

# **PROHIBITION OF THE ABUSE OF DOMINANT POSITION ON THE MARKET**

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# Categories of competition law

- Dominant position, abuse of dominant position
- Prohibition of cartels (collusion, conspiracy)
- Prohibition of state aid
- Merger
- Unfair competition

# Art. 102 TFUE ex 82 TEC

Any **abuse** by **one or more undertakings** of a **dominant position** within the **common market** (also **within a state under national law**) or in a **substantial part** of it shall be **prohibited** as incompatible with **the common market** in so far as it **may affect trade between Member States**

# Elements of prohibition

- **One or more enterprises may abuse their position which makes it difficult to distinguish from a cartel**
- **Abuse of dominant position is prohibited (not just being dominant)**
- **on the common market, or**
- **On substantial part of the common market**
- **Affecting interstate (state) trade**
- **Similar provisions under the national law**

# Elements of prohibition

Important!

- **Only abuse of dominant position is prohibited**
- **Just having a dominant position is not prohibited**
- However, having a dominant position may be a reason, under different sectorial regulations, for the state to intervene to compensate missing competition e.g. in the energy & telecommunications sectors

# Dominance - definition

## **HOFFMAN - LA ROCHE case 85/76**

A POSITION OF ECONOMIC STRENGTH ENJOYED BY AN UNDERTAKING WHICH ENABLES IT TO PREVENT EFFECTIVE COMPETITION BEING MAINTAINED ON THE RELEVANT MARKET BY AFFORDING IT THE POWER **TO BEHAVE TO AN APPRECIABLE EXTENT INDEPENDENTLY OF ITS COMPETITORS, ITS CUSTOMERS AND ULTIMATELY OF THE CONSUMERS**

# Dominance - definition

SUCH A POSITION **DOES NOT PRECLUDE SOME COMPETITION**, WHICH IT DOES WHERE THERE IS A MONOPOLY OR A QUASIMONOPOLY, BUT ENABLES THE UNDERTAKING WHICH PROFITS BY IT, IF NOT TO DETERMINE, AT LEAST TO HAVE AN APPRECIABLE **INFLUENCE ON THE CONDITIONS** UNDER WHICH THAT COMPETITION WILL DEVELOP, AND IN ANY CASE TO ACT LARGELY IN **DISREGARD** OF IT SO LONG *AS SUCH CONDUCT DOES NOT OPERATE TO ITS DETRIMENT*

# Collective dominant position

- The case ***Italian Flat Glass*** was the first case in which the Court confirmed that a collective dominant position can take place in **oligopolistic** markets when “**two or more undertakings jointly have, through agreements or licenses, a technological lead affording them the power to behave to an appreciable extent independently of their competitors, their customers and ultimately of their consumers**”.

It confirmed the possibility of the **parallel application** of articles ex 81 and ex 82 of the Treaty



# Market analysis

## Antimonopoly authorities have to determine:

- **structure of the market**: legal and factual monopolies, oligopolies etc.
- **market share > 40% creates assumption of dominance but not certainty (actual research of the market forces has to be conducted)**
- **sources of dominance**: technology, entry barriers, vertical integration, accessibility of raw materials, *high cost of market entry*
- Dominance may appear both on the **demand supply side**

# Relevant market

- European Commission or national antimonopoly authorities must determine the relevant market for the case :
  - **product market**
  - **territorial market, including neighboring market(s)**
  - **time framework** (seasons, rise and fall of markets and demand/supply, crises)

## **Substitutability – criterion of a product market**

- **properties**
- **function**
- **price**
- **consumer preferences**

} Cross elasticity

# Relevant market

- **A geographical relevant market** is a market where conditions of competition are **homogenous** (the same or similar)
- Such a market must be **distinctively different** from a neighboring market
- **Homogeneity criteria:**
  - **consumer habits**
  - **cost of transportation**
  - **entry barriers etc.**

# Abuse - definition

- Abuse is not defined in TFUE but by the ECJ – The European Court of Justice
- In case 85/76 *Hoffmann- La Roche* The ECJ defined *abuse* as having an impact upon the market structure by **hindering the degree of the existing competition or the growth of that competition**
- In the spirit of *formalism* the Court was finding such abuse whenever the *access to the market* was limited
- „*special responsibility*” of dominant enterprises – the very presence of a dominant enterprise weakens competition

# Abuse - examples

TFUE gives the following examples of an abuse:

- **directly or indirectly imposing unfair** purchase or selling **prices** or other unfair trading conditions [eg prices on xerox copying in a library where student cannot take out certain books to cheaper services]
- **limiting production, markets or technical development to the prejudice of consumers;**

# Abuse - examples

Applying **dissimilar conditions** to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage

*Polish Forests, supplier of 70% of lumber in Poland, selling lumber on the basis of competition of scores. Scores for certificates confirming their being environmentally friendly, which was a burden to smaller business*

# Abuse - examples

**Tied transactions** - 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.

*Microsoft selling Windows only with Internet Explorer*

# Case **United Brands Company**

case 27/76

- In **1975** the Commission instituted proceeding against UBC on the Charges of : **abuse of dominant position by:**
- Demanding from banana dealers to stop selling green bananas
- Fixing different prices according to a country
- demanding boycotting Danish firm Olsen

The Commission found the above actions by UBC to be in violation with the purposes of European integration and leading to its greater dominance on the market

- **1 mln. ECU fine imposed by the Commission**
- UBC appealed to the ECJ



# United Brands Company

Sprawa 27/76

## Position of **UBC**

- **The Commission erred in market analysis: banana market is not an independent relevant market but part of the general fruit market**
- Bananas compete with other fruits
- Commission erred in defining the territorial market where conditions for competition must be homogenous
- Commission **merged certain markets which were distinctively different**
- Ban on selling green bananas was intended to protect consumers
- Ban on cooperation with Olsen was justified by its increased cooperation with competitors at a time of slowing demand
- Fine is excessive and higher than ever applied in competition matters

# United Brands Company

## European COMMISSION

- Bananas constitute **a separate market** for they cannot be replaced by other fruits
- Geographical market was delineated with **exclusion of three member states** where **bananas compete with other fruits**
- Bananas sell all year round without loss in case of inflexible pricing policy
- Commission did not argue that UBC excluded competition but that UBC is capable of controlling the market with 45 % market share
- Applying different prices constitutes a discriminatory abuse of dominant position
- Art. ex 86 TEC (separate agricultural policy) applies only to food growers and not distributors
- ban on selling green bananas extended on ripener-distributors not doing direct business with UBC and not only Chiquita bananas
- Ripners where demanded to sell to UBC dealers only
- **Fine is justified by the number of violations and UBC turnover**

# United Brands Company

## EJC:

- UBC holds **35%** of the **world banana market** but only part of it could be taken into account in the case
- Both strength of the company and **number of competitors** has to be taken into account
- Competition does not have to be **excluded entirely** to establish market dominance
- UBC **sells** in all European, except Ireland, countries **two times more** bananas than any other competitor
- Even if competitors can apply the same methods they cannot overcome **the barrier of cost** (plantations, advertising etc. ). Therefore it must be assumed that **UBC is a dominant company**

# United Brands Company

ECJ:

UBC **abused** dominant position **by**:

- a) Ban on **selling green** bananas by distributors
- b) Ban on **redistribution** in certain countries
- c) **Partial fulfillment of orders of buyers**, so they could not take advantage of price difference. This was an instrument of controlling the market
- d) Ban on sales to ripeners-distributors **not authorized** by UBC and on sale of unlabeled bananas

# United Brands Company

## European Court

- Commission must determine the elements of the relevant market
- Product market: is banana a substitute for apples, oranges, grapes etc.)?
- Analysis has to differentiate between brand and non-brand bananas

**UBC argued that: bananas satisfy the same needs**, rest on the same shelves and are sold at similar prices as other fruits therefore are in the same market with them [which makes it more difficult to prove a dominant position]

## Commission argued that:

- Seasons influence sales volume and prices
- Demand is different on bananas that EU Commission has to prove

# United Brands Company

- Most consumers continue to buy bananas **regardless of seasonal** fruits coming and going
- Bananas are a separate product as it **sells all year round** and seasonality of other fruits is quantifiable
- Their substitutability has to be determined on the grounds of **annual sale (not seasonal)**
- Substitutability exists with **peaches and grapes**
- **Oranges and apples sell all year but they are not substitutes for bananas**
- However, the Commission failed to notice that **Germans consume three times more of bananas than the Irish** (different consumer habits)
- Therefore the Commission failed to define a uniform, homogenous relevant market

# Loyalty rebates – British Airways

- Case British Airways v. the Commission, T-219/99
- British Airways devised a system of rewarding ticket agents where in each case meeting the targets for sales growth leads to increase in the **commission paid on all tickets sold by the agent, not just on the tickets sold after the target is reached.**
- In the marketing agreements the cash bonus per ticket paid to the travel agent **increases for all tickets sold.** In the performance reward scheme the percentage commission paid increases for all ticket sales by the travel agent.
- This means that when a travel agent is **close to one of the thresholds** for an increase in commission rate selling **relatively few extra BA tickets can have a large effect on his/her income.**
- **Conversely, a competitor of BA who wishes to give a travel agent an incentive to divert some sales from BA to the competing airline will have to pay a much higher rate of commission than BA on all of the tickets sold by it to overcome this effect.**
- Therefore agents had **no incentive to sell tickets for BA competitors**

# Loyalty rebates British Airways

- Court: An undertaking may hold a dominant position not only in its capacity as a seller but also in its capacity **as a buyer** (although mostly it is seller's dominance like in Microsoft case)
- *The dominant position relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, of its customers and ultimately of its consumers*



# Loyalty rebates – British Airways

- ECJ: An **abuse of a dominant position** committed on the dominated product market, but the **effects of which are felt in a separate market** on which the undertaking concerned *does not have a dominant position* may fall within **Article 102 [ex82]** provided that **separate market** is **sufficiently closely connected** to the first. Such a connection may exist, for example, between, on the one hand, **travel agency services supplied to airlines** and, on the other, air transport services provided by those airlines in relation to the services sold to travelers through the intermediary of travel agents

# Hellenic Composers

- Greek case of 6 composers **Hellenic Composers' Union** against the copyright society **AEPI** for abuse of a dominant position on the **market of management of intellectual property rights**
- AEPI required transfer of exclusive rights of all aspects of copyright in all territories under it
- Obligatory total assignment of the right to protect was found to be abuse of a dominant position under the Greek Law (identical with art. 102 of the Treaty)

# Napp Pharmaceuticals

- Napp Pharmaceuticals, Cambridge produced a slow release morphine tablet taken by terminally ill patients
- Napp discounted prices by up to 90 % to hospitals perceived as the gateway to the general practitioner market
- Patients received drugs at the price 10 times higher than hospitals
- One competitor left the market during that period
- The price limited the choice for doctors and denied care terminally ill patients
- A fine of E 3.5 mil was imposed for abusing dominant position (under UK law)

# Essential facility doctrine

- **Abuse of dominant position by refusal of granting access for other enterprises to its own infrastructure, installations and equipment (e.g., railway, grids, software) owner of infrastructure holding by definition a dominant position, defined in **MAGILL****
  
- Abuse only when
  - 1) **Use of infrastructure is necessary**
  - 2) **Infrastructure impossible to replicate**
  
- **BRONNER v MEDIAPRINT (C-7/97)**
  - 1) A large press publisher developed its own effective system of distribution. A refusal to grant access to the system to a smaller company was found equal to the refusal of access to an essential facility – necessary to other businesses to exist on a given market and impossible to replicate

# Essential Facility

## **IMS HEALTH** - Commission decision *C(2003) 2920*)

- an American company engaged in collection, processing and interpretation of data concerning regional sales of pharmaceutical products in Germany refused its competitor to share the system of analyzing the market protected by German intellectual property law
- **NCD**, the competitor claimed that IMS created an **industry standard**
- EU Commission found that such a system constitutes infrastructure being the source of dominance. Refusal to grant a license is an abuse of dominant position
- ECJ confirmed Commission's stance but demanded additional clarification from the national court (NCD offers a new product + objective justification)

# Essential facility

## **Magill** case C-241/91

Two TV stations in Ireland distributed individual their own TV guides. A third company decided to publish a more universal guide encompassing both TV stations, which refused to grant a license. Their refusal was found to be an abuse of a dominant position resulting from ownership of intellectual property. They prevented a new product (limitation of production under Art. ex 82)

# ESSENTIAL FACILITY – **ROSCOFF 1**

Commission Decision CMLR 4/35.388 1995

- The **Chamber of Commerce at Morlaix**, France was **in charge of the local sea port** and, at the same time, it had a **5% stake in Brittany Ferries** that used the port facilities (so it had interest in not letting other similar companies to use the port)
- It **refused access to the port** to Irish Continental Group (ICG), a ferry company. It said **ICG can use other ports like Lorient** and St. Malo (assuming port in Morlaix is not the only available infrastructure)
- European **Commission** found that **Lorient is too far** away and St. Malo **lacks the necessary technical facilities**

# ESSENTIAL FACILITY – ROSCOFF 2

- Therefore the Commission applied the essential facility doctrine: The infrastructure in Morlaix is **not replicable** and gives the port authorities a **dominant position** on the relevant market (the market of ferry transportation)
- The Commission **ordered the port in Morlaix to grant access** to ICG for a temporary period. Access to the port amounted to access to the market
- This case also demonstrates that geographical relevant market does not have to encompass entire **EU territory** as long as it represents homogenous market forces



# Fines

- **Fines the European Commission may impose on enterprises for abuse of their dominant position:**
- **1% withheld or misleading information to the Commission**
- **5 % to force enterprises to implement the measures imposed by the Commission**
- **10 % of annual turnover for material breach of art. 102**