НАШКОВА Сузана **УДК: 347.77:339.137.2 (4-672ЕУ)**

ОДНОСОТ ПОМЕЃУ ПАТЕНТОТ, KNOW-HOW И ДОМИНАНТАТА ПОЛОЖБА ОД АСПЕКТ НА ЧЛЕН 102 ОД ДОГОВОРОТ ЗА ФУНКЦИОНИРАЊЕ НА ЕВРОПСКАТА УНИЈА (ДФЕУ)

Апстракт: Правата од индустриска сопственост, во кои спаѓаат и патенот и know-how се ексклузивни права кои му овозможуваат на нивниот сопственик да стекне одредена ексклузивна и доминантна положба на одреден пазар во однос на конкурентите. Често пати ваквата доминантна положба може да биде злоупоребена од сопственикот во однос на конкурентите кои не поседуваат вакви права, или пак поседуваат но недоволно успешно ги искористуваат. Со цел да се спречат можните злоупотреби на ваквата положба, Европската унија разви посебен систем на норми во рамки на правото на конкуренција. Истото од причина што, правото на конкуренција на ЕУ не претставува цел само по себе, туку правилата на конкуренција претставуваат средство за овозможување на правилно функционирање на единствениот пазар и за ефективно задоволување на потребите на потрошувачите. Овие правила во однос на приватно-правните субјекти опфаќаат три сегменти: а) забрана за рестриктивни договори и договорна пракса; б) забрана за злоупотреба на доминантната положба и в) контрола на концентрациите. Во рамки на овој труд ние ќе го разгледаме односот на патенотот и know-how во однос на вториот сегмент кој се однесува на забрана на злоупотреба на доминантната положба, за што одредби се содржани во член 102 од Договорот за функционирање на Европската унија (ДФЕУ). Со цел да дадеме попрегледна слика на сознанијата добиени од анализата на овој сооднос, истите се системски поделени во два дела. Првиот дел се однесува на анализа на сообносот помеѓу know-how, патентот и сфаќањето на доминантната положба во рамки на ЕУ, додека вториот дел се однесува на анализа на овие права и случаите кога постои злоупотреба на доминантната положба во рамки на претходно споменатиот правен систем.

Клучни зборови: *патент, „know-how“, доминантна положба, злоупотреба на доминантната положба, право на конкуренција, договор за функционирање на Европската унија (ДФЕУ)*

NASHKOVA Suzana

THE RELATION BETWEEN PATENTS, KNOW-HOW AND THE DOMINANT POSITION FORM THE ASPECT OF ARTICLE 102 OF TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU)

Abstract: Patents and know-how, as industrial property rights, are exclusive rights that allow to their owner to acquire an exclusive and dominant position on a relevant market over its competitors. In some situations this dominant position can be abused by the owner in relation to its competitors, who either do not possess such rights or they possess them but they are not able to exploit them as efficient as the former. In order to prevent the possible abuses of such position the European Union has developed a special system of norms within the domain of Competition Law. The establishment of this norms derives from the fact that the Competition law of EU is not an isolated objective, but its provisions constitute an adequate tool for successful functioning of the Single Market and for efficient satisfaction of the needs of the consumers. These rules regarding private legal entities covering three segments: a) prohibition on restrictive agreements and contractual practice b) prohibition of abuse of dominant position and c) control of the concentrations between undertakings. This article aims towards an analysis of the relation of the patents and know-how in relation to the second segment, which concerns the dominant position, for which provisions are contained in Article 102 of TFUE. In order to give a more descriptive picture of this relation the information obtained from the analysis will be divided into the two parts. The first part examines the correlation between patents, know-how and the notion of dominant position in the EU, whilst the second part refers to the analysis of these rights and cases when there is abuse of a dominant position within the aforementioned legal system.

Key words: *Patent, Know-how, Dominant position, Abuse of the dominant position, Competition Law; TFUE*

Introduction

According to the Article 102 (former article 86/82) on the Treaty on the Functioning of the European Union (TFEU)[1] the abuse of dominant position is prohibited, with no possibility of any exception. In fact, Article 102 of the Treaty states the following: *"It is consistent with the common market and prohibits any abuse and exploitation of a dominant position within the common market or a significant part, by one or more undertakings if it could adversely affect trade between Member States (...).*" More precisely, Article 102 of TFEU does not prohibit dominant position of the enterprise on the relevant market, but it only prohibits the abuse of such a position. In this context is the position of the Commission of the EU, adopted in one of its Communication,[2] related to the Article 102 of TFUE where is stated that: "*In accordance with the case-law, it is not in itself illegal for an undertaking to be in a dominant position and such a dominant undertaking is entitled to compete on the merits. However, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market."*[3]

The connection the patents, know-how and Article 102 of the Treaty is reflected in two domains: *the relation of patents, know-how and the dominant position* and *relation between patents, know-how and the abuse of dominant position.* In order to answer the question, how the possession of know-how, or the patent may lead to abuse of dominant position, which could harm the competition, we will make an analysis of these two groups of questions, by giving a further overview of the part the decisions of the European Commission[4]and the European Court of Justice[5] related to the regulation of this matter.

1. Patents, know-how and the dominant position

Within the first group of questions pertaining to the dominant position will take into consideration: 1) the relation of know-how and patents with the notion dominant position; 2) the ways of determination of the dominant position and

1) Treaty on the Functioning of the European Union (TFEU, 2007), Consolidate version - OJ C 326, 26.10.2012, [hereinafter The Treaty].

2) Communication from the European Commission—*Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,* (2009/C 45/02).

3) Ibid, paragraph 1.

4) European Commission of EU [hereinafter also refers as EC or The Commission]

5) European Court of Justice [hereinafter also refers as ECJ or The Court]

3) its appearing forms.[6]

1.1 The relation of know-how and patents with the notion dominant position - Article 102 of the Treaty does not expressly define the notion dominant position, but from the practice of the European Commission and the European Court of Justice, it can be concluded that the dominant position, is characterized by the economic supremacy of the enterprise, on a relevant market. For example, the Commission in one of its decisions in the *Europemballage Case,* otherwise referred to as the *Continental Can Case*,[7]defines the dominant position as follows:

> **"***Enterprises are in dominant position when they have the possibility of independent behaviour, which places them in a condition to act without taking noticeable account of competitors, byers or suppliers. Such is the case when by reason of their part of the market, or such part in conjunction with their disposal of technical knowledge, raw materials or capital, they have the possibility of determining prices or of controlling the production or distribution for significant part of the relevant products; and this possessing such to eliminate any will on the part of their economic partners; it is sufficient that it is strong enough on the whole to ensure to such enterprises a global independence of behaviour, even though there exist differences of intensity of their influence on the different partial markets."*[8]

Similar definitions are contained in the judgements of the European Court of Justice - United Brands[9] and Hoffmann La Roche[10] where the dominance has been defined under Community law as: *"position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers*

6) Damjanovič, K. (2001). Ugovor o know-how-u i pravila konkurencii u pravo Evropske Unije i u domaćem pravu. Pravo i privreda, vol.38, N.5/8, p. 727.

7) Judgment of the Court of 21 February 1973. *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities.* Case 6-72, European Court Reports 1973 -00215.

8) Ladas, P.S. (1975). *Patents, trademarks, and related rights: national and international protection: Cambridge,* Mass: Harvard University Press., pp.740-741.

9) Judgment of the Court of 14 February 1978. *United Brands Company and United Brands Continentaal BV v Commission of the European Communities. Chiquita Bananas*. Case 27/76. European Court Reports 1978 -00207. Paragraph 65.

10) Judgment of the Court of 13 February 1979. *Hoffmann-La Roche & Co. AG v Commission of the European Communities.* Case 85/76. Paragraph 38. European Court Reports 1979 -00461.

and ultimately of consumers".[11]More precisely, the dominant position is not characterized by the absence of any competition, but just a competition that is insufficient to prevent a company that has such a position to act autonomously and thus affect the behaviour of other entities. In this context is the aforementioned judgement of ECJ- Hoffmann La Roche, where is defined that: *"(...) the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question , the degree of competition is weakened (...)". Dominance entails that these competitive constraints are not sufficiently effective and hence that the undertaking in question enjoys substantial market power over a period of time. This means that the undertakings decisions are largely insensitive to the actions and reactions of competitors, customers and, ultimately, consumers. The Commission may consider that effective competitive constraints are absent even if some actual or potential competition remains.*[12]

In this context, the question arises, to what extent the possession of know-how or patent may give the enterprise economic domination over other enterprises on the relevant market? The jurisprudence of the European Court of Justice shows that the possession of patent, know-how or other industrial property right does not automatically allows the company to acquire a dominant position in the market. This position of the Court has been adopted in the judgement Parke Davis[13] where was stated : *the existence of the rights granted by a member state to the holder of a patent is not affected by the prohibitions contained in articles 85(1) and 86 of the treaty . The exercise of such rights cannot of itself fall either under article 85(1) (...) or under article 86, in the absence of any abuse of a dominant position."* Thus we can concluded that, the exclusivity that characterizes the industrial property rights does not presuppose *ipso facto* existence of a dominant position. Only in a situations when on the relevant market does not exist any substitute for the product protected by patent or produced on the basis of know-how, there will be coincidence of the

[11] Communication from the Commission—*Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,* (2009/C 45/02), p. C 45/8, paragraph 10.

[12] Communication from the Commission—*Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,* (2009/C 45/02), p. C 45/8. Paragraph 10. See also: Damjanovič, K. (2001). Ugovor o know-how-u i pravila konkurencii u pravo Evropske Unije i u domaćem pravu. Pravo i privreda, vol.38, N.5/8, pp. 727-728.

[13] Judgment of the Court of 29 February 1968. - *Parke, Davis and Co. v Probel, Reese, Beintema-Interpharm and Centrafarm. - Reference for a preliminary ruling: Gerechtshof 's-Gravenhage - Netherlands.* - Case 24-67.

dominant position of the enterprise and the possession of this right.[14]

1.2 Determination of the dominant position - In general, a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative.[15] In relation to the assessment and the determination of the dominant position in EU law are mainly used three groups of criteria. Those are the: criteria related to the structure of the enterprise (e.g., dimensions, size of the market covering);[16] criteria related to the conduct of the enterprise (for example, imposing prices) and criteria related to the results or consequences of the behaviour of the enterprise (e.g., technical and industrial capacity of the enterprise, which presumably has a dominant position, which on the other hand may deter other companies from the intention to enter the market). Regarding the patents and know-how, is especially significant the decision ZOJA[17] where the Court and the Commission found that enterprises have a dominant position on an intermediary-product necessary for the production of drugs against tuberculosis. The Court and the Commission determined that the enterprises enjoyed such position because the alternative procedures for obtaining competing drugs were experimental level.[18] The decisive element in reaching this decision was the fact that these enterprises with their behaviour in an indirect manner have inflicted the technological progress of other companies.[19]

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14) Ibid. supra note 10, p. 728.

15) Case 27/76 *United Brands and United Brands Continentaal v Commission* [1978] European Court Reports 207, paragraphs 65 and 66; Case C-250/92 *Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab* [1994] ECR I-5641, paragraph 47; Case T-30/89 *Hilti v Commission* [1991] ECR II-1439, paragraph 90., see in: *Communication from the Commission—Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,* (2009/C 45/02), p. C 45/8. Paragraph 10.

16) For example, if we analyse the market share of the beverage Coca Cola, on the market of sparkling beverages or drinks based on sugar, then we can conclude that the company does not have a dominant position on the relevant market. Additionally, but we analyse its share the relevant market of drinks based on Cola, it is undeniable that there is a dominant position. see in: Damjanovič, K., Marič, V. (2007) *Intelektualna svojina*, Beograd: Službeni Glaznik, p.371.

17) Judgment of the Court of 14 March 1973. *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities. Joined cases 6 and 7/73 R. European Court Reports* 1973 -00357.

18) Ibid, supra note 11.

19) As pointed out above, within the third set of criteria, prevention of technological development is the criterion which is taken into account in the determination of dominant position of enterprises.

1.3 Forms of the dominant position.

When it comes to the forms of dominant position we can distinct two different models. First one refers to the possibility of the enterprise to control of the market for certain products, which can be realized either through technological superiority, either by running a special technological politics. Another form of dominant position is reflected trough the control of the enterprise which has a dominant position over the other economic entities, which allows to this enterprise (based on the economic power it has) to control the entrance of other undertakings on the relevant market or to completely prevent their entry.[20]

2. Patents, know-how and the abuse of the dominant position

In order to be able to determine the relationship between the agreements for license of patents and know-how and the abuse of dominant position, we will must first look at the 1) notion of abuse of dominant position and 2) its forms.

1.1 The notion abuse of a dominant position.

This term is not directly nor indirectly defined in Article 102 of the Treaty. The relevant institution of the European Union (Commission and Court of Justice) are determining its character by examining the two elements. First the subject of the abuse and second its legal nature**.**

First, If we go back to the position of the European Court of Justice, according to which the exclusivity that characterizes the industrial property rights does not presumed *ipso facto* existence of a dominant position, than it is quite clear that only the use or refusal to use of the right, may initiate abuse of dominant position, (which would be contrary to Article 102 of the Treaty).[21]

Second, the question concerning the nature of the abuse of the dominant position comes down to the question, whether the abuse of a dominant position is from objective or subjective character? Regarding this issue the Commission expressed its position in one of its memorandums.[22] In this Memorandum, the Commission stressed that the abuse of a dominant position should result from

[20] Damjanovič, K. (2001). Ugovor o know-how-u i pravila konkurencii u pravo Evropske Unije i u domaćem pravu. *Pravo i privreda*, vol.38, N.5/8, p. 326.

[21] Nevertheless, as is clear from that case-law, exercise of an exclusive right by the owner may, in exceptional circumstances, involve abusive conduct (Volvo, paragraph 9, and Magill, paragraph 50).

[22] It is the Commission's *Memorandum on the Problems of concentration of the Common Market*, 1.12.1965, SEC (65)3500, which constitutes the first investigation on how mergers may be controlled on European level.

the conduct of the enterprise, which conduct *objectively* is contrary to the objectives of the Treaty. Accordingly, we can conclude that the Commission has accepted the objective criteria for determination of the abuse of dominant position. This position is also accepted by the European Court of Justice, which the assertion that the abuse of a dominant position is from objective character, has explained in the aforementioned judgment Hoffman - La Roche. Thus in paragraph *6 is stated: "The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, (...)"* The decisions of these two institutions show that they are not interested in determining the causes which conditioned the abuse of a dominant position (subjective criterion), but the main focus is the real situation, or the actual abuse of the dominant position (objective criterion). However, the Commission and the Court nevertheless took into account the situations that were the enterprise caused this situation intentionally. Hence, the existence of intention in these situations is interpreted as an aggravating circumstance.[23]

1.2 Forms of abuse of the dominant position.

Opposite of the notion of the abuse of the dominant position, which is not defined in Article 102 of the TFEU, the forms of its appearance are explicitly set forth in this article. More precisely the Article 102 foresees the following four forms[24] whose existence can lead to abuse of dominant position. Such abuse may, in particular, consist in: (a) directly or indirectly

[23] This position could be seen in other cases that are not directly connected with the patents and know-how, but we will mention them as an illustration of this position of the aforementioned bodies. *In Irish Sugar and Compagnie Maritime Belge*, the subjective intent of the dominant undertaking to respond to new entry was, absent evidence of predation within the meaning of *AKZO*, the decisive element that led to the prohibition decision. Order of the Court (Fifth Chamber) of 10 July 2001. *Irish Sugar plc v Commission of the European Communities.* Appeal - Article 86 of the EC Treaty (now Article 82 EC) Case C-497/99 P. European Court Reports 2001 I-05333, and the Decision 85/609/EEC: Commission Decision of 14 December 1985 relating to a proceeding under Article 86 of the EEC Treaty (IV/30.698 - *ECS/AKZO*) OJ L 374, 31.12.1985, p. 1–27. See more in: Art, J.Y., & Colomo, P.I. (2010). *Chapter 6: Judicial Review in Article 102:* in Etro, F. & Kokkoris, I, *Competition Law and the Enforcement of Art. 102.* Oxford University Press, p.4.

[24] The list contained in Article 102 of the Treaty, can be complemented with several forms of behavior of the undertaking which has a dominant position, and that can be considered as abuse of the same. Such are, for example, awards made by the enterprises that have or pretend had a dominant position on the relevant market, the other undertakings, which in order to receive this award, have not concluded an agreement with the enterprise which is a competitor of the enerprise, who given the award. Furthermore, as a possible form of abuse is the imposition of very low prices for manufactured products (predatory pricing) in order to eliminate competition; unjustified refusal of delivery of necessary products to the competing enterprises and so on. See more : Damjanovič, K., Marič, V. (2007). *Intelektualna svojina*, Beograd: Službeni Glaznik, p. 372.

imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. Each of this forms will be further analysed from the aspect of its interference with the patents and know-how agreements.

First, in terms of the of the imposition of unfair purchase or selling prices, for the agreements for patent and know-how occurs extremely sensitive issue, because it interfere with compensation that was determined for these agreements, and which by the opinion of the Court is an integral part of the subject matter of these agreements.[25] Regarding the imposition of prices for protected products, the competition authorities of EU took the position that the imposed price should be justified to some extent. If the undertaking which has a dominant position on the relevant market impose "excessive prices" for protected products or the products based on know-how, then the agreement would fallen under the provisions of Article 102 of the Treaty, i.e. would be considered null and void. General level in terms of which could be determined whether the price is "excusive", is very difficult and remains a fundamental problem. As the ECJ stated, a price is excessive if it bears no more "reasonable relation to the economic value of the product."[26] However, this "relation" could not be established for all types of patent and know-how agreements. Therefore, the European Commission and European Court of Justice[27] took the view that this level will be determined separately for each case, taking in that into account all relevant circumstances. Regarding the imposition of unfair trading conditions and prices, the bodies of the Union took the position that the agreements for know-how, or patent will be excluded from the effect of Article 102, despite the fact that they contain unfair trading conditions, if

[25] Judgment of the Court of 31 October 1974. *Centrafarm BV and Adriaan de Peijper v Sterling Drug Inc. Case* 15-74. European Court Reports 1974 -01147.

[26] ECJ, Judgment of 13 November 1975, Case 26/75, *General Motors Continental v. Commission* [1975] ECR 1367 at Rec. 12, *United Brands*, and Judgment of 11 November 1986, Case 226/84, *British Leyland v. Commission [*1986] ECR 3263 at Rec. 27, see: Damme, E. v., Larouche, P., & Müller, W. (2006). *Abuse of a Dominant position: Cases and Experiments*. Tilburg University, p.1-52.

[27] In any event, European competition authorities have repeatedly stated that they did not want to become price regulators, and accordingly only few cases of excessive pricing have been pursued. The leading case remains the ECJ judgment in United Brands. Ibidem.

the imposition of such conditions is necessary to accomplish the objective of the agreement. If the imposition of these conditions is unjustified, i.e. their imposition is not in relation to achievement of the goal of these agreements, it will be considered that the undertaking which has a dominant position in the relevant market has abused its position, thus such an agreement, in accordance with Article 102, would be considered null or void.

The second form of abuse of dominant position, refers to the limitation of the production, distribution and technical development. It shall be considered that undertaking which has a dominant position has abused it, if it had limited the production to other enterprises by conditioning the production with a control on the supply of protected products - basic products (raw materials) or intermediates, which are all necessary for other companies to produce the final products.[28] Thus, the Court of Justice in one of its judgements,[29] stated that the fact that company CSC, decided to fully stop the sale of the production of raw materials, in order to provide control over the production of derivatives by competing firms (whose production was dependent on the production of its raw materials), aiming towards the full elimination of the competitive enterprises in terms of derivatives, presents an act of abuse of dominant position. Case law on refusals to license intellectual property rights has traditionally set very high standards for intervention. In particular, the IMS Health case required that such a refusal prevents the emergence of a "new product". An analysis of the Microsoft case leads to similar conclusions. In Microsoft case, the Commission found the undertaking's refusal to license to be abusive, but not on the basis of this "new product requirement". Instead, the theory of harm was based on the assumption that the behaviour hindered follow-on innovation in the relevant market. According to the Commission, licensing of the dominant undertaking's intellectual property leading to a more fragmented market structure would yield more innovation. The logic of the relationship is not obvious and it has been questioned by reputed academics.[30] However, the ECJ did not examine the logic underpinning the choice made by the

[28] Damjanovič, K. (2001). Ugovor o know-how-u i pravila konkurencii u pravo Evropske Unije i u domaćem pravu. Pravo i privreda, vol.38, N.5/8, p.728-730.

[29] Order of the President of the Court of 14 March 1973. *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities*. Joined cases 6 and 7/73R. European Court Reports 1973 -00357.

[30] Lévêque, F. (2005). *Innovation, leveraging and essential facilities: interoperability licensing in the EU Microsoft case:* World Competition, vol. 28, n. 1, pp. 71-91. Katz, M. l., and Shelanski, H. (2006). See in: *Mergers and Innovation: Antitrust Law Journal,* vol. 74, pp. 1-86. See in: Art, J.Y., & Colomo, P.I. (2010). *Chapter 6: Judicial Review in Article 102*: in Etro, F. & Kokkoris, I, *Competition Law and the Enforcement of Art*. 102. Oxford University Press, p.8.

Commission, nor whether this logic was a sound or tenable one. It only noted that the interpretation of the notion of abuse as put forward in the decision was supported by a literal reading of Article 102(b), which refers to the limitation of technical development.[31]

The third form of abuse of the dominant position refers to the situation when the enterprise is applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. License agreements are subject to frequent assessments under Article 102 regarding the fact whether they contain discriminatory conditions, primarily in terms of compensation. This is primarily due to the fact that in these agreements compensation is determined on the basis of free assessment of the parties for each specific agreement, so it often may seems discriminatory in relation to the competitors on the market. However, based on the EU case law in this domain it could be concluded that when it comes to the license agreements, differences concerning the amount of compensation or other terms of the agreement will not fall under the application of Article 102(c), unless entail serious distortions of competition or if cannot be found real justification for such behaviour of the enterprise. Concerning the term "dissimilar conditions" we will mention the decision GEMA.[32] Namely, in this decision the Commission condemned the German company GEMA for the fact that it requested importers of magnetic tape recorders and magneto-scopes a bigger royalty than the one owed by the German manufacturers, without admitting the grounds according to which the control cost was much more important in the first case than the second. From this decision it can be concluded that discrimination in terms of determining the license fee on the basis of nationality of the licensee is inadmissible, therefore this agreement shall be considered null or void. Also, for abuse of a dominant position had been convicted and the corporation IBM.[33] This decision was taken when IBM refused to supply other enterprises with the necessary software that they needed for installation on other computer systems, and not just on those manufactured by IBM.[34]

[31)] Microsoft, paras. 647-648. See in: Art, J.Y., & Colomo, P.I. (2010). *Chapter 6: Judicial Review in Article 102*: in Etro, F. & Kokkoris, I, *Competition Law and the Enforcement of Art. 102*. Oxford University Press, p.4.

[32)] Order of the Court 18 August 1971. *GEMA (Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte) v Commission of the European Communities*. Case 45-71 R.

[33)] Judgment of the Court of 11 November 1981. *International Business Machines Corporation v Commission of the European Communities. Competition - Annulment of the decision to initiate a procedure and of the statement of objections.* Case 60/81. European Court Reports 1981 -02639

[34)] Damjanovič, K. (2001). Ugovor o know-how-u i pravila konkurencii u pravo Evropske Unije i u domaćem pravu. Pravo i privreda, vol.38, N.5/8, p.731.

Lastly, the fourth form of abuse of the dominant position refers to the cases when the conclusion of the agreement is a subject to acceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreements. For example, if the conclusion of an agreement for patent or know-how, has been conditioned with the purchase of products that have no connection with the subject of the contract, it shall be considered that the enterprise which has imposed such conditions has abused its position. Related to the patents and "know how" is the decision of the Commission, Parke Davis, where the Commission have condemned one of the parties for imposing an exclusive purchasing obligation concerning products not covered by the patent.[35] However, an exception to this rule, makes the case where the purchase of these products is it necessary for the proper use of technical subject matter of the agreement.[36]

Conclusion

The provisions related to the determination of the dominant position and the forms of its abuse has given rise to some of the most controversial debates within the EU Competition Law. The reason why patents, know-how and the agreements that are legal basis for use of these rights are subject of the Competition Law, finds its basis in the imperfection of the market of intellectual property rights. Namely, the simple fact that the compensation for this agreements is determined on the basis of free assessment of the parties, can easily transform this agreement into an instrument of unfair competition. Article 102 of TFEU contains detailed provisions that largely determined the dominant position and forms that constitute its abuse, however to date the application of these norms regarding patent and know-how agreements is causing considerable controversy. Moreover, same controversy around the choices made in individual cases seems natural and inevitable as a result. Hence, the EC and ECJ are facing a most challenging task. They need to draw a meaningful line between the free competition between enterprises/ undertakings on the Single Market and the limits to which extends this freedom (as defined in Article 102), which in the same time will not affect adversely their technological development. The case law formed upon the decisions of the aforementioned bodies constitute a sufficient basis for the orientation of enterprises in terms of the assessment of their position and the foundations

[35] Commission Decision of 10 January 1979 relating to a proceeding under Article 85 of the EEC Treaty (IV/C-29.290 Vaessen/Moris). Official Journal L 019, 26/01/1979 P. 0032 – 0036.

[36] Ibid, supra note 35.

of their behaviour in the case if they cannot be determined on a basis of the provisions contained in Article 102. However in a vast bulk of cases when it comes to the patents and know-how neither case law, nor the provisions of Article 102, ate not sufficient basis for determination and existence of the abuse of dominant position. Therefore, the European Commission, will need to take additional efforts in order to respond in detail to a significant number inherently complex questions such as: What is unfair purchase or excusive prices? What are unfair trading conditions for patent and know-how agreements? How know-how and patents can limit the production to the prejudice of the consumer? and so on.

We sure hope that the near future holds a promise for such regulation to be adopted within the EU legislation, which will contribute towards the facilitation of the transfer of these rights between the enterprises and in the same time will not lead to the abuse of the dominant position, and thus harm the competition.

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