

THE ABUSE OF THE DOMINANT POSITION WITHIN THE INTERNAL MARKET OF THE EUROPEAN COMMUNITY: FROM THEORETICAL ASSUMPTIONS TO PRACTICE

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OVERVIEW

The competition policy of the European Community does not concentrate on the “market power” of enterprises. Instead of that it uses the terms: “domination of the undertaking in the market” and “the abuse of the dominant position”. There is no doubt that such a position distorts free competition as it limits the freedom of activities of other market participants. Therefore, the art. 82 of the Treaty establishing the European Community (the EC Treaty) predicts that “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 insofar as it may affect trade between Member States”.

Thus, the prohibition predicted in art. 82 of the EC Treaty is subject to three conditions: the domination of the undertaking in the market, the abuse of this dominant position and its affection on trade between Member States. The aim of the paper is to analyse them in details. However, they are not define in the Treaty or Community legislation. The most important source of information on these conditions can be found in the decisions of the Commission and the judgements of the European Court of Justice and the Court of First Instance. As a result the main method used in preparing the paper is the analysis of the decisions and judgments and the formulation of general conclusions stemming from them.

It is expected that this analysis shows what is meant by “the relevant product and geographical market”, what are the indices of the dominant position and when we can talk about its abuse. The presentation of all these factors takes into account the circumstances of concrete cases. In other words, it is not abstract but shows how the art. 82 is used in practice.

Key words: dominant position in the internal market, product and geographical market, market shares, barriers to market entry, super-dominance, the abuse of the dominant position

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1. INTRODUCTION

In literature the art. 82 (previous art. 86) is treated as “the second of the twin pillars of the competition policy established under the EC Treaty” (e.g. Goyder, 1993: 339; Weatherill, 1996: 395). Its objective is to eliminate all forms of competition distortions made by a dominant firm which abuses its position. Thus, it is primarily aimed at the control of the conduct of a single firm, while art. 81 of the EC Treaty primarily concerns anti-competitive agreements between undertakings, decisions of the associations of undertakings and concerted practises. It can be seen that both provisions complement each other and therefore can be called twin pillars of the EC competition policy.

There is no doubt that dominant firms may act independently on the market – dictate the level of prices, the conditions of the supply of products etc. The existence of a dominant position can have positive economic advantages, for example enabling undertakings to pursue an adventurous research and development policy. This can even lead to keeping down the prices and improving the quality of their products (compare, Dashwood and Wyatt, 1993: 437). However, there is also another scenario – economically powerful firms may choose to charge high prices or refuse to supply products to customers. Therefore, their conduct must be controlled.

It should be underlined that in EC law the dominance alone is not prohibited. The European Court of Justice indicates that: “A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market” (Michelin, C-322/81). In other words dominant undertakings have to be careful about their behaviour and they cannot abuse their position.

According to the art. 82 “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 insofar as it may affect trade between Member States”. Therefore, in deciding whether any particular action falls within this provision, the most important conditions are:

1. the existence of a dominant position (this position has to be evaluated in the connection with relevant market);
2. the abuse of this position;
3. the effect on trade between Member States.

If these conditions are fulfilled, then an undertaking is in breach of art. 82. It should be noticed that there is no opportunity for an exemption to be sought from the application of this provision (the situation differs from that which exist in the case of art. 81). However, it does not mean that there is no scope for flexibility in the application of art. 82 - the concept of abuse is a flexible one and will usually be determined after careful analysis of each situation (compare Furse, 2002: 189). Therefore, it is important to see how the Commission and European courts (the European Court of Justice and the Court of First

Instance) evaluate particular cases of dominance and its abuse. The cases will be presented under three main headings. Firstly, the problems connected with the dominant position will be discussed – its definition, criteria, the existence on the relevant market. Secondly, the question of the abuse and its examples will be presented. Finally, effect on trade between Member States will be considered.

2. DOMINANT POSITION

2.1. Concept

The dominant position is not defined in the Treaty. However, the European Court of Justice clarified the meaning of this concept. It held that: “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, customers and ultimately of its consumers. In general, a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative” (United Brands, C-27/76). This means that the Court attaches the concept of dominance with the economic power of the undertaking, in particular its ability to act on the market in an independent way.

The undertaking takes the dominant position on the market if it controls a considerable part of this market. However, it does not mean that the possibility to compete has to be eliminated. In *Hoffman-la Roche* (C-85/76) the European Court of Justice stated that the dominant position “does not preclude some competition, which it does where there is a monopoly or quasi-monopoly, but enables the undertaking which profits by it, if not 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”.

It can be seen that the concept of the dominant position is based mainly on the independence of the undertaking on a particular market. Therefore, the process of determining the existence of a dominant position in a particular case normally should comprise two stages: the definition of relevant market (product, geographical and temporal) and the assessment of the strength of the undertaking in question on that market (see Dashwood and Wyatt, 1993: 441).

2.2. The relevant product market

The analysis of the Commission decisions and judgements of the European courts leads to the conclusion that generally it is in the interest of a defendant undertaking to describe the product market as broadly as possible and for the Commission to define it narrowly. Since the more narrowly the market is defined, the greater the market share of any undertaking will be (Furse, 2002: 191).

The European Court of Justice has described the relevant product market in many

cases. It underlines that „the definition of the relevant market is of essential significance, for the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products” (Continental Can Company, C-6/72). Thus, products have to be so characteristic that it is possible to tell them apart from other products.

Moreover, the European Court of Justice states that “the concept of the relevant market in fact implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned” (Hoffmann-La Roche, C-85/76). Thus, the most important factor in defining the relevant product market is that of substitutability. This can be analysed from the perspective of both consumers and suppliers but it seems that the Court concentrates more on buyers’ needs.

It also adds that “an examination limited only to the objective characteristics of the relevant products cannot be sufficient: the competitive conditions and the structure of supply and demand on the market must also be taken into consideration” (Michelin, C-322/81). This means that many factors have to be evaluated in order to define the product market.

Goyder (1993: 347) tries to list other relevant elements in this field. On the one hand, the attitudes of buyers to any closely matching substitutes, their technical qualities, composition and price range should be considered. On the other, the existence of barriers to entry to the market and the ability of undertakings to switch production from one type of goods to another without substantial capital expenditure or delay should be taken into account.

It can be seen that it is not easy to state if a product forms the relevant product market. Therefore, the analysis of this question remains a central issue in the majority of cases under art. 82. Some examples of the European Court of Justice’s reasoning is presented below.

United Brands (C-27/76) was one of the first cases in which the Court used the substitutability test. It concerned the supply of bananas to some of the Member States. According to the Commission, the product market consisted of bananas of all varieties, whether branded or unbranded but United Brands company argued that bananas formed part of the general market for fresh fruit. The Court considered many factors *inter alia* “seasonal substitutability in general between banana and all the seasonal fruit” and characteristics of bananas. It concluded that “a very large number of consumers having a constant need for bananas are not noticeably or even appreciably enticed away from the

consumption of the product by the arrival of other fresh fruit (...) consequently the banana market is a market which is sufficiently distinct from the other fresh fruit markets”.

The similar ruling was given in the case of Michelin (322/81). Here, the applicant claimed that the definition of the relevant market on which Commission based its decision was too wide, inasmuch as in the eyes of the consumer different types and sizes of tyres for heavy vehicles are not interchangeable and at the same time too narrow inasmuch as car and van tyres are excluded from it although they occupy similar positions on the market. The Court, however, did not accept these arguments. It stated that “as far as replacement tyres are concerned the first point which must be made is that at the user level there is no interchangeability between car and van tyres on the one hand and heavy-vehicle tyres on the other”. Thus, only tyres for heavy vehicles formed the relevant product market.

However, there are also examples of cases in which the Court disagreed with the opinion of the Commission on the relevant product market. One of such cases was *Continental Can* (C-6/72) where the Court stated that: „in order to be regarded as constituting a distinct market, the products in questions must be individualised, not only by the mere fact that they are used for packaging certain products, but by particular characteristics of production which make them specifically suitable for this purpose”. As a result “a dominant position on the market for light metal containers for meat and fish cannot be decisive, as long as it has not been proved that competitors from other sectors of the market for light metal containers are not in a position to enter this market by a simple adaptation”.

2.3. The relevant geographic market

The determination of the relevant geographic market is important in two aspects. First, this criterion is implicitly mentioned in art. 82 of the EC Treaty – there must be an abuse of a dominant position “within the common market or in a substantial part of it”. Secondly, the geographic definition of the market shows how many other competitors must be taken into account and this affects the assessment of the economic power wielded by the undertaking concerned. In general, the more extensive the market, the more diluted is the undertaking’s economic power and the less likely it is that it will be found to be dominant (Bridge and Lasok, 1994: 630).

There is no doubt that in determining the relevant geographic market one should take into account the economic importance of the area rather than its size. This was underlined by the European Court of Justice in the case of *Sugar* (joined cases 40-48, 50, 54-56, 111, 113, 114/73): “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 art. 82 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”. It can be seen that in defining a relevant market for the purpose of art. 82 of the EC Treaty it is necessary to identify the specific territory within which the interplay of supply and

demand is to be considered (Dashwood and Wyatt, 1993: 446).

The European Court of Justice also takes into account the conditions of competition on the market. As a result the dominant position should be referred to “a clearly defined geographic area in which the product is marketed and where the conditions of competition are sufficiently homogeneous for the effect of the economic power of the undertaking to be able to be evaluated” (United Brands, C-27/76).

The Court of the First Instance presents the same attitude. In the case Tetra Pak II (T-83/91) it stated that “the definition of the geographic market accordingly calls for an economic assessment; that market can thus be defined as the territory in which all traders operate in the same or sufficiently homogeneous conditions of competition in so far as concerns specifically the relevant products, without being necessary for those conditions to be perfectly homogeneous”.

Thus, the relevant geographic market can consist of several Member States, only one of them or even a substantial part or region in a Member State. This was confirmed by the jurisprudence of the European Court of Justice e.g. in United Brands (C-27/76) the Court agreed with the opinion of the Commission that six Member States (Federal Republic of Germany, Denmark, Ireland, the Netherlands, Belgium and Luxembourg) amounted to a substantial part of the common market. In Michelin (C-322/81) the relevant geographic market was confined to the Netherlands since the Commission decision concerned only a Dutch subsidiary of Michelin. Similarly, in British Airways (T-219/99) the Commission took the view that the relevant market was the United Kingdom market for air travel agency services and the Court of the First Instance agreed with that opinion. There were also such cases in which a part of the Member States amounted to the relevant geographic market e.g. in Sugar (joined cases 40-48, 50, 54-56, 111, 113, 114/73) the European Court of Justice accepted southern Germany as such an area.

2.4. The relevant time period

Markets change over time (particularly in terms of technological innovation) and market power must be sustained in the face of such possible changes over a considerable period of time for a position of dominance to be established under art. 82 (Tillotson, 1996: 353).

However, the European courts very rarely treat this criterion as a decisive one. One of the examples is the case of Benzine Petroleum (C-77/77), where the European Court of Justice took into account the oil crisis and general shortage of petroleum products in the period 1973-74. It stated that “the application to the Netherlands Companies (Aardolie Belagen Gemeenschap BV) by Benzine Petroleum a rate of reduction identical or very close to that applied to its traditional customers would have resulted in a considerable diminution of the deliveries which those customers expected”. As a result the Court held that Benzine Petroleum did not abuse the dominant position in relation to AGB and

annulled the decision of the Commission.

Generally the Commission's determination of the temporal constraints over which the relevant market is defined is not likely to be successfully challenged, though there may be arguments as to the duration of the alleged abuse (Furse, 2002: 198).

2.5. The strength of the dominant undertaking - the main criteria of dominance

There are many factors which should be taken into account in order to conclude that a dominant position exist on a given market. Most of them refer to the structure of the market. The conduct of an undertaking can also be treated as an indicative of dominance. However, the European Court of Justice does not accept that size and turnover alone could be such indicative (Goyder, 1993:341).

The most important criterion of dominance is the undertaking's share in the relevant market. The role of market share was underlined by the European Court of Justice e.g. in the case of *Hoffman-la Roche* (C-85/76, § 41): "although the importance of the market shares may vary from one market to another the view may legitimately taken that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position". Generally the European courts' approach appears to be that a market share of 70 per cent and above will certainly constitute a dominant position; a share of 50-70 per cent will raise a presumption of dominance; a share of 40-50 per cent may support a conclusion of dominance; and a share below 40 per cent is unlikely to permit the finding of dominance unless other evidence is overwhelming (compare Furse, 2002: 202). However, the Commission in its 10th Report on Competition Policy suggested that an undertaking could still be found to enjoy a dominant position with a market share as low as 20 per cent.

Another important criterion is connected with the position of competitors. It may be helpful to compare market shares of the undertaking deemed to be in the dominant position with market shares of its competitors. Undertakings with relatively low market shares, 30 to 40 per cent, may still be in the dominant position if the rest of the market is highly fragmented, so that none of the other participants constitutes a serious threat to its independence (Dashwood and Wyatt, 1993: 452). Therefore, the European Court of Justice takes this criterion into account together with market shares of the undertaking. In the case of *United Brands* (C- 27/76) it stated that UBC's share of the relevant market (40 %- 45%) did not automatically show that UBC controlled the market. According to the Court also the strength and number of its competitors should be considered. This comparison led the Court to the conclusion about UBC's "preponderant strength" as its shares in the market were several times greater than that of *Castle and Cooke* which "is the best placed of all the competitors" (§ 111 and 112).

Financial and technical resources of an undertaking should also be taken into account. There is no doubt that a firm with large financial and technical resources will be in a position to adapt its market strategy in order to meet and drive out competitors (Steiner, 1994: 172). Financial strength can assist the undertaking in maintaining dominance through large-scale advertising of its product e.g. United Brand's "Chiquita" banana. It can also allow the undertaking to remove a competitor and so increase its dominance by means of persistence price-cutting, which the smaller firm cannot match (Tillotson, 1996: 354). Financial resources also allow the undertaking to develop new technologies and as a result have a better position on the market.

The next criterion of dominance is called vertical integration. It was considered and developed in the case of United Brands (C-27/76). The European Court of Justice noticed that "UBC was an undertaking vertically integrated to a high degree". It owned large plantations, the bananas were carried from the place of production to the port of shipment by its own means of transport, including railways, it also owned refrigerated warehouses in key ports throughout Europe. Moreover, UBC led special advertising campaigns concerning "Chiquita" bananas. Thus, the vertical integration was evident at each of the stages: the production, packing, quality control, advertising and selling of bananas. According to the Court this allowed UBC to consolidate its economic strength.

The possession of know-how and intellectual property can also be taken into account while determining a dominant position of an undertaking. This was considered as a relevant factor e.g. in the case of *Hoffmann-La Roche* (C-85/76). The European Court of Justice held that its "technical lead over competitors is due to the fact that it is the proprietor of several patents relating to vitamin A, even after the expiration of these patents, is a further indication that it occupies a dominant position" (§ 51). Similarly, in the case of *Tetra Pak II* (T-83/91) the Court of the First Instance noticed that this undertaking could protect its 90% share in aseptic packaging through its patent rights – "the documents before the Court indicate that Tetra Pak has patented the basic technology which it has developed in relation to machines, cartons and processes" (§ 10).

Behaviour of the undertaking on the relevant market is also considered as an indicative of dominance e.g. in *United Brands* (C-27/76) the Commission noticed that this undertaking "enjoyed a degree of general independence in its behaviour on the relevant market which enabled it to hinder to a large extent any effective competition" (§ 59). However, behavioral evidence has only additional character. Thus, it should not normally be treated as sufficient in itself to establish the existence of a dominant position (Dashwood and Wyatt, 1993: 454).

Barriers to entry into the market may hinder or prevent competition from arising and so reduce or eliminate its threat to the dominant firm ((Tillotson, 1996: 356). Thus,

apart from the examination of the present situation on the market the question of potential competition should be assessed. Why is it so important? Since an undertaking could have large market shares and yet not be able to reap significant profits if it is constantly aware of the danger of potential competition (compare Furse, 2002: 203). However, it is not easy to examine the barriers to market entry as it requires a dynamic and long-term view of the market structure. Moreover, many barriers have to be taken into account e.g. geographical, financial, technical. They were examined in the case of *United Brands* (C-27/76) and the European Court of Justice stated that: “UBC’s economic strength has enabled it to adopt a flexible overall strategy directed against new competitors establishing themselves on the whole of the relevant market”. According to the Court: “the particular barriers to competitors entering the market are the exceptionally large capital investments required for the creation and running of banana plantations, the need to increase the sources of supply in order to avoid effects of fruit diseases and bad weather, the introduction of an essential system of logistics which the distribution of a very perishable product makes necessary, economies of scale from which newcomers to the market cannot derive any immediate benefit and the actual cost of entry made up *inter alia* of all the general expenses incurred in penetrating the market” (§ 122). This was a detailed analysis of barriers to entry into bananas market but usually the Commission and the European courts do not examine them in such a way. They just state that “barriers to entry are particularly high” or even do not take this criterion into account. Therefore, both the Commission and European courts are criticised for giving undue weight to such barriers and particularly for failing to take a long-term view as to the prospects of market entry (Steiner, 1994: 173).

2.6. Super-dominance

The differences in market power of the firms may result in different levels of dominance. Hence, the space for the doctrine of super-dominance is created, which entails the assumption that the same behaviour is deemed to be more abusive the larger the dominance of the undertaking in question is (see Appeldoorn, 2005: 655). There is no doubt that “super-dominant” undertakings have special responsibilities on the market.

This was underlined in the opinion of the Advocate General Fennelly in the case of *Compagnie Maritime Belge* (Joined Cases 395 and 396/96 P): “Article 82 cannot be interpreted as permitting monopolists or quasi-monopolists to exploit the very significant market power which **their super-dominance** confers so as to preclude the emergence either of a new or additional competitor. Where an undertaking, or group of undertakings whose conduct must be assessed collectively, enjoys a position of such overwhelming dominance verging on monopoly, comparable to that which existed in the present case ... it would not be consonant with **the particularly onerous special obligation affecting such a dominant undertaking** not to impair further the structure of the feeble existing competition” (§ 137 of the opinion). However, the European Court of Justice did not use that phrase in its judgment though it condemned the behaviour of the undertaking in

question.

It is obvious that super-dominant firms have a greater impact on competition than regular dominant firms. However, there are some problems with the practical application of the concept of super-dominance. They concern both the economic and legal aspects. It should be noticed that super-dominant firms are left with less room to compete the larger they grow. They must refrain from competition, otherwise they risk being found guilty of contravening art. 82 of the EC Treaty (Appeldoorn, 2005: 656). Another problem is that the assessment of super-dominance is based rather on the size of the undertaking than on its behaviour which is incompatible with the basic attitude of the European Court of Justice. Finally, the art. 82 is infringed only if an undertaking abuses its dominant position. This means that even if it enjoys super-dominance of the market, this factor alone cannot make it fall foul of art. 82 (Appeldoorn, 2005: 656).

All of these problems will have to be considered by the Court of the First Instance while judging the case Microsoft (T-201/04, pending case). The Commission in its decision took into account that this undertaking takes “an overwhelming dominant position” and imposed a fine on it and an obligation to disclose portions of technical information to its competitors.

3. THE ABUSE OF THE DOMINANT POSITION

3.1. Concept

Art. 82 of the EC Treaty prohibits the abuse of the dominant position but its definition is not given in this provision. It only predicts that “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”.

Thus, the art. 82 gives the examples of abusive practices. Decisions of the Commission and judgments of European courts confirm that there are many other practices which can have such a character. The range of cases decided under this article shows that the concept of abuse is wide, capable of covering variety of policies and actions that depart from normal competitive and commercial practice (Goyder, 1993: 350).

The European Court of Justice underlines that “the 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, by 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” (see Hoffman- La Roche where this statement was made for the first time). It can be seen that this is a broad concept which covers many different practices. The main types of abusive conduct are presented below but this is not a comprehensive list.

3.1. Examples

3.1.1. Pricing policies

Price competition is one of the most visible on the market. Generally, undertakings can be attacked for too high prices, which are a matter of exploiting a position of strength, for too low prices, termed ‘predatory pricing’ and for setting different prices for different customers (Furse, 2002: 238). Therefore, these main kinds of pricing policies will be discussed.

Excessively high price is defined by the European Court of Justice as the one which bears no reasonable relation to “the economic value of the product” (*General Motors Continental*, C-26/75). Prices charged by General Motors for its exclusive inspection service for second-hand Opel cars were found excessive. However, the undertaking showed that “it very quickly reduced the charge for the inspection ... and refunded the excess to the parties concerned” (§ 19). Therefore, the European Court of Justice did not treat General Motor’s conduct as the abuse of the dominant position.

The question of excessively high prices was also considered in the case of *British Leyland plc* (C-226/84). The Court confirmed that “an undertaking abuses its dominant position where it has an administrative monopoly and charges for its services fees which are disproportionate to the economic value of the service provided” (§ 27). British Leyland charge excessive fees for the approval certificates for left-hand drive cars and therefore abused its dominant position.

Predatory pricing is used by undertakings in order to drive out potential competitors out of the market - the prices of goods and services are reduced, if necessary below cost. Thus “the purpose of the dominant firm’s price-cutting is to preserve its long-run monopoly by frightening off potentially serious competition. The dominant firm is therefore quite willing to accept losses in that particular market for the time being – losses which can absorb since it is earning high profits in other markets” (Hay and Morris, 1991: 580). At the beginning consumers benefit from low prices but afterwards they become dependent on the dominant firm which can dictate the price conditions after capturing a larger share

of the market.

The question of predatory prices was considered in the case of *AKZO Chemie* (C-62/86). The European Court of Justice underlined that: “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”. However, “prices below average total costs (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”. Those criteria were used in the case and the Court stated that AKZO Chemie abused its dominant position. This approach to predation can be presented in the following way:

Price below average variable costs	Abusive conduct can be assumed
Price above average variable costs but below average total costs	Abusive conduct can be assumed but it is necessary to establish if it aims to the elimination of competition
Price above average total costs	There is no abusive conduct

Discriminatory prices - a dominant undertaking may fall foul of art. 82 by charging different prices in respect of equivalent transactions without objective justification (Dashwood and Wyatt 1993: 462). This case is predicted in art. 82 point c.

The question of price discrimination was considered in the case of *United Brands* (C-27/76). The Commission accused UB of charging each week for the sale of its branded bananas – without objective justification – a selling price which differed appreciably according to the Member State where its customers were established. The European Court of Justice agreed that UB used discriminatory prices which placed certain distributors at a competitive disadvantage. Consequently, it stated that “the policy of differing prices enabling UBC to apply dissimilar conditions to equivalent transactions with other trading parties ...was an abuse of a dominant position (§ 234).

3.1.2. *Abusive discounts or rebates*

The normal function of a discount or a rebate is the encouragement of a customer to do business with a supplier on a regular basis (Goyder, 1993: 358). However, this kind of activities can be dangerous for free competition. Particular pressure can be exerted by ‘loyalty (fidelity) discounts’ and ‘target discounts’.

The first ones are granted by a dominant supplier on condition that the customer enters into an obligation to purchase all or a very high percentage of his requirements from the dominant firm (Tillotson, 1996: 360). Thus, the discount is given for the purchasing of

certain products exclusively from one undertaking.

In the case of target discounts the price reduction is conditional on the purchasing of an agreed quantity of products from the supplier during the reference period (Dashwood and Wyatt, 1993: 464).

Both kinds of discounts were the subject of the judgments of the European courts. In *Hoffmann-La Roche* (C-85/76) the European Court of Justice underlined that “the fidelity rebate is designed through the grant of a financial advantage to prevent customers from obtaining their supplies from competing producers; furthermore the effect of fidelity rebates is to apply dissimilar conditions to equivalent transactions with other trading partners in that two purchasers pay a different price for the same quantity of the same product” (§ 90). Thus, according to the Court they fell within art. 82 point c and an undertaking which applies a system of fidelity rebates abuses its dominant position.

The same can be said about target discounts which were considered in the case of *Michelin* (C-322/81). The Court stated that “it is an abuse of a dominant position within the meaning of art. 82 for an undertaking to bind dealers to it by means of a system under which discounts are granted according to the quantities sold during a relatively long reference period with the result that the pressure increases on the buyer to reach the purchase figure needed to obtain the discount”. It also added that the target discount in question limited the dealer’s choice of supplier and made access to the market more difficult for competitors.

It is now well established that rebate or discount schemes are acceptable only if they are non-discriminatory and therefore do not fall within art. 82 point c. This can be illustrated e.g. by the case of *Irish Sugar* (T-228/97) where the Court of the First Instance confirmed that “fidelity rebates granted by an undertaking in a dominant position are an abuse within the meaning of article 82 where their aim is, by granting financial advantages, to prevent customers from obtaining their supplies from competing producers”. In this situation several factors should be taken into account: “whether there is a tendency, through an advantage not justified by any economic service, to remove or restrict the buyer’s choice as to his sources of supply, to block competitors’ access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to reinforce the dominant position by distorting competition” (§ 197).

3.1.3. Tie-in-sales

The provision of article 82 (d) covers all kinds of tying arrangements (“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”). Tie-in-sales entail situations in which the purchaser will be supplied with one product only if another is also purchased. In its extreme position,

where tie-in-sales extend across the complete range of the dominant supplier, such a practice may be termed full-line forcing (Furse, 2002: 209).

There is no doubt that this practice distorts competition. Thus, in the case of *Hilti* (T-30/89) the Court of the First Instance underlined that “it is an abuse of a dominant position for an undertaking to refuse to supply certain products separately, to put pressure on independent distributors to cause them to adopt its discriminatory practices and to refuse to honour the guarantee attaching to tools sold by it where they have been used with consumables produced by other manufacturers”. As a result it confirmed the position of the Commission that Hilti, which required users of its patented nail cartridges to buy nails from it as well, infringed art. 82 of the EC Treaty.

Similarly, in the case of *Tetra Pak II* (T-83/91) the Court of the First Instance noticed that: “where an undertaking in a dominant position directly or indirectly ties its customers by an exclusive supply obligation, that constitutes an abuse since it deprives the customer of the ability to choose his source of supply and denies other manufacturers access to the market”.

3.2.4. *The abusive use of intellectual property rights*

The general position in competition law is that property rights cannot be asserted in such a way as to lead to an anti-competitive outcome (Furse, 2002: 214). However, sometimes undertakings use their intellectual property rights e.g. patent rights in such a way that they act as a barrier to market entry for new competitors and in this way they consolidate the strength of a dominant position.

This issue was considered in the case of *Tetra Pak I* (T-51/89). Tetra Pack acquired a group which held an exclusive patent licence for new and important technology relating to the sterilisation of milk cartons. This was held by the Commission to be an abuse of its dominant position in the market for liquid food packaging. The Court of the First Instance agreed with this opinion. It stated that although an exclusive patent licence was not *per se* an abuse, the circumstances surrounding the acquisition of it in this case had “the effect of strengthening the undertakings’ already very considerable dominance of a market where very little competition was found and of preventing, or at least considerably delaying, the entry of a new competitor into that market”. Thus, barriers to entry into the market were taken into account

However, the leading case in the field of abusive use of intellectual property rights was that of *Magill* (Joined cases C-241 and 242/91 P). Here the Commission found that broadcasters in Ireland abused their dominant position by refusing to grant licences for the publication of their respective weekly listings and thus exploiting the copyright they held in television programme listings. The European Court of Justice confirmed that

mere ownership of an intellectual property right could not confer a dominant position but “by force of circumstances appellants (RTE and ITP), enjoyed, along with the BBC, *a de facto* monopoly over the information used to compile listings for the television programmes ... thus they were in a position to prevent effective competition on the market in weekly television magazines” (§ 47). Therefore, it stated that “the appellants’ refusal to provide basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer and for which there was a potential consumer demand. Such refusal constituted an abuse under heading (b) of the second paragraph of Article 82 of the Treaty” (§ 54).

It can be noticed that according to the Commission and European courts the exercise of an exclusive right by the proprietor may involve abusive conduct. However, the determination of an abuse is not automatic but depends on the circumstances of the case.

5.5.5. *Refusal to deal or supply and the “essential facilities” doctrine*

A dominant undertaking’s refusal to supply goods or services in the ordinary course of business or a refusal to supply except on very unreasonable terms may constitute a breach of article 82 (Tillotson, 1996: 361). The European Court of Justice underlines that such conduct can fall within the conditions of art. 82 points b and c, involving the limitation of markets to the prejudice of consumers and discrimination which might in the end eliminate a trading part from the relevant market (see *United Brands*, C-27/76, § 183).

The earliest case which concerned the question of refusal to deal was *Commercial Solvents Corporation* (Joined cases 6 and 7/73). Here CSC refused to supply Zoja with amnibutanol required for the manufacture of the derivative, ethambutol. This was the result of CSC’s decision to manufacture and sell the derivative on its own. The Commission stated that this was the abuse of the dominant position and the European Court of Justice upheld its decision. It noticed that: “an undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufactures of derivatives cannot just because it decides to start manufacturing these derivatives (in competition with its former customers) act in such a way as to eliminate their competition which in the case in question would amount to eliminating one of the principal manufacturers of ethambutol in the common market” (§ 25).

Similarly, in the case of *United Brands*, which was guilty of several abuses, the Court condemned its refusal to supply Olesen (a Danish distributor) with green bananas. It underlined that: “an undertaking in a dominant position for the purpose of marketing a product – which cashes in on the reputation of a brand name known to and valued by the consumers – cannot stop supplying a long standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of ordinary” (§

182).

Refusal to supply a service can be illustrated by the case of *Télémarketing* (C-311/84). Here the problem was that a subsidiary of Radio and television Luxembourg ceased to accept spot advertisements involving an invitation to make a telephone call for further information unless its telephone number was used (see Korah, 1996: 118). The Commission condemned this conduct and the European Court of Justice upheld its decision. It stated that: “an abuse within the meaning of art. 82 is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking” (§ 27).

It is underlined that this case signalled a new approach by the Commission to a refusal to supply goods or services – it has begun to develop the “essential facilities” doctrine (Tillotson, 1996: 363). An “essential facility” is a facility or infrastructure without access to which competitors cannot provide services to their customers. The owner of an essential facility which uses its power in one market in order to protect or strengthen its position in another relating market, imposing a competitive disadvantage on its competitor, infringes art. 82. (compare Furse, 2002: 256).

The leading case which shows how this doctrine operates is now *Bronner* (C-7/97). Bronner was the publisher in Austria of a daily newspaper with a market share of 3,6%. It argued that it could not develop its own home delivery and that such delivery constituted “essential facility” to which it should have access (it wanted to use the delivery service of Mediaprint which was the publisher of papers with a market share of 46,8 %). However, the European Court of Justice, following the Advocate General’s opinion, held that there are other methods of distributing daily newspapers, such as by post and through sale in shops and at kiosks. “Moreover, it does not appear that there are any technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult, for any other publisher of daily newspapers to establish, alone or in cooperation with other publishers, its own nationwide home-delivery scheme and use it to distribute its own daily newspapers” (§ 44).

Thus, in the literature it is stressed that the key elements are that: 1) access to the facility must be genuinely indispensable; 2) it is not possible practically to replicate the facility; 3) even by an undertaking of the same size and resources as the holder of the facility (Furse, 2002: 260). There is no doubt that it is not enough to show that without the facility the competitor would find it difficult to compete.

6. EFFECT ON TRADE BETWEEN MEMBER STATES

This is the last condition of the application of art. 82. It was described in detail in the case of *Hugin Kassaregister* (C- 22/78). The Court of Justice underlined that “the

purpose of that condition is to define, in the context of law governing competition, the boundary between the area respectively covered by Community law and the law of the Member States. Thus, Community law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by partitioning the national markets or by affecting the structure of competition within the common market. On the other hand conduct the effects of which are confined to the territory of a single Member State is governed by the national legal order”.

In the case of *Gesellschaft* (C-7/82) the Court confirmed that “in order to determine whether trade between Member States is capable of being affected by an abuse of a dominant position in the relevant market for the purpose of art. 82 of the Treaty, account must be taken of the consequences for the effective competitive structure in the common market”. Thus, the most important is the affection of the dominant undertaking’s conduct on the structure of competition within the common market, in particular it cannot partition national markets. It should also be noticed that it is not necessary to prove that the abusive conduct has in fact appreciably affected trade between Member States. It is sufficient to show that it was capable of having that effect (*Michelin*, C-322/81).

In practice it not difficult to establish that most transaction are capable of affecting trade between Member States. Therefore, only rarely this condition precluded the application of art. 82. One of such cases was the above-mentioned *Hugin Kassaregister* (C-22/78) where the European Court of Justice held that its refusal to supply had no perceptible repercussions beyond the UK. Thus, Hugin did not breach the art. 82.

5. CONCLUSIONS

This short overview of selected judgments of the European courts shows their role in the application of EC competition rules. It must be underlined that the art. 82 (previous 86) of the EC Treaty is general and does not define the concepts to which it refers. Thus, it would be difficult to apply it in practice without the explanation what is meant by the dominant position, its abuse and the effect on trade between Member States.

The overview also confirms that both the Commission in its decisions and the European courts in their judgments interpret art. 82 of the EC Treaty in a broad and at the same time elastic way. Thus, the dominant position “relates to the 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” but the particular criteria of dominance can differ. Similarly, the list of abusive practices is an open one. As a result different kinds of conduct can be taken into account in the frames of art. 82.

This is a good solution as new practices connected with the technological development can be considered by the Commission and European courts. At the same time they have competence to develop new doctrines such as “super-dominance” and “essential facility” doctrines. These concepts can be shaped in a new way by the European courts as the *Microsoft* decision, which deals with both of them, is being appealed now (T-201/04, pending case). Therefore, it is stressed that the application of art. 82 has arrived at a defining moment and the European courts have the opportunity to shape these doctrines for the years to come (Appeldoorn, 2005: 658).

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