

## **ARTICLE 102 (TOPICS 7-9)**

**Please see the syllabus for the prescribed reading per topic**

### **Topic 7 - Introduction and defining the market**

#### **RELEVANT MARKET AND DOMINANCE**

**ARTICLE 102** prohibits the abuse of a dominant position.

Any abuse by one or more undertakings of a dominant position within the common market 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. Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or 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.

#### **Similarities with Article 101**

i) Undertakings, ii) 'effect on trade' iii) goals eg market integration (United Brands) iv) direct effect

Unlike Article 101 no possibility of an exemption- must establish 'objective justification'

#### **THREE STEPS a) relevant market, b) dominance, c) abuse**

Usually focus on manufacturer but can be purchaser- BA buy services of travel agents

#### **a) relevant market**

(product, geographical, temporal)

#### **Product /service**

Notice on Definition of Relevant Market 1997

SSNIP (5-10%) Price increase of A –effect on demand for B  
Notice not binding- not used in Michelin II  
substitutability/interchangeability  
demand-side (cross elasticity of demand)  
supply-side

Continental Can “to constitute a distinct market, products must be individualised not only by the mere fact that they are used for certain products but by the particular characteristics of production which make them specifically suitable. A dominant position for light containers for meat/fish cannot be decisive so long as it has not been proved that competition from other sectors for light metal containers are not in a position to enter the market by a simple adaptation with sufficient strength to create a serious counter weight” (33).

Example from United Brands v. Commission [1978] ECR 207  
(31) 'The banana has certain characteristics, appearance, taste, softness, seedlessness, easy handling, a constant level of production which enables it to satisfy the constant needs of an important section of the population, consisting of the very young, the old and the sick'...consequently the banana market is a market which is sufficiently distinct from the other fresh fruit markets'

### **geographic**

must be substantial area  
where the conditions of competition are sufficiently homogenous ( United Brands)

'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<sup>1</sup>

Michelin NL market – very criticised

Seasonality

Transport- sea ferry.

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<sup>1</sup> Suiker Unie

## Topic 8 Establishing Dominance

Q for students to debate

Does the definition of dominance hamper/penalize the efficient competitor?

**b) dominance** (single or collective)

barriers to entry

‘market power is a matter of degree’ Prof Korah

‘Undertakings are in a dominant position when they have the power to behave independently, which puts them in a position to act without having to take into account their competitors, purchasers or suppliers ..’<sup>2</sup>

‘ a position of economic strength which ...enables it to prevent effective competition ...it does not preclude some competition.. but enables [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 ;’<sup>3</sup>

The existence of a DP 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 large market shares’ (HLR)

HLR 75% alone suffice  
but relationship to nearest rival relevant where market share  
47%, 63%, 54%

Michelin 57% but rivals 4%-8%

United Brands 45% double that of nearest rival

AKZO 50% alone

Notice : volume sales and value sales

Presumption- very high HLR (75%, AKZO 50%- criticised)

<50% if additional factors ( incl relative)

39.7% BA, seven times rival

Comm Report – 20%

Other factors

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<sup>2</sup> Continental Can

<sup>3</sup> Hoffmann- La Roche

Barriers- definition?  
Structure or conduct  
high degree of vertical integration  
IP,  
economies of scale,  
raw materials,  
financial resources,  
superior technology,  
advertising  
New Economy- winner takes all- first mover advantage- path dependence

### Topic 9 what is ABUSE?

Q for students to debate: Is one person's 'abuse' really only another person's tough market strategy?

### **ABUSE- CONCEPTUAL SCOPE**

non exhaustive list in Art 102

The finding of dominance is crucial to deciding whether the conduct is prohibited  
ie Art 102 applies only to dominant firms and thus makes illegal conduct that is perfectly legal for non dominant undertakings

### INTERPRETATION

Continental Can acq a majority share in rival- eliminate virtually all competition in mkt

Contextual (location in the Treaty) & Teleological/ Purposive

Not literal (dominance acquired rather than abused) or legislative intent

ECJ – prohibition not only aimed at practices which may cause damage to consumers directly but also at those which are detrimental to them through their impact on an effective competition structure”

Abuse- strengthen dom position ‘in such a way that the degree of dominance reached substantially fetters competition – only U remain in market whose behaviours depends on the dominant one.

## Comment

“...the Commission could not accomplish its pro-integration goals without a tool to combat excessive economic concentration and that art 82 would therefore have to be interpreted to provide such a tool...In effect the Court held that the teleological method could provide a basis for decision even where the text of the Treaty and the clear intention of the drafters dictated the opposite result. The Court’s message seemed to be that its own judgment of the needs of economic integration would dominate its decision-making regardless of the dictates of more traditional ‘judicial’ methodology”(Gerber 1998) p361

*Question- benefit competitors or consumers?*

‘exploitative’ vs ‘structural’  
‘reprisal’?

J&S “The line between protection of competition and protection of competitors is a fine one” p 372

Michelin I ‘special responsibility not to allow conduct to impair genuine undistorted competition-

Esp if ‘super-dominant’ ( AG Opinion in Maritime Belge)

also Commissioner Monti in press release of Microsoft

## DEFINITION IN CASELAW

objective concept comprising conduct which is such as to influence the structure of the market and which, through recourse to methods different from those which condition normal competition, has the effect of hindering the maintenance or growth of effective competition" 4

objective => no intention necessary

anti competitive conduct versus ‘competition on the merits’- objectively necessary

may be acceptable reasons- safety, bad debt, discounts if cost based

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<sup>4</sup> Hoffmann- La Roche

## Boosey & Hawkes

ECJ dom U “may always take reasonable steps to protect its commercial interests but such measures must be fair and proportionate to the threat.”

## ABUSIVE PRICING

### **Excessive pricing**

Art 102(a) ‘unfair’

### United Brands

Comm: in ‘Chiquita’ held ‘no reasonable relation to the economic value of the product’ see D, DK and BeNeLux compared (i) unbranded bananas (ii) rivals’ bananas (iii) Price of Bananas in Irl.

ECJ annul dec that unfair – excess price should be determined objectively if possible to compare selling price with cost of production ie reveal profit but Comm failed to exam UB cost structure- note ECJ did not say how much profit.

### **Margin squeeze**

Napier Brown & British Sugar

BS dominant in market both for raw material and for derived product. It maintained a margin between the price it charged for the raw material to U which competed with it in the derived product and the price it charged for the derived product which was insufficient to reflect the dom U own costs of transformation with the result that competition in the derived product was restricted.

### **Ttelefonica**

july 2007- fined €151m- control network- wholesalers had to buy from it.

### **Predatory Pricing**

## **PREDATORY PRICING**

Not all price competition is legitimate

US controversial- Bork irrational

Areeda Turner Test Harv LR 1975

Adapted test- presume price > AVC are ok but price < AVC are not

Problems- classification, data

1966 Comm Rep

AKZO-

Akzo and ECS, produced a chemical. One version was used in the flour and the plastics markets. Up to 1979 ECS produced only for the flour market. Then it entered the plastics market in 1979 by approaching some of Akzo's customers. ECS was threatened that Akzo would retaliate on the flour market if ECS stayed in plastics market. ECS stayed. Some of its flour customers were offered prices which were below average total cost by Akzo. Comm also found Internal memo- aggressive.

Akzo cross subsidised low prices from the plastics sector. ECS's business fell.

AKZO argue not breach US rule  $< AVC$

THE ECJ-test of abuse from *Hoffmann-La Roche*, and then stated

70. It follows that Article 102 prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by using methods other than those which come within the scope of competition on the basis of quality. From that point of view, however, not all competition by means of price can be regarded as legitimate.

71. Prices below average variable costs (that is to say, those which vary depending on the quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced.

72. Moreover, prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. Such prices can derive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.

Summary-  $< AVC \Rightarrow$  predation but if  $> AVC < ATC$  abuse if intention

Comment on AKZO

1. ECJ test not same as US

US not pred if  $> AVC$

EC pred if  $> AVC$  but  $< ATC$  if part of plan

. subjective element- how evidence this?

2. recoup- not explicit but implicit in para 71

3. justifications? Obsolescence, cost of shut down

TetraPak II in Nov '96

Commission [1991] T was dominant in market for certain packaging materials and for aseptic cartons. Sometimes it sold non-aseptic cartons in Italy well below ATC, AVC and average direct variable costs (ie with grossly negative margin)

For 7 years the difference in price between goods sold in Italy and elsewhere and DOCs showed this was a deliberate strategy to conquer Italian market where elopak has acquired some power (also predatory in UK)

ECJ A firm dominant in one market may abuse it in another market. Tetrapak held 90% of aseptic cartons but abuse in market for non aseptic cartons. ECJ upheld fine (earlier upheld by CFI) for adp in packaging liquids '...it would not be appropriate, in the circumstances of the present case, to require in addition proof that Tetrapak had a realistic chance of recouping its losses. It must be possible to penalise predatory pricing wherever there is a risk that competitors will be eliminated. The CFI found that there was such a risk ... The aim pursued, which was to maintain undistorted competition rules out waiting until such a strategy leads to the actual elimination of competitors'

UPS Europe & Deutsche Post- fidelity rebates and predatory pricing- war

DP monopolist in letter mail. Business parcel service open for competition.

Comm- predatory if the service provided by a monopolist does not cover at least the additional cost incurred in getting into the new market.

Solution set up a new co which had to buy inputs from DP at market rates

Wanadoo- subsidiary of France telecom

Retail price for ADSL internet access service were below cost. Problem for new entrants who relied on France Telecom. Eg mangoosta exit in august 2001.

Wanadoo in nov 2001 had 60% of high speed access for residential and >90% for ADSL internet access. 2003 Comm held < AVC from 1999- August 2001. Aug 2001-Oct 2002 about AVC but < ATC.

Plan to foreclose deliberate- documents show their expectation to sell at a loss til 2003/4. fine €10m

### **REBATES**- ( possibly infringe Art 101)

- Simple OR Volume
- Fidelity/loyalty;
- Targets;
- Tying rebates

Sugar- disadvantage consumers and rivals

HLR,- adp even if buyer's request

British Sugar- group of buyers benefit only if all bought from BS, pressure from fellow buyers

Michelin I, - target at beginning of year based on previous sales, long ref period, target set for each individual, opaque

Coca Cola<sup>5</sup> no target or growth rebates

Michelin II T-203/01 2003 excerpt from EU press release of CFI

French market for replacement tyres for trucks and buses, a market which includes both new replacement tyres and retreaded tyres.

quantitative discounts ("rappels quantitatifs" or "quantity rebates") and discounts calculated by reference to the quality of the service provided by the dealer to its customers ("primes de service" or "service bonuses").

These preferential prices were not stipulated when the dealer was invoiced but were generally applied in the year following the reference period.

The Court of First Instance upheld the Commission's decision: a company in a dominant position, which operates loyalty discounts and bonuses,

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<sup>5</sup> June 2005 Commitment Dec by CC and bottlers under Art 9 of 1/2003. Binding until 2010 in MS where market share > specified threshold. carbonated soft drinks.

impedes normal price-based competition and infringes Community law.- where there is proof that dom pos conduct has OBJECT of restricting competition, it is unrec to est actual or concrete effect.

Held Comm proved the rebate system had object of foreclosing rivals without economic justification- suffices. Point to very disreputable evidence

British Airways commission ( performance bonus) to travel agents if equal or increase sale of BA- Virgin complain fined 6m upheld by CI T-219/99 on December 17<sup>th</sup> 2003

Agreed that the relevant market was UK market for air distribution ticket services supplied by agencies to airlines

Dominant- number of seats offered by BA, number of flights, quantity of BA tickets sold by agents and number of passenger kilometres flown on BA flights.

**ECJ March 2007** not fidelity so is it exclusionary? Make new entry difficult? Make more difficult for contracting parties to chose among suppliers?- fidelity building effect 2. objective economically justification- criteria? Look to the whole of the circumstances- counterbalancing efficiencies- advantages to consumers'

**INTEL**

fidelity rebates to Original Equipment Manufacturers (OEM) who buy from Intel all or most of their CPU requirements, predatory pricing and pay them to delay launch of products incorporating CPU of Intel's rival