

Article 82 - introduction

- Regulates unilateral behaviour by one undertaking or more undertakings
- Can only be applied to undertakings holding a “dominant position”
- Prohibits “abuse” of a dominant position
 - The creation or possession of a dominant possession is not caught by art 82
 - Competition on the merits in concentrated markets
- Art 82 list four different actions that may constitute “abuse”
 - The list not exhaustive, only indicative
 - An abuse may consist in any kind of behaviour of a dominant undertaking that distorts competition or exploits customers



The concept of an “undertaking”

- Article 81 (and 82) applies only to “undertakings”
 - Undertaking not defined in the EC Treaty
- ECJs definition of an undertaking:
 - “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”
 - The legal form of the entity irrelevant
 - All kind of companies
 - Persons
 - Self employed
 - Not employees (Opinion of GA Jacobs, case C-67/96, Albany)
 - Associations
 - “Trade associations
 - Co-operatives, P&I clubs
 - NOT: trade unions representing their members
 - The entity’s engagement in “economic activity” decisive



- “Economic activity”
 - Any activity consisting in offering goods and services on a given market
 - Wide definition
 - Social activity not economic activity (joined cases C-159/91 and C-160/91 *Poucet and Pistre*, case C-244/94 *Fédération française des sociétés d'assurance*, case C-67/96 *Albany*)
 - fulfilling an exclusively social function
 - the activity must be based based on the principle of national solidarity
 - non-profit-making: The ”outcome” not dependent upon the contribution
 - Recent decision from the EFTA-Court: Municipal kindergartens are not undertakings



- The purchase of goods or services an economic activity?
 - An activity exercised on the market
 - Court of First instance: T-319/99 Fenin v Commission
 - "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)

State bodies

- Exercising official authority
 - ECJ: Article 81 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*)
 - Includes tasks which are typical those of a public authority
 - Such tasks are not of an economic nature, e.g. Eurocontrol
 - Can to a certain extent be financed through fees of economic contributions
- Engaging in economic activity
 - Will be regarded as an “undertaking”
 - How the public body is organised is not decisive
 - Port Authorities



Effect on trade between Member States

- Trade between Member States must be affected from Article 81 and 82 to apply
- Sets out the jurisdictional limit to the prohibitions in Article 81 and 82
 - Decides the borderline between EC-treaty and national competition rules
 - If trade is not affected an agreement will be regulated by national competition law exclusively
 - Parallel application above the limit



- “may affect trade” must be interpreted on the background of the objectives in the EC-Treaty
- STM-test (case 56/65):
 - 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



“trade between member states”

- Flow of trade
- Between Member states
 - Undertakings from different Member States involved
 - Export and import between Member States
 - Agreements covering the whole territory of a Member State
 - Agreement covering EU
 - “Per se rule”
 - Trade with third countries
 - Import to EU
 - Export from EU
 - Changes in Market Structure



“may affect”

- Direct or indirect effect
- Actual or potential
- Negative effects necessary?
 - “The case that an agreement encourages an increase, even a large one, in the volume of trade between states is not sufficient to exclude the possibility that the agreement may “affect” such trade”
 - Case 56 & 58/64, Consten & Grundig v Commission
- Appreciable effect on trade



The concept of market power

- Competition law concerned first and foremost with the problems that occur when a firm or two or more firms possess market power
- A firm or firms that possess market power can enjoy some of the benefits available to the true monopolist
 - Market power presents undertakings with the possibility of limiting output and raising price, which are clearly harmful to consumer welfare

Market definition

- Decides the factual framework for the analysis of market power
 - The relevant market
 - Economic concept: Economic or econometric analysis of the facts
- An analytical tool, not an end in itself
 - "a tool for aiding the competitive assessment by identifying those substitute products or services which provide an effective constraint on the competitive behaviour of the products or services being offered in the market by the parties under investigation"
- But have normative implications
 - The implications of a broad or limited definition of the relevant market

Market definition

- The market definition focus on the market as it is today
 - Identify competitive restraints from actual competitors, does not include potential competitors
- The European Commission's *Notice on the Definition of the Relevant Market*
 - Extract of the Commissions practice or experience
 - Without prejudice to the case law of the Court of First Instance and the ECJ
 - But: In practice an extremely an influential guide



Market definition

- The “relevant market” the product of three different market dimensions
- The relevant product market
 - Interchangeability: to what degree are other products substitutes to the product in question?
 - SSNIP: Small but Significant Non-transitory Increase in Price
 - Cellophane fallacy
 - Supply-side substitutability



Market definition

- The relevant geographic market
 - The area in which the actual product is sold; the relevant geographic market
 - Homogeneous conditions of competition
 - Transport costs
- Temporal market

Dominant position

- What is dominance?
 - Considerable economic power held for a period of time by a firm/s over customers and/or suppliers in a market
 - Not synonymous with monopoly
 - A matter of degree
- Market power
 - 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
 - In short: The ability to behave independently from the competitors and influence on market price



- The temporal element
 - Without entry barriers supra-competitive profits will attract new entrants
 - Thus: Dominance will vanish in the long term
 - A company is dominant if it is able to charge supra-competitive prices over time
 - Often the result of exclusionary or abusive practices engaged in to secure the dominant position
 - Short periods of competition does not mean that an undertaking is not dominant



ECJ's definition of dominant position

- [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
 - United brands v Commission, case 27/76

MR and “dominant position”

- MR art 2(2):
 - “A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.”
- The concept of “dominant position” in MR art 2 has the same meaning as in art 82

Different perspectives in Article 82 and MR

- Art 82 applies to existing dominant positions
 - Retrospective analysis
- MR applies to the creation of new ones or strengthening of existing
 - Prospective analysis
- Reduction of competition
 - Art 82: Focuses on conduct (abuse)
 - MR: Focuses on structure



The dominance test

- The importance of market definition
- Measurement of market power – overview
 - Markets shares
 - Price elasticity of demand
 - Profitability measurement
 - Barriers to entry
 - Barriers to expansion
 - Structural factors
 - Behavioural factors

Markets shares

- The primary indicator
- ECJ: 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 large market shares
 - Hoffman-La Roche
- Not possible to determine an absolute market share level



- ECJ:
 - Although the importance of the market shares may vary from one market to another the view may legitimately be taken that very large market shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position
 - Hoffman-La Roche
- In Hoffman-La Roche; 75-85% market share so high that it required no further examination
- Market shares over 50% strong prima facie evidence of dominance and creates a presumption for a dominant position if held over time (AKZO-presumption – case 26/86)



- Market shares under 40%: Generally considered to be indicative of a firm not holding a dominant position
 - 25-40%: Dominant position unlikely unless very small competitors
 - Less than 25%: Dominant position very unlikely
 - MR recital 15: Concentrations “where the market share of the undertakings concerned does not exceed 25% ... are presumed to be compatible with the common market”
- Very low shares definitive indicators of the absence of dominance
 - SABA II: 10% conclusive for the ECJ when finding lack of dominance



- Market share levels over time
 - Each case must be analysed on its merits
 - Not possible to operate with a certain time frame
 - The stage of the development of the market important
- 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
 - If the competitors are very few this can indicate collective dominance



Price elasticity of demand

- Market power can be directly measured by estimating the price elasticity of demand of the undertaking in question
- Price elasticity is the percentage by which the output sold by the undertaking decreases in relation to an increase in its price
- The lower price elasticity of demand, the higher the market power
- Difficult to measure
 - Require detailed information of hard available data



Profitability measurement

- Measuring profit can indicate if the undertaking in question earn supra-competitive profits
- BUT: Superior performance, for example superior efficiency, may also lead to high profits



Barriers to entry

- The ability to exert market power dependent upon the existence of entry barriers
- Types of barriers to entry
 - Legal or administrative barriers
 - Sunk costs of entry
 - Switching costs for consumers
 - Strategic behaviour
 - For example the threat to engage in price war or to expand output

Barriers to expansion

- Prevent firms already present in the market from expanding their output
- ECJ
 - Dominance could be established where competitors with smaller market shares than the leading undertaking were not “able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share”
 - Hoffman-La Roche



Structural factors

- Size of operations
- Wide geographical presence
- 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 dominant position

- Art 82 refers to abuses by “one or more undertakings”
 - Implies that art 82 is addressed also to undertakings holding together a dominant position
 - Joint dominance and art 81
- The oligopoly problem
 - Transparent markets with a few interdependent suppliers
 - Parallel behaviour
 - Oligopoly produces non-competitive stability



- The concept
 - Rejected in case 85/76 Hoffmann-La Roche
 - A dominant position must also be distinguished from parallel courses of conduct which are peculiar to oligopolies in that in an oligopoly the courses of conduct interact, whilst in the case of an undertaking occupying a dominant position the conduct of the undertaking which derives profits from that position is to a great extent determined unilaterally”
 - But confirmed by the CFI in Italian Flat Glass, cases T-68/89, T-77/89 and T-78/89
 - There is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by some economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators in the same market
- The key issue: economic links



- Supplemented by the CFI in Almelo (case C393/92):
 - In order for such a collective dominance to exist, the undertakings must be linked in such a way that they adopt the same conduct on the market
- In short: The links must unite the undertakings in such a way that they adopt the same conduct on the market
- The characteristics necessary to define a (joint) position as dominant are the same as those which apply to single dominant positions

The concepts 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



Describing "links"

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



- Economic or structural links

- Pure economic links sufficient, cf. ECJ in case C-396/96 *Compagnie Maritime Belge*
 - “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 an economic assessment and, in particular, on an assessment of the structure of the market in question”
- CFI in *Gencor/Lohnro* (case T-102/96):
 - “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”
 - MR decision, but the same applies to art 82

”substantial part of the common market”

- The dominant position must be held in a substantial part of the common 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 common 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 82] 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
 - ECJ in Suiker Unie (cases 40-48, 50, 54-56, 111, 113-114/73)



- ECJ brings in the product market in to the analysis
 - One must consider the economic importance of the market in quantitative terms relative to the total of the Community market
 - Porto de Genova
- The whole territory of a Member State will always be a substantial part
 - In most cases also large areas inside a Member State

Abuse

- Article 82 prohibits abuse of a dominant position
 - The holding of a dominant position not objectionable under Article 82
- A practice that is an abuse when carried out by a dominant undertaking is perfectly legal when carried out by an undertaking not holding a dominant position
 - The link in practice between “abuse” and “dominant position”
- Dominance and abuse in different markets

Definitions

- Art 82 puts a “special responsibility” on dominant undertakings *Michelin v Commission* (case 322/81):
 - Practices which are likely to affect the structure of a market where , as a direct result of the presence of the undertaking in question , competition has already been weakened and which , through recourse to methods different from those governing normal competition in products or services based on traders ' performance , have the effect of hindering the maintenance or development of the level of competition still existing on the market
 - A finding that an undertaking has a dominant position ... 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 in the common market (para 70)
- Discussion paper: ”conduct ...must ... have the capability, by its nature, to foreclose competitors from the market...”

Methods of regulation applied in art 82

- The wording of art 82: Primarily directed towards exploitative behaviour
- ECJ: Art 82 “is 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” (Continental Can, case 6/72)
- Thus: prohibits both customer exploitation and exclusionary practices



- Has in practice been applied mostly in cases with exclusionary practices
 - Why?
 - Probably because the market mechanism itself suited to take of the problem
 - The Commission hesitate in deciding whether a practice is “unfair” or “unreasonable”
- But: Sound economic reasons can lead to a regulation of exploitative abuses

Abuse not defined in art 82

- Exclusionary practises
 - Practices not based on normal business performance, which seeks to harm the competitive position of the dominant company's competitors, or exclude the altogether
 - The difficulty: To distinguish competition on the merits from exclusionary practises
- Exploitative abuses
 - Exploitation of consumers
- Exploitative abuses directly harmful to consumers, exclusionary practices can, in the short term, result in benefits for the consumers
 - Exclusionary practises serve to protect the dominant position
 - In the long term exclusionary abuses are often followed by exploitative abuses



Abuse is an objective concept

- Intent not required
- But evidence on intent can show the exclusionary intent of an undertaking
- No distinction between “object or effect”?
 - The CFI’s decisions in T-203/01, Michelin II and T-219/99, British Airways

Objective justification

- An otherwise abusive practice can be justified for reasons of an objective nature
 - Example: Refusal to supply an existing customer (and competitor) that is a reaction to a breach of contract
- Is the concept of “objective justifications” equivalent to the possibility provided for in art 81(3) to exempt agreements prohibited under art 81(1)?
 - Many similarities: Could be argued that the same legal analysis could be adopted under both articles
 - BUT: In practice is the scope for justifying behaviour rather limited

Exclusionary abuse – ECJ definition

- The concept of an 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
 - Hoffman-La Roche, case 85/76



Key elements

- An abuse takes only place when “methods different from those which condition normal competition “ are used
- Such methods must have the effect of “hindering the maintenance of the degree of competition still existing in the market or the growth of that competition”



Competition on the merits distinguished

- “methods different from those which condition normal competition “
- Any firm will try to outperform its competitors
- If an undertaking, even a large one, eliminates its competitors because of better performance this is perfectly legal
- Can the practice in question be justified by any reason other than a simple attempt to exclude competitors?
 - Reduces costs?
 - Increases efficiency?
 - Example: Volume rebates

Exclusionary effect

- Has the behaviour of the dominant undertaking the effect of “hindering the maintenance of the degree of competition still existing in the market or the growth of that competition”?
- Effect can be either actual or potential
 - No need to prove that the competition actually has been hindered
 - Enough to demonstrate that the behaviour in question is likely to produce such an effect
- No need that the effect of an abuse is substantial to fall under art 82
- Can art 82 be used to ensure fairness between competitors
 - Protect competitors rather than competition?