

Handout № 16

Abuse of a dominant position

1. General

- a) collusion: co-ordinated action → Art. 81; strong market position: to act without regard to competitors → Art. 82 (only in the event of abuse)
- b) directly effective (Community dimension provided, individuals may challenge behaviour/obtain remedies)

2. Definitions

- a) Undertaking: broad meaning as in Art. 81, not limited to monopolies/single organisations also U in the same corporate/economic group anywhere in the world (multinationals)
- b) Joint dominance: oligopolies (collective dominant position of independent U) when linked in such a way that they adopt the same conduct on the market, *Municipality of Almelo (C-393/92)*, *Compagnie Maritime Belge (C-395/96)* → Art. 81 *lex specialis*?
- c) dominance:
 - a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers, and ultimately of its consumers; [*United Brands Co. (case 27/76)*]
 - it may also involve the ability to eliminate or seriously weaken existing competitors or to prevent potential competitors from entering the market
- d) a position can be dominant only if it is dominant in the *relevant* market

3. Relevant market

- a) relevant product market: the products are substantially interchangeable including identical products, or products considered by consumers to be similar by reason of their characteristics, price or use:
 - i. to what extent is the customer/importer/wholesaler able to buy goods *similar* to those supplied by the dominant firm, or *acceptable as substitutes* (cross-elasticity of demand/demand-side substitutability)
 - ii. to what extent are other firms *able to supply/capable of producing* acceptable substitutes (cross-elasticity of supply/supply-side substitutability)
 - A. end products: *United Brands Co. (case 27/76)* → bananas, branded and unbranded (Commission) ↔ fresh fruit (*United Brands*) → evidence showed that existence of other fruit has very little influence on the price and consumption of bananas; bananas occupy a special place in the diet of young/old/sick with no acceptable substitutes (potentially even narrower market: little cross-elasticity of demand for branded bananas)
 - B. raw materials: similar consideration apply as for end products (substitution in the production *without difficulty*, but see *Istituto Chemioterapico Italiano (case 7/73)* the end product may have to be taken into consideration for establishing the relevant market
 - C. size: market can be quite small (sub-market): the essential question is whether the sub-market is sufficiently distinct in commercial reality

- b) relevant geographical market: within the common market or substantial part of it → objective conditions of competition are the same for all traders (*United Brands Co.* (case 27/76)); the area in which consumers are willing to shop around for substitutes or manufacturers are willing to deliver (for homogeneous, easily and cheaply transportable goods this may be as large as the Community, conversely as small as a part of a MS)
- c) temporal market (seasonal supplies of fruit)
- d) dominance in fact: power to behave independently, i.e. market share either in itself/in combination with know-how, access to raw materials, capital or advantage such as trademark ownership; a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to *behave to an appreciable extent independently of its competitors and customers*, and ultimately of consumers; factors are:
 - market share
 - length of time in the position in the relevant market
 - financial/technological resources
 - access to raw materials and outlets
 - behaviour
 - barriers to entry

4. Abuse

objective concept relating to the *behaviour* of an undertaking in a dominant position which is such as to *influence the structure of a market* where, as a result of the very presence of the undertaking in question, *the degree of competition is weakened* and which, through recourse to *methods different from those which condition normal competition* in products or services on the basis of the transactions of commercial operators, has the effect of *hindering the maintenance of the degree of competition still existing* in the market or the growth of that competition [*Hoffmann La-Roche* (case 85/76)]

Examples of exploitative and anti-competitive abuses:

- a) directly/indirectly imposing unfair purchase or selling prices or unfair trading conditions;
- b) limiting production, markets, or technical development to the prejudice of consumers;
- c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or commercial usage, have no connection with the subject of such contracts

5. Trade between Member States

6. Mergers: Art. 81, 82 may apply for concentrations falling outside the Merger Regulation

7. Relationship with Art. 86(2): three-stage test for exception

- a) requisite type of undertaking
- b) performing tasks impossible without relying on provision or behaviour normally in breach of competition provisions (account must be had to economic conditions in which the undertaking operates such as costs, legislation)
- c) Community interest (goals/shared values of the Union, promotion of social and territorial cohesion)