmark, Ireland, the Netherlands and the Belgo-Luxembourg Economic Union constitute a geographic market, it is necessary to examine whether United

[23] Ibid., p. 22.
[24] Ibid., pts. 34, 35.
[25] Ibid., pts. 23-33.
[26] Ibid., pt. 29.
[27] Ibid., pt. 30.
[28] Ibid., pt. 31.
[29] Ibid., pt. 31.
[30] Ibid., pt. 32.

Brands Company has the opportunity to impede effective competition, the Court concluded that „the geographic market, as defined by the Commission, which constitutes a substantial part of the common market must be considered relevant market in order to assess the possible dominant position of the applicant"[31].

b. Nederlandsche Banden Industrie Michelin[32]. Nederlandsche Banden Industrie Michelin, a Dutch company attacked before the Court in Luxembourg, the Commission decision through which it was fined, requiring thus, either its cancellation or its reduction. The decision of the European Commission was grounded on its findings, according to which Nederlandsche Banden Industrie Michelin infringed the Treaty provisions on the prohibition of abuse of dominant position on the market of new spare tyres for trucks, buses, etc., and the practices for which the company is culpable are the following[33]:

- (a) Nederlandsche Banden Industrie Michelin tied tyre dealers in the Netherlands to itself through the granting of selective discounts on an individual basis[34] conditional upon sales "targets" and discount percentages, which were not clearly confirmed in writing, and by applying to them dissimilar conditions in respect of equivalent transactions; and

- (b) Nederlandsche Banden Industrie Michelin granted an extra annual bonus on purchases of tyres for lorries, buses, as well as on purchases of car tyres, which was conditional upon attainment of a "target" in respect of car tyre purchases.

The reasons on which the applicant based its action are the following[35]:

a) the Commission's administrative procedure was irregular because :

- the Commission did not provide the applicant with the documents in the file, in particular the results of inquiries addressed to users and the undertaking's competitors;

- in its decision, the Commission made no mention of the results of the hearing or of the statements made by witnesses and experts at the hearing and

- during the administrative procedure the Commission did not disclose the criteria upon which it planned to fix a fine.

b) the Commission wrongly considered that Nederlandsche Banden Industrie Michelin had a dominant position. The applicant questioned the Commission's assessment as it relied on:

- an incorrect definition of the substantial part of the common market at issue and

- an incorrect assessment of the Nederlandsche Banden Industrie Michelin company's position in relation to its competitors as regards, on the one hand the company's share of the relevant product market , and particularly the definition of that market, and on the other hand, the other evidence tending to prove or disprove the existence of a dominant position;

c) The Commission wrongly decided that the discount system of Nederlandsche Banden Industrie Michelin and the grant of an extra discount amounted to an abuse within the meaning of the Treaty.

d) The Commission wrongly considered that the conduct in question was

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[31] Ibid., pt. 57.

[32] Judgment in the case *NV Nederlandsche Banden Industrie Michelin v. / Commission of the European Communities*, 322/81, ECLI:EU:C:1983:313.

[33] Ibid, pt. 3.

[34] Rebates = amount refunded by the seller to the buyer, which has been fixed in advance in relation with the importance of the turnover (according to https://dexonline.ro/definitie/risturn%C4%83, accessed on 10 January 2016).

[35] Judgment in the case *NV Nederlandsche Banden Industrie Michelin v. / Commission of the European Communities* (ECLI:EU:C:1983:313), pt. 4.

liable to affect trade between Member States and

e) the Commission should not have fined the company Nederlandsche Banden Industrie Michelin or at any rate should have fined it at a lesser amount.

For the purpose of investigating the possibly dominant position of an undertaking on a given market, the possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products. However, it must be noted that *the determination of the relevant market* is useful in assessing whether the undertaking concerned is in a position to prevent effective competition from being maintained and behave to an appreciable extent independently of its competitors and customers and consumers. For this purpose, therefore, an examination limited to the objective characteristics only of the relevant products cannot be sufficient: the competitive conditions and the structure of supply and demand on the market must also be taken into consideration”[36].

Given that the EU executive agreed not to take into account when assessing market share, the original new tyres, the Court held that „due to the special structure of demand characterized by direct orders from car manufacturers, competition is conducted in this area, according to completely different rules and factors”[37].

Referring to spare tires, the Court found that:

- there is no interchangeability between car and van tyres, on the one hand and heavy-vehicle tyres, on the other. Therefore, car and van tyres have no influence at all on the competition, on the market of heavy-vehicle tyres”[38].

- the structure of demand for each of those groups of products is different. Most buyers of heavy-vehicle tyres are trade users, particularly haulage undertakings, for whom, (…), the purchase of replacement tyres represents an item of considerable expenditure and who constantly ask their tyre dealers for advice and long-term specialized services adapted to their specific needs. On the other hand, for the average buyer of car or van tyres, the purchase of tyres is an occasional event and even if the buyer operates a business, he does not expect such specialized advice and service adapted to specific needs. Hence, the sale of heavy-vehicle tyres requires a particularly specialized distribution network which is not the case with the distribution of car and van tyres”[39] and

- there is no elasticity of supply between tyres “for heavy vehicles and car tyres owing to significant differences in production techniques and in the plant and tools needed for their manufacture. The fact that time and considerable investment are required in order to modify production plant for the manufacture of light-vehicle tyres instead of heavy-vehicle tyres or vice versa means that there is no discernible relationship between the two categories of tyre enabling production to be adapted to demand on the market. Moreover, that was why, when the supply of tyres for heavy vehicles was insufficient, the Nederlandsche

[36] Ibid, pt. 37 (the translation is taken from http://ier.ro/sites/default/files/traduceri/61981J0322.pdf accessed on 9 January 2016).

[37] Ibid., pt. 38.

[38] Ibid., pt. 40.

[39] Idem.

Banden Industrie Michelin decided to grant an extra bonus instead of using the surplus production capacity for car tyres to meet the demand”[40].

Finally, the Court accepted that in order to establish the existence of a dominant position, the market share of the applicant should be considered at the level of replacement tyres for trucks, buses and similar vehicles and tyres for cars and vans should not be taken into account.

4. Conclusions

In conclusion, for defining the relevant market, according to the European Commission, two aspects must be taken into consideration, namely: the relevant product market and the relevant geographic market. However, for defining the relevant market, it has to be resorted to the following *principles, considered fundamental*: competitive constraints; demand substitutability; supply substitutability and potential competition. In addition, there are also to be considered, including, the opinion of the Court of Justice of the European Union, meaning that *„the determination of the relevant market* allows evaluating whether the company has the ability to prevent maintaining an effective competition and to behave, to a considerable extent, independently of its competitors, customers and consumers. Consequently, it cannot, to this end, be confined to examining the objective characteristics of the relevant products, but it should also consider the possibilities of competition and the structure of supply and demand on the market”[41]

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[40] ***Ibid.,*** pt. 41.

[41] Judgment in the case NV Nederlandsche Banden Industrie Michelin v. / Commission of the European Communities (ECLI:EU:C:1983:313), pt. 37.