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**ECONOMIC AND LEGAL ASPECTS OF THE COMPETITION POLICY
FROM THE EUROPEAN UNION. ABUSE OF DOMINANT POSITION**

PhD Thesis

-Summary -

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SUMMARY OF THE THESIS

PART I. CONSIDERATIONS ON THE CONCEPT OF COMPETITION

CHAPTER I. CONCEPTUAL APPROACHES ON COMPETITION

CHAPTER II. FUNCTIONS AND FORMS OF COMPETITION

II.1. Perfect Competition

II.2. Imperfect Competition and its Forms

II.3. Workable Competition

CONCLUSIONS

PART II. THE COMPETITION POLICY OF THE EUROPEAN UNION

CHAPTER I. HISTORY OF THE COMPETITION POLICY

I.1. The Role of the State in Competition Policy. A Historical Perspective

CHAPTER II. COMPETITION POLICY

II.1. Competition Policy as a Policy of the EU

II.2. The Necessity of the EU Competition Policy

II.3. The Objectives of the EU Competition Policy

II.3.1. Supporting Internal Market

II.3.2. Ensuring Economic Efficiency

II.4. The Relationship between the EU Competition Policy and other Policies of the European Union

II.5. Institutions Involved in the Implementation Process of the EU Competition Policy

CONCLUSIONS

PART III. ABUSE OF DOMINANT POSITION – KEY AREA OF THE EU COMPETITION POLICY

CHAPTER I. EU COMPETITION POLICY REGARDING ABUSE OF DOMINANCE

I.1. The Legal Framework of the EU Competition Policy on Abuse of Dominance

I.2. Elements which define Abuse of Dominance

CHAPTER II. ISSUES RELATED TO THE DEFINITION OF THE RELEVANT MARKET

- II.1. Product or Service Market Definition
- II.2. Geographic Market Definition
- II.3. The Importance of Temporal Aspect in Defining the Relevant Market
- II.4. Aspects Related to Complementary Market Definition

CHAPTER III. FINDING A DOMINANT MARKET POSITION OR THE ANALYSIS OF MARKET POWER

- III.1. General Considerations on the Concept of Dominant market Position
- III.2. Relevant Factors when Determining Dominant Market Position
 - III.2.1. Market Shares
 - III.2.2. Barriers to Competition
 - III.2.3. Other Relevant Factors

CHAPTER IV. CONSIDERATIONS REGARDING ABUSIVE BUSINESS BEHAVIOUR

- IV.1. Theoretical Arguments Regarding the Need to Regulate Abuse of Dominance
- IV.2. Classifications of Abusive Behaviours
- IV.3. Methods for Determining the Anticompetitive Effects of Unilateral Business Behaviours

CHAPTER V. ABUSIVE BEHAVIOURS

- V.1. Excessive Prices
- V.2. Price Discriminations
- V.3. Predatory Pricing or “Dumping”
- V.4. Rebates
- V.5. Tying and Bundling
- V.6. Refusal to Supply
- V.7. The English Clause
- V.8. Abusive Practices which take place on the Market on which the Company is not Holding a Dominant Market Position
- V.9. The State and Abuse of Dominant Position

CHAPTER VI. ACTUAL APPROACH REGARDING ABUSE OF DOMINANCE

- VI.1. Formalist or Legal Approach vs., a More Economic” Approach
- VI.2. Advantages of the Economic Approach
- VI.3. Competition Restraint – Anticompetitive Market Foreclosure
 - VI.3.1. Anticompetitive Foreclosure which takes place on the same Market

VI.3.2. Anticompetitive Foreclosure which takes place on Complementary Markets

VI.3.3. Anticompetitive Foreclosure which takes place on Upstream or Downstream Markets

VI.4. Justifications of Abusive Behaviours

CHAPTER VII. EFFECT ON TRADE BETWEEN MEMBER STATES

CONCLUSIONS

PART IV. CASE STUDY: ECONOMIC EFFECTS OF THE MICROSOFT'S ABUSE OF DOMINANCE IN THE EU

CHAPTER I. INTRODUCTORY ISSUES

I.1. Facts related to Microsoft's Business Practices

I.2. Relevant Terminology

CHAPTER II. PROBLEMS RELATED TO RELEVANT MARKET DEFINITION AND FINDING OF A DOMINANT MARKET POSITION

II.1. Aspects related to Relevant Market Definition

II.2. Aspects related to finding Microsoft's Dominant Position on the Relevant Markets

CHAPTER III. MICROSOFT'S ABUSIVE BEHAVIOURS

CHAPTER IV. REMEDIES OFFERED BY THE EUROPEAN COMMISSION AND THEIR POSSIBLE EFFECT ON THE MARKET

GENERAL CONCLUSIONS

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1. MOTIVATION OF THE RESEARCH

Excessive or predatory prices, conditional rebates, refusals to supply, tying or bundling, etc. are business practices that we can meet relatively often in practice. Behaviors mentioned above may raise competition problems, if they are part of the business strategy of undertakings holding a significant market power and may impose the intervention of competition authorities.

The EU Competition Policy aims primarily to maintain and to ensure the effective and undistorted character of competition as a means to ensure competitive markets and the functioning of the European Internal Market.

The above mentioned objective would however be impossible to attain given the fact that dominant companies would restrict competition by their actions. It would be unfair if the authorities would try to prevent competitive restrictions by limiting the freedom of dominant firms to compete. The objective of the European Competition Policy in what regards undertakings which hold a dominant market position is to prevent and punish abusive behaviors. But the question arises, what we mean by dominant market position and especially, when we can speak about an abuse of a dominant position?

The above mentioned concepts - dominant position and abuse of dominance – are specific to the rules of the EU Competition Policy, but their meaning is not precisely defined by the European legislator. Vagueness of these concepts leaves room for confusion. Therefore, drawing a dividing line between keeping a certain market share and holding a dominant market position, respectively, between abuse of dominance and competitive market behavior is particularly difficult. The mission of solving problems of this nature belongs to competition policy and to national or regional competition authorities.

The adequate definition of the concept of abuse of dominance presents importance. Thus, a too narrow and superficial definition of the concept of abuse of dominance can enable businesses to take advantage of their economic power and to resort to competitive actions that may have a foreclosing effect of the rivals from the market. However, an overly broad definition of this concept may lead to adverse consequences for the competitive process, by affecting the freedom of action of the companies with a significant market power.

Finding a balanced approach regarding alleged abusive market conduct represents a challenge for the European authorities responsible for the elaboration and implementation of competition policy. So, the effects of business behavior are difficult to predict. The same conduct may give rise to different effects on the assumption that is made in different circumstances. What complicates the situation even more is the fact that a certain behavior usually produces both anti-competitive and pro-competitive effects. Also, short-term effects may differ essentially from those which may occur in the long term.

EU competition policy on abuse of dominance behavior tries to meet the challenge mentioned above, formulating the policy on abuse of a dominant position in such a way that it allows businesses with significant market power to compete in the market and at the same time to ensure the satisfaction of the public interest served by maintaining the competitive character of the markets.

In order to meet both of the above mentioned objectives, the reform process of the EU competition policy has envisaged the establishment of an economic approach to analyzing potential abusive behaviors.

Traditionally, the application of the EU competition policy in this area has been subject to the influence of the ideas of the Freiburg School. In the opinion of this school, protecting the economic freedom of the undertakings in what regards their participation into the competitive process is a prerequisite for ensuring the competitiveness of the markets. However, the representatives of this school has acknowledged that undertakings tend to affect by their behavior the economic freedom competitors, particularly through the use of anticompetitive agreements and business behaviors aimed to exclude competitors from the market. The only way to prevent the effects mentioned above, it was considered to be the imposition of a strict legal framework and the intervention of the state in protecting competition.

The consequence of the Freiburg School's approach adopted by the EU was an excessive legal formalism, often criticized by economists, academics and practitioners. Determination of the competitive or anticompetitive character of a business behavior takes place by considering the form which particular businesses practice embrace, rather than by considering the effects produced by this particular practice on the market.

As well, the Commission when applying EC competition policy took into consideration the historical jurisprudence of the European Courts, which was detrimental to the efficiency of

the implementation process and had as a consequence an insufficient attention accorded to the economic aspects of the cases analyzed. This latter aspect, may give rise to erroneous findings of the existence or lack of abusive behavior, after the case. The possibility to meet this type of errors can be particularly high in a formalist approach, especially if this approach is applied on markets characterized by rapid technological change, the creation and exploitation of intellectual property rights etc. Many traditional assumptions - enshrined in the decisional practice of the Commission and the case law of the European courts - on what is harmful to competition, does not find their applicability in the current economic climate.

The reform process initiated in 2003 aimed to remove these shortcomings, by involving national competition authorities and courts in the implementation of the EU competition policy and by using economic instruments when analyzing the business practices of dominant undertakings. The new vision, supported by the Economic Advisory Group for Competition Policy, proposes an approach based on a careful observation of the functioning of markets where abusive behaviors occur and on the evaluation of the economic effects of these behaviors. What is in this context sanctioned is the anticompetitive foreclosure, i.e. the restriction of competition by creating artificial obstacles in the way of competition and the creation of prerequisites for the dominant undertaking to obtain monopoly profits. Assessing the potential exclusionary effect of a given behavior will take place by taking into consideration the market position of the dominant undertaking, the features and competitive structure of the relevant market and the short and long term effects of behavior etc.

THE OBJECTIVES OF THE RESEARCH

The present study aims to provide a comprehensive and an up to date paper on issues concerning abuse of dominant position from the perspective of the EU competition policy. We thus seek answers to questions such as:

- How should we understand the concept of competition in the context of application of EU competition policy?
- What are the specific issues and objectives of the EU Competition Policy?
- What are the institutions engaged in policy implementation and what is the procedure followed by them?

- What are the defining elements of abuse of dominance?
- How should be the relevant market defined as required for the retention of a dominant position?
- What is a dominant position and which are the relevant criteria for holding such a market position?
- What are the main methods used by the Commission to determine the anticompetitive effects of the dominant undertakings' business practices?
- What are the main manifestations of abuse of dominant position and what are their particular features?
- What are the main advantages of adopting an economic approach in the context of the analysis regarding abuse of dominance?
- How to analyze the effect on trade between Member States as the essential criteria for the competence of the EU competition authorities?
- What are the peculiarities of application of the EU competition policy in high-tech industries characterized by rapid technological development?
- To what extent shows the Microsoft case the limits of competition policy application in high-tech industries?

3. LITERATURE-REVIEW

Deși în practică cazurile de abuz de poziție dominantă apar destul de frecvent, numărul lucrărilor de specialitate dedicate exclusiv acestui subiect poate fi considerat relativ restrâns, atât în cazul literaturii de specialitate străine, cât și în cazul celei autohtone. Nu același lucru putem spune despre articolele de specialitate pe această temă, care cel puțin în literatura străină sunt destul de numeroase și vizează mai ales aspectele discutabile ale aplicării politicii concurențiale a Uniunii Europene în acest domeniu.

Although in practice the cases of abuse of dominance occurs quite frequently, the number of specialized works devoted exclusively to this subject can be considered relatively few, both in the case of foreign and domestic literature. Not the same thing can be said about the articles published on the subject. The articles dedicated to abuse of dominance in foreign literature are

quite numerous and concern especially questionable aspects of the application of EU competition policy in this area.

The first foreign works dedicated exclusively to the issues regarding abuse of dominance from the perspective of the EU competition policy occurred relatively short after to the entering into force of the relevant regulations, in the early '50s. Thus, the first articles are dating back at the mid-'60s and the first books at the early '70s.

General references on the topic of abuse of dominant position can be found in works devoted exclusively to competition issues, to EU competition policy and to European Union policies in general or in volumes dedicated to European Union law, or to European Business Law. These latter types of works we can find also in our national literature. These publications (treaties, monographs, university courses, etc.) present abuse of dominance as a key area of the EU competition policy.

Work with an interdisciplinary character (legal and economic) are elaborated on this topic mostly by foreign authors, they are not so many and are mostly recent publications. Our national literature is not being able to boast with such publications.

This latter argument justifies our effort to write the present thesis, as an up to date and hopefully comprehensive study, having an interdisciplinary character.

The success of the scientific approach adopted by us was assured by the use of the scientific research methods appropriate to the context. We choose to elaborate a work with a mixed character, theoretical and empirical. We opted also for a qualitative approach of the analyzed topic.

We opted for the historical method when we presented the historical origin of given concepts or certain institutions and we have endeavored to offer current conclusions with the help of scientific induction and deduction. The comparative method helped us to reveal the specific features of concepts or institutions and to see the developments that took place in their development or, where appropriate, to show the advantages and disadvantages of certain competitive policy options. We used the scientific description to show the current state of development of certain institutions, to present the forms and features of some common business practices etc. Analytical analysis helped us to identify development trends in the application of competition policy and critical analysis allowed us to express our approval or disapproval, after the case, on the topic

4. THE STRUCTURE OF THE THESIS

This paper attempts to provide a detailed overview on issues concerning the EU competition policy, and especially on abuse of dominance, surprising the changes that have occurred in recent years and their theoretical and practical implications in what regards the evaluation of the business strategies of the dominant undertakings by the competition authorities.

In the first part of the study (Part I - *Considerations on the concept of competition*) we tried to define the key concept for the application of competition policy – the competitive phenomenon. To this end, we presented several definitions of the concept of competition; we have shown the functions performed by competition in the market economy and its major forms of manifestations.

The comprehensive definition of the concept of competition is extremely difficult, taking into the consideration the complexity of this phenomenon with multiple features and forms. Definitions in the economic literature have attempted to circumscribe the concept of competition both from a static perspective - defining it as a manifestation of rivalry, freedom of action, as a means of ensuring economic prosperity or the failure to monopolize the market, or the lack of barriers to entry - and from a dynamic perspective, considering it a selection process which ensures that the economically viable companies will remain on the market.

We can form a comprehensive view about the meaning of the concept of competition if we combine all the definitions given by the authors in the economic literature. Thus, competition is a form to exercise ownership rights, where the owners of goods and services are in a process of rivalry to achieve the desired objectives by all combatants, in a context where the desired objective is impossible to be achieved simultaneously by all of the competitors. Competition acts as a selection process which leads to the elimination of the less efficient firms and ensures the victory of those that can provide a consumer surplus in the form of new products, more efficient production technologies, lower prices or increased quality products and services. But competition cannot function in the presence of artificial barriers of competition and of that of monopoly, the latter being usually accompanied by adverse effects such as increased production costs, reduced innovation, high profits and poor quality products.

We opted for an own comprehensive definition of the competitive phenomenon, that could be defined as *a manifestation of freedom of economic action which gives rise to a confrontation between incumbent companies, this process acting as a means of selecting the winner rewarded, usually with profit and the improvement of its market position.*

Competition performs numerous functions within the market economy on which we have referred: preventing excessive profits, stimulating innovative activity, increasing economic welfare and consumer surplus, optimal allocation of resources, regulation of supply and demand; price reduction, control of monopolies etc.

The possibilities of classification of the various forms of competition are varied, but we opted for one of the criteria considered a traditional one by the economic literature, namely the one which takes into consideration the market structure. We had presented the main features of the two types of competition which can be identified with the help of the classification criterion mentioned above: perfect and imperfect competition. We also briefly defined the main forms of manifestation of the imperfect competition: monopolistic competition, monopoly, bilateral monopoly, countered monopoly, oligopoly, duopoly etc.

At the end of the first part of the thesis, we paid attention to the concept of functional competition, considered a level measure of the degree of competition envisaged by the EU competition policy. The concept was developed by J.M. Clark in his article "Towards a Concept of Workable Competition" in 1940 and was defined as the level of competition that can be achieved in practice, depending on the characteristics of each market and leads to acceptable results in terms of variety of goods, price and quality. Because of its vagueness, the concept provides the flexibility to the EU competition policy, because it can be easily adapted to the socio-economic realities of a particular economic context.

The second part of the thesis (*Part II - The European Union's competition policy*) was devoted to general issues concerning competition policy.

The emergence of competition policy took place in the late nineteenth century as a response to the formation of large trusts, formed by undertakings which coordinate their activities in a particular economic sector in terms of production volume and products' price. The first attempts that aimed to adopt regulations in this area took place in 1890 in the United States, in 1923 in Austria and Germany and in 1919 in the United Kingdom. Unlike the United States, European attempts to establish a national competition policy prior to 1957 were doomed to

failure, since the legislative proposals or competition laws had failed or had been into force only for a short time. Beginnings of EU competition policy could be found in the first treaties establishing the European Communities, namely the Treaty establishing the European Coal and Steel Community from 1951 (also known as the Treaty of Paris) and the Treaty on the European Economic Community (Treaty of Rome) from 1957.

The state's role in competition policy has undergone changes in time, depending on the dominant economic thinking of the moment. Thus, the physiocrats were in favor of a "*spectator state*." The framework of "laissez-faire's" policy was in compliance with natural laws, competitors operating on the market based on the principle of freedom of action, guaranteeing public order and respect for the fundamental freedoms. Communist ideology instead was against private initiative and rejected competitive phenomenon, assuming the role of state for the insurance of income redistribution through command economies. Going forward, we could see that the Keynesian ideology promoted active participation of the state in the economy in terms of jobs, growth and equitable redistribution of income in society. The neoliberals proposed instead a moderate state intervention in the economy in order to ensure the normal operation of the capitalist economy, by supporting private activity and as well the small and medium sized undertakings, and by suppressing anticompetitive agreements and abuse of dominant position.

Similarly the representatives of the Chicago School argued for moderate intervention in the economy, with the difference that in their opinion sanctioning anticompetitive behavior must take place according to the economic effects they produce. Recent literature speaks instead of the concept of state of competition, where government measures aim to ensure economic prosperity, international competitiveness, sustaining competitive mechanisms of the market, supporting innovation, globalization, liberalization of public services and reducing inflation.

Given the fact that EU competition policy is formulated by governments in order to meet a public need, we tried to identify its public policy nature, because it contributes, among others, to support the Union's internal market. For this reason it can be considered a regulatory policy, which ensures the regulation of a substantial part of the economic and social life. Adoption of competition policy was needed at European level, because national competition policies were not able to cope with cross-border anti-competitive behaviors, which by their size affected the functioning of the European Internal Market. The appearance of EU competition policy has contributed to the vitality of domestic competition, by imposing the liberalization of

national industries being under state monopoly and helped to eliminate the discriminatory measures taken by Member States, in order to foster national economies.

In our opinion, the establishing of competition policy took place in order to achieve two major objectives: a) supporting the internal market (by prohibiting price discrimination between Member States, supporting small and medium sized enterprises in order to ensure equal opportunities etc.) and ensuring economic efficiency (by maintaining and/or improving the variety, quality and price of goods and services provided in the Union).

Like all EU policies ,the EU competition policy interacts with other EU policies, such as consumer policy, internal market policy, industrial policy, regional development policy and policies from the energy, telecommunication and transport sector.

Just because of the complexity of this policy, its implementation requires specialized institutions from the national and EU level, having legislative, executive and judicial power. The main European institutions involved in the implementation of competition policy are: the European Parliament (having legislative and consultative powers and exercising democratic control over the activity of the European Commission), the European Council, the Council of the European Union (with legislative and executive powers – by the Competitiveness Council), the European Commission (playing a supervisory role in the implementation process and having significant decision-making powers), the EU courts (which exercise judicial review of Commission's decisions), the European Central Bank, the Court of Auditors and the Economic and Social Committee (all of them with advisory powers). National competition authorities and national courts ensure policy implementation in the context of the decentralized implementation of this policy. For ensuring a sustainable cooperation between institutions from the national and European level the European Competition Network (ECN) was established and is made up by the European Commission and by the national competition authorities.

In the third part of the thesis (*Part III - Abuse of dominant position - Key Area of the EU Competition Policy*), we focused on presenting the particular aspects of competition policy, especially in what regards the abusive behaviors of the undertakings holding a dominant market position.

Competition policy has as objective to maintain and to develop competitive market structures and to maximize consumer welfare, which could not be achieved without regulating the unilateral actions of the undertakings that have significant market power, which can disrupt

the market equilibrium by their actions in order to maintain or strengthen their market position. The abuse of dominance rules should not interfere with the ability of dominant firms to compete aggressively in the market, as long as the net effects of their business behavior are beneficial to consumers.

Before presenting the issues concerning the elements of an abuse of dominance we showed briefly the legal framework of the EU competition policy on the matter. This framework consists of provisions included in the EU treaties (Article 102 of the Treaty on European Union), regulations adopted by the EU Council and the European Parliament, the European Commission's communications on: cooperation between national competition authorities, the complaints before the Commission, on the topic of procedures before the European Commission and others. As well, it includes non binding rules (the so-called "*soft-law*" rules) containing the Commission guidelines for national competition authorities on relevant market definition, effect on trade between Member States, the priorities of the Commission's actions etc.

The finding of an abuse of a dominant position has to follow certain steps, before we proceed to analyze the presence of an abuse of dominance. The first step in the competitive assessment is the identification of the existence of a dominant market position. But this cannot exist in the abstract, it being necessary to define the relevant product market and the relevant geographic market. Product market definition is aimed to identify the competitive constraints exercised on the dominant undertaking and the existence of consumer products considered as being interchangeable with the product or service provided by the alleged dominant undertaking. European Commission uses for this reason the test called the hypothetical monopolist test (*Small but Significant Non-Transitory Increase in Prices – SSNIP Test*), which implies to check the rate of reorientation of consumers, or producers from the product market under view, if prices increase by 5-10%.

Discussions from the economic literature had drawn our attention to a practical problem which concerns the irrelevance of the SSNIP test, or its failure, if the price taken into account in the analysis is the prevalent market price (assuming that the prevailing market price has an increased character, given that the dominant undertaking does not face a significant degree of competition). Along with other authors, we proposed as a solution, to take into account the competitive price as the relevant price level for the hypothetical monopolist test, which can be defined as the price that allows competing actual or potential rivals.

Geographic market definition considers the delimitation of a geographical area where competitive conditions are similar. Like product market definition, it analysis the interchangeability in terms of supply and demand, the Commission resorting to apply the same hypothetical monopolist test, which this time is considering the consumers and producers shift to other geographical areas, if the price increases by 5-10% in the relevant geographical area. We also found that there are other factors besides interchangeability, which may affect the definition of the relevant market, namely the time factor (which may contribute to the finding of a seasonal or temporary market).

Once the relevant market definition has been finished we should orient our attention to the structural factors (market shares, barriers to entry) or behavioral factors (conduct of the dominant undertaking) that may contribute to achieve the conclusion that the undertaking is holding a dominant position.

For this reason we tried to define the meaning of the concept of dominant position in the context of the European competition policy. We rejected in principle the definitions offered by European courts, that the relevant criterion for dominance would be the independent behavior of the dominant undertaking when he determines its market strategy in relation with customers, competitors and clients. We consider that the independence of the company in relation to those mentioned above is utopian, given that even a monopolist will take into account the demand curve when it takes its decisions on the market. We choose to opt for an own definition of the concept of dominance in our attempt to bring a purely legal concept (invented by European courts) close to an economic concept, namely that of the concept of market power. We could define the concept of dominance as a degree of economic power held by the dominant undertaking which permits to the undertaking to resort to business practices that can harm consumers, customers and competitors. Therefore we are talking about a market power which resists in time and which not necessarily allow overcoming competition, but offers the possibility to restraint competition.

This dominant position may be held individually or collectively, when several undertakings jointly exercise their market power and have the possibility to harm competition by adopting a common line of action on the market, provided that none of the participating companies have the incentives to breach the joint strategy.

Related to the structural factors which can contribute to retain a dominant market position, we remember that the size of market share is relevant. So, overall market share of over 75% can give rise to the presumption of a dominant position. If market shares of between 40-50% we also need the presence of other factors that can contribute to retain a dominant position (e.g, the existence of entry barriers). Market shares below 40% raise usually a presumption of lack of dominance. Of course, there are exceptions when the fragmented nature of the market can prevent such a conclusion and we can retain the existence of a dominant position if there is a major difference between the market shares of the market leader and the market shares of competitors.

The existence of barriers to competition may also contribute to the retention of a dominant position. These barriers may be related to costs (significant sunk costs, scale economies, privileged access to raw materials, vertical integration and so on) or may have a non-economic character (e.g. legal restrictions, intellectual property rights, business behaviors like - refusal to supply, predatory pricing, exclusive distribution and so on).

Before presenting some examples of abusive behaviors, we have explained briefly the arguments that led to the regulation of abuse of dominance. These arguments did vary over time, depending on the relevant economic theory of the moment. We are mentioning here considerations related to prevention of social welfare reduction (neoclassical approach), ensuring freedom of action for competitors (ordoliberal approach) or maintaining the competitive structure of the market (the Chicago School approach).

If we surprise in time the evolution of the EU competition policy, we can observe that it took distance to the ordoliberal approach (considered a dominant view at the time of the adoption of the European regulations) and it get closer to the Chicago School approach, if we take into consideration the changes brought by the reform process initiated in 2005. Thus the declared objective of the EU competition policy is to protect the competitive process and hence, the interests of consumers.

Examples of unfair business behavior are varied in practice and they can be subject for classifications. We must remember, however, that these classifications have a great practical importance, being punished all types of behaviors that give rise to net effects which are detrimental to consumers.

In what regards us, we opted for the traditional classification of abuse of dominance into: behavioral abuses and structural abuses. The first type implies direct harm to customers (such as excessive prices, discriminatory pricing, etc.). The second type – i.e. structural abuses – affects the market structure, by excluding the dominant undertaking's competitors (by predatory pricing, conditional rebates, refusal to supply, exclusive distribution and so on). In the latter case we can distinguish between horizontal and vertical exclusion, depending on the level occupied at the production chain by the competitor of the dominant undertaking (which is the same level as the dominant undertaking - for horizontal exclusions, or a downstream or upstream market reported to the dominated market - for vertical exclusions). The classification presented by us has its limits, because the effects generated by a business practice considered to a behavioral abuse (for ex. application of higher prices to captive customers) can also have exclusionary effects, namely by causing the reorientation of consumers.

As mentioned above, punishing business practices of dominant undertakings takes place only in the event that the practices are anticompetitive. In order to establish whether a business conduct is anti-competitive or not several tests have been developed by the European Commission. None of this test can be applied for all types of abuses. These tests are named as follows: test on consumer welfare, reduced profits test or the lack of economic justification test. Each of these tests has advantages and disadvantages. Thus, for example, determining the net effects of a particular behavior on consumer welfare has an increased complexity; on the other hand not all abusive behaviors involve a profit sacrifice.

At the end of this part of the thesis we have tried to present the most common forms of abusive behavior and tried to identify their main features and their possible pro-or anti-competitive effects.

We have seen so, that identifying excessive market price is quite difficult, if on the market is present a dominant undertaking, due to the frequency of increased prices in these markets. However we cannot overlook the fact that increased prices on the market can have pro-competitive effects by favoring the entry of new firms on the market.

Discrimination of consumers through prices can give rise to foreclosure by shifting consumers to manufacturers offering a lower price. Price discrimination allows at the same time serving the interest of a greater number of consumers, thanks to different price levels which can be affordable to different categories of consumers.

As we have seen in the literature on abuse of dominance there exists a debate on predatory pricing, aimed to establish the relevant standard price (average avoidable cost, average variable cost, average total cost, etc.) which should be taken into account when determining the predatory character of a given price charged by the dominant undertaking. The European Commission has opted for average total costs as a cost standard for retaining the predatory character of prices. Prices which are above total costs are presumed to not raise competition problems. We also have to say that not all prices below average total cost may be considered abusive; selling in loss for example, is justified in the case of perishable products or in the case of new product on the market.

The existence of potential pro-competitive effects, in addition to anti-competitive effects (excluding competitors) can be observed also in the case of rebates, i.e. discounts conditioned by a quantity threshold or by exclusivity. The positive effects of rebates consists is that they contribute to the rapid recovery of investments made by enterprises, are lowering prices, increase revenues of the dominant undertakings, that can be invested in research and development activities etc.

Negative effects of tying and bundling arise from the creation of barriers to entry, exclusion of competitors and by the displacement of market power from the tying good market to the complementary market. However, tying can bring benefits, such as increasing the quality of products, creating cost savings for consumers and economies of scale for the enterprise.

Refusals of supply can be considered anticompetitive if they constitute a punishment against a longtime customer dealing with one or more competitors of the dominant company and the refuse of supply envisages an essential facility for the client. Positive effects of these business practices may be to reduce any losses that would be incurred in the event that the delivery took place to a customer who fails to pay to the seller. Negative effects may relate to the potential exclusion of existing competitors or preventing entry of a new competitor on the market.

We have also made reference to anti-competitive practices which are based on the state actions, being committed by undertakings with special or exclusive rights. The problem of abuse of dominance in these cases may be identified in the event that these companies are not able to satisfy the entire demand on the market and their exclusive rights prevent potential competitors to enter the market. Also we should note that the treaty allows derogation from the competition

law provisions in the case of existence of special or exclusive rights, if derogation can be justified by the need to fulfill certain obligations that constitute services of general economic interest.

At the end of the third part of the thesis we wanted to make some references to the current approach on EU competition policy and on the possibility to justify abusive behaviors. According to the legal and formalist approach, specific to EU competition policy until the reform, the existence of competition rules was justified by the argument which says that the market does not generate or maintain sufficient rules to ensure the efficient functioning of the market.

In this context dominant undertakings were considered as factors that weaken competition by their mere presence. Therefore, the legislature considered desirable to establish a *per se* ban on certain behaviors, by presuming their anticompetitive effects. Examples of such practices are excessive pricing and predatory pricing.

The need for the new approach was justified by the potential restrictive effect of these formal bans in what regards the freedom of action of dominant undertakings. Economic approach instead puts emphasis on the economic effects of the behavior, sanctioning only practices that contribute to the exclusion of competitors and which harms consumers. The new approach recognizes the fact that practices can produce different effects depending on the circumstances of the case and provide similar treatment for practices having a similar economic effect.

Competitors of the dominant undertaking are no longer protected. Instead the competitive process itself will be protected. So, the foreclosure of economically less efficient firms will be permitted.

The new approach also enables to justify behaviors that may be considered unfair at first glance, if these behaviors generate net positive effects to current or potential customers, and fulfill the criteria of necessity and proportionality. Among the justifications that may be invoked in order to justify potentially abusive business practices we can mention: the objective necessity defense, reasons related to public health or security, the defense of economic efficiency if it could be provided that the positive effects offset the negative effects to which the behavior gave rise.

A final element necessary to retain an abuse of dominant position, for the purposes of EU competition policy envisages the criteria of affecting trade between Member States. The

behaviors which fail to meet this criterion will not fall within the competence of the European competition authorities. The competence of European competition authorities covers those cross-border business behaviors between Member States which affects the activities and the competition structure of the Internal Market, as well the activities of foreign undertakings which produce the same effect on the Internal Market. The relevant practices are those which influence intra-Community trade, by restricting or increasing its volume. The potential foreclosure effect depends on the nature of the abusive behavior (i.e. behavioral or structural abuse), the nature of products involved (i.e. products commercialized in the EU), the market position of companies (i.e. market shares of the undertakings) and the legal and economic context in which they occur.

In the last part of thesis (*Part IV - Case study: Economic Effects of Microsoft's Abuse of Dominance in the EU*) we have tried to illustrate the application of competition policy provisions on a real case.

We opted to review the most publicized case from the history of application of the competition provisions on abuse of dominant position, due to the involvement of the largest companies producing computer programs and different IT applications. We have chosen an example from the information technology industry in order to illustrate the specific issues which can occur in the context of applying competition policy in industries characterized by rapid technological change.

Microsoft was charged two behaviors considered at first sight that being abusive: a) refusal to supply interoperability information to competing producers of operating systems for group servers and b) the incorporation of the media software (Windows Media Player) in the Microsoft Windows operating system for personal computers.

The arguments against Microsoft envisaged the foreclosure of competitors by the displacement of market power from the market of operating systems for personal computers to the market of group server operating systems. Microsoft was also accused by the reduction of the freedom of choice of consumers and competitors foreclosure by the incorporation of media application Windows Media Player in Windows.

The competence of the EU authorities in this case was justified even if the company does not have its head office in the Union, because the effects of the undertakings' behavior extended also to the Internal Market (*the effects doctrine*).

Remedies provided by the European Commission took envisaged the disclosure by Microsoft of the necessary interoperability information, making a version of Windows without the media application, as well the application of a fine of historical dimensions, namely 497 million Euros.

Before carrying out of the competitive analysis of the case we presented the importance of interoperability for computer systems. This character of computer systems increases the value of a software product and is essential for communication between different users (editing, storage and transmission of information), being also the source of network effects specific to this industry.

The first step of the competition analysis focused on defining the relevant market. In this context, note that in terms of interchangeability of the demand operating systems for personal computers and operating systems for group servers are different products, the two computer programs responding to different needs of consumers and there aren't strong enough substitutes for the operating systems of the group servers.

The Commission analyzes have revealed also the lack of interchangeability from the supply side, observing that if the between the two products mentioned above there is no significant shift towards the production of one of the products by the product manufacturers, if any of the product price increases by 5-10%. This can be explained due to high development costs and network effects that hinder new competitors entering the market.

We had also noted that the market for media applications is distinct from that of operating systems for personal computers. Geographic market was considered to have global dimensions in all of the market definitions provided by the Commission.

In terms of retaining market dominance, the Commission had conducted a traditional market power analysis, focusing mainly on the criterion of market share, which in both cases was extremely high. Microsoft had over 95% of market share on the market of operating systems for personal computers and a market share of over 60% on the market for operating systems for group servers.

The Commission failed to take into account Microsoft's fears that were offered in order to justify its behavior, namely the possibility of consumers' shifting from the platform formed by personal computers to applications offered via servers. The argument regarding the abandonment

of informatics systems based on personal computers could have been also explained by the cost advantages of a likely option.

Under this aspect we share the view expressed in the economic literature according to what the importance of relevant market shares in terms of retaining a dominant market position is limited in the information technology industry. This industry is subject to rapid technological changes, market shares of dominant companies having an ephemeral character, being replaced at the end of the technological era by the most effective market leaders who came with major innovations.

Also in the case of computer programs, their success depends on the number of applications that they offer. From this perspective, the fears of Microsoft could be considered justified. A reorientation of consumers and application developers to work group servers could not be excluded, given the increased popularity of these systems due to the cost advantages it offers. Judged from this perspective, Microsoft's action consisting in entering the market for operating systems for group servers and its refusal to supply interoperability information for competing manufacturers, could be considered a normal competitive action.

In what regards the incorporation of the media application in the Windows operating system, we can say that the media program had beneficial effects on consumers, besides it's eventually foreclosure effects.

Microsoft's exclusionary conduct could be justified in terms of arguments related to the specific features of high-tech industries, where market demand has the tendency "to tip" in the direction of the dominant manufacturer. In the Microsoft case it was a real opportunity for application developers to focus their attention to the possible dominant platform of the future, namely operating systems for group servers. Microsoft's option to enter the operating systems' market for group servers was a viable measure to maintain dominant position in the market of operating systems for personal computers and to obtain additional profits from the server group operating system market.

Finally, we expressed our reserves in terms of efficiency remedies offered by the European Commission, because of the rapid changes occurring in the IT industry and the extended duration of proceedings before the Commission. Even though the remedies were efficient in principle, the time involved with investigations (nine years, in this case) is that they do not respond to the current state of affairs. That is why we believe in the necessity to develop

special procedures applicable in the case of high-tech industries which will address the special needs of these industries in terms of celerity.

The remedy proposed by the Commission for the incorporation of the media application in the Windows operating system has its limits. Thus, the company was asked to make a version without the media program. What was not considered was that the company can still keep selling the product with or without the media application at the same price.

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