

European Competition Law: A Critical Analysis of the Process Employed by the Commission to Assess Dominance under Article 82 EC

*Anna Eberhard**

I. Introduction

Article 82 EC prohibits any abuse of a dominant position on the Common Market, or at least on substantial parts of it, by one or several undertakings, in so far as it may affect trade between Member States.

This prohibition of abuse completes the regulation of Article 81 EC, which addresses agreements or concerted practices between undertakings that harm competition on the European Market regardless of whether they have market power. The purpose of both rules is to impede anticompetitive behaviours. These rules are seen as instruments maintain and protect competition within the European Community.¹

Article 82 EC does not prohibit dominance itself. Nevertheless, it must be shown whether or not an undertaking has a dominant position on a market before being able to discuss any abuse of dominance. Hence, the question of dominance is one of the key questions to answer when we analyse the position of an undertaking on the European market under Article 82 EC.

II. Definition of ‘dominance’

The determination of dominance is of central importance in every Article 82 EC case. However, the EC-Treaty does not – as for example the German ‘Gesetz gegen Wettbewerbsbeschränkungen’ (GWB – Act against Restraints on Competition) does in its § 19 II and III – give any definition of dominance or any factors that may be seen as indicators for a dominant position.

It, therefore, remains difficult to determine what degree of market power is necessary before Article 82 EC applies. The principal problem the Commission hereby confronts is to define with sufficient clarity, which factors may lead to a dominant position of an undertaking in a way that also an undertaking concerned can be aware of its dominance and adapt its conduct to this position.²

Various definitions of dominance have been offered.

Economists describe dominance as economic power over a customer (or supplier) given over a period of time.³ Another definition is proposed in terms of either freedom of action

* LL.M. Eur. University of Bremen.

¹ ECJ Case 6/72 *Continental Can v. Commission* [1973] ECR 215, paras 22-25; ECJ Case 85/76 *Hoffmann-La Roche v. Commission* [1979] ECR 461, para. 38.

² Jones, Alison/Sufrin, Brenda, *EC Competition Law* (Oxford University Press, Oxford, 2004), 260; Korah, Valentine, *An Introductory Guide to EC Competition Law and Practice* (Hart Publishing, Oxford, 2004), p. 117.

³ Fuller, ‘Article 86 EEC: Economic Analysis of the Existence of a Dominant Position’, [1979] ELRev. 423.

or of absence of risk for an undertaking.⁴ The latter emphasizes that dominance of one undertaking is always related to the question of whether or not other competitors are able to constrain the undertaking's anticompetitive behaviour and hinder it from exercising pressure on the market.

In the *United Brands* judgment rendered in 1976, the European Court of Justice (ECJ) defines the dominant position 'referred to in Article 82 EC as 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'.⁵

This definition reflects the Commission's position as described in terms of independence and power over price in its *Continental Can* decision.⁶ Considered on its own, the definition is still rather vague and imprecise. Therefore, the Commission has set out several factors which reflect the market power of an undertaking and at the same time its capacity of dominating the market. The Commission stated that a dominant position in general derives from a combination of these factors which, taken separately, are not necessarily determinative.

III. The process of assessing dominance

The process employed by the Commission to assess dominance of an undertaking mainly follows a two-stage procedure. The Commission starts with the evaluation of the market on which the undertaking is operating. It then analyses the undertaking's position on this particular market.⁷

1. Relevant Market

Competition takes place on markets. For this reason, competition is always closely related to one or several particular markets. When determining the competing role of an undertaking, its behaviour and its status are to be analysed for these particular markets, the 'relevant markets'.

In order to define the relevant market for purposes of Community competition policies, the Commission has published a *Notice on Market Definition*,⁸ pointing out the following aspects as important.

⁴ Korah, Valentine, 'Concept of a Dominant Position Within the Meaning of Article 86', [1980] CMLRev. pp.395-396.

⁵ ECJ Case 27/76 *United Brands v. Commission* [1978] ECR 207, para. 65.

⁶ *Continental Can v. Commission*, Commission Decision 72/21/EEC, [1972] OJ L7/25, para. II-3.

⁷ Ritter, Lennart/Braun, W. David, *European Competition Law* (Kluwer Law International, The Hague, 2004), pp. 388-389; Jones/Sufrin, 297; Van Bael, Ivo/Bellis, Jean-Francois, *Competition Law of the European Community* (Kluwer Law International, The Hague, 2005), 118; Weatherill, Stephen, *EU Law* (Oxford University Press, Oxford, 2006), p. 550.

⁸ Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, [1997], OJ C325/5.

i. Product/Service Market

As for the material scope of the market, the Commission tries to distinguish one main product or service delimiting the relevant market. In its *Notice*, the Commission concludes that 'a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer'.⁹

When the Commission observes substitutability of a product, it differentiates between demand substitutability, i.e. if a customer would regard two products as interchangeable and would readily switch between them, and supply substitutability, i.e. if a supplier would be able to easily switch between producing two different products. In both cases, the products compared may form part of the same relevant market.¹⁰

Thus, the Commission recognises objective criteria like the product's (technical, physical or chemical) characteristics, and its price, in addition to subjective criteria like the competitor's views. It finally takes into account the subjective elements of the consumer's preferences and his intentions for the use of the product.¹¹

ii. Geographic Market

Not only the delimitation of a market by products, but also a geographic delimitation is necessary to define the relevant market under Article 82 EC. The geographic market names a geographic area in which the market power of an undertaking must be found out.¹²

The Commission takes into account whether or not the customer is free to purchase the product from elsewhere when prices increase. It also relies on the aspect whether or not competitors are able to supply their products or services under comparable conditions within this area; neither the place of production nor the place of final consumption is taken into consideration.¹³

A geographic market must not necessarily extend over the whole Common Market, but might be reduced to a 'substantial part' of it. A geographic market might even be limited to a quite small geographic area.¹⁴

iii. Temporal Market

The final aspect, the time dimension, is rarely of practical relevance in the Commission's process of appraising dominance under Article 82 EC. This is already underlined by the Commission's *Notice on Market Definition*. In this the Commission emphasises the product

⁹ Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, paras. 7, 15-23.

¹⁰ Chalmers, Damian/Szyszczak, Erika, *European Union Law* (Volume 2: Towards a European Polity? Ashgate, Aldershot, 1998), 629; Gyselen/Kyriazis, 'The Monopoly Power Measurement Issue Revisited', [1986] ELRev. pp. 138-144.

¹¹ For a detailed summary see Van Bael/Bellis, pp.139-140.

¹² Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, paras. 8, 28-31.

¹³ Loewenheim, Ulrich/Meessen/Riesenkampff, *Kartellrecht* (Verlag C.H.Beck, München, 2005), Article 82 EC, para. 82.

¹⁴ Ritter/Braun, 41; Bellamy, Christopher/Child, Graham, *European Community Law of Competition* (Sweet & Maxwell, London, 2001), p. 702.

and the geographic markets, whereas it does not explicitly mention any temporal criteria of market delimitation.

However, temporal developments (*e.g.* a seasonal distribution of goods, emergencies) are capable of influencing the relevant market and market positions. Market power may sink or increase temporarily in cases of varying offer/demand.¹⁵ Hence the Commission usually considers time factors indirectly when it includes them within its definition of the product market.¹⁶

iiii. Conclusion

It is rather difficult to define the relevant market objectively, as there will always be differing viewpoints whether a fact is significant enough to influence the market situation of one or several undertakings.¹⁷

The Commission's *Notice on Market Definition* can be considered as a first step towards an objective definition valid for any competition analysis under Article 82 EC.

Nevertheless, the *Notice* still leaves for a wide scope of discretion. Although it contains a list of factors and pieces of evidence that should be considered, it does not specify a ranking between them and even states that their weight might differ in each examination.

The fact that the Commission employs the criteria described above in a very narrow way¹⁸, sometimes even contradictory to economic viewpoints¹⁹, adds to the problem. I believe that it is therefore difficult for undertakings as well as for other institutions working with competition rules to find these rules a reliable and constant definition of the relevant market. This legal uncertainty may lead to diverging findings in similar cases of competition and may cause conflicts instead of solving them.

2. Dominant Position

Once the relevant market has been determined, the Commission has to must decide at what point an undertaking has sufficient power over this market to fall within the ambit of Article 82 EC. Central questions are, on the one hand, the capacity of an undertaking to prevent effective competition, and on the other hand, its possibility of behaving independently on the market.²⁰

As for defining an undertaking's position on the market, the Commission mainly examines the following criteria.

i. Market share

Market share is the principal element in the Commission's process to assess dominance. It is of such great importance because only an undertaking which that has won a large part of

¹⁵ Loewenheim/Meessen/Riesenkampff, Article 82 EC para 87; Ritter/Braun, p. 395.

¹⁶ *Tetra Pack II*, Commission Decision 62/163/EEC, [1992] OJ L72/1, para. 18.

¹⁷ Mestmäcker, Ernst-Joachim/Schweitzer, Heike, *Europäisches Wettbewerbsrecht* (Verlag H.C.Beck, München, 2004), p. 599.

¹⁸ Ritter/Braun, p. 390; Jones/Sufrin, p. 299.

¹⁹ Korah, p. 97.

²⁰ Loewenheim/Meessen/Riesenkampff, Article 82 EC, para 93; Whish, Richard, (LexisNexis UK, London, 2003), p. 179.

one market can be deemed to be in a dominant position.²¹ With its *Notice on Market Definition*, the Commission gives a guideline for calculating market shares for the purpose of Competition Law.²²

A high market share is considered as necessary, though rarely sufficient alone, to prove the existence of a dominant position.²³ Usually, market shares between 40% and 55% already indicate a dominant position, which must be confirmed by other factors of competitive conditions.²⁴ Nevertheless, a very high market share of more than 75% has been accepted as a presumption of dominance, so that no further investigation must be undertaken.²⁵

However, the analysis of the market shares is no definitive criteria, but can only indicate dominance. Even a monopolistic undertaking holding 100% of the market must not necessarily be dominant under Article 82 EC if barriers to entry definitely excluding possible competitors do not exist.²⁶

ii. Market structure

Next to the aspect of market share, different market structure elements influence the Commission's analysis of the existence of a dominant position.

Not only the percentage of the market share of one leading undertaking is of importance, but also the relation to the market shares of its nearest rivals.²⁷ A significant gap between the market share of the presumed dominant undertaking and the market share of its competitors may confirm the existence of a dominant position.

In addition, a group of undertakings sharing one market can occupy a 'collective dominant position'²⁸ if there are economic links between them which make it possible for them to act together, independently of their competitors, customers and consumers.

iii. Barriers to entry

However, market structure elements are only indicators of power on a market, and may be insufficient for determining the market position of an undertaking.²⁹

As potential competition is likely to reduce market power, the Commission adds 'barriers to entry' to the list of factors which indicate dominant positions. Barriers to entry are conditions which hinder competitors to enter the market.³⁰ For this purpose, it not only observes purely economic barriers to entry. It frequently extends its examination on social or short-term factors, like contractual commitments or a lack of information, which would

²¹ Bellamy/Child, 702; ECJ Case 27/76 *United Brands v. Commission* [1978] ECR 207, para. 107.

²² Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, paras. 53-55.

²³ ECJ Case 27/76 *United Brands v. Commission* [1978] ECR 207, para. 107.

²⁴ ECJ Case 27/76 *United Brands v. Commission* [1978] ECR 207, paras. 108-129; ECJ Case 85/76 *Hoffmann-La Roche v. Commission* [1979] ECR 461, paras. 50-52 and 61-63; ECJ Case 62/86 *AKZO v. Commission* [1991] ECR I-3359, para. 60.

²⁵ ECJ Case 85/76 *Hoffmann-La Roche v. Commission* [1979] ECR 461, paras. 41, 53-56, 59-60, 67.

²⁶ Jones/Sufrin, 337; Weatherill, p. 565; Whish, p. 181.

²⁷ Bellamy/Child, p. 705; Van Bael/Bellis, p. 125.

²⁸ *Italian Flat Glass*, Commission Decision 89/93/ECC, [1989] OJ L33/44, para. 79.

²⁹ Korah, pp. 107 ff; Whish, pp. 180, 183.

³⁰ Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, para. 24.

not be considered as barriers to entry from an economic point of view, but which actually cause difficulties for an undertaking to enter the market.³¹

iii. Conclusion

Determining dominance very much depends on how narrowly or broadly the relevant market is drawn.³² The more limited the definition of the market, the easier it becomes for the Commission to observe a dominant position of an undertaking on this restricted market. The same undertaking would possibly not be considered as dominant under a wider market definition.

One aspect that the Commission is often asked to examine with more attention concerns time scale, which is one fundamental element economists rely on when assessing dominance.³³

Not only the power of an undertaking over a longer period of time³⁴, but also seasonal or temporary changes in market share³⁵ should be considered as factors for evaluating dominance on a market: while no substituting products can be delivered in one season, the relevant market might be very restricted; when substitutes can be found in another season, the relevant market can be defined much wider – a fact that would influence the determination of dominance.

IV. Critics & Conclusion

Looking at the process employed by the Commission in an Article 82 EC case in order to determine whether or not an undertaking is in a dominant position, we see the difficulties the Commission still faces to classify position of an undertaking on the Common Market. The establishment of precise and significant criteria for the definition of the relevant market and an undertaking's position on this market can still be seen as the main difficulty. This can not only lead to a conflict with the aim of Article 82 EC and the Commission's competences in European competition policies, but can also create a lack of legal certainty as to the application of Article 82 EC.

The criteria the Commission employs vary from case to case. Furthermore, their importance as factors which distinguish a relevant market or their weight as indicators for dominance change. The Commission often takes into account social and political criteria or factors which do not necessarily arise from economic viewpoints on assessing market power.³⁶ The latter are based on economic facts and figures which can be proved more precisely. Thus, they describe the economic power of an undertaking in a far more objective way. The criteria employed by the Commission are basically related to the protection of the less powerful competitors, not to the protection of competition itself. In this way, the Commission extends its competences to maintain effective competition to a broader market control. The latter, including the protection of the smaller undertakings against more

³¹ Korah, pp. 103, 107-108; Whish, 183; *For further examples see case study in Bellamy/Child*, pp. 708-713.

³² Weatherill, p. 556; Van Bael/Bellis, p. 118; Chalmers/Szyszczak, p. 635.

³³ Jones/Sufrin, p. 369.

³⁴ Korah, pp. 102-103, 117; Fuller, pp. 436 f.

³⁵ Ritter/Braun, p. 395.

³⁶ Korah, p. 390.

powerful rivals or political interest against the market, risks to run against the idea of free competition with objectives like efficiency and consumer protection.³⁷

The Commission's flexible criteria of analysis increase the problem of legal uncertainty that undertakings face when they act on the European market. This legal uncertainty has grown with the Court of First Instance holding that the Commission must restate the actual relevant market and the conditions of competition whenever it applies Article 82 EC.³⁸

Surely the Commission cannot rely on previous findings which concern different market situations. Nevertheless, I believe it should rely more strictly on the criteria it has once designed as significant. Otherwise, the method employed by the Commission today may lead to market definitions strongly differing from previous findings, and therefore contradict purposes of legal continuity and legal security.

Another aspect of legal uncertainty is related to the applicability of Article 82 EC.

National institutions have gained competences with regard to European competition cases with the *Modernisation Regulation*³⁹. So today, Article 82 EC is directly applicable by the Commission and, in parallel, by national courts and national competition authorities.⁴⁰

National judges will now have to cope with European economic arguments of competition cases. As an effect of this 'decentralisation', national instances see themselves confronted to the same difficulties resulting from imprecise legal concepts as the Commission.

A close co-operation between national institutions and the Commission is aimed at in order to reduce the risk of contradictory decisions⁴¹. Nevertheless, influences of national viewpoints will probably lead to a greater number of interpretations under Article 82 EC. The future multiplicity of differing national applications may create new conflicts on the issue of the determination of dominance. Examining the measures already adopted by the Commission⁴² to facilitate the implementation of Regulation 1/2003, we see that, for example, the rights and obligations of the European Competition Network comprising all competition authorities have been specified.⁴³ However, rules for a consistent application of Article 82 EC are still missing.

Considering the statement of the European Court of First Instance that a national court or a national competition authority would not be bound by a previous decision of the Commission concerning dominance⁴⁴, it seems likely that there is still a long way to go from a 'modernised' to a harmonised application of Article 82 EC. Yet, such rules must urgently be agreed on in order to effectively prevent anti-competitive strategies on the European Common Market.

³⁷ [Effective competition] cuts pices, raises quality and expands customer choice, www.europa.eu.int/pol/comp/index_en.htm (20.12.2005).

³⁸ CFI joined Cases T-125 & 127/97 *Coca-Cola v. Commission* [2000] ECR II-1733, para. 82.

³⁹ Regulation 1/2003 [2003] OJ L1/1.

⁴⁰ Regulation 1/2003, Article 1; Jones/Sufrin, p. 1172; Ritter/Braun, pp. 75, 85-92.

⁴¹ Regulation 1/2003, Article 3, 11, 15, 16.

⁴² See list in Whish, p. 252.

⁴³ See Commission Notice on Cooperation within the Network of Competition Authorities [2004] OJ C101/43; further Commission Notice on the Cooperation between the Commission and the Courts of the EU Member States, [2004] OF C101/54.

⁴⁴ CFI joined Cases T-125 & 127/97 *Coca-Cola v. Commission* [2000] ECR II-1733, para. 85.