




Power Play: EU's New Rules on Market Giants' Exclusionary Tactics

Igra moći: Nova pravila EU o isključujućim taktikama tržišnih giganata

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Crna Gora se nalazi u pristupnim pregovorima da postane država članica Evropske unije, koji status je dobila 17og decembra 2010. godine. Kao takvu, propisi Evropske unije nijesu direktno primjenjivi u Crnoj Gori, međutim, mnogi propisi su usaglašeni sa EU direktivama kao rezultat postupka harmonizacije (acquis Communautaire).

Evropska unija nastoji da unifikuje pravnu regulisanost određenih oblasti i kroz donošenje akata, kao što su smjernice. Iako nijesu pravno obavezujuće za nacionalna tijela, smjernice mogu značajno pozitivno uticati na pravnu sigurnost.

Montenegro is not a member state of the European Union but rather a candidate country for membership, which status was granted on December 17, 2010. As such, European Union regulations are not directly applicable in Montenegro, however, many regulations have been harmonized with EU directives as a result of the harmonization process (acquis Communautaire).

The European Union seeks to unify the legal regulation of certain areas through the adoption of acts, such as guidelines. Although they are not legally binding on national authorities, the guidelines can have a significant positive impact on legal certainty.

Kao jednu od takvih, Evropska komisija je pripremila nacrt Smjernica o primjeni člana 102. Ugovora o funkcionisanju Evropske unije na zloupotrebu dominantnog položaja isključivanjem konkurenata sa tržišta, koji je objavljen 1og avgusta ove godine, dok period konsultacija traje do 31og oktobra. Tekst nacrtu dostupan je na sajtu: [2024 article 102 guidelines - European Commission \(europa.eu\)](#)

Član 102 Ugovora o funkcionisanju Evropske unije ("UFEU") zabranjuje dominantnim učesnicima tržišta da se uključe u zloupotrebe koje su u stanju da isključe konkurente sa tržišta. Ovo je jedna od rijetkih oblasti evropskog prava o konkurenciji u kojoj nema smjernica, još uvijek, a kojima se razjašnjava primjenu pravila Ugovora. Međutim, primjena člana 102 UFEU je ključna za obezbjeđivanje da konkurencija funkcioniše efikasno i da potrošači mogu da iskoriste prednosti konkurentnih tržišta.

European Commission has prepared draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to the abusive exclusionary conduct by dominant undertakings, published on August 1, this year, while the period of consultation ends on October 31. Text of the draft is available on the link: [2024 article 102 guidelines - European Commission \(europa.eu\)](#)

Article 102 of the Treaty on the Functioning of the European Union ('TFEU') prohibits dominant companies from engaging in abusive practices that are capable of excluding competitors from the market. This is one of the few areas of European competition law where no Guidelines, still, clarify the application of the rules of the Treaty. However, the enforcement of Article 102 TFEU is key to ensuring that competition works effectively and that consumers can reap the benefits of competitive markets.

Smjernice nastoje da, u skladu sa praksom sudova EU, utvrde načela na temelju kojih se utvrđuje da li postoji zloupotreba dominantnog položaja u skladu sa članom 102 UFEU.

Za ukazati je da navedeni član ne sprječava da se samostalno, usljed sposobnosti i vještina, ostvari dominantan položaj na tržištu, ali se zabranjuje da se vrši zloupotreba takvog položaja.

Smjernice razlikuju jedinstveni i zajednički dominantan položaj. Postojanje dominantnog položaja zavisi i procjenjuje se u odnosu na okolnosti svakog slučaja i analize položaja tržišta, te posebno tržišnih udjela. Veoma je relevantno utvrditi da li postoje prepreke u širenju i ulasku na tržište koje sprječavaju stvarne konkurente da prošire svoje djelatnosti ili sprječavaju potencijalne konkurente da pristupe tržištu.

The Guidelines seek to establish, in line with the case law of the EU Courts, the principles on the basis of which it is determined whether there is an abuse of a dominant position in accordance with Article 102 TFEU.

It should be pointed out that this article does not prevent the independent achievement of a dominant position in the market due to abilities and skills, but it is forbidden to abuse such a position.

Guidelines makes difference between dominant position held by one or more undertakings. The existence of a dominant position depends on and is assessed in relation to the circumstances of each case and the analysis of the position of the market, and in particular of the market shares. It is also relevant to determine the existence of barriers to market expansion and entry that prevent actual competitors from expanding their activities on the market or that prevent potential competitors from gaining access to the market,

Neke od prepreka bi uključivale: carine ili kvote, propise o planiranju, zahtjeve za licenciranje i zahtjeve za ovlašćenje, zakonske monopole i prava intelektualne svojine, uspostavljenu distribuciju i prodajnu mrežu, vertikalnu integraciju i ekskluzivni ili preferencijalni pristup inputima ili kupcima, pristup kritičnim sirovinama, inerciju ljekara u njihovim navikama propisivanja lijekova itd.

Kada je riječ o kolektivnom dominantnom položaju, utvrđuju se neki od elemenata koji dovode do potvrđivanja veze između učesnika koja im omogućava da djeluju zajedno nezavisno od svojih konkurenata, njihovih kupaca i potrošača kao što su postizanje uslova koordinacije, sposobnost praćenja poštovanja uslova koordinacije, postojanje kredibilnog mehanizma odvratanja, spoljna stabilnost – nedostatak ograničenja stvarnih ili potencijalnih konkurenata i nedostatak kompenzacijske moći od strane kupaca.

Some barriers have been found and detected to include: tariffs or quotas, planning regulations, licensing requirements and authorization requirements, statutory monopolies and intellectual property rights, established distribution and sales network, vertical integration and exclusive or preferential access to inputs or customers, access to critical raw materials, inertia of doctors in their prescribing habits, etc.

When it comes to the collective dominance it has been found that some of the elements that give rise to a connection between undertakings enabling them to act together independently of their competitors, their customers and consumers may be reaching terms of coordination, ability to monitor adherence to terms of coordination, existence of a credible deterrence mechanism, external stability – lack of constraints exercised by actual or potential competitors and lack of countervailing power by customers.

Smjernice dalje utvrđuju načela koja se primjenjuju kako bi se ocijenilo da li postupanje učesnika i dominantan položaj predstavljaju zloupotrebu. Ukazuje se da je pojam zloupotrebe objektivan, te nije od značaja da li je postojala namjera učesnika da naruši konkurenciju zloupotrebom dominantnog položaja.

Radi utvrđenja da li je postupanje učesnika zapravo zloupotreba dominantnog položaja potrebno je utvrditi da li se **odstupa od tržišne konkurencije na osnovu zasluga i da li to može imati efekat isključivanja.**

Koncept konkurencije na osnovu zasluga obuhvata ponašanje u okviru normalne konkurencije na osnovu učinka privrednih subjekata i koje se, u principu, odnosi na konkurentsku situaciju u kojoj potrošači imaju koristi od nižih cijena, boljeg kvaliteta i šireg izbora novih ili poboljšanih dobara i usluga, koje nudi taj konkurent. Smjernice dalje utvrđuju koji faktori utvrđuju da li određeno ponašanje odstupa od tržišne konkurencije na osnovu zasluga.

Guidelines also established general principles applicable to the assessment of whether conduct by dominant undertakings is liable to be abusive. It is determined that the concept of abuse is an objective one and is generally not necessary to show that an undertaking had the intent to impair effective competition in order to establish an abuse of a dominant position.

To determine whether conduct by dominant undertakings is liable to constitute an exclusionary abuse, it is generally necessary to establish **whether the conduct departs from competition on the merits and whether the conduct is capable of having exclusionary effects.**

The concept of competition on the merits covers conduct within the scope of normal competition on the basis of the performance of economic operators and which, in principle, relates to a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods and services, which provides such competitor. Guidelines further determine relevant factors to establish that conduct departs from competition on the merits.

Smjernice takođe određuju sposobnost stvaranja efekta isključivanja utvrđujući teret dokazivanja da postupanje može dovesti do efekta isključivanja. Kategorizacija postupanja je izvršena na postupanje za koje je potrebno dokazati da dovode do efekta isključivanja, postupanja za koje se pretpostavlja da dovode do efekta isključivanja, neprikrivena ograničenja.

U sudskoj praksi sudova EU razvijeni su posebni analitički okviri kojima bi se utvrdilo da li određena postupanja od strane dominantnih učesnika predstavljaju povredu člana 102 UFEU (tzv. posebni pravni testovi, kako se navodi u Smjernici) a koji predstavljaju konkretizaciju načela.

Posebni pravni testovi razvijeni su za pet vrsta zloupotreba klasifikovanih kao: isključivo poslovanje, vezana prodaja i prodaja u paketu, odbijanje snadbijevanja, određivanje predatorskih cijena, istiskivanje dobiti.

The guidelines also determine the ability to produce an exclusionary effect by establishing the burden of proving that the conduct may lead to an exclusionary effect. The categorization of behavior has been made into conduct for which it is necessary to demonstrate a capability to produce exclusionary effects, conduct that is presumed to lead to exclusionary effects, naked restrictions.

The case law of the Union Courts has developed specific analytical frameworks to establish whether certain types of conduct by dominant undertakings infringe Article 102 TFEU (specific legal tests as referred in Guidelines), which represents concretization of general principles.

Specific legal tests have been developed for five types of abuse classified as: exclusive dealing, tying and bundling, refusal to supply, predatory pricing, margin squeeze.

Smjernice prepoznaju i određena ponašanja učesnika za koja sudovi Unije nijesu razvili posebne pravne testove, ali daju usmjerenja na koji način primijeniti osnovne pravne principe.

Konačno, Smjernice utvđuju generalni princip koji je primjenjiv na procjenu objektivne opravdanosti određenog ponašanja.

Može se braniti da je određeno ponašanje objektivno opravdano i da ne predstavlja kršenje člana 102 UFEU ukoliko je takvo ponašanje objektivno neophodno (objective necessity defence) ili proizvodi efikasnosti koja dovodi do razvnoteže, ili čak nadmašuje negativan efekat ponašanja na konkurenciju (efficiency defence).

Guidelines recognize specific conduct for which Union Courts did not develop specific test, but have provided guidance as to how to apply general legal principles.

Finally, Guidelines determine general principle applicable to the assessment of objective justification of certain conduct.

It may be defended that certain conduct is objectively justified and does not violate article 102 of the TFEU if it is objectively necessary (objective necessity defence) or produce efficiencies that counterbalance, or even outweigh, the negative effect of the conduct on competition (efficiency defence).

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