



UiO : Department of Private Law

University of Oslo

EU Competition Law –
Abuse of Dominance (Article 102 TFEU)

Eirik Østerud



Outline – abuse of dominance

- Tuesday 2 September
 - Article 102 TFEU
 - Introduction
 - Undertaking
 - Dominance and the relevant market
 - Effect on trade between Member States
- Tuesday 9 September
 - Article 102 TFEU
 - The general notion of abuse
 - Forms of abusive conduct
 - Objective justification

- 1. Introduction**
2. Undertaking
3. Dominance and the relevant market
4. Effect on trade between Member States

Outline: substantive EU competition law

	CONDUCT (ex post)		STRUCTURE (ex ante)
	Abuse of dominance (unilateral conduct)	Anti-competitive agreements (cooperation)	Concentrations (mergers, acquisitions, FFJV)
Legal sources and soft-law instruments	<p>Art. 102 TFEU</p> <p>Case law</p> <p>Commission decisions</p> <p>Guidance on enforcement priorities in applying Article 102</p>	<p>Art. 101 TFEU</p> <p>Block exemptions</p> <p>Case law</p> <p>Commission decisions</p> <p>De minimis notice</p> <p>Guidelines Article 101(3)</p> <p>Guidelines horizontal cooperation agreements</p> <p>Guidelines vertical restraints</p> <p>Other guidelines</p>	<p>EUMR</p> <p>Case law</p> <p>Commission decisions</p> <p>Commission jurisdictional notice</p> <p>Horizontal Guidelines</p> <p>Non-horizontal Guidelines</p> <p>Notice on ancillary restraints</p> <p>Notice on remedies</p> <p>Other notices & guidelines</p>
	Guidelines on the effect on trade concept		
	Notice on the definition of relevant market		

EU competition law – in a «nutshell»

- The goals:
 - EU competition law is primarily concerned with the problems that may occur when an undertaking or two or more undertakings have or obtain substantial market power
 - (+ internal market)
 - Undertakings that have substantial market power enjoy some of the benefits available to a true monopolist
 - Market power enables undertakings to limit output and raise prices, harmful to economic efficiency and consumer welfare
- The (substantive) means:
 - Conduct: prohibitions on anti-competitive market behaviour
 - Article 101 and 102 TFEU
 - Structure: control with concentrations
- Common two-step analysis
 - Step 1: negative effects (restriction of competition)
 - Step 2: positive effects (efficiencies) and balancing

Article 102 TFEU

(ex Article 82 EC, ex Article 86 EC)

“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) directly or indirectly 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.”

Article 101 TFEU

(ex Article 81 EC, ex Article 85 EC)

“1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which

(...)

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: [cooperation] which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”

Overview of Article 102 TFEU

- Prohibits certain forms of unilateral market behaviour
- Applies only to «undertakings»
- Applies only to undertakings holding a dominant market position
- Applies only in so far as the conduct affects trade between Member States
- Applies only to abusive conduct
 - The list of examples is not exhaustive
 - Types of abuses (may be classified in various ways)
 - Exclusionary
 - Exploitative
 - Discriminatory

EU: top 10 fines for abuse of dominance

Year	Undertaking	Amount in €
2009	Intel	1.060.000.000
2008	Microsoft	860.000.000
2004	Microsoft	497.200.000
2006	Microsoft	280.500.000
1998	TACA (15 undertakings)	273.000.000
2006	Telefonica	151.875.000
1991	Tetra Pak II	75.000.000
2005	AstraZeneca	60.000.000
2006	Tomra	24.000.000
2001	Deutsche Post	24.000.000

1. Introduction
- 2. Undertaking**
3. Dominance and the relevant market
4. Effect on trade between Member States

The notion of “undertaking”

- Article 102 (and 101) applies to “undertakings”
 - “Undertaking” not defined in the TFEU
- ECJ definition
 - “the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed”
 - Case 41/90, Höfner and Elser v Macrotron, para 21
- “every entity” – functional approach, legal form irrelevant, engagement in “economic activity” decisive
 - Companies
 - Individuals (self employed, not employees)
 - Trade associations
 - Co-operatives
 - P&I clubs
- Single economic entity doctrine

“Economic activity”

- Any activity consisting in offering goods and services on a given market
 - Joined cases C-180/98 etc, Pavlov
- The purchase of goods or services an economic activity?
 - An activity exercised on the market
 - Case T-319/99, Fenin v Commission
 - Complaint by FENIN (association of undertakings which markets medical goods and equipment used in Spanish hospitals) against various bodies and organisations responsible for the operation of the Spanish health system. The Commission rejected the complaint on the ground that the alleged bodies were not acting as undertakings when they purchased medical goods and equipment from FENIN.
 - “an organisation which purchases goods - even in great quantity - not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market.” (para 37)

“Economic activity” (cont.)

- Social activity not economic activity
- Joined cases C-159/91 and C-160/91, Poucet and Pistre
 - Reference for a preliminary ruling concerning the question of whether the French social security organisations which manage sickness and maternity insurance for self-employed persons was an “undertaking”
 - ECJ: non-economic activity=>not “undertaking” (Fulfilled an exclusively social function based based on the principle of national solidarity and is entirely non-profit making)

State bodies

- “the classification as an activity falling within the exercise of public powers or as an economic activity must be carried out separately for each activity exercised by a given entity”
 - Case C-49/07, MOTOE
- Exercise of public authority
 - ECJ: Article 101 does not apply to agreements concluded by bodies “acting in their capacity as public authorities and undertakings entrusted with the provision of a public service” (Case 30/87, *Bodson*)
 - Case T-155/04, SELEX v Commission
 - Question of whether Eurocontrol, an entity created by Member States of the EU for the purpose of establishing navigational safety in the airspace of Europe, was acting as an undertaking for the purpose of EU competition rules
 - Not economic activity: development of technical standards, procurement of prototypes, managing IPRs
 - Economic activities: providing technical assistance to national administration

1. Introduction
2. Undertaking
- 3. Dominance and the relevant market**
4. Effect on trade between Member States

Introduction

- Definition of dominance
 - “[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, customers and ultimately of its consumers”
 - Case 27/76, United Brands v Commission
- The need to define the relevant market
 - “For the purposes of Article [102], the appropriate definition of the relevant market is a necessary precondition for any judgment concerning allegedly anti-competitive behaviour (...), since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined.”
 - Case T-61/99 Adriatica di Navigazione SpA v Commission, para 27

Market definition

- The European Commission's *Notice on the Definition of the Relevant Market*
 - Reflects the Commission's practice and policy
 - Relevant for the application of Article 101, 102 and EUMR
 - Without prejudice to the case law of the General Court and the ECJ
 - In practice, very influential
- Purpose
 - “Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way *the competitive constraints* that the undertakings involved face.” (Commission Notice, para 2)

The relevant market

- Legal and economic concept
 - “The concept of ‘relevant market’ is different from other definitions of market often used in other contexts. For instance, companies often use the term ‘market’ to refer to the area where it sells its products or to refer broadly to the industry or sector where it belongs.” (Commission Notice, para 3)
- Determines the factual framework for the analysis of market power
 - Tool for aiding the competitive assessment by identifying substitute products or services that provide an effective constraint on market behaviour
- Implications of a broad or narrow definition of the relevant market
 - Market definition often decisive for the outcome of a case

Basic principles of defining the relevant market

- The relevant market is established by a combination of the market's two dimensions
 - the relevant product market and the relevant geographic market
- The 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.” (Commission Notice, para 7)
- 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 homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.” (Commission Notice, para 7)

Sources of substitution/competitive constraints

- Demand substitution
 - Normally the most important factor
 - What products/services and suppliers are viewed as substitutes by the customer?
 - SSNIP (Small but Significant Non-transitory Increase in Price) : “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 of 5-10 %) but permanent relative price increase in the products and areas considered. If substitution were enough to make price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market.” (Commission Notice, para 17)
- Supply substitution
 - Normally less immediate and less weight than demand substitution
 - “Suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to a small and permanent increase in price.” (Commission Notice, para 20)

Dominant position

- Legal concept – A question of yes or no, although the level of dominance may influence the application of the notion of abuse
- Case 27/76, United Brands v Commission
 - “[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, customers and ultimately of its consumers.”
- Case 85/76, Hoffmann LaRoche v Commission
 - “Such a position does not preclude some competition, which it does where there is a monopoly or a quasi-monopoly, 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.”

Dominance vs market power

- Similar, but not identical
- Market power – economic concept – matter of degree
 - The ability to restrict output and thus raise prices over the level that would prevail in a competitive market, without existing rivals or new entrants in due time taking away the customers
- Some market power does not entail dominance
- The ability to raise prices vs the ability to behave to an appreciable extent independently

Factors when assessing dominance

- Case 85/76, Hoffmann-LaRoche v Commission
 - «The existence of a dominant position may derive from several factors which taken separately are not necessarily determinative (...)» (para 39)
- Overview
 - Market shares
 - Price elasticity of demand
 - Profitability measurement
 - Barriers to entry
 - Barriers to expansion
 - Structural factors
 - Behavioural factors

Market shares

- Often the primary indicator
 - Calculation of market shares hinges on the definition of the relevant market
- Case 85/76, Hoffmann-LaRoche v Commission
 - “The existence of a dominant position may derive from several factors which taken separately are not necessarily determinative *but among these factors a highly important one is the existence of very high market shares*” (para 39)
 - “Although the importance of market shares may vary from one market to another the view may legitimately be taken that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position.” (para 41)

Market shares “Rules of thumb”

- Market shares > 50 %: Presumption of dominance
 - Case 62/86, AKZO v Commission, para 60
- Market shares > 70-80 %: clear indication of dominance
 - Case T-30/89, Hilti v Commission, para 92
- Market shares > 40%: requires thorough economic analysis
- Market shares < 40 %: Generally considered to be indicative of a firm not holding a dominant position

Market shares – other considerations

- Market share levels over time
 - Stability or volatility?
- Market shares relative to competitors
 - The market shares of the closest competitors must usually be examined
 - Except where the market share is so high that it in itself is conclusive proof
 - Small competitors indicate dominance
 - Equal competitors indicate that one firm is not dominant
 - Few competitors may indicate collective dominance

Other factors

- Price elasticity of demand
 - The percentage by which the output sold by the undertaking decreases in relation to an increase in its price
 - The lower the price elasticity of demand, the higher the market power
 - Difficult to measure - Requires detailed information of hard available data
- Profit margins
 - Supra-competitive profit margins may indicate market power – but also consistent with superior efficiency
- Barriers to entry and expansion
 - Legal or administrative barriers
 - Sunk costs of entry
 - Switching costs for consumers
 - IPRs
 - Economies of scale and scope

Other factors (cont.)

- Structural factors
 - Size of operations
 - Financial resources
 - Vertical integration
 - Product range differentiation
- Behavioural factors
 - The conduct of the allegedly dominant firm
 - Can the undertakings conduct only be explained by the holding of a dominant position?

Collective/joint dominance

- “Any abuse by one or more undertakings of a dominant position” (Article 102 TFEU)
- Joined cases, T-68/89 etc, Italian Flat Glass
 - “There is nothing, in principle, to prevent two or more *independent economic entities* from being, on a specific market, united by such *economic links* that, by virtue of that fact, *together they hold a dominant position* vis-à-vis the other operators on the same market. This could be the case, for example, where two or more independent undertakings jointly have, through *agreements* or *licences*, a technological lead *affording them the power to behave to an appreciable extent independently of their competitors, their customers and ultimately of their consumers*” (para 358)
- Case C-393/92, Almelo
 - “in order for such a collective dominant position to exist, the undertakings in the group must be *linked* in such a way that *they adopt the same conduct on the market*”

Collective/joint dominance (cont.)

- The key issue: actual/economic links
 - In short: The links must unite the undertakings in such a way that they adopt the same conduct on the market
- Forente saker C-395/96, *Compagnie Maritime Belge*
 - “The existence of a collective dominant position may therefore flow from *the nature and terms of an agreement*, from *the way in which it is implemented* and, consequently, from *the links or factors which give rise to a connection between undertakings* which result from it.
 - Nevertheless, the existence of an agreement or of other links in law is *not indispensable* to a finding of a collective dominant position; such a finding may be based *on other connecting factors and would depend on an economic assessment* and, in particular, on an assessment of the structure of the market in question.” (para 45)
- The characteristics to define a (joint) position as dominant the same as those that apply to single dominance

The concept: three elements

- The entities must be independent economic entities
 - If they constitute a single economic unit they are regarded as one undertaking
- The undertakings must be united through “economic links”
 - The links should unite the undertakings in such a way that they adopt the same conduct on the market
 - The Commission: The undertakings in question must have the same position vis-à-vis their customers and competitors as a single company with a dominant position would have
 - There must be no effective competition between the companies
- By virtue of the economic links the undertakings must together hold a dominant position

Actual “links”

- Contracts
- Licences
- Joint agents
- Cross-shareholdings
- Joint administration
- The sharing of a common infrastructure

Economic/structural «links»

- Tacit collusion in a tight oligopoly
- Case T-102/96, Gencor (EUMR decision, but the same applies to Article 102)
 - “There is no whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly within which, in a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another’s behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximise their joint profits by restricting production with a view to increase prices”

Dominance within a substantial part of the internal market

- The dominant position must be held in a substantial part of the internal market
 - The criteria relates to the geographic scope of a finding of dominance
 - The relevant geographic market must constitute at least “a substantial part” of the internal market
- “For the purpose of determining whether a specific territory is large enough to amount to ‘a substantial part of the common market’ within the meaning of [Article 102] of the Treaty, the pattern and volume of the production and consumption of the said product as well as the habits and economic opportunities of vendors and purchasers must be considered”
 - Joined cases 40-48, 50, 54-56, 111, 113-114/73, Suiker Unie
- Dominance throughout the EU - yes
- Dominance in one Member State - yes
- Dominance within parts of a Member State? Case by case assessment

1. Introduction
2. Undertaking
3. Dominance and the relevant market
4. **Effect on trade between Member States**

Effect on trade between Member States

- Trade between Member States must be affected for Article 102 (and 101) to apply
- The jurisdictional limit to the prohibitions
 - Decides the borderline between TFEU and national competition rules
 - If trade is not affected, an agreement will be regulated by national competition law exclusively
 - Parallel application above the limit
- Case 56/65, STM
 - “It must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it *may* have an influence, *direct or indirect, actual or potential*, on the pattern of trade between Member States”
- Commission Notice – Guidelines on the effect on trade concept in Articles 101 and 102

“trade between Member States”

- Arrangements covering EU
 - “Per se rule”
- Undertakings from different Member States involved
- Export and import between Member States
- Arrangements covering the whole territory of a Member State
- Appreciability