Charles University Prague

Faculty of Law

Abuse of dominant position in EU & US Law

Ph.D. Dissertation

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Prague, 2011

Univerzita Karlovy v Praze

Právnická Fakulta

Zneužitie dominantného postavenia v práve EU a USA

Doktorská dizertačná práca

Katedra Európskeho Práva

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Praha, 2011

Prehlasujem, že som svoju Ph.D. prácu napísal samostatne, pod dohľadom vedúceho práce a s použitím citovaných prameňov.

I hereby declare that I have written this Ph.D. dissertation independently, under the supervision of my supervisor and with use of the sources quoted.

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V Prahe/In Prague, 2011 **Rastislav Funta**

Abstract

"Price competition is the essence of free and open competition. It favours more efficient firms and it is for the benefit of consumers both in the short and the long run. Dominant firms not only have the right but should be encouraged to compete on price"

The past and recent decisions of the EU and US Courts refreshed the debate on the different approaches to antitrust policies on both continents. While in contrast to the US where it will be highlighted that Americans protect competition in the EU Europeans protect competitors. Nevertheless, protecting the consumer welfare and securing that enterpreneurs have a real opportunity to compete in the market economy are overall important objectives. This has been the main objective of the European Community since the former Article 3 (1) (g) of the EC Treaty provided that "a system ensuring that competition in the internal market is not distorted." To achieve an effective competition, the creation of a system of undistorted competition is necessary. But an effective competition is unthinkable without competitive freedom of the market participants.

By an investigation if an undertaking has substantial market power giving it a dominant position we have to consider a variety of factors, among others, market position of the allegedly dominant undertaking, market position of the competitors, or the buyer's strength. It is often difficult to distinguish between an undertaking that is monopolist and other one that is a competitor as well as between predatory pricing and legitimate price competition. Although a dominant undertaking has the right to protect its own commercial interests, this does not mean to undertake actions to strengthen its dominant position.

Abuse of dominance as a legal concept has been defined by the European Court of Justice (ECJ) in United Brands and Hoffmann La Roche as: "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by

affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers." For the term corresponding to "dominant position" in the EU law, in the USA will be used the term "monopoly". In America, the U.S. Supreme Court held that, "a party has monopoly power if it has, over any part of the trade or commerce among the several States a power of controlling prices or unreasonably restricting competition." The fundamental difference between the EU (Article 102 TFEU) and US (Section 2 of the Sherman Act) law may be explained with the words that while Section 2 aims at preventing monopolization, Article 102 TFEU is primarily focus on constraining monopolies. To the subparts which are often considered as abuse of a dominant position belongs unfair prices, refusal to supply, price discrimination, predatory pricing, etc. In the next parts we will analyze and clarify the phenomenon of predatory pricing using three-sided approach (economic, legal and business strategy). Predatory pricing is described as illegitimate anti-competitive strategy in both the EU and the USA. The principle of free price formation is the essence of competition and price cuttings are necessary and desirable expression of intense competition, however, they can be used specifically with the intention to force the competitors from the market. Whether the entrepreneurial behaviour is commercially and economically correct or not is the central task of the competition, which in case of an abuse has to punish such behavior. Predatory pricing realized by a dominant undertaking, i.e. setting predatory prices, which are designed to force competitors out off the market or deter the market access is a violation of Article 102 TFEU. According to the decision practice of the EU Commission and the ECJ the current practice is characterized by use of economic methods, which play a crucial role in identifying predatory pricing. However, there is a criticism that the economic context is not sufficiently considered.

From the perspective of consumers, predatory prices are generally positive evaluated because consumers are neither interested about the undertakings strategic motives nor about the problems associated with predatory pricing by

competing companies. Predatory prices may, however, as well as discount schemes lead to force competitors off the market or deter them the market access, which in the medium to long term period is not in the consumer interest. Competition is thus a "process of creative destruction." The resulting injury to competitors is immanent to competition and can not therefore be the measure of the competitive nature of entrepreneurial behavior. Predatory pricing strategies are thus consequently very difficult to distinguish from normal competitive behavior. The assessment of targeted predatory pricing strategies is therefore one of the most controversial question of the theory of competition and competition (antitrust) law. The extensive collection of literature goes from the denial of such behavior as a rational business strategy to the appraisal that it has to be vigorously tackled. The more recent - especially game theory - models come to the conclusion that for predatory pricing strategies particularly imperfect information is a necessary prerequisite. Therefore, it is difficult to undertake the proof in practice.

Also in the U.S., the American studies are limited on the one side on the analysis of historical cases and on the other hand on statistics over the period of the last century, which covers all the most important competition cases in this area. This statistics is showing us that claims concerning the predatory pricing strategies were numerically small and on decline. The frequency of predatory pricing strategies depends not only on the importance of price as a marketing tool. In the earlier neo-classical price theory, the price formation was in the focus of scientific interest. Therefore, Schumpeter wrote in 1942: "The economists finally outgrown to the stage where they saw only price competition and nothing else. As soon as quality competition and customer service will be accepted in the sacred realm of the theory, the price variable is displaced from its dominant position." Also in business administration the interest is focused on the pricing policy. This one-sided focus on prices will be in the practice not reflected: undertakings take their decisions because of various alternatives, of which pricing is one of many. What strategy is finally used depends largely on where the best cost-benefit ratio is achieved.

The European competition rules have a special position, as they have to watch not only about the maintenance of effective competition, but also about the achievement of the objectives of the Treaty. They contain no specific finding that prohibits systematic price cuttings. Thus, the EU Commission and the European courts have to develop criteria for the assessment of such behavior. The European Commission has, regarding the evaluation of the concentrations between undertakings raised a question whether predatory pricing can be subsumed under Article 82 (now Article 102 TFEU). If an undertaking use its dominant position, e.g. during long-time practice of selling below cost, to force a competitor to the merger, it is contrary to Article 82 (now Article 102 TFEU). The discussion of the competitive assessment of this question gained additional relevance in the ECJ AKZO case.

After the statement of influential Professor McGee who believes that predatory prices are so irrational that they can be hardly used in practice, the U.S. antitrust law began to examine this question in broad details in order to recognize this behavior from the competitive behavior. The answer to this question was provided by Areeda and Turner, through their economic test based on a comparison of prices and costs. But this does not satisfy the schollar audience and the critics began their discussion regarding next element by the examination of predatory pricing. The difference in the doctrine on both continents has been fully reflected in Brooke and AKZO cases. In the first case, the U.S. Supreme Court stated as a precondition by a proof of the predation the so called recoupment, while the ECJ held in the AKZO case the intent of the dominant urdertaking as a relevant factor. Since the landmark ruling in the Brooke case, the American antitrust law requires recoupment as one of two conditions proving predation. On the European continent, the ECJ rejected this condition as a prerequisite of a predation, but schollars are often looking to the opposite conclusion. This conviction is based on the ground that if the undertaking will not raise its prices and then begin to recoup its losses suffered in the previous period, consumers can not be harmed and there is no need to punish the dominant (thus without any evidence of a recoupment).

Opposite to this is the argument, that the recoupment, it is not the same as the harm of consumers, because, in the case when the dominant behavior has not been successfull there will be no recoupment, it may result in weakening competition and thus adversely affect consumers. While in the U.S. it will be required the proof of recoupment during the examination of predatory pricing, on the European continent in the first place we have the predatory intent of the dominant undertaking. In the case AKZO the Court held that if prices are between average variable and average total cost the predation occur only if a dominant undertaking will try to force the concurence from the market. In the United States, predatory pricing has been examined in the Standard Oil Company Case. In the EU the ECJ and the European Commission had the chance to deal with predatory pricing cases nearly 100 years after the Standard Oil Company Case, namely in the above mentioned case AKZO case followed by the Tetra Pak or Irish Sugar.

I will divide my analysis as follows: we begin in Part I with the Introduction to the Review of Predatory pricing (pp. 19 and follows) The second part represents the theoretical competitive approaches and competition policy solutions to predatory pricing (pp. 32 and follows) The third part presents the classification and subsumption of targeted predatory pricing strategies under Article 102 TFEU (pp. 80 and follows) The fourth part investigates the EU/US Judicial Approach to Predatory Pricing (pp. 107 and follows) The last part presents proposals for the treatment of predatory strategies under Article 102 TFEU (pp. 149 and follows).

The present work is conceived to illustrate legal and economic developments of predatory pricing and shed light on the analyse of different approaches having a look from both sides of the Atlantic, because predatory pricing phenomenon is a great area of study both from EU as well as US perspective (using three sided approach economic, legal and business strategy). The method choosen for this work is qualitative in its nature because it does not rely on numbers or other quantitative measures but mainly on verbal wordings.

I decided for this method because it represents the best approach to the submitted work. Also the case study does not focus only to one case. Comparative analysis between the legal views from both sides of the Atlantic has been considered as well. I have relied on EU Treaty provisions, EU/U.S. case law and literature dealing with the predatory pricing theories.

My deep sense of gratitude is extended Doc. JUDr. Pavel Svoboda, Ph.D., D.E.A. from Department of European Law; The Charles University in Prague, who has patiently guided me through the research.

I would also like to thank to one of U.S. American leading antitrust scholar, Prof. Dr. John E. Lopatka, J.D., LL.M., (A. Robert Noll Distinguished Professor of Law; The Pennsylvania State University - The Dickinson School of Law) who has provided useful early comments and feedback. I also acknowledge the valuable suggestions and help from Prof. JUDr. Luboš Tichý, CSc., Head of the Institute of Comparative Law at the Faculty of Law in Prague.

Prague, 2011

Keywords: Predatory pricing, Abuse, Antitrust law