

102.1 Competition – Abuse of Dominance and Cartels

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Structure of presentation

I. EC Competition – Primary Legislation

1) Article 81 EC Treaty: Restrictive agreements, decisions and concerted practices (cartels)

2) Article 82 EC Treaty: Abuse of a dominant market position

II. Dawn Raid: Investigation conducted by the European Commission – a brief guideline about what needs to be kept in mind

Article 81 EC Treaty

- Article 81 (1): Restrictive agreements, decisions and concerted practices are prohibited (e.g. price fixing, output restrictions, market sharing)
- Article 81 (2): Agreements prohibited by Article 81 (1) are void
- Article 81 (3): Agreements prohibited by Article 81 (1) can be exempted (individual or block exemption)

Article 81: Fines imposed by European Commission

Year	Company	Case	Amount in Euro
2007	ThyssenKrupp	elevators	479,669,850
2001	F. Hoffmann-La Roche	vitamins	462,000,000
2007	Siemens AG	gas insulated switchgear	396,562,500
2006	Eni SpA	synthetic rubber	272,250,000
2002	Lafarge SA	plasterboard	249,600,000
2001	BASF AG	vitamins	236,845,000
2007	Otis	elevators and escalators	224,932,950
2007	Heineken NV	Dutch beer market	219,275,000
2006	Arkema SA	methacrylates	219,131,250
2006	Solvay SA/NV	hydrogen peroxide	167,062,000

Scope and conditions of Article 81 (1)

- Article 81 (1): prohibits agreements or concerted practices, which have as their purpose or effect a restriction of competition
 - no restrictive intent
 - restrictive effect never occurred
- } **No excuses!**
- Article 81(1): prohibits conducts and behaviour of undertakings in two different dimensions:
 - (i) Horizontal agreements: entered into between competitors
 - (ii) Vertical agreements: entered into between supplier and its customers

Horizontal competition restrictions

The most common horizontal arrangements or practices prohibited under Article 81 (1) include:

- (i) Fixing of prices
- (ii) Sharing of markets
- (iii) Sharing of customers or sources of supply
- (iv) Restriction of production capacity
- (v) Exchange of information
- (vi) Collective discrimination
- (vii) Collective boycott

Article 81 (1) – Appreciable Effect

- Article 81 (1) EC does not require a paramount market position of the companies concerned
- Not every (per se illegal) agreement between competitors has the ability to affect competition on the market
- European Court of Justice: Article 81 (1) not applicable to agreements where their impact on intra community trade or on competition is not appreciable


See de-minimis-notice of European Commission (if market share does not exceed 10% / 15%)

Article 81 (3) – Individual or block exemption

- Not all agreements that restrict competition and effect interstate trade are prohibited
- Some forms of restrictive collaboration may have beneficial effects
- Individual Exemptions: Agreements prohibited by Article 81 (1) may be exempted if four conditions are met:
 - Efficiency gains
 - Fair share for consumers
 - Indispensability of restriction
 - No elimination of competition
- Block Exemptions:
 - Commission Regulation 2790/1999 (vertical agreements)
 - Commission Regulation 772/2004 (technology transfer agreements)
 - Commission Regulation 2658/2000 (specialisation agreements)
 - Commission Regulation 2659/2000 (R&D agreements)

Infringement of Article 81 - Sanctions

- Only undertakings, not individuals
- Fines can be up to 10% of worldwide group turnover (Commission's Guidelines on the method of setting fines), depending on:
 - duration
 - market share
 - repeated infringement
 - refusal to cooperate
 - obstruct Commission's investigations
 - leader of cartel
 - retaliatory measures against other companies
- Leniency Programme (Commission's Notice on Immunity from fines and reduction of fines in cartel cases)

 Commission will grant immunity from any fine if that company is the first to submit information

Article 82 – Abuse of a Dominant Position

- Article 82: „Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States (...)“
- In contrast to Article 81 the provision of Article 82 regulates the unilateral behaviour of one undertaking
- Exemptions possible under Article 81, but an abuse of a dominant position can never be exempted

Article 82 EC – Fines imposed by European Commission

Year	Company	Case	Amount in EUR
1989	Hilti	Tying	6,000,000
2003	France Télécom	Predatory Pricing	10,350,000
2003	Deutsche Telekom	Unfair Pricing	12,600,000
2001	Michelin II	Discount Systems	19,000,000
2001	Deutsche Post	Resale / Predatory Pricing Scheme	24,000,000
1991	Tetra Pak II	Tying	75,000,000
2004	Microsoft	Tying / Refusal of access	497,000,000

Concept of dominance

- Does your company hold a dominant market position?
- Necessary to analyse the relevant product and geographic market:
 - Product market: Two types of substitutability have to be considered:
 - (1) Demand perspective: Does a reasonable customer regard two products as substitutable? (SSNIP test: If the price of product A is raised by 5-10%, will so many customers switch to product B that the price increase becomes unprofitable?)
 - (2) Supply perspective: Can a producer of product A quickly and easily switch to production of product B in response to increased demand for that product?
 - Geographic market: „...the area in which the undertakings are involved in the supply and demand of products of services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.“

Factors in Assessing Dominance

- Primary factor: Market share of the undertaking
 - Between 25-40%: dominance possible in exceptional cases
 - Above 40%: dominance likely in the absence of equal competitors
 - Above 50%: presumption of dominance
 - The higher above 50%, the more difficult to rebut the presumption!

- Other factors:
 - Competitors' market shares
 - Development of market shares over time
 - Technological lead
 - Financial resources
 - Barriers to entry into the market
 - Access to supply and sales markets

Types of Abusive Behaviour (examples)

- Excessive pricing
- Predatory pricing
- Price discrimination
- Fidelity rebates / Discount schemes
- Refusal to supply
- Tying
- Abuse of intellectual property rights
- Discrimination (other contractual conditions)

Abusive Behaviour

- **Excessive pricing** designed to achieve for the dominant undertaking larger profits than it would earn in a more competitive environment, are likely to infringe Article 82 EC
 - charging a price that is excessive in relation to the economic value of the product may be abusive. „Economic value“ has been assessed by reference to the costs of the relevant goods / services supplied, or by reference to prices by comparable goods / services
 - Cases: C-27/76 United Brands v. Commission; C-26/75 General Motors v. Commission; C-226/84 British Leyland v. Commission
- **Predatory pricing** is in essence the setting of prices by a dominant company at a level which has, as a principal objective the diminution or serious weakening of a competitor rather than the generation of profit
Cases: C-62/86 Akzo v. Commission; C-333/94 Tetra Pak v. Commission

Abusive Behaviour

• Refusal to supply:

- Main rule: Dominant company may not refuse to supply to existing customers
Case: Commercial Solvents C-7/73
- However: Refusal allowed where there is objective justification
- Refusal to supply to new customer prohibited if (i) refusal likely to prevent any competition on the applicant's business, and (ii) access must be denied without any objective justification. Case: Bronner C-7/97.

• Tying:

- Dominant firm is prepared to supply the product in respect of which it holds a dominant position only if the customer also agrees to buy another product (the tied product).
Case: Microsoft T-201/04 → Microsoft leveraged its near monopoly in the market for PC operating systems onto the markets for work group server operating systems and for media players.

Dawn Raid – Inspection carried out by European Commission

When European Commission officials have arrived:

1. Contact in-house legal counsel as well as external legal counsel and companies executives
2. Ask them to identify themselves
3. Explain that you are waiting for external legal counsel (might wait up to 1 hour)
4. Appoint your own keeper of minutes
5. Contact the company's IT department
6. Check the officials' authority (may be in form of written authorization or a Commission decision)
7. Ask for the purpose / scope of the inspection

Dawn Raid – Inspection carried out by European Commission

During the inspection:

1. Proceed in a business-like and professional manner, remain calm, polite and helpful towards the Commission officials
2. Do not hide or destroy possibly incriminating documents, including e-mails
3. Each official should be accompanied at all times
4. Present all books and business records which the officials request
5. Do not produce documents, which do not relate to the subject matter or for which legal privilege is claimed

Dawn Raid – Inspection carried out by European Commission

During the inspection (II):

Legal Privilege: Under EC competition law a company may refuse access to documents if regarded as privileged.

- Written communications from an independent lawyer (not in-house!)
- Written communications from the client to the independent lawyer
- Copies of legal advice in the same way as the original
- Internal notes of meetings or telephone conversations with independent lawyers

Dawn Raid – Inspection carried out by European Commission

During the inspection (III):

6. Check that documents handed out are directly relevant to the aim of the inspection
7. Make copies of these documents
8. Provide only print-outs of computer files
9. Questions asked by officials must directly relate to the aim of the investigation (not entitled to „go on fishing expeditions“)
10. Failure to answer correctly or completely may give rise to fines
11. Observe strict respect of seals

Thank you!