# Article 102 TFEU

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## Assessing the dominance: the relevant market

- A necessary precondition
- The product market
- The geographic market

# Dominance

- Two stage process:
  - Determine relevant market
  - Assess dominance on that market:
    - "…power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.", Case 27/76 *United Brands v Commission*, para 65
    - Can be some remaining competition, Case T-340/03 France Telecom v COM, para 101
- The assessment of the market power
  - Statutory monopoly – e.g. Case 179/90 *MCP di Genova v SG*
  - "…very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position.", Case 85/76 *Hoffman-La-Roche v Commission*, para 41
    - 50% - **Case 62/86 *Akzo Chemie v Commission*** presume (save in exceptional circumstances)
    - 40-45% - Case 27/76 *United Brands v Commission*
  - Range of factors: see next slide

# Framework for assessing market power

- **Competitive constraints**
  - **Existing competitors**
  - **Potential competitors**
  - **Buyer power**
- **Market shares and market power important but e.g.:**
  - **Low entry barriers**
  - **Buyer power**
  - **Bidding markets**
  - **Successful innovation**
  - **Product differentiation**
- **Entry barriers**
  - **sunk costs**
  - **poor access to key inputs and distribution outlets**
  - **regulation**
  - **economies of scale**
  - **network effects, and**
  - **exclusionary behaviour.**

- Other issues
  - Previous findings of dominance - Case T-125/97 *Coca-Cola v Commission*
  - Dominance is not a problem in itself BUT undertaking has a special responsibility – **Case 322/81 *Michelin v Commission, para 57, C-52/09 Telia Sonera para. 24***
  - Degrees in dominant position? ***C-52/09 Telia Sonera para. 79 et seq***

# Abuse (general)

- Objective concept:
  - No intention needed, **Case 85/76 *Hoffman-La-Roche v Commission***, para 91, ***C-52/09 Telia Sonera para. 20***
  - Is for some, e.g. sometimes predatory pricing, see also C-549/10 P Tomra, para 19-20
- Exploitative
- Exclusionary
- Single market
  - Conduct which undermines efforts to achieve an integrated internal market
  - Joined Cases C-468/06 *Sot. Lelos kai*

# Types of abuses

"Exploitative" conduct:

- The dominant firm takes advantage of its market power to extract rents from customers that could not have been obtained by a non dominant firm;
- pricing practices that result in a direct loss of consumer welfare; Exploiting consumers because of market power, e.g. high price, low innovation/ quality
- Article 102(2)(a) – unfair selling prices or other trading conditions, excessive prices

"Exclusionary" conduct:

- pricing practices directed against rivals that indirectly cause a loss to consumer welfare by limiting the rivals' ability to compete (e.g. predatory pricing)
- Conduct which limits opportunities of actual/ potential rivals
- Case 6/73 *Commercial Solvents v Commission* – refusal to supply, margin squeeze, predatory pricing

| Business practice | Harmful economic effect | Legal qualification |
|---|---|---|
| High prices | Customers exploitation | Excessive pricing Art. 102(a) |
| Low prices | Competitors exclusion | Predatory pricing and abusive rebates Art. 102(b) |
| High prices (wholesale) + low prices (retail) | Downstream competitors exclusion | Abusive margin squeeze Art.102(b) |
| Differentiated prices | Customers exclusion | Price discrimination Art 102(c) |

# Must the abuse and the effects of abuse be in the same market?

| Case | Market X | Market Y |
|---|---|---|
| Case 322/81 *Michelin v Commission* – rebates | Dominance<br>Abuse<br>Benefit | |
| Case 6/73 *Commercial Solvents v Commission* – refusal to supply | Dominance<br>Abuse | Benefit |
| Case 62/86 *Akzo Chemie v Commission* – discriminatory pricing | Dominance<br>Benefit | Abuse |
| **Case C-333/94P *Tetra Pak II*** – tying and predatory pricing | Dominance | Abuse<br>Benefit |

# Price Discrimination – Article 102(c)

- In pure efficiency terms, price discrimination can be a good thing:
  - For example, train from Brussels to Paris, 70 seats and train costs 3,600 Euro to run each trip:
    - If charge 100€ per seat then 50% full (100€ x 35 = 3,500€)
    - If charge 30€ per seat then 100% full (30€ x 70 = 2,100€)
    - If could price discriminate between rich businessmen and poor students then could get:
      - 3,500 from the 100€ businessmen tickets
      - 1,050 from the remaining 30€ tickets
      - Total 4,550€ making the train efficient to run, so only way to make a profit and increases welfare for all (if train only costs 3,400 to run then also a wealth transfer to the poor?)
- Price discrimination can overlap with other types of abuse e.g. *Post Danmark, British Airways, GVL v COM*

## Price Discrimination

- **First condition**:
- "Dissimilar conditions to equivalent transactions with other trading parties"
- ✓ determine whether transactions are equivalent: do the sales involve different costs for the seller?

- **Second condition:** "Thereby placing them at a competitive disadvantage"
  - this may mean either:
    - Different prices for sale/ purchase of same goods
    - Same price for sale/ purchase of different goods
  - where, in the vertical chain of production, the adverse competitive effects are supposed to materialize

    primary-line discrimination: the discriminating firm sets its prices lower in certain markets in order to inflict competitive harm on its rivals

    Secondary-line discrimination: when an upstream firm charges different prices to its customers who, in turn, compete in a downstream market

- ✓ Need to identify a downstream relevant market;
- ✓ Need to show a distorsion of competition on that market
- ✓ competitive disadvantage:
  - ✓ distortion of competition on an upstream or a downstream market,
  - ✓ hindrance of the competitive position of some of the business partners of that undertaking in relation to the others (C-95/04 P British Airways, paras 143-145, C-209/10 Post Danmark, para. 30)

## pricing practices

- necessary to consider all the circumstances and to examine whether those practices tend to remove or restrict the buyer's freedom as regards choice of sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or to strengthen the dominant position by distorting competition (see, to that effect, Deutsche Telekom v Commission, paragraph 175 and case-law cited)

# Excessive (or "unfair") pricing

- Originality of EC competition law.
- Other competition law regimes :high prices are short lived as they should trigger entry of new firms; high prices lead to increased competition in the market place – always??

- Enforcement limited to exceptional circumstances:
  1. Typically in exorbitant situations where price exceed at least from 100% the costs of the dominant firm. A price simply in excess of the competitive level will not trigger intervention
  2. Cases often involving a market partitioning problem (see the *United Brands*, *General Motors*, *British Leyland* cases)

# Excessive pricing – Legal Standard

- **Definition**: "[c]harging a price which is excessive because it has no reasonable relation to the economic value of the product supplied" (*United Brands*);
- **Test**: "determine whether the difference between the costs actually incurred and the price actually charged is excessive; and if the answer [...] is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products";
- **Commission's practice**: four methods have been used (i) price-cost margin analysis; (ii) price comparisons accross markets or competitors; (iii) geographic price comparisons; (iv) comparisons over time.

# Predatory pricing

- Predatory Pricing
  - Pricing below cost
  - Recoupment in the long term
- Economist definition of predation
  - Conduct that sacrifices profits (need not involve an accounting loss) in the short-term (this benefits consumers)
  - Entrants deterred or rivals exit (because of the expectation of low profits or insufficient funding due to capital market interpretations regarding the intensity of post-entry competition)
  - Post-exit, predator changes conduct (e.g. increases prices) resulting in higher profits (detrimental for consumers) –which is successful because the predatory conduct affects the post-exit market structure (e.g. deters future entry by signalling aggressive behaviour )
  - For conduct to be predatory it must meet all of the above conditions

# Prices

- Presumption that prices below average variable cost (AVC) are predatory
- Prices below average total cost (ATC) and above AVC predatory if intention to eliminate a competitor:
  - ECJ explains this:
    - In *AKZO* because an as efficient competitor can be driven from the market "…but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.", para 72.
  - Intention:
    - What kind of intention?
      - Objective
      - Subjective
    - Priorities 102 Paper, para 112 and following "…direct evidence of intent, evidence that the pricing only makes commercial sense as part of a predatory strategy, the actual or likely exclusion of prey, whether certain customers are selectively targeted, whether the dominant company actually incurred specific costs in order for instance to expand capacity, the scale, duration and continuity of the low pricing…"
    - Priorities 102 Paper, para 102, says dominant firm unlikely to have to price below ATC, so good reason for Commission to investigate here
- Prices above ATC a priori are not a problem:
  - unless selective; as only exclude less efficient competitors, Priorities 102 Paper, para 127.
  - Unless exceptional circumstances, e.g. economies of scale or see selective pricing (next)

# Recoupment

- ECJ holds that there is no need to show recoupment

# Predatory Pricing - conclusion

- Economic issues:
  - Is it ever in a firm's interest to sell at a loss?
  - Discourage competitive pricing or prohibiting unreasonable exclusionary pricing?
  - What makes this strategy more likely to be effective?
    - Substantial market power
    - Less reliance on external financing
- If dominant then why need to sell at a loss (should be independent of customers and competitors)
- Objective justification/ efficiencies:
  - Are these possible?
  - ECJ says pricing below AVC always abusive
- Yes :
  - Firm could justify its pricing strategy, e.g. there is no possibility of exclusionary effect because the price campaign is so short, etc.
  - One off promotion for new products.
  - Efficiency defences unlikely as pricing below cost

## Margin squeeze

- A vertically integrated firm sells wholesale inputs (e.g. access to a platform) to firms it competes against in a downstream market
  - A vertically integrated firm may 'squeeze' the margin available to rivals by: Setting the input price high relative to cost (e.g. by discriminating against its rivals)
  - Setting a retail price too low
- If a firm operating in the downstream market were as efficient as the integrated firm's own downstream affiliate, a margin squeeze would have the effect of making entry unprofitable
- A margin squeeze may therefore be applied by a dominant firm to foreclose markets

## Margin squeeze EU Case law

- COMP/C-1/37.451, Decision May 2003 and CFI Case T-271/03 - *Deutsche Telekom AG v. Commission*(2008)
- Dispute about wholesale costs of access to the local loop
- Unbundled loop can be used for voice telephony and DSL (broadband)
- DT found to be applying a margin squeeze and was fined €12.6m
  - The GC stated :*"a margin squeeze exists if the charges to be paid to DT for wholesale access… are so expensive that competitors are forced to charge their end users prices higher than the prices DT charges its own end users for similar services. If wholesale charges are higher than retail charges, DT's competitors, even if they are at least as efficient as DT, can never make a profit…" (para 102 of the judgement)*
  - *to show that there is a margin squeeze it is sufficient that there should be a disproportion between the two charges (the wholesale and the retail one) such that competition is restricted (para 105)*

## Margin Squeeze EU case-law

- C-52/09 *Telia Sonera*:
- the unfairness, within the meaning of Article 102 TFEU, of such a pricing practice is linked to the very existence of the margin squeeze and not to its precise spread: not necessary to establish that the wholesale prices for input or the retail prices are in themselves abusive on account of their excessive or predatory nature
- In order to assess the lawfulness of the pricing policy reference should be made to pricing criteria based on the costs incurred by the dominant undertaking itself

## Predatory pricing v margin squeeze

- Predation involves the predatory firm incurring a loss (opportunity cost i.e. foregone profits –need not be an accounting loss) with the intention of driving out a rivalI
  - if successful the predator changes conduct (increases price) to recover lost profits in the future
- A margin squeeze is intended to disadvantage or drive out a potential rival but unlike predation can in some circumstances stimulate profit
  - e.g. by setting high wholesale prices, profits can be made on these sales

## Tying/bundling

- Conditions (Microsoft judgment):
  - the tying and tied products are two separate products;
  - the undertaking concerned is dominant in the market for the tying product;
  - the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; and
  - the practice in question forecloses competition

## Rebates

- Rebates are discounts from the standard price paid to the buyer after the transaction. A distinction is generally drawn between two types of rebates:
  - ✓ **Unconditional rebates**, *i.e.* those granted to certain specific customers - and not to others - independently of their purchasing behaviour;
  - ✓ **Conditional rebates**, *i.e.* those granted to certain customers in exchange for a specific purchasing behaviour.

## Rebates

- **Unconditional rebates** are only problematic where used as a predation means: the dominant firm selectively eliminates key sources of demand for actual and potential competitors to prevent market entry. The Commission applies the framework applicable to predatory pricing.
- **Conditional Rebates** are generally problematic.

## Intel decision

- Intel and Advanced Micro Devices (AMD). The contention made by the latter was that Intel was abusing its dominant position through exclusionary practices.
- the market was defined as encompassing a specific category of chips—x86 CPUs.
- Intel dominant due to its very large and stable market share (80%). This arose from, inter alia, the existence of barriers to entry and expansion, making it unlikely for competitors to constitute a credible threat to the dominant firm.

## Intel decision

- Three abusive practices:
- 1. the provision of rebates to various original equipment manufacturers (OEMs) in exchange for a commitment that they purchase all (or at least a significant part) of their orders from Intel;
- 2. the provision of financial advantages to a distributor in exchange for a commitment to sell Intel products exclusively; and
- 3. the provision of financial advantages to some OEMs in exchange for a commitment to cancel, delay, or restrict the sale of specific equipment they had already produced using chips made by competitor AMD.

## T-286/09 Intel v COM

- 72 (…) a dominant undertaking which ties purchasers — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate (Hoffmann-La Roche, para.89, and Case T-155/06 Tomra para. 208).

- Rec. 73 "where that undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of loyalty rebates, that is to say, discounts conditional on the customer's obtaining — whether the quantity of its purchases is large or small — all or most of its requirements from the undertaking in a dominant position (Hoffmann-La Roche, para. 89, and Case C-549/10 P Tomra para. 70).
- There are **three categories of rebates**:

## Intel: quantity rebates

- 75 First, '**quantity rebates**' **linked solely to the volume of purchases** made from a dominant undertaking are generally considered not to have the foreclosure effect prohibited by Art. 102 TFEU. If increasing the quantity supplied results in lower costs for the supplier, the latter is entitled to pass on that reduction to the customer in the form of a more favourable tariff.
- Quantity rebates can reflect gains in efficiency and economies of scale made by the undertaking in a dominant position (see Case T-203/01 'Michelin II', para. 58).

## Intel judgment: Fidelity rebates/exclusivity rebates

- 76 Second, there are rebates the grant of which is conditional on the customer's obtaining all or most of its requirements from the dominant undertaking.
- 77 Such exclusivity rebates, when applied by a dominant undertaking, **are incompatible with the objective of undistorted competition within the common market,**

## Intel: effect of fidelity/exclusivity rebates

- because they are not based — save in exceptional circumstances — on an economic transaction which justifies this burden or benefit but are designed to remove or restrict the purchaser's freedom to choose his sources of supply and to deny other producers access to the market (see, Hoffmann-La Roche, para. 90, and Case T-155/06 Tomra, para. 209-210).
- Such rebates are designed, through the grant of a financial advantage, to prevent customers from obtaining their supplies from competing producers (idem).

## Exclusivity rebates: Necessity to establish the potential foreclosure effect

- Para 80(…) the question whether an exclusivity rebate can be categorised as abusive **does not depend on an analysis of the circumstances** of the case aimed at establishing a potential foreclosure effect
- are by **their nature capable of restricting competition** (para 85) no need to assess all the circumstances of the case – this goes only for the rebates of third category (para 82, see below)
- No requirement of a proof of a capacity to restrict competition depending on the circumstances of the case (para 81)

## Exclusivity rebates

- Foreclosure effect occurs not only when market access made impossible but also where it is made more difficult (see C-52/09 Telia Sonera, para 63, Intel para 88)
- Exclusivity can be positive? Never when the competition is weakened because of the presence of the dominant undertaking (Intel para 89)
- Dominant undertaking as an unavoidable trading partner (non-contestable share and contestable share of the market) see paras 92-93 Intel

## Intel: third category rebates

- 78 Third, there are other rebate systems where the grant of a financial incentive <u>is not directly linked to a condition of exclusive or quasi-exclusive supply from the undertaking in a dominant position, but where the mechanism for granting the rebate may also have a fidelity-building effect ('rebates falling within the third category').</u>
- That category of rebates includes inter alia rebate system depending on attainment of individual sales objectives which do not constitute exclusivity rebates, since those systems do not contain any obligation to obtain all or a given proportion of supplies from the dominant undertaking

## Intel: third category rebates - assessment

- 78 (…) **it is necessary to consider <u>all the circumstances</u>,** particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, that rebate tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, or to strengthen the dominant position by distorting competition (Michelin I, para. 73; Case C-95/04 P British Airways, paras. 65 and 67; and Case C-549/10 P Tomra, para. 71).

# refusal to supply/ deal

- Refusal to supply a downstream competitor
  - Broad definition – actual refusal/ unreasonable
  - Refusal to supply:
    - Existing customers:
      - Case 6/73 *Commercial Solvents v Commission?*
      - Joined Cases C-468/06 *Sot. Lelos kai* – refusal to prevent distributor engaging in parallel trade
    - New customers
      - Case C-241/91 *RTE and ITP v Commission (Magill)*
  - **Case C-7/97 *Oscar Bronner v Mediaprint*** (newspaper distribution system)
    - ECJ held that refusal to supply is only abusive here if:
      - Access to the essential facility is indispensable (not just suitable/ convenient) to carry on business downstream (not for firm complaining, but for a firm equivalent in size to those already with the facility)
      - Refusal likely to eliminate all competition in the downstream market
    - Advocate General Jacobs points to above *issues* and says only invoke if clear detriment to competition
  - Limits?
    - Maybe if no public funds used for construction? BUT Case C-7/97 *Oscar Bronner v Mediaprint*
    - Refusal to supply at time of shortage Case 77/77 *BP v Commission* – can favour regular over occasional customers

    In Case T-486/11, Orange Polska S.A. v Commission

# Objective justification

- Can these exist? No equivalent to Article 101(3)
- EU Courts:
  - support this:
    - Case 27/76 *United Brands v Commission*, para 184
    - **Case C-209/10 *Post Danmark v Konkurrencerådet***, paras 40-44
    - Case T-286/09 Intel, para 94
  - BUT never successfully applied
- Substance – Case C-209/10 *Post Danmark v Konkurrencerådet*:
  - Efficiency defence
    - Efficiencies likely to be realised as a result of the conduct
    - Likely efficiencies:
      - benefit consumers
      - outweigh negative effects on competition and consumer welfare
    - Conduct is necessary for realising efficiencies
    - Conduct does not eliminate effective competition
  - Objectively necessary – all the ECJ says is that it exists (no test)
  - Commission, *Article 102 Priorities Paper*, paras 27-30 adds:
    - Efficiency issues
    - Objectively necessary
      - Objectively necessary factors outweigh anti-competitive effects on consumers, for example:
        - Health and safety (normally for state to do this)
        - Cutting off supplies to a bad debtor
      - Indispensible / necessary
      - Proportionate
  - Factors external to the dominant undertaking
  - It is for the undertaking concerned to provide the evidence of this, Case C-209/10 *Post Danmark v Konkurrencerådet*