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| Case number: | Vj – 45/2004 |
| Short title (party, conduct, type of case): | Buvihír - newspaper distribution, unjustified conditions - abuse of dominance |
| Type of case: | Abuse of dominance Exploitative |
| Description: | It was alleged that the newspaper distributor forced dealers (kiosks, local vendors) to take newspapers the vendors did not want and could not sell. The proceeding was terminated, after it was established that although the newspaper distributor was the sole provider of newspapers and magazines available, it did not enjoy a dominant position over vendors, as vendors could contract out without incurring costs. |
| Date: | November 9, 2004 |

VJ-45/2004

NEWSPAPER DISTRIBUTORS

(Abuse of dominance)

Summary

The Competition Council terminated the proceedings against BUVIHİR Rt, the regional newspaper wholesaler as the Council did not consider it dominant on the relevant market.

I.

The facts

BUVIHIR Rt, which deals with the wholesale of dailies, weekly, monthly and other papers is owned by Magyar Lapterjesztő Rt (hereinafter Lapker), which is the owner of the other 9 wholesalers in Hungary as well. Lapker distributes 1100 papers of 450 publishers in the whole territory of Hungary. Lapker divided the country into 10 areas and set up wholesalers for each area.

BUVIHIR Rt provides newspapers for 2000 retailers under similar agreements certain aspects of which (e.g. duty to pay caution, retail margin, rules on payment) are subject to individual negotiations.

Proceedings were initiated ex officio under complaint of several retailers. Complaints included that BUVIHİR set aside the needs of retailers and provided them with papers they had not requested or did not provide extra issues of papers for which demand was greater.

III.

The submission of BUVIHIR

BUVIHIR invoked that newspapers are distributed by *transactions in commission*. The number of issues are determined by the publishers and the aim is not to sell all the papers but to meet all possible demand. Taking this into account it is BUVIHIR who determines the variety of papers for the retailer and not the retailer itself. The variety and the number of issues can be extended or reduced later on. The changes in the variety are determined by a computer based system established by BUVIHIR. The system applies objective criteria for the determination of possible changes in the supply of a given retailer. BUVIHIR considers this system economically justified. It also serves the freedom of press as due to their lack of freedom in this respect, retailers can not refuse the trade of certain papers they do not like.

BUVIHIR submitted that retailers are supplied on a SOR system so damage deriving from unsold papers does not rest on them.

BUVIHIR admitted that in the case of monthly and occasional papers the costs of retailers (pay in advance for the received papers) are not imbalanced in the first three weeks. However taken into account the daily and weekly papers, costs and incomes are in balance on the short run as well. It stated that such a pre-financing is not unusual in the sector.

It also stated that the sector is characterised by the following advantages:

- there is no retail price competition;
- the price of unsold papers does not rest on the retailer;
- daily and weekly papers provide spare financial assets for the retailers.

It concluded that conditions in the sector are much more favourable than in any other sectors, that risks are bare by the wholesaler and that there are no sunk costs on behalf of the retailers.

IV.

Legal assessment

Newspaper retailers of the relevant region can resell only papers provided by BUVIHIR. Market entry is unlikely as wholesalers in other regions are not independent from BUVIHIR.

The lack of competitors generally eligible to establish dominance as the monopolist does not have to take into account the behaviour of its business partners.

However the Competition Council found it appropriate to analyse dominance in the light of the agreement itself. In its assessment it established that:

- there is no need for specific investments by the retailers and therefore there are no sunk costs,
- the products do not become the property of the retailers and in the case of market exit can be re-sold to the wholesaler,
- retailers do not have to contribute to the transport costs of the papers or their advertisements,

Therefore the Competition Council shared the view of BUVIHIR that newspaper retailers' risks are much lower than that of retailers in other sectors.

The Council concluded that due to the lack of financial risks, despite its monopoly position on the market, BUVIHIR is not dominant as has to take into account the possible exit of its retailers in case of disadvantageous changes in trading conditions. In this case the lack of dominance is not based on the possibility of turning to a different supplier but in the fact that the possible termination of business relations is not a real threat for retailers.

The Council underlined that the lack of dominance is not a general matter of fact but that it is due to the special nature of the agreements concluded between the wholesaler and the retailers and the lack of normal entrepreneurial risks. The Council made an analogy with agent agreements in this respect as these agreements are also specially treated under Article 81 EC.

The Council submitted that the lack of dominance does not mean that no damage would arise on behalf of a retailer from the termination of the agreement. It added that this damage would not be of entrepreneurial nature. It also added that the restriction of the freedom of an undertaking with the assets of competition law is justified only if in the absence of such intervention the application of such freedom would result in the loss of consumer welfare. Such a situation was not identifiable in the given case.

Based on the above argumentation proceedings were terminated.

The Competition Council brought similar decisions in two subsequent cases.