European Economic Law

Lesson 10

Art. 102 TFEU – Abuse of a Dominant Position

Art. 102 TFEU
Abuse of a Dominant Position

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) [unfair prices or conditions];

(b) [limitation of production, supplies or technical development];

(c) [discrimination];

(d) [tying].

Art. 102 TFEU
Abuse of a Dominant Position

- The best prevention of abusive behaviour comes from competitive pressure.
- This mechanism does not work if one or several enterprises are in a dominant position.
- In this case, the control by competition is replaced by a special control of abuses.
- Art. 102 TFEU does not prohibit dominant positions as such. It prohibits the *abuse* of a dominant position.

➔ Firms in a dominant position are subject to stricter rules than "normal" firms.

Art. 102 TFEU
Abuse of a Dominant Position

ECJ, 9 November 1983 – *Michelin*, case 322/81, n. 57:

"A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market."

Art. 102 TFEU
Abuse of a Dominant Position

Important texts:

- Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372/5)

- Guidance of the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ 2009 C 45/7)

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Art. 102 TFEU: Conditions of prohibition

1. **Undertaking** (see lesson 8)
2. **Dominant Position**
3. **Abuse**
4. **Effect on trade between Member States** (see lesson 8)

Art. 102 TFEU
Abuse of a Dominant Position

Dominant position

a) Definition of the relevant market

b) Dominant position on this market

Relevant Market

Relevant market

see *Commission Notice on the definition of relevant market*:

- relevant product market
- relevant geographic market
- less important: relevance in time

Relevant Market

Relevant product market

"A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."

- **demand substitutability**
- supply substitutability
- potential competition (-)

Relevant Market

Demand substitutability

Commission notice

15. The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. […]

17. The question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5 % to 10 %) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. […]

➔ **SSNIP test** ("small but significant non transitory increase in price")

Relevant Market

See the example in the *Commission notice*

> 18. […] An issue to examine in such a case would be to decide whether different flavours of soft drinks belong to the same market. In practice, the question to address would be whether consumers of flavour A would switch to other flavours when confronted with a permanent price increase of 5 % to 10 % for flavour A. If a sufficient number of consumers would switch to, say, flavour B, to such an extent that the price increase for flavour A would not be profitable owing to the resulting loss of sales, then the market would comprise at least flavours A and B. The process would have to be extended in addition to other available flavours until a set of products is identified for which a price rise would not induce a sufficient substitution in demand.

Relevant Market

See *European Commission*, 22 June 2005 – *Coca-Cola*

> 20. In the Commission's preliminary assessment, the relevant product market was identified as being that of CSDs ["carbonated soft drinks"]. CSDs were considered to comprise the following: cola-flavoured, orange-flavoured, lemon- and/or lime-flavoured, other fruit-flavoured CSDs and bitter drinks. Other beverages, such as packaged water (including flavoured water), juices and nectars, still drinks, ice tea as well as sports and energy drinks were deemed to be outside the relevant product market.

Relevant Market

See *ECJ*, 14 February 1978 – *United Brands*

(see Craig/de Búrca, p. 1013-14)

- Bananas constitute a relevant market (to be distinguished from other fresh fruit).

Relevant Market

- supply substitutability

  Suppliers who are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks are part of the same relevant market.

  Example: Production of standard writing paper and of high quality paper (e.g. for art books)

- potential competition

  Potential competition is not taken into account when defining markets (at most at a later stage).

Relevant Market

Relevant geographic market

"The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area."

➔ depends e.g. on preservability, transportability, shipping costs

Examples: Geographic markets for retailing or concrete are rather small. For the construction of aircraft, they are global.

Dominant Position

Dominant position

See *Guidance of the Commission's enforcement priorities*, n. 10:

"Dominance has been defined under Community law as a 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 and ultimately of consumers."

Dominant Position

See *Guidance of the Commission's enforcement priorities*, n. 9 et seq.:

- Actual competition
- Potential competition
- Countervailing buyer power

Dominant Position

Actual competition

- The market share of a firm is an important, but not the only indicator of market power.
- Dominance is not likely if the undertaking's market share is below 40 % in the relevant market.
- Presumption of market power starting from 50 % (see ECJ – *AKZO*, 1991).

Dominant Position

Other criteria are (see Commission guidelines for electronic communications networks and services, n. 78)**:**

- overall size of the undertaking
- control of infrastructure not easily duplicated
- technological advantages or superiority
- absence of countervailing buyer power
- access to capital markets/financial resources
- economies of scale and scope
- vertical integration
- barriers to entry
- network effect

See the critique in *Craig/de Búrca* concerning some of these criteria.

Dominant Position

- The dominant position must exist "within the common market or in a substantial part of it".

- This is interpreted in a large sense: Regions of big Member States are considered a "substantial part" of the common market. Even the port of Genoa has been qualified as a "substantial part" of the common market.

Abuse

ECJ, 13.2.1979, Case 85/76 – *Hoffmann-LaRoche*, n. 91:

"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 degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

➔ German concept of "Leistungswettbewerb" = competition on the merits

Abuse

Examples of abusive practices in Art. 102 TFEU

(a) [unfair prices or conditions];

(b) [limitation of production, supplies or technical development];

(c) [discrimination];

(d) [tying].

Abuse

➔ This list is not exhaustive. General distinction between:

- exploitation (of customers and suppliers)
- exclusionary practices (against competitors)
- structural abuse (see ECJ - *Continental Can*)

- Also in the case of exclusionary abuse, it is not competitors who are protected but competition.

Abuse

Exploitation: e.g. excessive pricing ("monopoly rent")

- "cost plus" approach

  costs incurred plus "reasonable" profit

- concept of "comparable markets"
  - geographic
  - in time
  - comparable products (e.g. domestic fuel oil and natural gas)

Abuse

Exclusionary practices

As in the case of vertical agreements, there is a danger of:

- input foreclosure
- customers foreclosure

➔ This could enable the dominant firm to profitably increase prices.

Abuse

Exclusionary practices

- exclusive dealing (e.g. *single branding*, non-compete obligations)
- rebates (loyalty or fidelity rebates as opposed to rebates due to cost savings)
- tying and bundling
- refusal to supply
- margin squeeze
- predatory pricing (prices below average variable costs, respectively below average total costs, see ECJ – *Akzo*)
- preventing parallel imports (fragmentation of the internal market)

Exceptions

- Except Art. 106 (2) TFEU, there is no exception to Art. 102 TFEU. Art. 101 (3) TFEU or block exemption regulations do not apply to Art. 102 TFEU.

- However, it is recognized that there is no abuse if "objective necessity" (e.g. health or safety, capacity restraints, unreliability of the customer) justifies the behaviour in question (provided that proportionality is given).

- The European Commission accepts the (contested) *efficiency defence:* There is no abuse if substantial efficiencies outweigh the anticompetitive effects.

Case Law

European Commission, 22 June 2005 – *Coca-Cola*

Coca-Cola accepted commitments to stop exclusive agreements with shops and pubs. See extracts from the press release:

No target or growth rebates. Coca-Cola will no longer offer any rebates that reward its customers purely for purchasing the same amount or more of Coca-Cola's products than in the past. This should make it easier for Coca-Cola's customers to purchase from other CSD suppliers if they so wish.

Case Law

No use of Coca-Cola's strongest brands to sell less popular products. Coca-Cola will not require that a customer that only wants to buy one or more of its best-selling brands (e.g. regular Coke or Fanta Orange) also has to purchase other Coca-Cola products such as its Sprite or its Vanilla Coke. Similarly, Coca-Cola will no longer offer a rebate to its customers if the customer commits to buy these other products together with its best-selling products or to reserve shelf space for the entire group of products.

- **20% of free space in Coca-Cola's coolers.** Where Coca-Cola provides a free cooler to a retailer and there is no other chilled beverage capacity in the outlet to which the consumer has a direct access and which is suitable for competing CSDs, the outlet operator will be free to use at least 20% of the cooler provided by Coca-Cola for any product of its choosing.

Case Law

ECJ, 22 January 1974 – *Commercial Solvents*

(see Craig/de Búrca, p. 1028-29)

- **Facts:** Aminobutanol is needed to produce ethambutol (a drug used against tuberculosis). *Commercial Solvents* stops supplying *Zoja* with this raw material.

- **ECJ:** "[…] it follows that an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position […]"

Case Law

Essential Facilities Doctrine

Under certain (restrictive) conditions, the owner of a facility which cannot be duplicated, and which is necessary to become active on a certain market, has to grant access to competitors.

- **ECJ, 6 April 1995 – *Magill***
  (see Craig/de Búrca, p. 1031)
- **ECJ, 26 November 1998 – *Bronner***
  (see Craig/de Búrca, p. 1032)
- **ECJ, 29 April 2004 – *IMS Health***
  (see Craig/de Búrca, p. 1033)

Case Law

The European Microsoft case

- European Commission, 24 March 2004 – *Microsoft*
- General Court, 17 September 2007 - *Microsoft*

Microsoft

(1) Bundling

Integration of Microsoft's media player (*WMP*) into *Windows*.

> **<u>European Commission:</u>** Because of the joint shipping of operating system and media player competing media players are impeded.

➔ *Microsoft* must offer a full-functioning *Windows* version which does not incorporate the media player *("Windows N")*.

Microsoft

(2) Interface Information

Compatibility problems between competing server software and the *Windows* client PC operating system.

European Commission: *Microsoft's* strategy aims at unlawfully conquering the market for work group server operating systems.

➔ Microsoft has to make interoperability information available to all interested undertakings.

Microsoft

General Court, 17 September 2007 - *Microsoft*

- The Commission's decision is confirmed in all relevant points (including the amount of the fine).
- Only the appointment of a monitoring trustee (at the expense of *Microsoft*) was annulled.

  No authority to grant to a third person so far-reaching powers
- *Microsoft* does not appeal to the ECJ.

Microsoft

New proceeding:

European Commission, 16 December 2009 - *Microsoft*

- The Commission had expressed concerns that tying the Internet Explorer to the *Windows* operating system might infringe Art. 102 TFEU.
- *Microsoft* gave the binding commitment (see Art. 9 Reg. 1/2003) to grant customers (in the EEA) a free and fully informed choice of web browser. For five years (i.e. until 2014), there has to be a "ballot screen" enabling customers to download competing browsers.
- Consequently, the Commission has stopped proceedings in this matter.

Microsoft

European Commission, 24 October 2012 - *Microsoft*

- The European Commission sends a "Statement of Objections"
- Reason: *Microsoft* apparently did not deliver the browser choice screen from February 2011 until July 2012.
- Consequence: The sanction for an infringement of a binding commitment is the same as for an infringement of Art. 101, 102 TFEU themselves, see Art. 23 (2) (c) Reg. 1/2003.

Art. 102 TFEU: Examination

1. Undertaking

2. Dominant Position

a) Definition of the relevant market

- relevant product market (demand and supply substitutability)
- relevant geographic market

b) Dominant position (within the internal market): Power to behave independently

- actual competition: market share etc.
- potential competition: barriers to entry etc.
- countervailing buyer power

3. Abuse

- letters (a) – (d)
- exploitative abuse – exclusionary abuse

4. Effect on Trade between Member States

Outlook

- A recent Art. 102 case:
  - European Commission – *Intel*, 13 May 2009 (pending before the General Court, case T-286/09)