

EU Competition Law II (Abuse of a dominant position, Merger Control)

(Last update: 11.04.2021)

Summer term 2021

Monday, 16:15 – 17:00

via Zoom

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A. Introduction and Basic notions

I. Overview

1. Important provisions

a) Treaty on the Functioning of the European Union (TFEU)

Article 101 TFEU

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:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make 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.

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:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

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.

Article 102 TFEU

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.

b) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Regulation 1/2003)

Article 3 – Relationship between Articles 81 and 82 of the Treaty and national competition laws

1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty.
2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

Article 7 - Finding and termination of infringement

1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. [...]

Article 9 – Commitments

1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission. [...]

Article 23 – Fines

[...]

2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:
 - (a) they infringe Article 81 or Article 82 of the Treaty; or

(b) they contravene a decision ordering interim measures under Article 8; or

(c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year. Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association.

[...]

2. Important terms

Abuse of a dominant position - Anti-competitive business practices (including improper exploitation of customers or exclusion of competitors) which a dominant firm may use in order to maintain or increase its position in the market.

Treaty on the Functioning of the European Union (TFEU)

Competition on the merits – Competition through recourse to methods governing normal competition in products or services on the basis of transactions of commercial operators. (≠ abuse of a dominant position)

Relevant market – A relevant market is defined according to both product and geographic factors.

- The relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable (→ Substitutability)
- The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services

Interdiction (or: Prohibition) of restrictive agreements (→ article 101 TFEU)

Control of concentration between undertakings – Control of mergers and acquisitions between undertakings by the competition authority. (See: Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation))

Block exemption regulation – Regulation issued by the Commission or by the Council pursuant to Article 101 III of the TFEU, specifying the conditions under which certain types of agreements are exempted from the prohibition on restrictive agreements laid down in Article 101§1 of the TFEU.

Vertical agreement – Agreement or concerted practice entered into between two or more undertakings each of which operates at a different level of the production or distribution chain.

Different levels of the production or distribution chain – Market at the previous/next stage of the production/distribution chain, for example, the distribution and sale of motor vehicles would be a downstream market in relation to the production of motor vehicles.

Market share – Measure for the relative size of a firm in an industry or market, in terms of the proportion of total output, sales or capacity it accounts for.

Proposed concentration – Two or more undertakings intend to merge and propose this concentration to the competition authority.

Antitrust authority – Authority that deals with competition issues, e. g. European Commission, Bundeskartellamt [GER], CMA - Competition and Markets Authority (former OFT) [UK], Autorité de la concurrence [FR], AGCM - Autorita' Garante della Concorrenza e del Mercato [IT], CNMC - Comisión Nacional de los Mercados y la Competencia [ES], UOHS - Úřad pro ochranu hospodářské soutěže (Office for the Protection of Competition) [CZ], GVH - Gazdasági Versenyhivatal [HR], Turkish Competition Authority [TR]

Exploitative abuse – e. g. the setting of excessive prices or the provision of poor quality services by a business holding a dominant position.

Excessive prices – prices set significantly above competitive levels because of monopoly or market power.

Competitive price level – Setting the price of a product or service with the intention of attracting a larger number of buyers based on what the competition is charging.

Exclusionary abuses – Strategic behaviour by a firm or group of firms to restrict market access possibilities of potential competitors. This behaviour normally has a so called → foreclosure effect.

Foreclosure effect – the fact that anti-competitive practice significantly raises barriers to entry into a market

Actual or potential competitors – A firm which is currently active on the same relevant market as the company under investigation (actual competitor), or which could and would be likely to undertake the necessary additional investments or other necessary switching costs to enter the relevant market (potential competitor).

Unilateral conduct – Single firm conduct (as opposed to restrictive agreements between two or more undertakings)

Legal consequences:

- Finding and termination of infringement (article 7–decision)
- Commitment decision (article 9–decision)
- Fines (Article 23 of Reg. 1/2003)
- Nullity (cf. article 101§2 TFEU)
- Claims to supply
- Claims to access (e. g. to an essential facility)

II. Market Definition

1. Important texts

a) Court of Justice of the European Union (CJEU), Judgment of 13 February 1979, Hoffmann-La Roche

(28) [...] 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.

b) COMMISSION NOTICE on the definition of relevant market for the purposes of Community competition law (97/C 372/03)

(7) A **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.

(15) The **assessment of demand substitution** entails a determination of the range of products which are viewed as substitutes by the consumer.

(15, continued) [**SSNIP-Test**] One way of making this determination can be viewed as a speculative experiment, postulating a hypothetical small, lasting change in relative prices and evaluating the likely reactions of customers to that increase. The exercise of market definition focuses on prices for operational and practical purposes, and more precisely on demand substitution arising from small, permanent changes in relative prices. This concept can provide clear indications as to the evidence that is relevant in defining markets.

(16) Conceptually, this approach means that, starting from the type of products that the undertakings involved sell and the area in which they sell them, additional products and areas will be included in, or excluded from, the market definition depending on whether competition from these other products and areas affect or restrain sufficiently the pricing of the parties' products in the short term.

(17) 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 5 % to 10 %) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographical areas is such that small, permanent increases in relative prices would be profitable. The equivalent analysis is applicable in cases concerning the concentration of buying power, where the starting point would then be the supplier and the price test serves to identify the alternative distribution channels or outlets for the supplier's products.

(20) **Supply-side substitutability** may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved. Such an impact in terms of effectiveness and immediacy is equivalent to the demand substitution effect.

2. Important terms

Market power – A firm has market power if it is able to profitably raise prices (above marginal costs). “Raising price” includes similar restrictions such as limiting output, suppressing innovation or depriving consumers of choice.

Many degrees of market power (continuum between two extremes):

Pure monopoly (absolute control over a market) – substantial market power (dominant position) - perfectly competitive market (no firm has market power)

Delineation of the market – Market definition

Demand-side substitutability – The fact that consumers have the possibility to buy another product instead, which they judge as being equivalent by its nature, use and/or price.

Interchangeability – Products that can be replaced by each other; they are seen as equivalent or interchangeable.

Price elasticity (of demand) - The degree to which the demand for a product or a service changes as its price rises.

Cross-price elasticity – Cross-price elasticity between products A and B measures the responsiveness of demand for product B to percentage change in the price of product A.

Supply substitution – A firm which is able to switch production to relevant products and market in the short term without incurring significant additional costs or risks.

SSNIP (small but significant non-transitory increase in price) – A test used to define the relevant market in a consistent way (see the Commission notice above), so called hypothetical monopolist test.

Profitable price increase – Price increase that is profitable to the undertaking despite the resulting loss of sales.

Switch of production (→ supply side substitution, see the Commission’s Communication above)

III. Market Power (dominant position)

1. Important texts

Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, Official Journal C 45, 24/02/2009, p. 7-20

“The assessment of dominance will take into account the competitive structure of the market, and in particular the following factors:

- constraints imposed by the existing supplies from, and the position on the market of, actual competitors (the market position of the dominant undertaking and its competitors),
- constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors (expansion and entry),
- constraints imposed by the bargaining strength of the undertaking's customers (countervailing buyer power).” (para. 12)

2. Important terms

Dominant position (beherrschende Stellung) – “A position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the

power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers” (Case 85/76 Hoffmann-La Roche, paragraph 38).

Market share (Marktanteil) – *Measure for the relative size of a firm in an industry or market.*

Financial strength (Finanzkraft) – *Sum of financial resources and opportunities of an undertaking.*

Entry barriers (Marktzutrittsschranken) – *Factors that prevent or hinder companies from entering a specific market.*

Actual competitor (tatsächlicher Wettbewerber) – *A firm which is either currently active on the same relevant market as the undertaking.*

Potential competitor (potentieller Wettbewerber) – *A firm which is held to be able to undertake the necessary investments to enter the relevant market in a short time.*

Opposite market (Marktgegenseite) – *Customers or suppliers of an undertaking.*

Supply market (Angebotsmarkt) – *Market for the purchase of production goods.*

Sales market (Absatzmarkt) – *Market for the sale of the goods or commercial services of an undertaking.*

IV. Aftermarkets

1. Important texts

a) Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03)

(56) There are certain areas where the application of the principles above has to be undertaken with care. This is the case when considering primary and secondary markets, in particular, when the behaviour of undertakings at a point in time has to be analysed pursuant to Article 86 (now Article 102 TFEU). The method of defining markets in these cases is the same, i.e. assessing the responses of customers based on their purchasing decisions to relative price changes, but taking into account as well, constraints on substitution imposed by conditions in the connected markets. A narrow definition of market for secondary products, for instance, spare parts, may result when compatibility with the primary product is important.

Problems of finding compatible secondary products together with the existence of high prices and a long lifetime of the primary products may render relative price increases of secondary products profitable. A different market definition may result if significant substitution between secondary products is possible or if the characteristics of the primary products make quick and direct consumer responses to relative price increases of the secondary products feasible.

b) DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses Discussion Paper, December 2005

(245) The application of traditional market definition tools such as the SSNIP-test to aftermarkets often leads to the definition of markets comprising only the products of the supplier of the primary product.

Often patents or know-how will allow the supplier of the primary product to have a monopolistic position on the aftermarket.

(246) The strong position of the supplier on such product markets may, however, not be indicative of the actual degree of market power of the supplier, since it may be constrained by competition in the primary market. If the primary market is competitive, competition in the primary market may make price increases in the aftermarket unprofitable due to its impact on sales in the primary market, unless prices in the primary market are lowered to offset the higher aftermarket price. Competition in the primary market may thus ensure that the overall price of the bundle of goods and services comprising the primary product and the secondary product(s) is competitive. In such a situation the supplier of the primary product cannot be said to be dominant on the aftermarket.

c) U.S. Supreme Court, Eastman Kodak Co. v. Image Technical Services, Inc. (504 U.S. 451 (1992))

Justice Blackmun delivered the opinion of the Court.

[..] The principal issue here is whether a defendant's lack of market power in the primary equipment market precludes — as a matter of law — the possibility of market power in derivative aftermarkets.

Petitioner Eastman Kodak Company manufactures and sells photocopiers and micrographic equipment. Kodak also sells service and replacement parts for its equipment. [Kodak equipment is unique; Kodak parts are not compatible with other manufacturers' equipment, and vice versa.] Respondents are 18 independent service organizations (ISOs) that in the early 1980s began servicing Kodak copying and micrographic equipment. Kodak subsequently adopted policies to limit the availability of parts to ISOs and to make it more difficult for ISOs to compete with Kodak in servicing Kodak equipment.

[...] Kodak also contends that, as a matter of law, a single brand of a product or service can never be a relevant market under the Sherman Act. We disagree. The relevant market for antitrust purposes is determined by the choices available to Kodak equipment owners. [...] Because service and parts for Kodak equipment are not interchangeable with other manufacturers' service and parts, the relevant market from the Kodak equipment owner's perspective is composed of only those companies that service Kodak machines. See *du Pont*, 351 U.S., at 404 (the "market is composed of products that have reasonable interchangeability"). This Court's prior cases support the proposition that in some instances one brand of a product can constitute a separate market. [...] The proper market definition in this case can be determined only after a factual inquiry into the "commercial realities" faced by consumers. [...]

2. Important terms

Aftermarkets (synonymous: Secondary markets, replacement markets) – The market for parts and accessories used in the upkeep or enhancement of a previous purchase, as of a car or computer (spare parts).

Bundle Competition (syn: Systems competition) – A marketing strategy that joins products or services together in order to sell them as a single unit. Bundled items are usually sold at a price attractively lower than the total of their individual selling prices (so called price bundling).

Complementary products – Products that are sold separately but that are used together, each creating a demand for the other, for example, computers and computer programs.

After market price – Price charged on the aftermarket

Original market (syn.: Primary market) – The market for goods or services that are newly available for buying and selling.

Original product (syn.: Primary product)

Spare part (Ersatzteil) – A duplicate part to replace a lost or damaged part of a machine.

Consumables (Verbrauchsgüter) – *Goods which*

- *are used up (not returned) after issuance from stores*
- *become incorporated into other goods and lose their identity*
- *cannot be used for their intended purpose without extinguishing or transforming their substance.*

Consumer durables (Gebrauchsgüter) – Goods intended to last three or more years such as washing machines, refrigerators, furniture etc.

Brand-specific aftermarket – aftermarket on which the spare parts must match the brand of the primary product that has to be repaired/maintained.

Patent – The exclusive right to make, use, or sell an invention for a specified period, granted by a public authority (patent office) to the inventor.

Know-how – the information, practical knowledge, techniques, and skill required to achieve some practical end, esp. in industry or technology. B. Merger Control (European Merger Control Regulation 139/2004)

B. Merger Control (European Merger Control Regulation 139/2004)

I. Jurisdiction

1. Important texts

a.) Reg. 139/2004 (European Merger Control Regulation)

Article 1 – Scope

(1) Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in this Article.

(2) A concentration has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

(3) A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

(4) On the basis of statistical data that may be regularly provided by the Member States, the Commission shall report to the Council on the operation of the thresholds and criteria set out in paragraphs 2 and 3 by 1 July 2009 and may present proposals pursuant to paragraph 5.

(5) Following the report referred to in paragraph 4 and on a proposal from the Commission, the Council, acting by a qualified majority, may revise the thresholds and criteria mentioned in paragraph 3.

Article 3 – Definition of concentration

(1) A concentration shall be deemed to arise where a change of control on a lasting basis results from:

(a) the merger of two or more previously independent undertakings or parts of undertakings, or (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

(2) Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

(3) Control is acquired by persons or undertakings which:

(a) are holders of the rights or entitled to rights under the contracts concerned; or

(b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

(4) The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b).

(5) A concentration shall not be deemed to arise where:

(a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies can show that the disposal was not reasonably possible within the period set;

(b) control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;

(c) the operations referred to in paragraph 1(b) are carried out by the financial holding companies referred to in Article 5(3) of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (1) provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.

b) Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ 2008, C 95/1

(5) [...] the Merger Regulation only applies to operations that satisfy two conditions. First, there must be a concentration of two or more undertakings within the meaning of Article 3 of the Merger Regulation. Secondly, the turnover of the undertakings concerned, calculated in accordance with Article 5, must satisfy the thresholds set out in Article 1 of the Regulation. [...]

(124)[...] **Turnover** is used as a proxy for the economic resources being combined in a concentration, and is allocated geographically in order to reflect the geographic distribution of those resources.

c) German Act against Restraints of Competition

§ 37 – Concentration

(1) A concentration shall arise in the following cases:

1. acquisition of all or of a substantial part of the assets of another undertaking;

2. acquisition of direct or indirect control by one or several undertakings of the whole or parts of one or more other undertakings. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking having regard to all factual and legal circumstances, in particular through:

a) ownership or the rights to use all or parts of the assets of the undertaking,

b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of the undertaking;

3. acquisition of shares in another undertaking if the shares, either separately or in combination with other shares already held by the undertaking, reach:

a) 50 percent or

b) 25 percent

of the capital or the voting rights of the other undertaking. The shares held by the undertaking shall also include the shares held by another for the account of this undertaking and, if the owner of the undertaking is a sole proprietor, also any other shares held by him. If several undertakings simultaneously or successively acquire shares in another undertaking to the extent mentioned above, this shall be deemed to also constitute a concentration among the undertakings concerned with respect to those markets on which the other undertaking operates;

4. any other combination of undertakings enabling one or several undertakings to directly or indirectly **exercise a competitively significant influence** on another undertaking. [...]

d) COMMISSION STAFF WORKING DOCUMENT: Towards more effective EU merger control, Brussels, 25.6.2013, SWD(2013) 239 final, p 3 et seq.

[Merger control for the acquisition of non-controlling minority shareholdings (“structural links”)]

Effective competition policy requires having the appropriate means to tackle all sources of harm to competition and consumers. Acquisitions of non-controlling minority shareholdings (hereafter “structural links”) may in some cases lead to anticompetitive effects. Today, the Commission does not seem to have the tools to systematically prevent anti-competitive effects deriving from such structural links. A solution explored in this paper could be to extend the scope of the Merger Regulation to give the Commission the option to intervene in a limited number of problematic cases of structural links, in particular those creating structural links between competitors or in a vertical relationship.

Objectives

Significant harm to competition and consumers can occur not only from acquisitions of control, but also from structural links, which as such are currently not covered by the Merger Regulation. According to established economic theory, structural links may lead to competitive harm in various manners:

- by reducing competitive pressure between competitors ("horizontal unilateral effects");
- by substantially facilitating coordination among competitors ("horizontal coordinated effects");
- in case of vertical structural links by allowing companies to hamper competitors' access to inputs or customers ("vertical effects").

Anti-competitive effects from structural links are likely to be less pronounced than in case of acquisition of control. However, at the same time the potential efficiencies from structural links are likely to be more limited. Consequently, structural links may lead to a significant impediment to effective competition (with effects, for instance, on innovation, growth, offer, prices). The potential anti-competitive effects of acquisitions of minority shareholdings according to economic theory are set out in Annex I. The Commission's and the Member States' practice shows that structural links can result in significant harm to competition.

[Example Ryanair – Aer Lingus]

An example of a structural link is Ryanair's shareholding in its competitor Aer Lingus. Ryanair had acquired a significant non-controlling minority stake in Aer Lingus' share capital, when Ryanair notified in 2006 the proposed acquisition of control of Aer Lingus. Due to the serious competition harm that was expected to result from the merger, the Commission eventually prohibited the acquisition of control in June 2007.

However, after the Commission's prohibition decision, Ryanair maintained a minority stake of 29.4% in Aer Lingus. In view of the fact that the Merger Regulation only provides for the ex ante review of operations leading to the acquisition of control, the Commission could not enforce against Ryanair's minority stake under EU merger control – a reasoning confirmed in 2010 by the General Court.⁴ According to Aer Lingus, Ryanair's minority stake would have significant negative effects on competition between the two carriers. Aer Lingus argued that Ryanair uses the minority stake to get access to Aer Lingus' confidential strategic plans and business secrets, to block special resolutions, and to request extraordinary general meetings with a view to attempting to reverse already adopted strategic decisions. As a result, Aer Lingus could have been weakened as an effective competitor of Ryanair or, alternatively, Ryanair's desire to maintain the value of its investment in Aer Lingus could have reduced Ryanair's incentives to compete.

2. Important terms

Merger review/merger control

“One-stop-shop” principle – *Exclusive jurisdiction of the Commission*

Concentration with a Community dimension – Concentration falling within the jurisdictional scope of the European Merger Control Regime (Articles 1 and 3 of EUMR)

Exclusive Jurisdiction of the Commission – *Exclusion of the scope of application of national merger control regimes*

Concentration (Art. 3 of EUMR)

- Merger
 - o Merger by creation of new company
 - o Merger by absorption of one company by another one
- Acquisition of control
 - o Control by the acquisition of shares or assets
 - o Control on a contractual basis
 - o Control by other means (exceptionnel)
 - o Sole controle/Joint control

- Joint venture performing on a lasting basis all the functions of an autonomous economic entity

Minority shareholder

Decisive influence

Turnover thresholds (Art. 1 of EUMR)

Allocation of cases between the Commission and the national competition authorities

Referrals (Articles 4, 9 and 22 of the EUMR) – *Re-Allocation of cases from the Member states to the Commission or vice versa*

II. Substantive Appraisal of Concentrations

1. Important texts

a) Reg. 139/2004 (European Merger Control Regulation)

Article 2 - Appraisal of concentrations

(1) Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establishing whether or not they are compatible with the common market.

In making this appraisal, the Commission shall take into account:

(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

(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 compatible with the common market.

(3) A concentration which would **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.

(4) To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.

(5) In making this appraisal, the Commission shall take into account in particular:

- whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market,

- whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

b) German Act against Restraints of Competition (2013, current version)

§ 36 – Principles for the Appraisal of Concentrations (2013)

(1) A concentration which would **significantly impede effective competition, in particular, which is expected to create or strengthen a dominant position**, shall be prohibited by the Federal Cartel Office. Unless

1. the participating undertakings prove that the concentration will also lead to improvements of the conditions of competition, and that these improvements will outweigh the impediment of effective competition, or
2. the prohibition criteria of sentence 1 concern a market in which goods or commercial services have been offered for at least five years, and which had a sales volume of less than EUR 15 million in the last calendar year, or
3. the dominant position in the field of a newspaper or magazine publisher would strengthen, which takes over a small or medium-sized newspaper or magazine publisher, if it is proved that the acquired publisher had a significant net loss within the meaning of Sec. 275 (2) No. 20 of the Commercial Code and he would be jeopardized in his existence without the concentration. Furthermore, it is to be proved that before the concentration no other acquirer was found, who would have ensured a more competitive solution.

(2) If a participating undertaking is a controlled or controlling undertaking within the meaning of Sec. 17 of the Joint Stock Corporation Act or a group company within the meaning of Sec. 18 of the Joint Stock Corporation Act, then the undertakings so affiliated shall be regarded as a single undertaking. If several undertakings act together in such a way that they can jointly exercise a controlling influence on another undertaking, each of them shall be regarded as controlling.

(3) If a person or association of persons which is not an undertaking holds a majority interest in an undertaking, it shall be regarded as an undertaking.

c) German Act against Restraints of Competition (2005, former version)

§ 36 - Principles for the Appraisal of Concentrations

(1) A concentration which is expected to **create or strengthen a dominant position** shall be prohibited by the Bundeskartellamt unless the undertakings concerned prove that the concentration will also lead to improvements of the conditions of competition and that these improvements will outweigh the disadvantages of dominance.

d) Clayton Antitrust Act 1914 (USA)

15 U.S. Code § 18 (Sec. 7 Clayton Act)

[Acquisition by one corporation of stock of another]

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be **substantially to lessen competition**, or to tend to **create a monopoly**.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be **substantially to lessen competition**, or to tend to **create a monopoly**. [...]

e) F.T.C. v. H.J. Heinz Co., United States District Court for the District of Columbia, 2000. 116 F. Supp. 2d 190; 2000-2 Trade Cases (CCH) ¶73,066.

The Federal Trade Commission seeks a preliminary injunction pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), to enjoin the **proposed merger** of the baby food divisions of H.J. **Heinz** Company and Milnot Holding Corporation ("**Beech-Nut**"). . . .

[...] There are only three major manufacturers and distributors of jarred baby food in the United States: Heinz, Beech-Nut, and Gerber Products Company. Gerber is by far the largest domestic manufacturer. It enjoys, and has enjoyed for some 40 years, a dominant market share that has recently grown to between 65 and 70 percent. The Gerber market share is now 65 percent, the Heinz share 17.4 percent, and the Beech-Nut share 15.4 percent.

[...] Nearly all supermarkets stock only two brands of baby food, not three. Gerber is invariably one of the two.

f) Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal 2004. C 31/6

MARKET SHARE AND CONCENTRATION LEVELS

(14) Market shares and concentration levels provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors.

(16) The overall concentration level in a market may also provide useful information about the competitive situation. In order to measure concentration levels, the Commission often applies the **Herfindahl-Hirschman Index (HHI)**. The HHI is calculated by summing the squares of the individual market shares of all the firms in the market. The HHI gives proportionately greater weight to the market shares of the larger firms. [...] While the absolute level of the HHI can give an initial indication of the competitive pressure in the market post-merger, the **change in the HHI** (known as the "**delta**") is a useful proxy for the change in concentration directly brought about by the merger.

Market share levels

(17) According to well-established case law, very large market shares - 50 % or more - may in themselves be evidence of the existence of a dominant market position. However, smaller competitors may act as a sufficient constraining influence if, for example, they have the ability and incentive to increase their supplies. A merger involving a firm whose market share will remain below 50 % after the merger may also raise competition concerns in view of other factors such as the strength and number of competitors, the presence of capacity constraints or the extent to which the products of the merging parties are close substitutes. The Commission has thus in several cases considered mergers resulting in firms holding market shares between 40 % and 50 %, and in some cases below 40 %, to lead to the creation or the strengthening of a dominant position.

(18) Concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market. Without prejudice to Articles 81 and 82 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25 % either in the common market or in a substantial part of it.

HHI levels

(19) The Commission is unlikely to identify horizontal competition concerns in a market with a post-

merger HHI below 1000. Such markets normally do not require extensive analysis.

(20) The Commission is also unlikely to identify horizontal competition concerns in a merger with a post-merger HHI between 1000 and 2000 and a delta below 250, or a merger with a post-merger HHI above 2000 and a delta below 150, except where special circumstances such as, for instance, one or more of the following factors are present:

- (a) a merger involves a potential entrant or a recent entrant with a small marketshare;
- (b) one or more merging parties are important innovators in ways not reflected in market shares;
- (c) there are significant cross-shareholdings among the market participants(25);
- (d) one of the merging firms is a maverick firm with a high likelihood of disrupting coordinated conduct;
- (e) indications of past or ongoing coordination, or facilitating practices, are present;
- (f) one of the merging parties has a pre-merger market share of 50 % of more(26).

(21) Each of these HHI levels, in combination with the relevant deltas, may be used as an initial indicator of the absence of competition concerns. However, they do not give rise to a presumption of either the existence or the absence of such concerns.

g) Commission, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2008, C 265/6

(3) Two broad types of non-horizontal mergers can be distinguished: vertical mergers and conglomerate mergers.

(4) Vertical mergers involve companies operating at different levels of the supply chain. For example, when a manufacturer of a certain product (the 'upstream firm') merges with one of its distributors (the 'downstream firm'), this is called a vertical merger.

(5) Conglomerate mergers are mergers between firms that are in a relationship which is neither horizontal (as competitors in the same relevant market) nor vertical (as suppliers or customers). In practice, the focus of the present guidelines is on mergers between companies that are active in closely related markets (e.g. mergers involving suppliers of complementary products or products that belong to the same product range).

2. Important terms

To lessen competition substantially (Clayton Act)

Substantial impediment to effective competition (Reg. 139/2004)

Unilateral price increase

Decisive influence (§ 36 Act Against Restraints of Competition)

Compatibility with the Common Market (Reg. 139/2004)

Market post-merger

Horizontal effects

Herfindahl-Hirschman-Index (HHI) – *allows the Commission to measure concentration levels in a given market*

Buyer power – *can act as a countervailing factor to an increase in market power resulting from the merger*

Vertical effects

Conglomerate effects

- Portfolio effects
- Strengthening of resources

Efficiencies – *can act as a factor counteracting the harmful effects on competition which might otherwise result from the merger*

III. Remedies eliminating the competition concerns of a proposed concentration

1. Important texts

a) Reg. 139/2004 (European Merger Control Regulation)

Article 9 - Commitments

1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.

2. The Commission may, upon request or on its own initiative, reopen the proceedings:

- (a) where there has been a material change in any of the facts on which the decision was based;
- (b) where the undertakings concerned act contrary to their commitments; or
- (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

b) Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ 2008 C267/1

(18) [A] general distinction can be made between **divestitures**, other **structural remedies**, such as granting access to key infrastructure or inputs on non-discriminatory terms, and **commitments relating to the future behaviour** of the merged entity. Divestiture commitments are the best way to eliminate competition concerns resulting from horizontal overlaps, and may also be the best means of resolving problems resulting from vertical or conglomerate concerns [...].

(61) Whilst being the preferred remedy, divestitures or the removal of links with competitors are not the only remedy possible to eliminate certain competition concerns. However, divestitures are the benchmark for other remedies in terms of effectiveness and efficiency. The Commission therefore may accept other types of commitments, but only in circumstances where the other remedy proposed is at least equivalent in its effects to a divestiture.

(62) In a number of cases, the Commission has accepted remedies foreseeing the granting of access to key infrastructure, networks, key technology, including patents, know-how or other intellectual property rights, and essential inputs. Normally, the parties grant such access to third parties on a non-discriminatory and transparent basis.

c) OECD, Policy Roundtable Remedies in Merger Cases 2011, DAF/COMP(2011)13, 30. Juli 2012, Contribution Germany, 85, 86

Examples of **remedies** that have been accepted by the Bundeskartellamt and that do not involve the divestment of a business include the following: divestment of slots at airports,² termination of exclusive distribution agreements,³ granting the right to terminate long-term supply contracts,⁴ access to infrastructure,⁵ granting licenses of IP rights,⁶ obligation to undertake formal tender procedures after public transportation licenses have expired, with the aim of opening up the market for competition,⁷ admission of a competitor as a supplier of publicly funded healthcare services,⁸ and obligation to disclose calculations.⁹

- 2 Bundeskartellamt, Decision of 19 Sep. 2001, B9-147/00 – Lufthansa/Eurowings, pp. 2, 22ff.
- 3 Bundeskartellamt, Decision of 2 June 2005, B3-123/04 – H&R WASAG/Sprengstoffwerke Gnaschwitz, pp. 3, 13f.
- 4 Bundeskartellamt, Decision of 11 Oct. 2000, B8-109/00 – Contigas/Stadtwerke Heides, pp. 2, 8f; Bundeskartellamt, Decision of 4 Sep. 2000, B8-132/00 – Eon/Hein Gas, pp. 2, 18ff; Bundeskartellamt, Decision of 26 Jan. 2001, B8-208/00 – EnBW/Stadtwerke Schwäbisch Gmünd Iff, 12; Bundeskartellamt, Decision of 3 Apr. 2001, B8-263/00 – Neckarwerke Stuttgart/Stadtwerke Reutlingen, pp. 2f, 12; Bundeskartellamt, Decision of 18 May 2001, B8-29/01 – EnBW Regional, Stadt Schramberg u. a., pp. 2, 8f; Bundeskartellamt, Decision of 18 May 2001, B8-291/00 – Trienekens Niederrhein, Stadt Viersen, Stadtwerke Viersen, pp. 2, 10f; Bundeskartellamt, Decision of 29 Jul. 2002, B8-23/02 – EnBW/ZEAG, pp. 2f.
- 5 Bundeskartellamt, Decision of 11 Oct. 2000, B8-109/00 – Contigas/Stadtwerke Heides, pp. 2, 8f; Bundeskartellamt, Decision of 4 Sep. 2000, B8-132/00 – Eon/Hein Gas, pp. 2, 18ff; Bundeskartellamt, Decision of 26 Jan. 2001, B8-208/00 – EnBW/Stadtwerke Schwäbisch Gmünd Iff, 12; Bundeskartellamt, Decision of 3 Apr. 2001, B8-263/00 – Neckarwerke Stuttgart/Stadtwerke Reutlingen, pp. 2f, 12; Bundeskartellamt, Decision of 18. May 2001, B8-29/01 – EnBW Regional, Stadt Schramberg u. a., pp. 2, 8f; Bundeskartellamt, Decision of 18. May 2001, B8-291/00 – Trienekens Niederrhein, Stadt Viersen, Stadtwerke Viersen, pp. 2, 10f; Bundeskartellamt, Decision of 29. July 2002, B8-23/02 – EnBW/ZEAG, pp. 2f.
- 6 Bundeskartellamt, Decision of 3. Jul. 2002, B3-6/03, - BASF/Bayer Crop Science, pp. 2, 9ff; Bundeskartellamt, Decision of 25. May 1999, B5-16/99, - Federal Mogul/Alcan, p. 1f, 39f.
- 7 Bundeskartellamt, Decision of 3. Jul. 2002, B9-164/01 – DB AG/Stadt- und Regionalbus Göttingen, pp. 2f, 46ff; Bundeskartellamt, Decision of 2. Dec. 2003, B9-91/03 – DB Regio/üstra, pp. 2ff, 64ff.
- 8 Bundeskartellamt, Decision of 10. May 2000, B3-587/06 – Klinikum Region Hannover/Landeskrankenhaus Wunstort, pp. 2ff, 60ff.
- 9 Bundeskartellamt, Decision of 11. Oct. 2000, B8-109/00 – Contigas/Stadtwerke Heides, pp. 2, 8f; Bundeskartellamt, Decision of 04. Sep. 2000, B8-132/00 – Eon/Hein Gas, pp. 2, 18ff; Bundeskartellamt, Decision of 26 Jan. 2001, B8-208/00 – EnBW/Stadtwerke Schwäbisch Gmünd Iff, 12; Bundeskartellamt, Decision of 3 Apr. 2001, B8-263/00 – Neckarwerke Stuttgart/Stadtwerke Reutlingen, pp. 2f, 12; “

2. Important terms

Commitments – Modifications proposed by the undertakings concerned with a view to rendering the concentration compatible with the common market

Remedies

- Structural v. behavioural remedies
- Divestitures
- Access remedies (to facilitate market entry or to prevent foreclosure)

IV. Merger Control Procedure, Third Party Rights

1. Important texts

Reg. 139/2004 (European Merger Control Regulation)

Article 7 - Suspension of concentrations

(1) A concentration with a Community dimension as defined in Article 1, or which is to be examined by the Commission pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6).

(2) Paragraph 1 shall not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control within the meaning of Article 3 is acquired from various sellers, provided that:

(a) the concentration is notified to the Commission pursuant to Article 4 without delay; and

(b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under paragraph 3.

[...]

(3) The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 1. The request to grant a derogation must be reasoned. In deciding on the request, the Commission shall take into account inter alia the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration. Such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, be it before notification or after the transaction.

[...]

Article 6 - Examination of the notification and initiation of proceedings

(1) The Commission shall examine the notification as soon as it is received.

(a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.

(b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

(c) Without prejudice to paragraph 2, where the Commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings. Without prejudice to Article 9, such proceedings shall be closed by means of a decision as provided for in Article 8(1) to (4), unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration.

(2) Where the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c), it shall declare the

concentration compatible with the common market pursuant to paragraph 1(b).

The Commission may attach to its decision under paragraph 1(b) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

(3) The Commission may revoke the decision it took pursuant to paragraph 1(a) or (b) where:

(a) the decision is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit,

or

(b) the undertakings concerned commit a breach of an obligation attached to the decision.

(4) In the cases referred to in paragraph 3, the Commission may take a decision under paragraph 1, without being bound by the time limits referred to in Article 10(1).

(5) The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

Article 18 - Hearing of the parties and of third persons

(1) Before taking any decision provided for in Article 6(3), Article 7(3), Article 8(2) to (6), and Articles 14 and 15, the Commission shall give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them.

(2) By way of derogation from paragraph 1, a decision pursuant to Articles 7(3) and 8(5) may be taken provisionally, without the persons, undertakings or associations of undertakings concerned being given the opportunity to make known their views beforehand, provided that the Commission gives them that opportunity as soon as possible after having taken its decision.

(3) The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.

(4) In so far as the Commission or the competent authorities of the Member States deem it necessary, they may also hear other natural or legal persons. Natural or legal persons showing a sufficient interest and especially members of the administrative or management bodies of the undertakings concerned or the recognised representatives of their employees shall be entitled, upon application, to be heard.

2. Important terms

Notification – *Formal information to the Commission of a planned concentration*

Pre-notification contacts – *Informal (confidential) negotiations between the undertakings of a planned concentration and the Commission*

Notifying Parties

Suspension obligation – *Prohibition to implement a transaction before its notification and before it has been declared compatible with the Common Market (Article 7 of the EUMR)*

Clearance – *Decision declaring a proposed concentration (where applicable: as modified*

by obligations and/or conditions) compatible with the Common Market

Gun jumping

Phase I – Initial Examination Phase, possibility for the Commission to clear the transaction, but not to prohibit it

Phase II – In-Depth-Investigation Phase, possibility for the Commission to declare the proposed transaction incompatible with the Common Market

Stopping the clock

Third party submission – Third parties demonstrating a sufficient interest must also be given the opportunity of expressing their views.

Withdrawal and Abandonment of a proposed merger by the notifying parties

V. Public interest considerations and Merger Control

1. Important texts

a) OECD Round Table DAF/COMP/WP3(2016)32 on Public interest considerations and merger control 2016, Background Paper by the Secretariat

Abstract

Although efficiency is central to competition law and policy in all OECD Members, the competition laws of some jurisdictions also include objectives which extend beyond the core economic goal of competition law, so-called ‘public interest considerations’. Merger control is likely to have political and economic consequences, so such considerations are particularly prevalent. [...]

Competition authorities might face a difficult balancing exercise in weighing public interest criteria against competition factors, as they do not necessarily point to the same direction.

[On the institutional design]

(17) Public interest clauses in merger control law take various forms, such as explicit requirements to consider the public interest in merger assessments, exempting mergers from the competition authority’s assessment or allowing other public bodies’ merger-related decisions to override that of the competition authority.

3.1.1 Definition of public interest in merger control

(19) There is no universal definition of public interest. For the purposes of this paper, public interest considerations are non-competition factors taken into account in merger control. Public interest clauses vary considerably from one jurisdiction to the other, depending on the social, cultural and political context, and may change overtime to reflect the developments of the society [...]

(21) Many OECD Members have clauses permitting the state to intervene in merger control on various public policy grounds, such as:

- industrial development, protecting employment, promoting the competitiveness of the undertakings in

- international competition in France;
- benefits to the economy as a whole or an overriding public interest in Germany;
- relevant general interests of national economy, within the context of European integration in Italy;
- [...]
- national defence and security, protection of public security and public health, free movement of goods and services within the national territory, protection of environment, promotion of technical research and development and the maintenance of the sector regulation objectives in Spain;
- exceptional public interests, such as national security, media plurality, or the stability of the financial system in the United Kingdom.

3.1.3 Institutional design to enforce public interest considerations

(25) The various institutional ways of enforcing public interest considerations can be summarised in two categories, namely i) the single authority model and ii) the dual responsibilities model.

(26) Single authority model. Certain jurisdictions entrust the public interest test in merger review to the competition authority, regardless of the sector or industry concerned (e.g. People's Republic of China, South Africa).

(27) The single authority concept allows consistent and coherent application of the law [...] and therefore can serve legal certainty. This approach enables competition authorities to conduct a holistic analysis that takes into account both competition and non-competition criteria. As competition authorities are generally independent from the government and stakeholder groups, they may be less susceptible to external pressure [...].

(29) Dual responsibilities model. In this model, competition authorities follow a standard competition assessment, while public interest considerations are assessed by a sectoral regulator or a political decision-making body (e.g. a ministry).

[...]

External intervention. The consideration of public interest clauses is left to a minister or other public decision-making body (non-regulator), and the outcome of the competition authority's assessment may be overruled on the basis of such other body's subsequent assessment. In this model, the application of the public interest clause is an exception. [Germany, § 42 Act against Restrictions of Competition].

[...]

2. Important terms

Non-EU investor

Foreign direct investments - Investment made by a firm or individual into business interests located in another country. The investor can establish new business operations in the host state (green field investment) or acquire foreign business assets in the host state (brown field investment)

FDI scrutiny (FDI review regime) – Control of FDI activities, exercised by the host state

US CFIUS review – The Committee on Foreign Investment in the United States (CFIUS). CFIUS is an interagency committee authorized to review certain transactions involving foreign investment in the United States and certain real estate transactions by foreign persons, in order to determine the effect of such transactions on the national security of the United States.

public interest clause

C. The prohibition of an abuse of a dominant position (art. 102 TFEU)

I. Internet Platforms and the Assessment of Market Power

1. Important texts

a) *Crémer, de Montjoye, Schweitzer, Competition Policy in the Digital Era (“Vestager-Report”) – April 2019, p. 125 et seq.*

VII. Conclusion

[...] Digitisation is profoundly changing our economies, societies, access to information, and ways of life. It has brought welcome innovation, new products and new services, and has become an integral part of our daily lives. However, there is increasing anxiety about its ubiquity, political and societal impact and, more relevant to our focus, about the concentration of power by a few very large digital firms.

In Europe, competition law has come to play a special role in shaping both the public perception of the digital future, and the legal environment in which it is developing. Part of this role stems from its empirical focus and the thoroughness of the investigations by the competition authorities. The extensive investigation and analysis, along with the discussions that have accompanied the intervention of the European Commission in cases such as Microsoft (2004), Google Shopping (2017) and Google Android (2018), including the contributions of the defendants, have contributed to our understanding of digital markets. The case law has also raised awareness of the need to adjust the analytical tools, methodologies and theories of harm to better fit the new market reality. However, these investigations take lots of time and there is growing awareness of the need to process cases with sufficient speed. Theories of harm must be designed with a view both to the relevant error costs and with a view to the practicality of applying them. [...]

[C]omplementarity [...]exists between competition law and other legal regimes. With digitisation, new needs for coordination between these regimes emerge, and adjustments and/or re-interpretation of contract law, consumer protection law, or unfair trading law will be part of the shaping of the legal order in reaction to a different economic reality. Some of these rules may lessen the likelihood of specific types of conflicts arising in the future, or may dampen the incentives to strategically abuse new positions of power. In some respects, competition law would then return to its original role: to function as a background regime of an otherwise well-ordered marketplace based on the general rules of both private and public law that addresses the specific tensions that arise in the light of economic power. In other respects, the economic rules of the new economy may be different enough that competition policy will need to be vigorously enforced, even after the adjustments to the other legal regimes have been conducted.

2. Important terms¹

Matching Platform – Intermediary (a platform) serving to connect two or more user groups for the purpose of direct interaction.

Transaction Platform - Intermediary between two sides whose aim is to enable direct (observable) transactions (i. e. the conclusion of a contract) between them, e. g. Ebay, Amazon, HRS etc.

Non-transaction Platform – intermediarie between two or more sides who come

¹ The following definitions are taken from: Bundeskartellamt, B6 -113/15, Working Paper – The Market Power of Platforms and Networks, June 2016¹, available here: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Langfassung.pdf;jsessionid=90A2EFefd12A3E79E71A36033F2A8B1C.2_cid362?__blob=publicationFile&v=2; Executive Summary: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Zusammenfassung.pdf?__blob=publicationFile&v=4.

together for an unspecific interaction, e.g. looking at advertisements or finding new friends or even partners (e. g. Facebook, Tinder).

Audience providing platform (Advertising platform) – Intermediary enabling one user group to attract the attention of another user group, e. g. Google Search.

Direct Network Effect – The increase in usage leads to an increase in value. E.g. The more people use telecommunication systems (and can thus be reached via the telephone), the more valuable is the use of a telephone.

Indirect Networks Effect – Exists if the value of a service or product for a specific group of users increases (positive network effects) or decreases (negative network effects) with the number of users of another group. E.g. More people using DVD players may have a light effect on the use of DVD Players but DVDs will increase in value subsequently.

SSNDQ-test (Small but significant, non-transitory decrease in quality) - Modification of the → SSNIP-Test taking into account the characteristics of two-sided markets where one side often does not pay a monetary price but provides its attention. Therefore, one could conceive to analyse a reduction in quality (instead of the price increase) on the non-monetary side in order to define the relevant market.

Disruptive innovation – With increasing demand a new technology or business model becomes a dominant market factor and ultimately displaces many established companies and their products. Example: The invention of the MP3-Format by an 18-year-old changed the sound recording industry which until then was dominated by a few large companies that only distributed physical phonograms. MP3-Format quickly became the new standard.

Two-sided-market - Refers to markets where the benefits of the participants on both sides of the market depend positively or negatively on the number of participants on the other side of the market. The term "two-sided" refers to the reciprocal effect between the market participants. Example: credit card market - the more merchants accept a credit card, the more valuable it becomes for credit card users. Conversely, the more widespread the use of credit cards is, the more worthwhile it is for the merchant to accept it.

Multi-sided-market – Cf. two-sided-markets. However, there can be reciprocal effects between more than two market participants. Example: Google Search – Users, Webshops, Advertisers.

Market Tipping - The mutually reinforcing network effects gradually lead to a concentration of market activity on one platform. Only one platform side caters to the market and other providers disappear. The market basically “tips” towards monopolisation.

Multihoming - Users take advantage of the comparable offer of several platforms simultaneously. Example: Hotels offering their accommodation and users searching on several booking platforms.

Economies of Scale – Decrease of cost per unit with increasing scale (= average costs start falling as output increases). Example: The offer of most internet platforms is associated with high fixed costs but only low variable costs. Accordingly, the unit costs decrease with each new user.

II. Exploitative Abuses

1. Important texts

a) Court of Justice, Judgment of 14 February 1978 - Case 27/76 - United Brands Company and United Brands Continental BV v Commission of the European Communities ("Chiquita Bananas"), European Court reports (ECR) 1978, p.207

"[Charging] a price which is excessive because it has no reasonable relation to the product supplied may be an abuse of a dominant position [within the meaning of subparagraph (a) of article 86 [now article 102 TFEU]. This excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin; however the Commission has not done this since it has not analysed UBS's cost structure." (para. 250 and 251)

b) Court of Justice, Judgment of 4th May 1988 - Case 30/87 - Corinne Bodson v. Pompes Funèbres European Court reports

"Such a comparison [between the prices charged by the dominant undertaking and those charged in 30.000 other French towns] could provide a basis for assessing whether or not the prices charges by the concession holders are fair." (para. 31)

c) Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings

"(7) Conduct which is directly exploitative of consumers, for example charging excessively high prices or certain behaviour that undermines the efforts to achieve an integrated internal market, is also liable to infringe Article 82 [= Article 102 TFEU]. The Commission may decide to intervene in relation to such conduct, in particular where the protection of consumers and the proper functioning of the internal market cannot otherwise be adequately ensured."

2. Important terms

Excessive Pricing – Prices set significantly above competitive levels as a result of monopoly or market power.

Selling price – The total amount for which property is sold, often including any services that are part of such sale.

Cost of production – The costs related to making or acquiring goods and services that directly generate profit for a firm.

Cost-Price-Analysis – An analytical technique that weighs the expense of a proposed project against the expected economic advantages.

Profit margin – Ratio of profit after taxes to cost-of-sales, often expressed as a percentage

Price comparison

- Direct price-cost comparison
- Comparison to prices charged in other markets (e.g. other geographic markets or other products closely linked to the product in question)
- Inter-temporal price discrimination (pre-entry price v. post-entry price)

Predatory pricing – strategy, usually by a dominant firm, of driving competitors out of the market by setting very low prices or selling below the firm's incremental costs of producing the output.

III. Tying and Bundling (Kopplung und Bündelung)

1. Important texts

a) Treaty on the Functioning of the European Union (TFEU)

Art. 102

[...] Such abuse may, in particular, consist in:

[...]

(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.

b) Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings

(47) A dominant undertaking may try to foreclose its competitors by tying or bundling. [...]

(48) **'Tying'** usually refers to situations where customers that purchase one product (the tying product) are required also to purchase another product from the dominant undertaking (the tied product). Tying can take place on a technical or contractual basis¹. **'Bundling'** usually refers to the way products are offered and priced by the dominant undertaking. In the case of pure bundling the products are only sold jointly in fixed proportions. In the case of mixed bundling, often referred to as a multi-product rebate, the products are also made available separately, but the sum of the prices when sold separately is higher than the bundled price.

(49) Tying and bundling are common practices intended to provide customers with better products or offerings in more cost effective ways. However, an undertaking which is dominant in one product market (or more) of a tie or bundle (referred to as the tying market) can harm consumers through tying or bundling by foreclosing the market for the other products that are part of the tie or bundle (referred to

(50) The Commission will normally take action under Article 82 where an undertaking is dominant in the tying market and where, in addition, the following conditions are fulfilled: (i) the tying and tied products

2. Important terms²

Tying (technical and contractual tying)– Kopplung (technische und vertragliche Kopplung)

– Refers to situations where the sale of one good is conditioned on the purchase of another good.

- *Contractual tying: As the consequence of a specific contractual stipulation purchasers are required to buy not only the tying product but also the tied product products are only sold jointly (exemple: Hilti required users of its nail guns to purchase nails exclusively from Hilti too)*
- *Technical tying: physical integration of the tied product in the tying product (ex. Microsoft Windows and Microsoft Media Player)*

Other form of tying: withdrawal of a guarantee unless the user also uses the components of the dominant supplier

Bundling (pure and mixed bundling) – (reine und gemischte) Bündelung – Is also referred to as package tie-in.

- *Pure bundling: products are only sold jointly*
- *Mixed bundling: products can be purchased separately, but the sum of both prices is lower than the bundled price (“multi-product rebate”)*

Tying good – Kopplungsprodukt – Desired product

Bundling good – Bündelungsprodukt – Desired product

¹ the tied product (and not with the alternatives offered by competitors). Contractual tying occurs when the customer who purchases the tying product undertakes also to purchase the tied product (and not the alternatives offered by competitors).

² Beachte: Die Begriffe „Tying and Bundling“ werden in der deutschen Version der Nicht-horizontal- Leitlinien mit „Bindung und Kopplung“ wiedergegeben (Rn. 96 f.)

Tying (bundling) market – Kopplungsmarkt – Market of the desired product. Tied

(Bundled) good – Gekoppeltes (gebündeltes) Produkt – Additional product

Tied (Bundled) market – gekoppelter (gebündelter) Markt – Market of the additional product.

IV. Refusal to supply and refusal to provide access to an Essential Facility

1. Important texts

a) Court of Justice, Judgment of 26.11.1998, Case C-7/97, ECR I-7791 – Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co., KG

Facts (paras. 4 seq.)

*“(4) The objects of Oscar Bronner are the editing, publishing, manufacture and distribution of the daily newspaper **Der Standard**. In 1994, that newspaper's share of the Austrian daily newspaper market was **3.6%** of circulation and 6% of advertising revenues.*

*(5) Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG publishes the daily newspapers **Neue Kronen Zeitung and Kurier**. It carries on the marketing and advertising business of those newspapers through two wholly-owned subsidiaries, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG.*

*(6) In 1994, the combined market share of Neue Kronen Zeitung and Kurier was **46.8%** of the Austrian daily newspaper market in terms of circulation and 42% in terms of advertising revenues. They reached 53.3% of the population from the age of 14 in private households and 71% of all newspaper readers.*

*(7) For the distribution of its newspapers, Mediaprint has established a **nationwide home-delivery scheme**, put into effect through the intermediary of Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG. The scheme consists of delivering the newspapers directly to subscribers in the early hours of the morning.*

*(8) In its action under Paragraph 35 of the Kartellgesetz, Oscar Bronner seeks an order requiring Mediaprint to cease abusing its alleged dominant position on the market by **including Der Standard in its home-delivery service against payment of reasonable remuneration**. In support of its claim, Oscar Bronner argues that **postal delivery**, which generally does not take place until the late morning, does not represent an **equivalent alternative** to home-delivery, and that, in view of its small number of subscribers, it would be entirely **unprofitable** for it to organise its own home-delivery service. Oscar Bronner further argues that Mediaprint has **discriminated** against it by including another daily newspaper, Wirtschaftsblatt, in its home-delivery scheme, even though it is not published by Mediaprint.”*

[Legal findings of the Court]

*“(43) In the first place, it is undisputed that **other methods** of distributing daily newspapers, such as by post and through sale in shops and at kiosks, even though they may be less advantageous for the distribution of certain newspapers, exist and are used by the publishers of those daily newspapers.*

*(44) 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.*

*(45) It should be emphasised in that respect that, in order to demonstrate that the creation of such a system is **not a realistic potential alternative** and that access to the existing system is therefore indispensable, it is not*

enough to argue that it is not economically viable by reason of the small circulation of the daily newspaper or newspapers to be distributed.

(46) For such access to be capable of being regarded as **indispensable**, it would be necessary at the very least to establish, as the Advocate General has pointed out at point 68 of his Opinion, that it is not economically viable to create a second home-delivery scheme for the distribution of daily newspapers with a circulation comparable to that of the daily newspapers distributed by the existing scheme.

(47) In the light of the foregoing considerations, the answer to the first question must be that the refusal by a press undertaking which holds a very large share of the daily newspaper market in a Member State and operates the only nationwide newspaper home-delivery scheme in that Member State to allow the publisher of a rival newspaper, which by reason of its small circulation is unable either alone or in cooperation with other publishers to set up and operate its own home-delivery scheme in economically reasonable conditions, to have access to that scheme for appropriate remuneration does not constitute abuse of a dominant position within the meaning of Article 86 of the Treaty.”

b) Advocate General Jacobs, Opinion delivered on 28 May 1998, Case C-7/97, ECR I-7791 – Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co., KG

(57) [The] justification in terms of competition policy for interfering with a dominant undertaking's freedom to contract often requires a careful balancing of conflicting considerations. In the long term it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be **no incentive for a competitor to develop competing facilities**. Thus while competition was increased in the short term it would be reduced in the **long term**. Moreover, the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits. Thus the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it.

c) Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings

When setting its enforcement priorities, the Commission starts from the position that, generally speaking, any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose freely of its property. The Commission therefore considers that intervention on competition law grounds requires careful consideration where the application of Article 82 would lead to the imposition of an obligation to supply on the dominant undertaking. The existence of such an obligation — even for a fair remuneration — may undermine undertakings' incentives to invest and innovate and, thereby, possibly harm consumers. The knowledge that they may have a duty to supply against their will may lead dominant undertakings — or undertakings who anticipate that they may become dominant — not to invest, or to invest less, in the activity in question. Also, competitors may be tempted to free ride on investments made by the dominant undertaking instead of investing themselves. Neither of these consequences would, in the long run, be in the interest of consumers.

2. Important terms

Refusal to supply – The practice of refusing or denying supply of a product to a purchaser.

Refusal to deal – A company's declination to do business with another company. De novo-refusal (vis-à-vis a potential customer)

Withdrawal of supply (vis-à-vis an existing customer) – termination of an existing relationship is more likely to be abusive (due to specific investments made by the

purchaser)

Constructive refusal - Offer to deal, but under unreasonable or uneconomic conditions

Downstream market/Upstream market – Market at the next/previous stage of the production/distribution chain.

Facility necessary to compete with a downstream competitor

Utility or transport infrastructure, e.g. electricity transmission grids, gas pipelines, ports, airports, railway bridges

IP right – intellectual property right – Knowledge, creative ideas, or expressions of human mind that have commercial value and are protectable under copyright, patent, trademark, or trade secret laws from imitation, infringement, and dilution.

Owner of an IP right

Refusal to licence (AE: license) – IP rights holders' refusal to licence patents or copyrights to other competitors.

Compulsory licence – A statutorily created license allowing certain people to use an intellectual property without the permission of the rights holder.

Potential licensee – A person wanting to commercially utilise an IP right held by somebody else.

Indispensability - Absence of a potential realistic alternative to the upstream input. Here: a test whether the supply of the refused input is objectively necessary for operators to be able to compete effectively on the market.

Objective necessity of the input – Technical, legal, or economic obstacles make it impossible or at least unreasonably difficult for any third party to reproduce the upstream facility.

Reward for investment – Concept that return from an investment is proportional to risk. Thus, investors will demand a greater reward where the risk of loss is greater.

Incentive to invest

Interoperability - Ability of different systems to exchange information and mutually to use the information which has been exchanged.

(Refusal to supply) Information needed for interoperability – Information necessary to design a program that is compatible with another program or system, e.g. an operating system.

Leveraging of market power – Using the market power on a specific market to drive rivals out of another market.

Bill Gates in a 1997 internal e-mail: "What we're trying to do is to use our server control to do new protocols and lock out Sun and Oracle specifically....the

symmetry that we have between the client operating system and the server operating system is a huge advantage for us".³

V. Price based exclusionary conduct – Overview

1. Important texts

a) Court of Justice, Judgment of 3 July 1991, Case C-62/86, ECR 1991, I-3359 - AKZO

["AKZO test"]

(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 drive 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.

b) Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, Official Journal C 45, 24/02/2009, p. 7–20

(23) [...] Vigorous price competition is generally beneficial to consumers. With a view to preventing anti-competitive foreclosure, the Commission will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking.

(24) However, the Commission recognises that in certain circumstances a less efficient competitor may also exert a constraint which should be taken into account when considering whether particular price-based conduct leads to anti-competitive foreclosure. The Commission will take a dynamic view of that constraint, given that in the absence of an abusive practice such a competitor may benefit from demand-related advantages, such as network and learning effects, which will tend to enhance its efficiency.

c) General Court, Judgment of 17 February 2011, Case C- C-52/09 - Konkurrensverket v. Telia Sonera Sverige

[Equally v. reasonably efficient competitor-test]

³ http://ec.europa.eu/dgs/competition/economist/leveraging_monopoly_power_en.pdf, S.2

(44) Furthermore, the validity of such an approach is reinforced by the fact that it conforms to the general principle of legal certainty, since taking into account the costs and prices of the dominant undertaking enables that undertaking to assess the lawfulness of its own conduct, which is consistent with its special responsibility under Article 102 TFEU, as stated in paragraph 24 of this judgment. **While a dominant undertaking knows its own costs and prices, it does not as a general rule know those of its competitors** (*Deutsche Telekom v Commission*, paragraph 202).

(45) That said, it cannot be ruled out that the costs and prices of competitors may be relevant to the examination of the pricing practice at issue in the main proceedings. That might in particular be the case where the cost structure of the dominant undertaking is not precisely identifiable for objective reasons, or where the service supplied to competitors consists in the mere use of an infrastructure the production cost of which has already been written off, so that access to such an infrastructure no longer represents a cost for the dominant undertaking which is economically comparable to the cost which its competitors have to incur to have access to it, or again where the particular market conditions of competition dictate it, by reason, for example, of the fact that the level of the dominant undertaking's costs is specifically attributable to the competitively advantageous situation in which its dominant position places it.

(46) It must therefore be concluded that, when assessing whether a pricing practice which causes a margin squeeze is abusive, account should as a general rule be taken primarily of the prices and costs of the undertaking concerned on the retail services market. Only where it is not possible, in particular circumstances, to refer to those prices and costs should those of its competitors on the same market be examined.

d) Court of Justice, Judgment of 27 March 2012, Case C-209/10 – Post Danmark v. Konkurrencerådet

[Efficiency Defense]

(41) In particular, such an undertaking may demonstrate, for that purpose, either that its conduct is **objectively necessary** (see, to that effect, *Case 311/84 CBEM* [1985] ECR 3261, paragraph 27), or that the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of **efficiency** that also benefit consumers (*Case C-95/04 P British Airways v Commission* [2007] ECR I-2331, paragraph 86, and *TeliaSonera Sverige*, paragraph 76).

(42) In that last regard, it is for the dominant undertaking to show that the [1] efficiency gains likely to result from the conduct under consideration [2] counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, [3] that such conduct is necessary for the achievement of those gains in efficiency and [4] that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.

2. Important terms

Equally efficient competitor-test – Test recommended by the European Commission to verify whether in the presence of a given practice of the dominant undertaking, an equally efficient competitor would be able to compete effectively in the market without incurring losses.

Reasonably efficient competitor – In contrast to an “equally efficient competitor” - defined by using information on the costs of the dominant position - a “reasonable efficient competitor” is defined by cost data of competitors or other comparable reliable data.

Pricing below average avoidable (variable) cost – Strategy that is always considered to be abusive (AKZO-test).

Pricing above average avoidable (variable) cost but below average total cost – Strategy that is only considered to be abusive, if it is determined as part of a *plan* for eliminating a competitor (AKZO-test).

Direct and indirect evidence of a predatory strategy

- Direct: Documentary evidence from the allegedly predating undertaking.
- Indirect: Signs of a strategy to predate, e.g. pricing behavior only makes commercial sense as part of a predatory strategy, or is shown only vis-à-vis important customers of the competitor, et cetera.

Long-run average incremental costs (LRAIC) – The average of all the (variable and fixed) costs that a company incurs to produce a particular product in a certain time frame.

Defences (AE: defenses) – The justification of an allegedly abusive behavior is possible. Whether by showing that it was objectively necessary or there were efficiencies.

Objective justification – e.g. necessity to clear the stock of perishable goods (see § 20 para 3 German Act against restrictions of competition)

Efficiencies – Gains that outweigh the negative effects of the conduct in favour of the affected markets and the consumers; that was causal to the conduct (which was necessary to achieve the efficiencies); that do not eliminate an effective competition.

Rebates – Return of a portion of a purchase price by a seller to a buyer, usually on purchase of specified quantity, or value, of goods within a specified period.

Margin Squeeze – A vertically integrated firm holding a dominant position in the upstream market prevents its (non-vertically integrated) downstream competitors from achieving an economically viable price-cost margin.

VI. Margin Squeeze

1. Important texts

General Court, Judgment of 17 February 2011, Case C- C-52/09 –Konkurrensverket v. Telia Sonera Sverige

[Equally efficient competitor-test in Margin Squeeze cases]

(31) A margin squeeze, in view of the exclusionary effect which it may create for competitors who are **at least as efficient as the dominant undertaking**, in the absence of any objective justification, is **in itself** capable of constituting an abuse within the meaning of Article 102 TFEU (see, to that effect, *Deutsche Telekom v Commission*, paragraph 183).

(32) In the present case, there would be such a margin squeeze if, *inter alia*, the spread between the wholesale prices for ADSL input services and the retail prices for broadband connection services to end users were either negative or insufficient to cover the specific costs of the ADSL input services which TeliaSonera has to incur in order to supply its own retail services to end users, so that that spread does not allow a competitor which is as efficient as that undertaking to compete for the supply of those services to end users.

(33) In such circumstances, although the competitors may be as efficient as the dominant undertaking, they may be able to operate on the retail market only at a loss or at artificially reduced levels of profitability.

(34) It must moreover be made clear that since the unfairness, within the meaning of Article 102 TFEU, of such a pricing practice is linked to the very existence of the margin squeeze and not to its precise spread, it is in no way necessary to establish that the wholesale prices for ADSL input services to operators or the retail prices for broadband connection services to end users are in themselves abusive on account of their excessive or predatory nature, as the case may be (*Deutsche Telekom v Commission*, paragraphs 167 and 183).

[Indispensability of the wholesale product for the sale of the retail product]

(70) Where access to the supply of the wholesale product is **indispensable** for the sale of the retail product, competitors who are at least as efficient as the undertaking which dominates the wholesale market and who are unable to operate on the retail market other than at a loss or, in any event, with reduced profitability suffer a competitive disadvantage on that market which is such as to prevent or restrict their access to it or the growth of their activities on it (see, to that effect, *Deutsche Telekom v Commission*, paragraph 234).

(71) In such circumstances, the at least potentially anti-competitive effect of a margin squeeze is probable.

(72) However, taking into account the dominant position of the undertaking concerned in the wholesale market, the possibility cannot be ruled out that, by reason simply of the fact that the wholesale product is not indispensable for the supply of the retail product, a pricing practice which causes margin squeeze may not be able to produce any anti-competitive effect, even potentially. Accordingly, it is again for the referring court to satisfy itself that, even where the wholesale product is not indispensable, the practice may be capable of having anti-competitive effects on the markets concerned.

2. Important terms

Wholesale price / wholesale product

Retail price / wholesale product Rebate Systems

VII. Rebate Systems

1. Important texts

a) General Court, Judgment of 12.6.1998, Case T-286/09–INTEL:

[Three categories of rebates]

(75) First, **quantity rebate systems** ('quantity rebates') linked solely to the volume of purchases made from an undertaking occupying a dominant position are generally considered not to have the foreclosure effect prohibited by Article 82 EC ...

(76) Second, there are rebates the grant of which is conditional on the customer's obtaining all or most of its requirements from the undertaking in a dominant position. That type of rebate, to which the Commission refers by the expression 'fidelity rebates within the meaning of *Hoffmann-La Roche*', will subsequently be referred to as '**exclusivity rebates**' ...

(77) Such exclusivity rebates, when applied by an undertaking in a dominant position, are incompatible with the objective of undistorted competition within the common market, because they are not based — save in exceptional circumstances — on an economic transaction which justifies this burden or benefit but are designed to remove or restrict the purchaser's freedom to choose his sources of supply and to deny other producers access to the market ...

(78) Third, there are other rebate systems where the grant of a financial incentive is not directly linked to a condition of exclusive or quasi-exclusive supply from the undertaking in a dominant position, but where the mechanism for granting the rebate may also have a **fidelity-building effect** ('rebates falling within the third category'). That category of rebates includes inter alia rebate systems depending on the attainment of individual sales objectives which do not constitute exclusivity rebates, since those systems do not contain any obligation to obtain all or a given proportion of supplies from the dominant undertaking. In examining whether the application of such a rebate constitutes an abuse of dominant position, it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, that rebate tends to

remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, or to strengthen the dominant position by distorting competition ...”

b) General Court of the European Union, Press Release No. 82/14 (12th June 2014) on the INTEL-Judgment

“In that regard, the General Court states that, in order to submit an attractive offer, it is not sufficient for a competitor to offer Intel's customer attractive conditions for the units that that competitor can itself supply to the customer; it must also offer that customer **compensation for the potential loss of the exclusivity rebate** for having switched supplier. In order to submit an attractive offer, the competitor must therefore apportion solely to the share which it is able to offer the customer the rebate granted by Intel in respect of all or almost all of the customer's requirements (including the requirements which Intel alone – as an unavoidable supplier – is able to satisfy).”

c) Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, Official Journal C 45, 24/02/2009, p. 7-20

“(37) **Conditional rebates** are rebates granted to customers to reward them for a particular form of purchasing behaviour. The usual nature of a conditional rebate is that the customer is given a rebate if its purchases over a **defined reference period** exceed a certain **threshold**, the rebate being granted either on all purchases (retroactive rebates) or only on those made in excess of those required to achieve the threshold (incremental rebates). [...] Undertakings may offer such rebates in order to attract more demand, and as such they may stimulate demand and benefit consumers. However, such rebates — when granted by a dominant undertaking — can also have actual or potential foreclosure effects similar to exclusive purchasing obligations. Conditional rebates can have such effects without necessarily entailing a sacrifice for the dominant undertaking.

(38) [...] the following factors are of particular importance to the Commission in determining whether a given system of conditional rebates is liable to result in anti-competitive foreclosure and, consequently, will be part of the Commission's enforcement priorities.

(39) As with exclusive purchasing obligations, the likelihood of anti-competitive foreclosure is higher where competitors are not able to compete on equal terms for the entire demand of each individual customer. A conditional rebate granted by a dominant undertaking may enable it to use the **'non contestable' portion of the demand** of each customer (that is to say, the amount that would be purchased by the customer from the dominant undertaking in any event) as leverage to decrease the price to be paid for the **'contestable' portion of demand** (that is to say, the amount for which the customer may prefer and be able to find substitutes).

(40) In general terms, retroactive rebates may foreclose the market significantly, as they may make it less attractive for customers to switch small amounts of demand to an alternative supplier, if this would lead to loss of the retroactive rebates. The potential foreclosing effect of retroactive rebates is in principle strongest on the **last purchased unit of the product before the threshold is exceeded**. However, what is in the Commission's view relevant for an assessment of the loyalty enhancing effect of a rebate is not simply the effect on competition to provide the last individual unit, but the foreclosing effect of the rebate system on (actual or potential) competitors of the dominant supplier. **The higher the rebate as a percentage of the total price and the higher the threshold, the greater the inducement below the threshold and, therefore, the stronger the likely foreclosure of actual or potential competitors.**

(41) When applying the methodology explained in paragraphs 23 to 27, the Commission intends to investigate, to the extent that the data are available and reliable, whether the rebate system is capable of hindering expansion or entry even by competitors that are equally efficient by making it more difficult for them to supply part of the requirements of individual customers. In this context the Commission will estimate **what price a competitor would have to offer in order to compensate the customer for the loss of the conditional rebate if the latter would switch part of its demand ('the relevant range') away from the dominant undertaking**. The **effective price** that the competitor will have to match is not the **average price** of the dominant undertaking, but the normal (list) price less the rebate the customer loses by switching, calculated over the relevant range of sales and in the relevant period of time. The Commission will take into account the margin of error that may be caused by the uncertainties inherent in this kind of analysis.

[...]

(43) The lower the estimated effective price over the relevant range is compared to the average price of the dominant supplier, the stronger the loyalty-enhancing effect. However, as long as the effective price remains consistently above the LRAIC of the dominant undertaking, this would normally allow an equally efficient competitor to compete profitably notwithstanding the rebate. In those circumstances the rebate is normally not capable of foreclosing in an anti-competitive way.

(45) [This] analysis [sc. the comparison of the effective price charged by the dominant undertaking with its own costs] will be integrated in the general assessment, taking into account **other relevant quantitative or qualitative evidence**. It is normally important to consider whether the rebate system is applied with an **individualised** or a **standardised threshold**. An individualized threshold — one based on a percentage of the total requirements of the customer or an individualized volume target — allows the dominant supplier to set the threshold at such a level as to make it difficult for customers to switch suppliers, thereby creating a maximum loyalty enhancing effect. [...]"

d) DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses Discussion Paper, December 2005

(154) The **suction effect** in principle is strongest on the **last purchased unit** of the product before the **threshold** is exceeded. However, what is relevant for an assessment of the loyalty enhancing effect is not competition to provide an individual unit, but the foreclosing effect of the rebate system on **commercially viable amounts** supplied by (potential) competitors of the dominant supplier. [...] The lower the calculated **effective price** is compared to the **average price** of the dominant supplier, the stronger the loyalty enhancing effect. [...] Below is a box giving an example of the calculation of the effective price.

Box: A retro-active rebate and calculation of the effective price

Rebate of 2.5% on all sales once $St > 1,000,000$

- St is the purchased amount in the reference period
- Price per unit = 100 before rebate
- Price per unit = 97.5 after rebate
- Commercially viable amount = 5% or 50,000 units

With rebate: $1,000,000 \times 97.5 = 97,500,000$

Without rebate: $950,000 \times 100 = 95,000,000$

The difference of 2,500,000 is what is paid for the last 50,000 units over which the suction effect is calculated. P effective (P_e) over the last 5% = $2,500,000 / 50,000 = 50$

The question is thus whether or not $ATC > 50$

2. Important terms

Rebate – Reduction from the list price

Normal list price – Price without any rebate

Conditional rebate system - Rebates are granted to customers to reward them for a particular form of purchasing behaviour

Quantity rebate system – Rebates are linked solely to the volume of purchases from the

rebate granting undertaking

Exclusivity rebate system – The grant of the rebate is conditional on the customer's obtaining all or most of its requirements from the undertaking in question

Fidelity-building effect – Loyalty-enhancing effect

Suction effect (Sogwirkung)

Threshold – Here: Amount of purchases the customer has to make in order to be granted the rebate

Reference period – Here: Period of time over which the threshold can be achieved.

Retroactive rebate - The rebate is granted on all purchases in the reference period, even on those made in the time before achieving the threshold.

Incremental rebate – The rebate is granted only on those purchases made in excess of those required to achieve the threshold

Individualised threshold — Here: Threshold based on a percentage of the total requirements of the customer or an individualised volume target

Standardised volume threshold —Threshold being the same for all or a group of customers

Non contestable portion of the demand of each customer - The amount that would be purchased by the customer from the dominant undertaking in any event

Contestable' portion of demand - The amount for which the customer may prefer and be able to find substitutes (offered by competitors of the dominant undertaking)

Average price – Total Price divided by the number of units purchased (measure of a range of prices)

Effective price - Normal (list) price less the rebate the customer loses by switching, calculated over the relevant range of sales and in the relevant period of time (normally higher than the average price).

Last purchased unit

Commercially viable amount of the demand – The share of customers' requirements on average the entrant at least should capture so that the effective price is at least as high as the average total cost of the dominant company ("the required share").

VIII. Price Discrimination

1. Important texts

a) Press release of the European Commission: "COMMISSION FINES SHIPPING COMPANIES FOR ABUSING DOMINANT POSITION ON SHIPPING TRADE BETWEEN

NORTHERN EUROPE AND ZAIRE" (23/12/1992) – Compagnie Maritime Belge SA / CEWAL⁴

[In this case, the European Commission and the Courts set the question, whether the prices made by the dominant undertaking were cost-covering or not, aside and based the decisions on the selectivity of the price reductions and the predatory intention of those price reductions only.]

The European Commission has imposed fines totaling 10.1 MECU on four ship-owners (armateurs) for anti-competitive practices on behalf of the CEWAL shipping conference (Associated Central West Africa Lines). The Compagnie Maritime Belge (CMB) has been fined 9.6 MECU, while the remainder has been imposed on Woermann Linie, Dafra Line (both currently owned by CMB) and Nedlloyd. CMB has a period of four years within which to pay the fine.

In determining the size of the fines, the Commission took account of the minor role played by Woermann, Dafra and Nedlloyd, and their small market share, compared to the CMB. The fines also aim to reflect certain mitigating circumstances which came to the Commission's attention.

Following complaints from the Danish Government and from several ship-owners, the Commission opened proceedings against 11 Ship-owners' Committees and 4 Liner Conferences (CEWAL, MEWAC, COWAC and UKWAL).

Regarding the Committees, the Commission imposed a heavy fine last April for violating the EC Treaty (Articles 85 and 86 on traffic between France and 11 West and Central African countries.

Today's decision, the first against a maritime conference, primarily concerns CEWAL, which groups together several shipping companies in order to provide a regular shipping service between Western European ports and the ports of Zaire and Angola. The decision only applies to traffic between Northern European ports (except the UK) and Zaire.

The Commission has found that on these routes the members of CEWAL abused their dominant market position, in breach of Article 86, in three different ways in order to eliminate competition from their chief competitor, G&C (a common service between the Belgian ship-owner Cobelfret and the Italian ship-owner Grimaldi):

1: They participated in a cooperation agreement with the Zairean maritime authorities (Ogefrem: l'Office Zairois de Gestion de Fret Maritime) under which all cargo on this line would be carried by CEWAL members.

2: They used the "fighting ships" method. If a competitor offered cheaper rates than those set by CEWAL, the conference would hold a meeting to undercut that competitor, and ensure that CEWAL members scheduled their sailings at or around the same time as those of the competitor in order to win over its customers. Charges equivalent to the losses incurred by the competitor would then be shared out among CEWAL members.

3: CEWAL imposed 100% loyalty rebates, under which members would have to surrender all their cargo to the Conference in order to qualify for a rebate. Black lists would be drawn up with the names of shippers who broke the 100% rebate system. This went beyond the terms of the rules of Art. 5 II of the block exemption regulation no° 4056/86, under which maritime conferences can, under certain conditions, be exempted from the EC-competition rules.

b) European Court of Justice, Judgment of 27.03.2012, Case C-209/10 – Post Danmark

In Denmark, Post Danmark and Forbrugerkontakt are the two largest undertakings in the unaddressed mail sector (brochures, telephone directories, guides, local and regional newspapers etc.). [...]

⁴ See also: EuG, 08.10.1996 - T-24/93, T-25/93, T-26/93 und T- 28/93 and EuGH, 16.03.2000 - C-395/96 P, C-396/96 P.

At the material time, Post Danmark enjoyed a monopoly in the delivery of addressed letters and parcels not exceeding a certain weight, which, on account of the sole right of distribution, was allied with a universal service obligation to deliver addressed mail under that weight. For that purpose, Post Danmark had a network that covered the national territory in its entirety and that was also used for the distribution of unaddressed mail.

The principal activity of Forbruger-Kontakt, part of the press group Søndagsavisen a-s, is the distribution of unaddressed mail. At the material time, it had created a distribution network covering almost the entire national territory, chiefly through the acquisition of smaller distribution undertakings.

Until 2004, the SuperBest, Spar and Coop groups, undertakings in the supermarket sector, were major customers of Forbruger-Kontakt. Towards the end of 2003, Post Danmark concluded contracts with those three groups for the distribution of their unaddressed mail from 1 January 2004.

Before concluding a contract with Post Danmark, the Coop group had conducted negotiations both with that undertaking and with Forbruger-Kontakt. The offers made by those two operators were comparable in terms of price, Post Danmark's being only marginally lower.

When that estimation was completed, it was found, among other things, that the price offered to the Coop group did not enable Post Danmark to cover the average total costs attributed to the activity of unaddressed mail distribution taken as a whole, but did enable it to cover the average incremental costs pertaining to that activity, as estimated by the Danish competition authorities. [...]

Moreover, it is common ground that, in the present case, the prices offered to the Spar and SuperBest groups were assessed as being at a higher level than those average total costs, as estimated by those authorities. In those circumstances, it cannot be considered that such prices have anti-competitive effects.

As regards the prices charged the Coop group, a pricing policy such as that in issue in the main proceedings cannot be considered to amount to an exclusionary abuse simply because the price charged to a single customer by a dominant undertaking is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to the latter, as respectively estimated in the case in the main proceedings.

2. Important terms

Primary-line discrimination – Injury, which is occasioned by the dominant firm to its competitors by applying different prices to its own customers.

Secondary-line discrimination – Injury, which is imposed on one of several customers of the dominant firm as against one or several other customers (the dominant firm's downstream customers). – cf. Art. 102 para. 2 lit. c TFEU