

*Uroš Vranac**
Bar Association of Vojvodina
ORCID: 0009-00079418-3619

COLLECTIVE DOMINANCE IN THE MARKET**

ABSTRACT: This paper aims to define the concept of a market participants' collective dominant position in the market, given that it is insufficiently explained and underdeveloped in the competition law of the Republic of Serbia, in contrast to its evolution in the competition law of the European Union. While harmonization between EU regulations and those of the Republic of Serbia has largely been achieved in accordance with the Stabilization and Association Agreement, their practical application in Serbia remains lacking. Therefore, this paper will analyze the concepts of a position of dominance and a collective dominant position in the market and provide a clearer definition of these terms.

Keywords: dominant position in the market, collective dominant position in the market, competition, European Union, Commission for the Protection of Competition

* e-mail: urosv29@gmail.com, Lawyer in Novi Sad.

** The paper was received on October 9, 2022, and it was accepted for publication on January 29, 2024.

The translation of the original article into English is provided by the *Glasnik of the Bar Association of Vojvodina*.

INTRODUCTION AND TERMINOLOGY

Various terms can be found in the literature that describe this legal concept. The collective dominant position is the most commonly used term, and for this reason, it is referred to in this paper, even though it is quite awkward for use while using Serbian. However, there are alternative terms that are also in use to varying extents. To indicate a collective dominant position in the market, the term joint dominance is also used as a synonym.¹ This term would certainly be more in line with the spirit of the Serbian language. In the US legal system, the designation “collective (united) monopolization of the market” is used in accordance with the terminology of the Sherman Law, however, this term can have other meanings besides collective dominance.² In many court decisions and decisions of authorities responsible for the protection of competition and in certain scientific papers, we can also encounter the term oligopolistic dominance, indicating that in specific instances, the dominance of several market participants has been observed in an oligopolistic market.³ Nevertheless, a collective dominant position does not necessarily occur in an oligopolistic market, and the use of this term should be approached with caution, as individual market dominance can also manifest in an oligopolistic market.⁴

ON THE CONCEPT OF COLLECTIVE DOMINANCE IN THE MARKET

Defining the concept of a collective dominant position in the market falls within the domain of antitrust law, as a branch of competition law. However, its definition has not evolved simultaneously in theory, case law, and the practice of competition protection authorities.⁵ In fact, the concept of a collective

¹ Gudofsky, J., Kriaris, E. L., Vital, L. (2010). Abuse of Joint dominance – Is the Cure Worse than the Disease? *Canadian Bar Association - Annual Competition Law Conference*. Ontario, 4.

² *Ibid.*, 4.

³ Andersson, A. (2001). *Collective Dominance in E. C. Merger Control: An Analysis of Legal and Economic Arguments*. Göteborgs Universitet: Juridiska Institutionen, 8.

⁴ Škorić, S. (2009). Kolektivna dominacija na tržištu. *Pravo – teorija i praksa*, 11–12. Novi Sad, 104.

⁵ Jones, A., Sufrin, B. (2016). *EU Competition law, text, cases and materials*. New York: Oxford University Press 6th edition. Available at: Ariel Ezrachi, *EU competition law, an analytical guide to the leading cases*. Oregon: Oxford and Portland, 706.

dominant position in the market was initially established through practice.⁶ There have been sporadic attempts to define this concept, but it appears that jurisprudence has focused more on clarifying conceptual definitions derived from practice, rather than developing an independent definition. Furthermore, it is possible to distinguish the concept of a collective dominant position in the market as it appears in both practice and legislation, although there is no significant difference based on the criteria mentioned. Therefore, it can be concluded that the notion of a collective dominant position in the market is defined on a **case-by-case basis**.

To define the concept of a collective dominant position in the market, it is first necessary to establish what constitutes a dominant position in the market.

It is important to point out that there is no single theoretical definition of a dominant position. It is also important to point out that the notion of a dominant position in the market in competition law is defined against the dominant position of one business entity. However, as we will see, this term is also applicable to the dominant position of several market entities, albeit in a modified form.

The concept of a dominant position is not found in financial literature, as it is a construct from law.⁷ The definition of a dominant position in the market was established by the EU Court of Justice in the *United Brands vs. Commission*.⁸ This definition served as a model for legislation not only in EU member states but also in other countries, including our own.⁹

“A dominant position is characterized by a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the market by giving it the power to behave to an appreciable extent independently of its competitors, its customers, and ultimately, consumers.”¹⁰

⁶ See: Andersson, A. (2001). *Op. cit.* or Bergkvist, P. (2019). *Collective Dominance and EU Competition Law, An assessment of the concept and the challenge facing the European Court of Justice*. Örebro University, School of Law, Psychology and Social Work. Juridicum, 36.

⁷ Jones, A., Sufrin, B., Dunne, N. (2019). *EU Competition law, text, case and materials*. Oxford University press 7th edition. New York, 187.

⁸ *Ibid.*, 187.

⁹ Art. 15, paragraph 1. Law on Protection of Competition reads: "A dominant position in a relevant market is deemed to be the position of an undertaking which, due to its market strength, may operate in the relevant market to an appreciable extent independently in relation to the actual or potential competitors, customers, suppliers or consumers."

¹⁰ *C 27/76 United Brands Company and United Brands Continentaal BV v. Commission*, ECLI:EU:C:1978:22, para. 65. Begović, B., Pavić, V., Popović, D. V. (2020). *Uvod u pravo konkurencije*. Belgrade: Publishing and Information Center of the Faculty of Law in Belgrade, 187.

It is evident that a dominant position refers to a situation where one market participant possesses significant market power, specifically the ability to set the price of its product sustainably above its marginal costs.¹¹ Additionally, the definition implies that the key elements of a dominant position are the relevant market and the market share through which the market participant exerts its market power. The relevant market is determined on a case-by-case basis, representing the market where competitive pressure exists.¹² Furthermore, the determination of a dominant position and the extent of market share are also assessed based on each specific case. However, there is a “tacit consensus” that a market share of around 40% indicates a significant likelihood of dominance.¹³ Therefore, when a participant’s market share exceeds 40%, it strongly suggests the presence of a dominant position.¹⁴ An important factor not captured by the definition is entry barriers, which restrict the possibility of new competitors entering the market and thus enhance the market power of those already operating.¹⁵ Additionally, the consumer’s purchasing power is another key consideration in assessing dominance. If a consumer’s purchases constitute a large portion of a market participant’s sales, it is unlikely that the participant will raise prices for its products or services.¹⁶

However, while determining the relevant market and market share is also crucial for a collective dominant position in the market, the question arises as to how these elements should be applied when multiple entities in the market behave in a collectively dominant manner. Specifically, it must be considered whether the element of market share applies to each market participant individually or to all participants collectively and whether the 40% threshold established for individual dominance is also applicable to a collective dominant position. Moreover, the issue of the relationships among market participants who hold a collective dominant position must be addressed. Are these independent legal entities, or are they connected through legal and/or

¹¹ Begović, B., Pavić, V., Popović, D. V. (2020). *Uvod u pravo konkurencije*. Belgrade: Publishing and Information Center of the Faculty of Law in Belgrade, 80.

¹² Stanivuković, M. (2016). *Uvod u pravo Evropske unije*. Novi Sad: Center for Publishing Activities of the Faculty of Law, 322; Begović, B., Pavić, V., Popović, D. V. (2020). *Uvod u pravo konkurencije*. Belgrade: Publishing and Information Center of the Faculty of Law in Belgrade, 82.

¹³ Begović, B., Pavić, V., Popović, D. V. (2020). *Op. cit.*, 80.

¹⁴ Jones, A., Sufrin, B. (2016). *EU Competition law, text, cases and materials*. New York: Oxford University press 6th edition, 195. More on the size of the market share necessary to establish the existence of a dominant position in *T-201/04 Microsoft v. Commission* ECLI:EU:T:2007:289, *C-333/94 Tetra Pak v. Commission*, ECLI:EU:C:1996:436.

¹⁵ Begović, B., Pavić, V., Popović, D. V. (2020). *Op. cit.*, 81.

¹⁶ *Ibid.*

economic links? This question becomes particularly significant in cases of market concentrations involving multiple entities. To answer these questions, it is necessary to analyze the concept and criteria of a collective dominant position in the market.

THE CONCEPT OF COLLECTIVE DOMINANCE IN EU LAW

In EU competition law, Article 102 of the Treaty on the Functioning of the EU (TFEU) prohibits the abuse of a dominant position by one or more market participants in the internal market or a significant part of it, to the extent that it affects trade between member states. The linguistic interpretation of this provision suggests that multiple market participants can abuse a collective dominant position in the market. For a long time, however, there were uncertainties regarding the interpretation of this provision, leading to two main perspectives on its applicability to “multiple market actors”. The narrow interpretation holds that the phrase “one or more market participants” applies only to legal entities that are part of the same corporate group or a single, larger entity.¹⁷ This interpretation resulted from a decision of the Court of Justice of the EU (CJEU), which found that a dominant position could exist among members of a group constituting a single economic entity.¹⁸ Nevertheless, such an interpretation of the CJEU was, as we will see, supplemented. The broader interpretation argues that Article 102 of the TFEU applies not only to a single economic entity but also to legally and economically independent companies that exhibit a collective dominant position.¹⁹ EU law quickly adopted this broader interpretation, driven by frequent market changes. It became necessary to adapt the application of this provision to evolving market dynamics. The European Commission (hereinafter: EC), as the guardian of the EU’s legal order, sought to establish the framework for implementing a collective domi-

¹⁷ Bergkvist, P. (2019). *Collective Dominance and EU Competition Law: An assessment of the concept and the challenge facing the European Court of Justice*. Örebro University, School of Law, Psychology and Social Work. *Juridicum*, 14; Đuričić, J. (2011). Razvoj pojma kolektivne dominacije tumačenjem čl. 82. UEZ u praksi suda Evropske unije. *Pravo i privreda*, 1–3. Belgrade, 134.

¹⁸ Bergkvist, P. (2019). *Op. cit.*, 14. *C6-72 Europemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities*, ECLI:EU:C:1973:22. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=C_ELEX%3A61972CJ0006&qid

¹⁹ Wish, R., Bailey, D. (2018). *Competition law*, 9th edition. Oxford: Oxford University press, 562. Bergkvist, P. (2019). *Op. cit.*, 14; Đuričić, J. (2011). *Op. cit.*, 134.

nant position in the market, which is logical given the increasing presence of oligopolistic markets in modern economies. Scholars note that this provision is applicable to a collective dominant position resulting from tacit collusion among market participants.²⁰

It is often emphasized in theory that Article 101 of the TFEU is also significant for the application of the concept of a collective dominant position in the market.²¹ This article provides:

“The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market...”

The aforementioned provision may encompass a wide range of practices or abuses carried out by collectively dominant market participants.²² Article 101 of the TFEU also applies to cases of parallel behavior by market participants, which can be seen as a rational response to the market structure and may serve as evidence of sustained practices among such participants.²³ In this way, a collective dominant position in the market can also be established. Therefore, this article of the TFEU should be considered when assessing the existence of a collective dominant position in the market.

In addition to the TFEU, EU Council Regulation No. 139/2004 of January 20, 2004, on the control of concentrations between market participants (EUMR) is also significant. Article 2 of the EUMR states that concentrations are incompatible with the common market if they significantly restrict competition in the common market or a significant part of it, particularly as a result of the creation or strengthening of a dominant position. Concentrations involve changes such as mergers, acquisitions, takeovers, or control over one market participant by another, and their effects on competition can be either unilateral or coordinative.²⁴ Unilateral effects occur when the concentration

²⁰ Ezrachi, A. (2014). *EU competition law. An analytical guide to the leading cases*. Oxford: Hart Publishing, 288.

²¹ Mestmäcker, E. J., Schweizer, H. (2014). *Europäisches Wettbewerbsrecht*, Munich: C. H. Beck, 426.

²² Verheyden, A., Day, J., Padilla, J. (2017). *Joint dominance in the new European Electronic Communications Code. An opportunity to ensure consistency & legal certainty*. Compass Lexecon, 16.

²³ Ezrachi, A. (2014). *EU competition law. An analytical guide to the leading cases*. Oxford and Portland, Oregon: Hart Publishing, 288.

²⁴ Kokkoris, I. (2007). World competition, *The Development of the Concept of Collective Dominance in the ECMR, From its Inception to its Current Status*. Amsterdam: Kluwer Law International, 422; Begović, B., Pavić, V., Popović, D. V. (2020). *Uvod u pravo*

of market participants allows one participant to achieve or solidify significant market power. Coordinative effects, on the other hand, reduce the number of market participants, leading to potential distortions of competition due to coordinated activities among the entities involved.²⁵ It is these coordinative effects that can give rise to a collective dominant position in the market. However, Article 2 of the EUMR does not specify whether the dominance in question is individual or collective, maintaining neutrality regarding these two types of dominance. As a result, this regulation is often viewed as a key guideline for applying the concept of a collective dominant position, as a teleological interpretation of the provision implies its indirect regulation of the concept.²⁶ For this reason, it is often suggested that there is no difference between the dominant position outlined in the EUMR and the concept of a collective dominant position under the TFEU.²⁷ Nevertheless, the consequences of applying the TFEU and EUMR differ.²⁸ The TFEU prohibits the abuse of a collective dominant position, but the mere existence of such dominance is not prohibited under the TFEU *per se*. On the other hand, the EUMR allows for the prohibition of market concentrations if they present a risk of significantly restricting, impairing, or preventing competition by creating or solidifying a collective dominant position. In essence, Article 102 of the TFEU regulates the current behavior of market participants, while the EUMR focuses on shaping the future market structure.²⁹

This leads to the conclusion that EU competition law does not provide a conceptual definition of a collective dominant position in the market, although it is indirectly regulated through the concept of abuse of a dominant position and provisions on the effects of concentrations on competition.³⁰ Nonetheless, the CJEU and the EC have attempted to address this gap. As a result, certain

konkurencije. Belgrade: Publishing and Information Center of the Faculty of Law in Belgrade, 94 and 96.

²⁵ Begović, B., Pavić, V., Popović, D. V. (2020). *Uvod u pravo konkurencije*. Belgrade: Publishing and Information Center of the Faculty of Law in Belgrade, 97.

²⁶ Franz, W., (2016) *Handbook of EU Competition Law*, Springer, Aachen, 1199.

²⁷ Kokkoris, I. (2007). World competition, *The Development of the Concept of Collective Dominance in the ECMR: From its Inception to its Current Status*. Amsterdam: Kluwer Law International, 422.

²⁸ Bergkvist, P. (2019). *Collective Dominance and EU Competition Law: An assessment of the concept and the challenge facing the European Court of Justice*. Örebro University, School of Law, Psychology and Social Work. Juridicum, 36.

²⁹ Kokkoris, I. (2007). *Op. cit.*, 426.

³⁰ Domazet, S. (2009). Pojam dominantnog položaja u pravu konkurencije EU. *Glasnik of the Bar Association of Vojvodina*, 9/2009. Novi Sad, 388; Snäll, S. (2012). *Legal test for Finding of a Collective Dominant Position under Article 102 TFEU*. Lund: Faculty of Law, Lund University, 24.

important decisions by EU bodies include conceptual definitions of this legal concept. Admittedly, these definitions are generally similar. In practice, they are used more to examine whether the conditions for the creation, solidifying, or existence of a collective dominant position in the market are met, rather than to define the concept *per se*. In the following analysis, we will explore how the CJEU has defined this concept in specific cases.

One of the first attempts to define a collective dominant position in the market can be found in the case of *Societa Italiaca Vetro SpA and others v. Commission*, which was heard before the General Court of the EU, commonly known as the Italian Flat Glass case.³¹ In this case, three glass manufacturers in Italy were linked by a production agreement. Collectively, they controlled more than 80% of the automotive glass market and had a combined market share of 79% in the non-automotive glass sector.³² As a result, distributors in Italy were unable to choose any other glass manufacturer. In these proceedings, a collective dominant position in the market was recognized for the first time, albeit in a negative context. This was based on Article 102 of the TFEU, with the court confirming that:

“...There is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis (in relation to)³³ the other operators on the same market.³⁴”

In this case, however, the existence of a collective dominant position in the market was not established, even though the EC believed there had been a violation of Article 101 due to a contract between the three glass manufacturers, and a violation of Article 102 of the TFEU due to the alleged abuse of a collective dominant position by the glass producers. However, the court emphasized the distinction between a single company and a collective entity, concluding that Article 101 of the TFEU cannot be applied to companies that are part of the same economic entity.³⁵ Since this was the first case address-

³¹ *T-68/89, T-77/89, T-78/89 Societa Italiaca Vetro SpA and others v. Commission*, ECLI:EU:T:1992:38.

³² Đuričić, J. (2011). Razvoj pojma kolektivne dominacije tumačenjem čl. 82. UEZ u praksi suda Evropske unije. *Pravo i privreda*, 1–3. Belgrade, 135

³³ Added by the author.

³⁴ Ezrachi, A. (2014). *EU competition law. An analytical guide to the leading cases*. Oxford and Portland, Oregon: Hart Publishing, 289. *T-68/89, T-77/89, T-78/89 Societa Italiaca Vetro SpA and others v. Commission*, para. 358.

³⁵ Bergkvist, P. (2019). *Collective dominance and EU Competition Law: An assessment of the concept and the challenge facing the European Court of Justice*. Örebro University, School of Law, Psychology and Social Work. Juridicum, 22.

ing a collective dominant position in the market, it highlighted the importance of economic links between market participants. The CJEU stressed that such participants must be legally independent entities to be considered collectively dominant. The significance of economic links between market participants will be further discussed later. In this case, the court provided an important guideline for applying Articles 101 and 102 of the TFEU. It concluded that facts establishing a violation of Article 101 cannot automatically constitute a violation of Article 102, merely because market participants hold a significant market share and thus do not need to consider the behavior of competitors.³⁶ It is suggested that this decision by the General Court of the EU created a misunderstanding, implying that additional links between market participants are necessary for a collective dominant position to exist. The court rejected the application of Article 102 of the TFEU in this case, finding that a collective dominant position exists only when market participants within a collectively dominant group exhibit similar behavior.³⁷

The case of *Irish Sugar v. Commission* is of particular interest, as the General Court of the EU provided the first conceptual definition of a collective dominant position in the market.³⁸ The specific issue in the case was whether Irish Sugar, together with SDL, had abused its dominant position. Irish Sugar owned 100% of the shares in SDL and thereby controlled this market participant.³⁹ SDL purchased sugar exclusively from Irish Sugar, while Irish Sugar covered advertising costs and rebates that SDL offered to suppliers and consumers. By setting selective or discriminatory prices, the two companies sought to protect the market in which Irish Sugar operated and limit sugar imports to Northern Ireland.⁴⁰ According to the General Court of the EU, a collective dominant position exists when several market participants can adopt a common market policy, particularly due to factors that solidify their interrelationships, allowing them to act to some extent independently of their competitors, customers, and ultimately, consumers.⁴¹ As we can see, this definition incorporates a modified version of a dominant position, as discussed

³⁶ Ezrachi, A. (2014). *EU competition law. An analytical guide to the leading cases*. Oxford and Portland, Oregon: Hart Publishing, 289.

³⁷ Donoghue, R. O', Padilla, J. (2013). *The Law and Economics of Article 102 TFEU*. Oregon: Hart Publishing Ltd, 187; Ezrachi, A. (2014). *Op. cit.*, 290.

³⁸ T-228/97 *Irish Sugar v. Commission* ECLI:EU:T:1999:246.

³⁹ Đuričić, J. (2011). Razvoj pojma kolektivne dominacije tumačenjem čl. 82. UEZ u praksi suda Evropske unije. *Pravo i privreda*, 1–3. Belgrade, 143.

⁴⁰ Ezrachi, A. (2014). *Op. cit.*, 293.

⁴¹ T-228/97 *Irish Sugar v. Commission* ECLI:EU:T:1999:246, para. 46.

earlier.⁴² So, the General Court of the EU extended the traditional concept of dominant position to include a common policy and interconnections among multiple market actors. This case is particularly significant in the development of the concept of a collective dominant position, as it marked the first recognition of vertical collective dominance. The court emphasized that the vertical relationship between Irish Sugar and its supplier SDL did not preclude the existence of a collective dominant position in this case.⁴³ The ruling also set a precedent by establishing that the abuse of a collective dominant position can result from the actions of a single company, rather than a collective entity.⁴⁴ This decision facilitated the EC's and the EU's ability to monitor oligopolistic markets more effectively.⁴⁵ In this case, the EC relied on Article 102 of the TFEU to establish the existence of a collective dominant position. The decision, which is supported in the literature, emphasizes that the behavior of the companies towards third parties, particularly competitors and consumers, appeared as both a collective and a single entity.⁴⁶ The General Court of the EU based its decision on this reasoning when it determined a collective dominant position among the participants in this case. As we will see in further analysis, the CJEU insists on the collective actions and conduct of entities that are collectively dominant in the market.

In the case of *Compagnie maritime Belge SA v. Commission*, the General Court of the EU elaborated the concept of a collective dominant position in the market in a manner that remains relevant today.⁴⁷ In this case, the court addressed the abuse of a collective dominant position by maritime companies that were members of maritime conferences. The EC argued that the companies, as members of the Association of Port Authorities of Central-West Africa (Associated Central West Africa Line, hereinafter: CEWAL), were collectively dominant in the transportation of goods between the ports of Northern Europe and Congo, as well as between Northern Europe and the USA and Canada, due to their participation in anti-competitive agreements within the conference.⁴⁸ The General Court of the EU found that the companies involved were

⁴² Ezrachi, A. (2014). *Op. cit.*, 293.

⁴³ *T-228/97 Irish Sugar v. Commission* ECLI:EU:T:1999:246, para. 61.

⁴⁴ Ezrachi, A. (2014). *EU competition law. An analytical guide to the leading cases*. Oxford and Portland, Oregon: Hart Publishing, 293.

⁴⁵ Đuričić, J. (2011). Razvoj pojma kolektivne dominacije tumačenjem čl. 82. UEZ u praksi suda Evropske unije. *Pravo i privreda*, 1–3. Belgrade, 144.

⁴⁶ Mestmäcker, E. J., Schweizer, H. (2014). *Europäisches Wettbewerbsrecht*. Munich: C. H. Beck, 436.

⁴⁷ *T-276/04 Compagnie maritime belge SA v. Commission*, ECLI:EU:C:2000:132.

⁴⁸ Đuričić, J. (2011). *Op. cit.*, 141.

collectively dominant and defined the concept of a collective dominant position as follows:

“...a dominant position in the market may be held by two or more economic entities legally independent of each other, provided that, from an economic point of view, they present themselves or act together on a particular market as a collective entity.”⁴⁹

In addition, the General Court of the EU emphasized that to establish a collective dominant position in the market as defined, it is necessary to demonstrate an economic link between market participants. In other words, the CJEU holds that identifying a collective entity requires first establishing factors that reinforce the connection among entities that are collectively dominant.⁵⁰ Further analysis of the economic link and factors connecting companies that are collectively dominant will be discussed when examining the conditions and control of such a position in the market, as the General Court of the EU has addressed these issues in its analysis of this position’s criteria. The court’s insistence on the need for economic links between market participants has led to the misconception that oligopolistic interdependence alone cannot suffice to establish a collective dominant position.⁵¹ In this case, the claim of a collective dominant position was based on Article 102 of the TFEU. Notably, this case is significant in the court’s practice because the court found that the existence of a contract, decision, or concerted practice can result in a collective dominant position. However, the determination of such dominance can also rely on other connecting factors, depending on the specific market structure. This interpretation suggests that a collective dominant position can exist without any legal ties, thus providing grounds for the application of Article 102 in cases where tacit collusion exists in the market from an economic perspective, i.e., it is sufficient for market participants to adopt the same behavior pattern.⁵² In this case, the EC based its claim on the existence of a collective dominant position on Article 102 of the TFEU.

In theory, the case of *Airtours v. Commission*⁵³ is considered the most significant turning point regarding the concept of a collective dominant position in the market and the conditions necessary to establish it. In this case, the

⁴⁹ *T-276/04 Compagnie maritime belge SA v. Commission*, ECLI:EU:C:2000:132, para. 36.

⁵⁰ *Ibid.*, 41.

⁵¹ Đuričić, J. (2011). Razvoj pojma kolektivne dominacije tumačenjem čl. 82. UEZ u praksi suda Evropske unije. *Pravo i privreda*, 1–3. Belgrade, 141.

⁵² Korah, V. (2004). *An Introductory Guide to EC Competition Law and Practice*. Oxford and Portland, Oregon – Folly Brigade, 114.

⁵³ *T-342/99 Airtours v. Commission* ECLI:EU:T:2002:146

EC prohibited the concentration, i.e., the takeover of First Choice by Airtours. Both companies were competitors in the UK short-haul flight market.⁵⁴ The EC believed that the takeover would enable Airtours, along with Thomson and Thomas Cook, the other major competitor in the market, to tacitly coordinate their behavior, given their combined market share of 79%.⁵⁵ In response to the question of what constitutes a collective dominant position in the context of concentration, the General Court of the EU provided a complex answer. According to the ruling:

“...A collective dominant position significantly impeding effective competition in the common market or a substantial part of it may thus arise as the result of a concentration where, in view of the actual characteristics of the relevant market and of the alteration in its structure that the transaction would entail, the latter would make each member of the dominant oligopoly, as it becomes aware of common interests, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice within the meaning of Article 81 EC,⁵⁶

without any actual or potential competitors, let alone customers or consumers, being able to react effectively. Therefore, in this case, the court, to determine the creation of a collective dominant position in the market, relied on the provisions of the EUMR concerning market concentration. In these proceedings, the General Court of the EU established the so-called collective dominant position test, which specifies the parameters that must be met to confirm the existence of a collective dominant position in a specific case, which will be discussed later. This case is exceptionally significant because it continued the application of the concept of a collective dominant position in line with the economic theory of tacit collusion.⁵⁷ The General Court of the EU also found that the degree of competition that existed in the relevant market at the time the concentration was reported is the most crucial factor in determining whether the concentration resulted in a collective dominant position.⁵⁸ Therefore, the evaluation had to begin with the level of competition before the concentration, rather than the current market conditions in cases where a collective dominant

⁵⁴ Ezrachi, A. (2014). *EU competition law. An analytical guide to the leading cases*. Oxford and Portland, Oregon: Hart Publishing, 297.

⁵⁵ *Ibid.*, 297.

⁵⁶ Former art. 81 of the Treaty on European Communities is the current art. 101 TFEU.

⁵⁷ Ezrachi, A. (2014). *Op. cit.*, 298.

⁵⁸ *T-342/99, Airtours v. Commission*, ECLI:EU:T:2002:146, para. 82.

position was suspected.⁵⁹ The General Court of the EU annulled the EC's decision to prohibit the concentration in question due to a series of errors in the procedure of proving that this concentration would establish a collective dominant position among market participants.

Various definitions of a collective dominant position can be found in theoretical literature. Some authors define a collective dominant position as a legal concept based on the economic proposition that in highly concentrated markets it is likely that the small number of firms surviving will recognise their interdependence and the futility of aggressive competitive behaviour.⁶⁰ Unlike those provided by the CJEU, this definition is based on the economic characteristics of oligopolies, i.e., economic criteria. This makes it imprecise, particularly when considering that a collective dominant position can also occur in other types of markets, not only in highly concentrated or oligopolistic ones. In some papers, it is stated that a collective dominant position exists when a collective entity achieves a collective dominant position in the market.⁶¹ This kind of definition does not explain what constitutes a collective dominant position but merely states that it is achieved by a collective entity. It is insufficient to define a collective dominant position solely by identifying the entities involved, without considering their relationships and behavior. While there are other definitions, they generally describe a collective dominant position in a different and simpler manner than those given by the CJEU. However, given the exhaustive definitions provided by the CJEU, we believe that further defining the concept of a collective dominant position is unnecessary.

It is important to note that jurisprudence distinguishes between a collective dominant position based on the existence of a contract and a collective dominant position resulting from market interdependence or tacit collusion.⁶² However, it is argued in theory that this distinction is not particularly significant, as the conditions for both types of a collective dominant position are the same.⁶³

⁵⁹ Ezrachi, A. (2014). *EU competition law. An analytical guide to the leading cases*. Oxford and Portland, Oregon: Hart Publishing, 298.

⁶⁰ Andersson, A. (2001). *Collective Dominance in E. C. Merger Control: An Analysis of Legal and Economic Arguments*. Göteborgs Universitet: Juridiska Institutionen. Available at: <https://gupea.ub.gu.se/bitstream/2077/2086/1/200155.pdf>. Accessed: May 16, 2021, 8.

⁶¹ Bergkvist, P. (2019). *Collective Dominance and EU Competition Law, An assessment of the concept and the challenge facing the European Court of Justice*. Örebro University, School of Law, Psychology and Social Work. Juridicum, 36.

⁶² EC Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 15

⁶³ Donoghue, R. O', Padilla, J. (2013). *The Law and Economics of Article 102 TFEU*. Oregon: Hart publishing ltd., 196.

THE CONCEPT OF A COLLECTIVE DOMINANT POSITION IN THE LAW OF THE REPUBLIC OF SERBIA

In the law of the Republic of Serbia, every law on the protection of competition has included a conceptual definition of a collective dominant position. The main difference between the previous and the current Law on the Protection of Competition regarding the concept of a collective dominant position lies primarily in the systematization of the provisions regulating it. In the 2005 Law on the Protection of Competition, the concept of a collective dominant position was presented as a separate article, while in the current Law on the Protection of Competition (hereinafter: LPC), it is incorporated within the framework regulating a dominant position in general.⁶⁴ Therefore, in the LPC, a collective dominant position is addressed within the provisions governing individual dominance, which cannot be considered a proper legislative approach, given the growing significance of this concept, especially considering the increasing presence of oligopolies in the market.

Art. 17 of the previously valid Law on the Protection of Competition, titled “Collective Dominant Position”, provided that a collective dominant position can be held by two or more independent market participants who are connected by economic links in the relevant market, thereby acting together as one market participant.⁶⁵ Comparing this provision with the conceptual definitions of a collective dominant position by the CJEU, it can be observed that it is similar to the definition in the *Compagnie maritime Belge SA v. Commission* case, although the Serbian legislator did not fully adopt this approach. As in EU law, Serbian law emphasizes the independence of market participants who achieve a collective dominant position. However, the law is ambiguous regarding whether this provision refers to economic or legal independence. A teleological interpretation suggests that the lawmaker’s intention was to indicate legal independence. Additionally, there is a difference in the wording of this provision compared to the EU law’s definition of a collective dominant position. In Serbian law, two or more market participants act collectively as a single entity, while in EU law, they act as a collective entity. However, this difference in wording does not alter the essence of the provision, as some decisions by the CJEU when applying Article 102 of the TFEU also state that several market participants act collectively as a single entity.⁶⁶

⁶⁴ Law on the Protection of Competition, *Official Gazette of the RS*, no. 79/2005.

⁶⁵ *Ibid.*, art. 17.

⁶⁶ *T 191/98 Atlantic Container Line and Others v. Commission*, ECLI:EU:T:2003:245. para. 655.

The current LPC, in Article 15, paragraph 3, stipulates that two or more legally independent market participants can hold a dominant position if they are connected by economic links such that they collectively act as a single participant in the relevant market (a collective dominant position). As we can see, the LPC defines a collective dominant position similarly to the Law on the Protection of Competition from 2005, with the addition that two or more market participants can be dominant if they are legally independent. This amendment corrects a deficiency in the previous law, making the current provision clearer and more precise. This definition of a collective dominant position is also based on the one established by the CJEU in the case of *Compagnie maritime Belge SA v. Commission*. Additionally, the LPC emphasizes that the connection between entities that are collectively dominant must be based on economic links, excluding other forms of connection. Although, as in the previous law, the current law insists that two or more market participants act as a single entity, EU competition law emphasizes that they must act as a collective entity in the market. However, this difference in terminology does not alter the meaning of the provision. To interpret the economic links that may exist among participants in a collective dominant position, one could refer to Article 5 of the LPC concerning related parties, which stipulates that related market participants are considered single market participants.⁶⁷ It is important to note that such an interpretation was not possible under the 2005 Law on the Protection of Competition, as the definition of related parties was different in that law.⁶⁸ Article 5, paragraph 2 of the LPC establishes the criteria for determining whether one market participant exercises control over another, leading to a conclusion about the connection or disconnection of the market participants.⁶⁹ The LPC lists various types of control, such as the status of a controlling member in terms of the Company Law; control based on ownership or other property rights over another participant's assets or part thereof, control through contracts, agreements, or securities, control via claims or means of security and conditions of business practices imposed by the controlling participant. Thus, the emphasis is clearly on economic or property links among market participants. This interpretation applied analogously to Article 15, paragraph 3 of the LPC, is appropriate because, despite one participant's control over another in terms of connection, their formal legal independence remains unaffected.

⁶⁷ Škorić, S. (2009). Kolektivna dominacija na tržištu. *Pravo – teorija i praksa*, 11-12. Novi Sad, 110.

⁶⁸ Law on the Protection of Competition, *Official Gazette of the RS*, no. 79/2005, Art. 5, paragraph 2.

⁶⁹ *Ibid.*

The preliminary version of the Draft Law on the Protection of Competition proposes that a collective dominant position can be held by two or more legally independent market participants who act collectively in one or more relevant markets due to structural, economic, personal, or other direct or indirect links. In relation to their suppliers, competitors, customers, or consumers, they function as a single participant with significant and lasting market power.⁷⁰ The preliminary version of the new law defines a collective dominant position more precisely by emphasizing the presence of economic or other links in the market, thereby addressing the deficiency in the current LPC. If this provision is adopted, simple oligopolistic interdependence could be considered a sufficient link among market participants to establish a collective dominant position. It can be inferred that this provision is also based on the CJEU's decisions in the cases of *Compagnie maritime Belge SA v. Commission*, as well as *Airtours v. Commission*, both of which elaborated on the concept of economic links.

Comparing the regulations and practices of EU bodies with Serbian law, we can conclude that there are no obstacles in Serbian competition law to applying, as in EU law, the provisions of the LPC related to concentrations of market participants to the concept of a collective dominant position. Specifically, Article 19 of the LPC allows concentrations unless they would significantly limit, impair, or prevent competition in the market of the Republic of Serbia or part of it, particularly if such restriction, impairment, or prevention results from the creation or solidifying of a dominant position. However, there is no clear guidance on how this article of the LPC would be applied to a collective dominant position in practice. The Commission for the Protection of Competition (hereinafter: CPC) has prohibited concentrations by referring to Article 19 of the LPC, explaining that such concentrations would limit, distort, or prevent competition by creating or solidifying dominant positions, but without specifying whether these were individual or collective dominant positions.⁷¹

To date, there have been no cases in CPC practice where a collective dominant position in the market was established. As a result, the CPC has not had the opportunity to “refine” the concept of a collective dominant position through case law, addressing potential shortcomings in the legal framework, as the EC and the CJEU have done. However, given the differences between the legal systems of Serbia and the EU, the specific roles of the EC and the EU in safeguarding competition in the internal market, and the absence of a

⁷⁰ Preliminary version of the Draft Law on the Protection of Competition, Art. 35.

⁷¹ Decision of the Commission for the Protection of Competition RS no. 6/0-02-138/07-15 of 26 November 2007, 17

conceptual definition of a collective dominant position in EU law sources, it is reasonable to assume that the CPC would not adopt a different notion of a collective dominant position than that outlined in the JPC.

The only case identified in the literature where a collective dominant position could have been established is the 2008 case against JSC “Mlekara Subotica”, JSC “Imlek”, and JSC “Novosadska mlekarar”, commonly referred to as the Danube Foods Group.⁷² However, a collective dominant position was not established in this case. Firstly, the case involved only two market participants, as JSC “Imlek” was the legal successor of JSC “Novosadska mlekarar”,⁷³ and secondly, JSC “Mlekara Subotica” and JSC “Imlek” were both owned by a third party, namely Danube Foods Group, leading the CPC to view them as a single economic entity.⁷⁴ At the time of this decision, the 2005 Law on the Protection of Competition was in effect. The entities jointly abused their dominant position by imposing unfair business conditions and applying unequal conditions to different market participants. Despite acting collectively and having an economic link through third-party ownership, which led to their being treated as a single entity, it remains unclear why the CPC did not apply the concept of a collective dominant position and instead applied provisions related to individual dominance.⁷⁵ The literature suggests that the decision was likely influenced by the presence of majority ownership and the inconsistency between the concepts of related parties and a collective dominant position in the previous law, resolving the issue of economic links in favor of individual dominance.⁷⁶

CONCLUSION

The concept of a collective dominant position in the market originates from the practice of the European Commission and the Court of Justice of the EU, with its foundation primarily in economic theory. As the concept of a

⁷² Škorić, S. (2009). Kolektivna dominacija na tržištu. *Pravo – teorija i praksa*, 11-12. Novi Sad, 107; for the purposes of this paper, the abbreviated business names of the mentioned companies are used; Decision of the Commission for the Protection of Competition of the RS dated January 25, 2008.

⁷³ The first paragraph of the ruling of the Commission for the Protection of Competition of the Republic of Serbia dated January 25, 2008.

⁷⁴ Page 4, paragraph 3 of the explanation of the decision of the Commission for the Protection of Competition of the RS dated January 25, 2008.

⁷⁵ The second paragraph of the resolution of the Commission for the Protection of Competition of the RS dated January 25, 2008.

⁷⁶ Škorić, S. (2009). *Op. cit.*, 110.

collective dominant position evolves in practice, jurisprudence has offered a critical perspective on it, highlighting potential doubts and concerns regarding its application and definition.

Specifically, the notion of a collective dominant position builds upon the fundamental parameters of individual dominance. However, it has been further developed through the practices of EU institutions to address the unique situations where at least two or more entities achieve such a position.

Analysis of past practice, as outlined in this paper, indicates that this concept is so broadly defined that it can be applied across nearly all provisions of competition law—spanning from monopolies to concentrations. As a result, it should be more thoroughly regulated in the legislation of countries that promote competition protection and recognize the positive impact of competition on social welfare. This need is particularly relevant to Serbian competition law, where there is an adequate foundation for the application of this concept. Given the increasing presence of markets classified as oligopolistic, a collective dominant position should play a more significant role in the work of the Commission for the Protection of Competition.

BIBLIOGRAPHY

- Begović, B., Pavić, V., Popović, D. V. (2020). *Uvod u pravo konkurencije*. Belgrade: Publishing and Information Center of the Faculty of Law in Belgrade.
- Donoghue, R. O., Padilla, J. (2013). *The Law and Economics of Article 102 TFEU*. Oregon: Hart Publishing Ltd.
- Franz, W. (2016). *Handbook of EU Competition Law*. Aachen: Springer.
- Jones, A., Sufrin, B. (2016). *EU Competition Law, Text, Cases and Materials*. 6th Edition. New York: Oxford University Press. Available at: Ariel Ezrachi, *EU Competition Law, an Analytical Guide to the Leading Cases*. Oregon: Oxford and Portland.
- Jones, A., Sufrin, B., Dunne, N. (2019). *EU Competition Law, Text, Cases and Materials*. 7th Edition. New York: Oxford University Press.
- Korah, V. (2004). *An Introductory Guide to EC Competition Law and Practice*. Oxford and Portland, Oregon: Folly Brigade.
- Mestmäcker, E. J., Schweizer, H. (2014). *Europäisches Wettbewerbsrecht*. Munich: C.H. Beck.
- Stanivuković, M. (2016). *Uvod u pravo Evropske unije*. Novi Sad: Center for Publishing Activities of the Faculty of Law.
- Wish, R., Bailey, D. (2018). *Competition Law*, 9th Edition. Oxford: Oxford University Press.

Articles

- Andersson, A. (2001). *Collective Dominance in E. C. Merger Control: An Analysis of Legal and Economic Arguments*. Göteborgs Universitet: Juridiska Institutionen. Available at: <https://gupea.ub.gu.se/bitstream/2077/2086/1/200155.pdf>. Accessed on May 16, 2021.
- Bergkvist, P. (2019). *Collective Dominance and EU Competition Law: An Assessment of the Concept and the Challenge Facing the European Court of Justice*. Örebro University, School of Law, Psychology and Social Work. Juridicum. Available at: <https://www.diva-portal.org/smash/get/diva2:1352645/FULLTEXT01.pdf>. Accessed on May 23, 2021.
- Domazet, S. (2009). *Pojam dominantnog položaja u pravu konkurencije EU*. *Glasnik of the Bar Association of Vojvodina*, No. 9/2009, Novi Sad, 372–392.
- Đuričić, J. (2011). Razvoj pojma kolektivne dominacije tumačenjem čl. 82. UEZ u praksi suda Evropske unije. *Pravo i privreda*, 1–3, Belgrade, 130–148.
- Ezrachi, A. (2014). *EU Competition Law: An Analytical Guide to the Leading Cases*. Oxford: Hart Publishing.
- Gudofsky, J., Kriaris, E. L., Vital, L. (2010). *Abuse of Joint Dominance – Is the Cure Worse than the Disease?* Toronto, Ontario: Canadian Bar Association - Annual Competition Law Conference. Available at: http://www.cba.org/cba/cle/pdf/comp10_gudofsky_paper.pdf. Accessed on May 3, 2021.
- Kokkoris, I. (2007). *World Competition: The Development of the Concept of a Collective Dominance in the ECMR, From its Inception to its Current Status*. Amsterdam: Kluwer Law International. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2896428. Accessed on May 3, 2021.
- Snäll, S. (2012). *Legal Test for Finding of a Collective Dominant Position under Article 102 TFEU*. Lund: Faculty of Law, Lund University. Available at: <https://lup.lub.lu.se/luur/download?func=downloadFile&recordOid=2608278&fileOid=3132557>. Accessed on May 3, 2021.
- Škorić, S. (2009). *Kolektivna dominacija na tržištu*. *Pravo – teorija i praksa*, 11-12, Novi Sad, 101–112.
- Verheyden, A., Day, J., Padilla, J. (2017). *Joint Dominance in the New European Electronic Communications Code: An Opportunity to Ensure Consistency & Legal Certainty*. Compass Lexecon. Available at: https://www.jonesday.com/-/media/files/publications/2017/09/joint-dominance-in-the-new-european-electronic-com/files/joint-dominance-in-the-new-european-electronic-com/fileattachment/joint-dominance-in-the-eccc-report.pdf?rev=d8a05c19f4534814b36dffe0ab291a5a&sc_lang=en. Accessed on May 23, 2021.
- Wisnumurti, P. S. (2016). *A Collective Dominant Position: Its Interpretation and Assessment after Airtour in Merger Control*. Jakarta: Center for Trade Competition and Policy Studies, Faculty of Law, University of Indonesia. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2852834. Accessed on May 3, 2021.

Regulations

Law on the Protection of Competition, *Official Gazette of RS*, No. 51/2009 and 95/2013.

Law on the Protection of Competition, *Official Gazette of the RS*, No. 79/2005.

The working version of the Draft Law on the Protection of Competition, available at: <https://www.paragraf.rs/dnevne-vesti/090519/090519-vest14.html>. Accessed on April 10, 2021.

EC Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, No. OJ C 45 of 24/02/2009. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52009XC0224%2801%29>.

T-68/89, T-77/89, T-78/89 *Societa Italiana Vetro SpA and others v. Commission*, ECLI:EU: T:1992:38. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61989TJ0068>.

T-276/04 *Compagnie maritime belge SA v. Commission*, ECLI:EU:C:2000:132. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62004TJ0276&from=EN>.

T-228/97 *Irish Sugar v. Commission*, ECLI:EU:T:1999:246. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61997TJ0228>.

T-191/98 *Atlantic Container Line and Others v. Commission*, ECLI:EU:T:2003:245. Available at: <https://curia.europa.eu/juris/liste.jsf?num=T-191/98&language=en>.

C-6/72 *Europemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities*, ECLI:EU:C:1973:22. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61972CJ0006&qid>.

C-27/76 *United Brands Company and United Brands Continental BV v. Commission*, ECLI:EU:C:1978:22. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61976CJ0027&from=EN>.

T-342/99 *Airtours v. Commission*, ECLI:EU:T:2002:146. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61999TJ0342>.

Decision of the Commission for the Protection of Competition RS No. 6/0-02-138/07-15, dated November 26, 2007. Available at: <http://www.kzk.gov.rs/kzk/wp-content/uploads/2012/11/DELTA-resenje-u-ponovnom-postupku-26.11.2007.pdf>.