

Chapter V

Article 82: Abuse of Dominant Position

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A. Scheme of Article 82

Common Aim of Articles 81 and 82: Maintaining Effective Competition.

Article 82 prohibits any abuse of a dominant position by one or more firms in a substantial part of the Common Market that may affect trade between member states. Article 82 is to be applied and construed – like Article 81 – in the light of the task assigned to the Community by Article 3 (g) of the Treaty of instituting a system ensuring the maintenance of effective competition in the Common Market.¹ Article 81 prohibits the prevention, restriction or distortion of competition by means of an agreement or concerted practice between firms, regardless of whether they have market power. By contrast, Article 82 applies only to firms that have market power and seeks to prevent the abuse of such power for anticompetitive ends. It prohibits the abuse of market power both by the unilateral conduct of a single firm, and by the interdependent action of several oligopolists. In the latter case, no agreement or concerted action between multiple actors must be proved as under Article 81. However, where the conditions of both provisions are fulfilled both Articles 81 and 82 may be applied in parallel.²

Unchanged Application of Article 82 in the Framework of the Commission's Modernization.

The modernization of the EC competition rules does not bring significant changes with respect to Article 82. In particular, there is no change to the basic approach, which is the existence and abuse of a dominant position.³ Article 82 was and remains directly applicable in parallel by the Commission, the national competition authorities and the national courts (subject to close cooperation⁴). Where national authorities or national courts apply national law to any abuse prohibited by Article 82 (because it is likely to affect trade between member states), they must also apply Article 82, thereby reducing the risk of conflicting decisions.⁵

1. *Continental Can*, ECJ Feb. 12, 1973, 1973 ECR 215, paras 22–25; *Hoffmann-La Roche*, ECJ Feb. 13, 1979, 1979 ECR 461, 520, para. 38; *Michelin*, ECJ Nov. 9, 1983, 1983 ECR 3461, paras 29–30.

2. *See infra* Section F.

3. There is no application of the new standard of 'significantly impeding effective competition' as applies under Article 2 (2) of Regulation 139/2004 on the control of concentrations, 2004 OJ L 24/1.

4. Articles 11 and 15 of Regulation 1/2003 and the Commission's notices.

5. Article 3 of Regulation 1/2003. *See* Chapter I.F.

Existence or Acquisition of Dominant Position Unobjectionable under Article 82.

Article 82 covers only the abuse of an already existing dominant position. The existence or attainment of a dominant position⁶ is in itself unobjectionable. This applies however the dominant position was obtained, whether by internal growth, resulting from superior performance or technological prowess,⁷ by the acquisition of exclusive rights,⁸ or by merger.⁹ Mergers or acquisitions which have a Community dimension must be assessed under a stricter standard. Regulation 139/2004 provides that mergers may be declared incompatible with the Common Market where they significantly impede effective competition in the Common Market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. Mergers and acquisitions that do not have a Community dimension may be assessed:

- under Article 82 where they constitute an abuse of a dominant firm *already holding* a dominant position within the terms of the Continental Can doctrine,¹⁰ and
- under the merger provisions of national competition law by national competition authorities, unless the case is referred to the Commission according to Article 22 of Regulation 139/2004.

Different Types of Abuse.

Article 82 enumerates certain types of abuses without being exhaustive. The general concept of 'abuse' is broad and comprises any type of conduct that runs counter to the principle of Article 3 (g).¹¹ The main categories of abuse are:

- *Exploitative Abuses*: Exploiting market power in trading relationships with customers or suppliers by such practices as unfair purchase or selling prices, tying arrangements, price discrimination, etc.

6. *Michelin*, ECJ Nov. 9, 1983, 1983 ECR 3461, 3511, para. 57: 'A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the Common Market.' See *Telecommunication Directive Services*, ECJ Nov. 17, 1992, 1992 ECR I-5833, para. 35.

7. *Hoffmann-La Roche*, ECJ Feb. 13, 1979, 1979 ECR 461, 524, para. 48.

8. *British Leyland*, ECJ Nov. 11, 1986, 1986 ECR 3263, paras 3–10; *Renault*, ECJ Oct. 5, 1988, 1988 ECR 6039, para. 15; *Crespelle*, ECJ Oct. 5, 1994, 1994 ECR I-5077, paras 17, 22; *Maggill*, ECJ April 6, 1995, 1995 ECR I-743, para. 46; *Banchero*, ECJ Dec. 14, 1995, 1995 ECR I-4663, para. 55.10; *UPS Europe*, CFI March 20, 2002, 2002 ECR II-1915, para. 51.

9. *Continental Can*, ECJ Feb. 21, 1973, 1973 ECR 215, paras 18–27.

10. *Ibid.*

11. See *Continental Can*, ECJ Feb. 21, 1973, 1973 ECR 215, 244–245, paras 24–25.

Exclusionary Abuses: Abusing market power to harm a competitor by anticompetitive means such as refusal to deal, predatory pricing, or other predatory actions.

Structural Abuses: Eliminating a competitor by merger or acquisition. This can also be regarded as a subcategory of exclusionary abuses.

Elements to be Proved.

The elements that must be proved to establish an abuse of a dominant position which infringes Article 82 are that:

- one or more *undertakings*
- that hold a *dominant position* conferring market power
- within a *relevant product and geographic market*
- within the *Common Market* or in a *substantial part* thereof
- commit an *abuse* of the dominant position
- that may *affect trade* between member states.

This Chapter will discuss the various forms of abuse under Article 82, with the exception of 'structural abuses', i.e., creating or strengthening a dominant position by takeover of a competitor, which are covered in Chapter VI dealing with the evaluation of mergers and joint ventures under the merger control regulation.

B Undertaking

Definition.

The meaning of 'undertaking' was discussed in Chapter I.¹² It refers to any entity engaged in business activities, regardless of its legal status and the way it is financed.¹³ Thus both private and state-owned or controlled firms and public bodies that engage in industrial or commercial activities may be subject to Article 82.¹⁴

12. See Chapter I.D.

13. *Telecommunication Directive Services*, ECJ Nov. 17, 1992, 1992 ECR I-5833, para. 24. This may include associations or cooperatives provided they have the legal status of an undertaking: *Milk Marketing Board*, Comm. comfort letter, Twenty-second Report on Competition Policy, points 161–167; *CEWAL*, D.Comm. Dec. 23, 1992, 1993 OJ L 34/20, upheld in substance by CFI Oct. 8, 1996, 1996 ECR II-1201 (arguing that CEWAL, the association composed by four members, acted on the market autonomously as one single unit); *aff'd* ECJ March 16, 2000, 2000 ECR I-1365; *Aéroports de Paris*, CFI Dec. 12, 2000, 2000 ECR II-3929, para. 107; *aff'd* ECJ Oct. 24, 2002, 2002 ECR I-9297, para. 79; *Deutsche Bahn (German Railways)*, CFI Oct. 21, 1997, 1997 ECR II-1689; *aff'd* ECJ April 27, 1999, 1999 ECR I-2387.

14. *Commission/Italy*, ECJ June 16, 1987, 1987 ECR 2599, para. 7; *Höfner/Macrotron*, ECJ April 23, 1991, 1991 ECR I-979, para. 26; *Greek Television*, ECJ June 23, 1991, 1991 ECR I-2925, para. 38; *Diego Cali & Figli/Porto di Geneva*, ECJ March 18, 1997, 1997 ECR I-1547, para. 16. Article 82 applies directly to any entrepreneurial behavior whereas governmental behavior

The fact that a firm owes its dominant position to government measures such as the grant of monopoly rights is irrelevant.¹⁵ By contrast, entities to which a member state has conferred a task of public interest which forms part of the essential functions of the state are not subject to Article 82,¹⁶ whereas those parts of the activities of such an entity that can be separated from those in which it engages as a public authority (exercising sovereign powers) are subject to Articles 81 and 82.¹⁷ The decisive criteria is whether the undertaking acts autonomously and at its own initiative or whether national measures require, reinforce or encourage the undertaking's anti-competitive conduct¹⁸ (creating a situation 'where that body (*Deutsche Post*) may be led, to the detriment of users of postal service, to abuse its dominant position resulting from the exclusive right'¹⁹).

Examples.

Examples of 'undertakings' to which Article 82 has been applied are:

- The UK national telecommunications authority, British Telecommunications, which refused to allow private message-forwarding agencies to use its network to relay telex messages between foreign countries.²⁰

The monopoly Luxembourg television network which refused to sell TV advertising time to a private 'tele-sales' agency.²¹

National posts and telecommunications administrations which wanted to extend their monopoly to courier services,²² the supply of telecommunications terminals, to the marketing and maintenance of equipment to be connected to the network,²³ or to unfair trading conditions²⁴ or discriminatory (predatory) practices.²⁵

- The national railway administrations, which engaged in joint marketing of combined land and sea transport of containers and abusive practices by applying discriminatory tariffs.²⁶
- The UK central bank, the Bank of England, which sponsored agreements restricting admission to the London foreign exchange market.²⁷
- The state-owned British automobile manufacturer, British Leyland, which among other measures charged excessive fees for issuing conformity certificates for imported cars in order to curb parallel imports.²⁸
- State-owned airlines, which refused to grant a competitor access to its computerized reservation system²⁹ or applied exclusionary royalty rebates.³⁰
- The state-owned airport administrations, which reserved the new terminal at Orly to national airlines whereas the other airlines were left with the old terminal,³¹ or which at Frankfurt refused groundhandling services.³²
- Port authorities which granted preferential rights to national persons or firms.³³

is subject to a combined application of Articles 82 and 86 (because the decision has to be addressed to a member state): *GT-Link A/S v. De Dansk Statsbaner*, ECJ July 17, 1997, 1997 ECR I-4449; *Telecommunication Directive Terminal Equipment*, ECJ March 19, 1991, 1991 ECR I-1223, paras 53–57; *Ilmailulaitos/Luftfartsverket*, D.Comm. Feb. 10, 1999, 1999 OJ L 69/24, points 21–23.

15. *Télémarketing*, ECJ Oct. 3, 1985, 1985 ECR 3261, paras 17–18; *General Motors*, ECJ Nov. 13, 1975, 1975 ECR 1367, para. 9; *INNO/ATAB*, ECJ Nov. 16, 1977, 1977 ECR 2115, paras 24–38; *British Telecommunications*, ECJ March 20, 1985, 1985 ECR 873, paras 16–20. See also *supra* Chapter I.D. and *infra*, section D.1 (Article 86 (2) exception) of this chapter.
16. *AOK Bundesverband/Ichthyol-esellschaft Kordes*, ECJ March 16, 2004, C-264/01, paras. 55–57. See also *Eurocontrol*, ECJ Jan. 19, 1994, 1994 ECR I-43, paras 28–32; *Diego Cali & Figli/Porto di Genova*, ECJ March 18, 1997, 1997 ECR I-1547, paras 23–25; *French Post*, D.Comm. Oct. 23, 2001, 2002 OJ L 120/19, point 29.
17. *SAT/Eurocontrol*, ECJ Jan. 19, 1994, 1994 ECR I-43; *Portuguese Airport*, D.Comm. Feb. 10, 1999, 1999 OJ L 69/31 (under Article 86 (3)), *aff'd* ECJ March 29, 2001, 2001 ECR I-2613; *Aéroports de Paris*, CFI Dec. 2000, 2000 ECR II-3929, paras 100 and 108–130 (distinction between State fees for supervisory activities and commercial fees for purely commercial activities such as groundhandling), *aff'd* ECJ Oct. 24, 2002, 2002 ECR I-9297, para. 75.
18. *Irish Sugar*, CFI Oct. 7, 1999, 1999 ECR II-2969, para. 130; *Arduino*, ECJ Feb. 19, 2002, 2002 ECR I-1529, paras 34–43; *German Post*, D.Comm. July 25, 2001, 2001 OJ L 331/40, points 99–102.
19. *Deutsche Post/GVS, Citicorp*, ECJ Feb. 10, 2000, 2000 ECR I-825, para. 48.
20. *British Telecommunications*, ECJ Oct. 3, 1985, 1985 ECR 3261, paras 17–18. See the *Telecommunication Directives* judgments where the Court confirmed the application of Article 86 (1) and (3) to the obligations imposed by the government (responsibility of the government) but considered Article 82 directly applicable to restrictive agreements concluded by the telecommunication body (responsibility of this entity): ECJ March 19, 1991, 1991 ECR I-1223, paras 53–57 and Nov. 17, 1992, 1992 ECR I-5833, para. 24.

21. *Télémarketing*, ECJ Oct. 3, 1985, 1985 ECR 3261, 3275–3276, paras 17–18.

22. *Bundespost I*, Fifteenth Report on Competition Policy, point 259. *An Post (Irish Postal Company)*, Sixteenth Report on Competition Policy, point 298; *French Postal Monopoly*, Bull. EC 12–1985, point 2.1.79; *Italian International Courier Services*, Nineteenth Report on Competition Policy, point 228; *Dutch Express Mail Service*, D.Comm. Dec. 20, 1989, 1990 OJ L 10/47.

23. *RTT/GB-INNO-BM*, ECJ Dec. 13, 1991, 1991 ECR I-5941, paras 17–19.

24. *German Post II*, D.Comm. July 25, 2001, 2001 OJ L 331/40.

25. *German Post I*, D.Comm. March 20, 2001, 2001 OJ L 125/27.

26. *HOV-SVZ/Deutsche Bahn*, D.Comm. March 29, 1994, 1994 OJ L 104/34, para. 47, *aff'd* CFI Oct. 21, 1997, 1997 ECR II-1689.

27. *Sarabex*, Eighth Report on Competition Policy, points 35–37.

28. *British Leyland*, ECJ Nov. 11, 1986, 1986 ECR 3263, para. 9. See also *General Motors*, ECJ Nov. 13, 1975, 1975 ECR 1367, para. 9.

29. *Sabena*, D.Comm. Nov. 4, 1988, 1988 OJ L 317/47.

30. *Virgin Airlines/British Airways*, D.Comm. July 14, 1999, 2000 OJ L 30/1, points 108–111.

31. *Aéroports de Paris*, D.Comm. June 11, 1998, 1998 OJ L 230/10, *aff'd* ECJ Oct. 24, 2002, 2002 ECR I-9297, para. 116.

32. *Airport of Frankfurt*, D.Comm. Jan. 14, 1998, 1998 OJ L 72/30.

33. *Porto di Genova*, ECJ Dec. 10, 1991, 1991 ECR I-5889 (application of Article 82) confirmed by Corte di Appello of Florence, Italy, of 9 Oct. 1993, Twenty-fourth Report on Competition Policy, point 102; *Harbour of Roscoff (ICG/CCI Morlaix)*, D.Comm. May 16, 1995, Twenty-fifth Report on Competition Policy, p. 120. However, a port authority entrusted with the compulsory surveillance and rapid intervention service designed to protect the maritime

- Maritime conferences applying exclusionary practices and predatory tariffs.³⁴
- The German monopoly over recruitment services which is part of the public administration and which used its exclusive rights in order to prevent others from furnishing these services.³⁵
- A privately-owned funeral services firm which was able to charge excessive prices thanks to the monopoly granted to it by the local authority.³⁶

C. Dominant Position

I. DEFINITION AND CRITERIA

Definition.

In the *Hoffmann-La Roche* judgment the Court of Justice defined a dominant position as:

... a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. Such a position does not preclude some competition, which it does where there is a monopoly or a quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.³⁷

The existence of a dominant position may derive from several factors, which, taken separately, are not necessarily decisive; however, extremely large market shares are in themselves, save exceptional circumstances, evidence of the existence of a dominant position.³⁸ The market definition makes it possible to calculate market

environment does not exercise a commercial activity even where port users must pay fees to finance that activity. *Diego Cali & Figli/Porto di Genova*, ECJ March 18, 1997, 1997 ECR I-1547.

- 34. *CEWAL*, D.Comm. Dec. 23, 1992, 1993 OJ L 34/20, *aff'd* in substance by CFI Oct. 8, 1996, 1996 ECR II-1201.
- 35. *Höfner/Macrotron*, ECJ April 23, 1991, 1991 ECR I-1979, paras 25–31.
- 36. *Bodson – Funeral Services*, ECJ May 4, 1988, 1988 ECR 2479, paras 26–29.
- 37. *Hoffmann-La Roche*, ECJ Feb. 13, 1979, 1979 ECR 461, paras 38–39. *See also Michelin*, ECJ Nov. 9, 1983, 1983 ECR 3461, para. 30; *Alsattel/Novasam*, ECJ Oct. 5, 1988, 1988 ECR 5987, para. 12; *AKZO*, ECJ July 3, 1991, 1991 ECR I-3359, para. 69; *Irish Sugar*, Oct. 7, 1999, 1999 ECR II-2969, para. 70.
- 38. *Irish Sugar*, CFI Oct. 7, 1999, 1999 ECR II-2969, para. 70.

shares that would convey meaningful information regarding market power'.³⁹ Thus, in determining whether a firm has a dominant position on a market, the first – but often most difficult – step is to define the market concerned, the 'relevant market', both in terms of products and geography. Indeed, Article 82 presupposes a link (but not necessarily a causal connection⁴⁰) between the dominant position and the alleged abusive conduct, which must produce its effects on the dominated market or, under special circumstances, on a distinct, but associated, market.⁴¹ This process of determining the relevant market is described in section 2 below and is based upon the general description of the relevant market which is common to any application of the EC competition rules, and therefore is explained as one of the 'fundamentals' in Chapter I.C. above. Only after the 'relevant market' has been properly defined is it possible to apply the various criteria suggested by the Court's definition of dominant position.

Criteria of Dominant Position.

These can be summarized under three main headings in order of decreasing importance: market structure, firm structure and market conduct.

- The *structure* of the *relevant market* must be such as to give the firm the ability to act in a largely unconstrained manner because of the absence of effective competition. The main elements are the firm's market share, its lead in terms of market share over its rivals, the degree of dependence of its customers or suppliers, and its ability to set its prices and terms and conditions of sale without serious regard to the competitive response of smaller competitors. The evaluation of market structure is the most important in determining whether a firm holds a dominant position.
- The *structure* and characteristics of the *firm* itself may give it the ability to prevent effective competition due to its internal strength. Relevant factors are the firm's technological resources, production capacity, access to raw materials, financial strength and other commercial advantages over its rivals.
- The *conduct* of the firm on the *market*, such as overpricing or predatory acts against competitors, may indicate that the firm is behaving in a manner largely unconstrained by competition and therefore holds a dominant position. However, caution must be exercised in drawing conclusions from market behaviour, as most types of behaviour can be practised both by dominant and non-dominant firms.

The criteria for evaluating dominance are described in section 3 below. Section 4 deals with the concept of collective dominance, i.e., a dominant position held collectively by several firms, while section 5 is devoted to dominant purchasers.

39. Commission Notice on the definition of the relevant market, 1997 OJ C 372/3, point 2.

40. *Continental Can*, ECJ Feb. 21, 1973, 1973 ECR 215, para. 27.

41. *Tetra Pak II*, ECJ Nov. 14, 1996, 1996 ECR I-5951, para. 27.

2. RELEVANT MARKET

Uniform Parameters for Defining the Relevant Market.

The definition of the relevant market or markets is the first step in the evaluation of any alleged abuse of a dominant position under Article 82. The question of how to define the relevant market was answered by the Court of Justice in the *Michelin* case as follows:

‘... the determination of the relevant market is useful in assessing whether the undertaking concerned is in a position to prevent effective competition from being maintained and behave to an appreciable extent independently of its competitors and customers and consumers. For this purpose, therefore, an examination limited to the objective characteristics only of the relevant products cannot be sufficient; the competitive conditions and the structure of supply and demand on the market must also be taken into consideration.’⁴²

The possibilities of competition must be judged in the context of the market comprising the totality of the products or services which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products or services.⁴³ This approach has been further developed by the Commission in its ‘Guidelines on the Definition of the Relevant Market for the Purposes of Community Competition Law’,⁴⁴ which provide guidance on its concept of relevant product and geographic market in its ongoing enforcement of Articles 81, 82 and the merger control regulation. The parameters for defining the relevant market are basically the same under each of these provisions, and have therefore been discussed in Chapter I under section C. This section is limited to highlighting certain particulars when applying Article 82.

Relevant Product Market: Narrow Definitions Predominate.

The relevant product market includes those products, which are actually or potentially substitutable,⁴⁵ thereby including short-term and medium and long-term substitutability⁴⁶ on both the demand and the supply side.⁴⁷ The Court of Justice and the Commission tend to define the relevant product market rather narrowly, including sub-markets, as may be shown by the following examples:

42. *Michelin*, ECJ Nov. 9, 1983, 1983 ECR 3461, para. 37.

43. *British Airways*, CFI Dec. 17, 2003, T-219/99, para. 91.

44. Commission Notice, 1997 OJ C 372/3.

45. *RTE(Magill)*, ECJ April 6, 1995, 1995 ECR I-743, paras 53–54; *Tierce Ladbroke*, CFI June 12, 1997 ECR II-923, para. 131; *European Night Services*, CFI Sept. 15, 1998, 1998 ECR II-3141, para. 208; *Belgian Post*, D.Comm. Dec. 5, 2001, 2002 OJ L 61/32, points 39–51.

46. *Tetra Pak II*, ECJ Nov. 14, 1996, 1996 ECR I-5951, para. 19.

47. E.g. *DSD* (‘Green Dot’), D.Comm. April 20, 2001, 2001 OJ L 166/1, points 65–86.

pharmaceuticals according to their therapeutic effect⁴⁸ and, even if chemically identical, distinguishing markets based on different end-uses,⁴⁹ chemicals as raw materials as distinct from the finished products,⁵⁰ products supplied to reprocessors from products supplied on the merchant market,⁵¹

natural sugar as distinct from sugar substitutes,⁵²

impulse ice cream, consisting of single-wrapped items, as distinct from other ice cream, such as take-home and catering ice cream,⁵³

natural beet or cane sugar in granulated form (as distinct from speciality sugars, liquid sugars and syrups) sold in two sub-markets, namely to retail and industrial customers,⁵⁴

cola-flavoured carbonated soft drinks from other soft drinks,⁵⁵

bananas as distinct from other fresh fruit,⁵⁶

aseptic milk filling machines from fresh milk filling machines,⁵⁷

plasterboard as distinct from wet plastering,⁵⁸

flat glass as distinct from hollow glass containers which are in competition with cans and plastic bottles,⁵⁹

48. Vitamin A to be distinct from vitamin B, etc.: *Hoffmann-La Roche*, ECJ 13 Feb. 1979, 1979 ECR 461, paras 21–30, and *Vitamins*, D.Comm. Nov. 21, 2001, 2003 OJ L 6/1, points 22–73.

49. *Human v. veterinary use or cosmetics in pharmacies v. cosmetics which are freely marketed: Vichy*, CFI Feb. 27, 1992, 1992 ECR II-415, para. 63 (under Article 81).

50. *Commercial Solvents*, ECJ March 6, 1974, 1974 ECR 223, paras 19–22; *Aminobutanol*, Sixteenth Report on Competition Policy, point 76. See, however, Article 4 (2) of the R&D block exemption regulation, Regulation 2659/2000, which requires products in which the newly developed products are integrated as components to be considered when calculating the market share limit of 25%.

51. See, under Article 81, *Philips/Osram*, D.Comm. Dec. 21, 1994, 1994 OJ L 378/37, points 7–8.

52. Assumed in *Sugar*, D.Comm. Jan. 2, 1973, 1973 OJ L 140/17, 18; *Aspartame*, Eighteenth Report on Competition Policy, point 53; *British Sugar*, D.Comm. July 18, 1988, 1988 OJ L 284/41; *Irish Sugar*, D.Comm. May 14, 1997, 1997 OJ L 258/1, points 86–90.

53. *Van den Bergh Foods*, D.Comm. March 11, 1998, 1998 OJ L 246/1, point 255. See under Article 81: *Langnese-Iglo*, CFI June 8, 1995, 1995 ECR II-1533, paras 60–72; *aff’d* ECJ Oct. 1, 1998, 1998 ECR I-5609.

54. *British Sugar*, D.Comm. July 18, 1988, 1988 OJ L 284/41, 50; *Irish Sugar*, D.Comm. May 14, 1997, 1997 OJ L 258/1, paras 86–90 (*aff’d* CFI Oct. 7, 1999, 1999 ECR II-2969).

55. *Coca Cola I*, D.Comm. IP (88)615. See also under the merger control regulation *Coca Cola/Carlsberg*, D.Comm. Sept. 11, 1997, Twenty-seventh Report on Competition Policy, p. 193.

56. *United Brands*, ECJ Feb. 14, 1978, 1978 ECR 207, paras 12–35.

57. *Tetra Pak I*, D.Comm. July 26, 1988, 1988 OJ L 272/27, 33–38; *aff’d* CFI July 10, 1990, 1990 ECR II-309; *aff’d* ECJ Oct. 6, 1994, 1994 ECR I-5951.

58. *British Plasterboard*, D.Comm. Dec. 5, 1988, 1989 OJ L 10/50, 51–52, 64–65, *aff’d* ECJ April 6, 1995, 1995 ECR I-865.

59. *Italian Flat Glass II*, D.Comm. Dec. 7, 1988, 1989 OJ L 33/44, 65; *rev’d* CFI March 10, 1992, 1992 ECR II-1403 (for lack of evidence for anticompetitive coordination).

- tyres: original equipment market as distinct from replacement market tyres,⁶⁰
- replacement truck tyres as distinct from truck retreads,⁶¹
- nail guns as a specific fastening system from other fastening systems, to be separated from the market of cartridges and nails,⁶²
- different sizes and capacities of computers,⁶³ motors⁶⁴ and aircraft,⁶⁵
- computerized airline reservation systems from non-computerized systems,⁶⁶
- postal universal services from specific services, such as collection and distribution of business mail.⁶⁷
- advanced weekly listings of all TV programmes in TV guides from daily listings,⁶⁸
- mobile telephone from voice telephone,⁶⁹
- spare parts for particular makes of cash registers or particular car models from the ‘primary product’,⁷⁰
- deliveries of industrial gases (oxygen, hydrogen, nitrogen) in pipelines from deliveries in bulk or in bottles,⁷¹
- scheduled airline flights from charter flights and other means of transport,⁷² i.e., means of transport for time-sensitive passengers (business travellers) from transport means of price-sensitive leisure passengers,⁷³ and
- services of air travel agencies distinct from the air transport market.⁷⁴

60. *Michelin I*, ECJ Nov. 9, 1983, 1983 ECR 3461, paras 38 *et seq.*

61. *Michelin II*, D.Comm. June 20, 2001, 2002 OJ L 143/1, points 109–118; *aff’d* CFI Sept. 30, 2003, T-203/01.

62. *Hilti*, D.Comm. Dec. 22, 1987, 1988 OJ L 65/19, 31–33; *aff’d* CFI Dec. 12, 1991, 1991 ECR II-1439, paras 66–78, and ECJ March 2, 1994, 1994 ECR I-667.

63. *IBM*, Fourteenth Report on Competition Policy, point 94.

64. *UTC/MTU*, Twenty-second Report on Competition Policy, p. 415.

65. *Aerospaciale Alenia/DeHavilland*, D.Comm. Oct. 2, 1991, 1991 OJ L 334/42; *Boeing/McDonnell Douglas*, D.Comm. July 30, 1997, 1997 OJ L 336/16; *ATR/Alenia/British Aerospace II*, Twenty-fifth Report on Competition Policy, pp. 128–131 (comfort letter).

66. *Sabena*, D.Comm. Nov. 4, 1988, 1988 OJ L 317/47, 49–50.

67. *Italian Post*, D.Comm. Dec. 21, 2000, 2001 OJ L 63/59, point 17; *German Post*, D.Comm. July 25, 2001, 2001 OJ L 331/40, point 84; *Belgian Post*, D.Comm. Dec. 5, 2001, 2002 OJ L 61/32, points 43–51.

68. *Magill TV Guide*, D.Comm. Dec. 21, 1988, 1989 OJ L 78/43, 48.

69. *Omnitel Pronto Italia*, D.Comm. Oct. 4, 1995, 1995 OJ L 280/49, point 16.

70. *Hugin/Liptons*, ECJ May 31, 1979, 1979 ECR 1869, paras 3–10; *Renault*, ECJ Oct. 5, 1988, 1988 ECR 6039, paras 15–16.

71. *Industrial Gases*, Nineteenth Report on Competition Policy, point 62; *Dutch Industrial and Medical Gases*, D.Comm. July 24, 2002, 2003 OJ L 84/1, points 55–63.

72. *Ahmed Saeed*, ECJ April 11, 1989, 1989 ECR 803, paras 39–41; *European Night Services*, CFI Sept. 15, 1998, 1998 ECR II-3141, para. 90.

73. *See the air alliances*, Twenty-seventh Report on Competition Policy, point 92; *European Night Services*, CFI Sept. 15, 1998, 1998 ECR II-3141, para. 90.

74. *British Airways*, CFI Dec. 17, 2003, T-219/99, para. 100.

Relevant Geographic Market: Difference between Analysis under Article 82 and Analysis under Merger Control Regulation

The principal purpose of Article 82 is to halt abuses of a single or a collective dominant position that are likely to harm competitors, customers and ultimately consumers, whereas the objective of the merger control regulation is to control anticompetitive structural changes in the supply of a product or service. Therefore, the methodologies of applying Article 82 and of applying the merger control regulation may lead to different results: the analysis of abuse of a dominant position concerns essentially past and present behaviour,⁷⁵ whereas the analysis of a merger or a joint venture calls for an evaluation of prospective anticompetitive effects and may therefore include, to a greater extent, potential competition arising from the ongoing process of market integration.⁷⁶ For example, the *Michelin I* case⁷⁷ under Article 82 concerned the abusive application of exclusive supply obligations imposed on Dutch distributors. Similarly, the *Michelin II* case⁷⁸ concerned the abusive application of loyalty-inducing rebates to new replacement tyres and retreaded tyres in France. The relevant geographic market was the Netherlands because that was the market in which Michelin employed abusive practices when distributing a whole range of tyres to dealers for replacement purposes. On the other hand, in the *Continental/Michelin* joint venture case dealt with under Article 81,⁷⁹ the relevant geographic market was held to be that of the whole Community because the joint venture would produce a new tyre for purposes of both replacement and original equipment for distribution Community-wide. This accords with the determination of the relevant geographic market in merger cases where the Commission tends to a wider market definition in order to take into account the growing ‘Europeanization’,⁸⁰ except in cases of ‘distinct markets’, i.e. where the competitive conditions on the market are still appreciably different in view of the nature and the characteristics of the products or services concerned, the existence of entry barriers, consumer preferences and the existence of appreciable differences in market shares and prices between territories.⁸¹ The distinct market concept as applied by the Commission in merger cases may sustain the tendency of a rather narrow definition of the relevant geographic market under Article 82.⁸²

75. *UFEX*, CFI May 25, 2000, 2000 ECR II-2167, para. 49.

76. Commission Notice on the definition of the relevant market, point 32. *See Airtours*, CFI June 6, 2002, 2002 ECR II-2585, para. 210.

77. *Michelin I*, D.Comm. Oct. 7, 1981, 1981 OJ L 353/33, *aff’d* ECJ Nov. 9, 1983, 1983 ECR 346.

78. *Michelin II*, D.Comm. June 20, 2001, 2002 OJ L 143/1, points 119–171.

79. D.Comm. Oct. 11, 1988, 1988 OJ L 305/33.

80. *See Procter & Gamble/Schickedanz*, D.Comm. June 21, 1994, 1994 OJ L 354/32, point 104.

81. Article 9 (7) of Regulation 139/2004. *See Royal Philips Electronics*, CFI April 3, 2003, T-119/02, paras 335–337.

82. *See* Chapter VI.C.4.(b)(iii) and VI.D.1.

Examples of Geographic Market Definitions.

The relevant geographic market may be:

- the whole Community,⁸³ possibly including the EEA countries⁸⁴ or even extending to the whole world market;⁸⁵
- several member states;⁸⁶
- one single member state,⁸⁷ in particular because of high costs of transport or the nation-wide coverage of a fixed telecommunications network (local loop);⁸⁹
- a part (region) of a member state;⁹⁰
- an 'essential facility' within a member state such as ports⁹¹ or airports;⁹² and

83. See *Hoffmann-La Roche*, ECJ Feb. 13, 1979, 1979 ECR 461, para. 22; *Hilti*, ECJ Dec. 12, 1991, 1991 ECR II-14339, paras 80-81; *Tetra Pak II*, CFI Oct. 6, 1994, 1994 ECR II-755, paras 92-99.

84. Commission Notice on the definition of the relevant market, point 28.

85. *Commercial Solvents*, D.Comm. Dec. 14, 1972, 1972 OJ L 299/51; *aff'd* ECJ March 6, 1974, 1974 ECR 223 (world monopoly). See under Article 81 *British Telecommunications/MCI I*, D.Comm. July 27, 1994, 1994 OJ L 223/36; under the merger control regulation *British Telecommunications/MCI II*, D.Comm. Jan. 30, 1997 M.856; *Boeing/McDonnell Douglas*, D.Comm. July 30, 1997, 1997 OJ L 336/16, para. 20.

86. *Sugar*, ECJ Dec. 16, 1975, 1975 ECR 1663, paras 370-375 (Belgium and Luxembourg); *United Brands*, ECJ Feb. 14, 1978, 1978 ECR 207, paras 36-38 (Germany, Benelux-countries, Denmark and Ireland); *Magill*, CFI July 10, 1991, 1991 ECR II-485, para. 64 (Ireland and Northern Ireland).

87. *British Leyland*, ECJ Nov. 11, 1986, 1986 ECR 3263, paras 4-9; *British Telecommunications*, ECJ March 20, 1985, 1985 ECR 873, paras 21-22; *RTB/SABAM II*, ECJ March 27, 1974, 1974 ECR 313, para. 5; *Michelin I*, ECJ Nov. 9, 1983, 1983 ECR 3461, paras 32-61; *Michelin II*, D.Comm. June 20, 2001, 2002 OJ L 143/1, points 119-168, *aff'd* CFI Sept. 30, 2003, T-203/01; *BPB*, CFI April 1, 1993, 1993 ECR II-389, para. 66; *aff'd* ECJ April 6, 1995, 1995 ECR I-865; *Deutsche Bahn* (combined container traffic by rail and boat), D.Comm. March 29, 1994, 1994 OJ L 104/34, paras 191-250; *aff'd* CFI Oct. 21, 1997, 1997 ECR II-1689, para. 58.

88. *Irish Sugar*, CFI Oct. 7, 1999, 1999 ECR II-2969, paras 86-88.

89. *Deutsche Telekom*, D.Comm. May 21, 2003, IP/03/717; *Wanadoo*, D.Comm. July 16, 2003, IP/03/1025.

90. Southern part of Germany: *Sugar*, ECJ Dec. 16, 1975, 1975 ECR 1663, paras 441-448; Northern part of Ireland: *Irish Sugar*, D.Comm. May 14, 1997, 1997 OJ L 258/1, paras 99-113 (*aff'd* CFI Oct. 7, 1999, 1999 ECR II-2969, paras 87-92). Under the merger control regulation: *Promodes/S21/Gruppo GS*, D.Comm. March 10, 1998, M.1086 (partial referral with respect to the retail activities in certain Italian provinces whereas the other activities were dealt with by the Commission itself).

91. *Porto di Genova I*, ECJ Dec. 10, 1991, 1991 ECR I-5889; *Silvano Raso (Porto di Genova II)*, ECJ Feb. 12, 1998, 1998 ECR I-593, para. 26; *Port of Rodby*, D.Comm. Dec. 21, 1993, 1994 OJ L 55/52; *Porto di Genova (employment)*, D.Comm. Oct. 21, 1997, 1997 OJ L 301/17, point 20.

92. *Aéroports de Paris*, CFI Dec. 12, 2000, 2000 ECR II-3929, paras 137-143; *aff'd* ECJ Oct. 24, 2002, 2002 ECR I-9297, paras 91-96; *Airport of Frankfurt*, D.Comm. Jan. 14, 1998, 1998 OJ L 72/30, point 56.

transport connections between two different destinations,⁹³

provided the challenged conduct has appreciable effects on trade between member-states.⁹⁴

Definition of the Relevant Time Period.

A position of market power may arise from an emergency like an oil shortage which temporarily increases the customer's dependence on its traditional supplier.⁹⁵ Under normal conditions, however, the market must be considered over a longer period.⁹⁶ Seasonal variations in demand were not accepted by the Court of Justice in the *United Brands* case as sufficient to consider bananas as belonging temporarily to a larger fresh fruit market.⁹⁷ Such temporary changes in market shares are nevertheless relevant considerations when evaluating the existence of a dominant position.

Definition of the Relevant Market in Cases of Buying Power.

In the case of an abuse of buying power by a dominant purchaser, the relevant product market is judged by similar criteria but based primarily upon the standpoint of the seller, i.e. whether the seller has realistic alternatives for distributing its products or to offer its services via other outlets.⁹⁸ Examples of applying the concept of buying power include:

- the supply of railway rolling stock material by independent manufacturers to dominant railways,⁹⁹
- the licensing of films by film distributors to television stations,¹⁰⁰

93. *French-West-African Shipowners Committee*, D.Comm. April 1, 1992, 1992 OJ L 134/1; *British Midland/Aer Lingus*, D.Comm. April 10, 1992, 1992 OJ L 96/34; *CEWAL*, D.Comm. Dec. 23, 1992, 1993 OJ L 34/20, *aff'd* CFI Oct. 8, 1996, 1996 ECR II-1201, para. 75; under Article 81: *Lufthansa/SAS*, D.Comm. Jan 16, 1996, 1996 OJ L 54/28; *Transatlantic Air Agreements*, Twenty-seventh Report on Competition Policy, point 92.

94. See, in particular, *Sea Containers/Stena Sealink*, D.Comm. 21 Dec. 1993, 1994 OJ L15/8, point 77.

95. *BP*, ECJ June 29, 1978, 1978 ECR 1513, paras 16-18, although the Court neither confirmed nor rejected the Commission's holding on this issue.

96. See *infra* section C.3 (a).

97. *United Brands*, ECJ Feb. 14, 1978, 1978 ECR 207, paras 12-35.

98. Twenty-sixth Report on Competition Policy, point 147. See with respect to countervailing effects of buying power: Commission Notice on horizontal mergers, points 64-67.

99. *Eurofima*, Third Report on Competition Policy, points 68-69.

100. *CICCE*, ECJ March 28, 1985, 1985 ECR 1105 (however, in this case, the question of dominant position was not discussed by the Court since it agreed with the Commission that the alleged abuse of imposing unfair prices was not proven).

- the collective purchasing of copyrights by a single copyright collecting society,¹⁰¹
- procuring products, services or licences by dominant, mostly state-owned telecommunication operators,¹⁰² and
- procurement of services by ports¹⁰³ or airports.¹⁰⁴

Calculation of Market Shares – The Merchant Market Rule.

The total market size and market shares of each supplier are calculated on the basis of their sales of the relevant products on the relevant market.¹⁰⁵ The calculation must include all of the important competitive constraints and exclude all those products that are irrelevant to the analysis of the parties' market power. Therefore, the calculation must include those products made to independent third parties ('merchant market sales') and exclude sales made by the suppliers to customers to whom the suppliers are linked by full or partial ownership and swaps between suppliers ('captive sales').¹⁰⁶

3. DOMINANT POSITION

Criteria for Dominant Position.

The Court of Justice has defined a dominant position as 'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers'.¹⁰⁷ As noted above, the main criteria by which a dominant position is judged are (a) the structure of the market, (b) the structure of the firm and (c) the firm's conduct.

(a) Market Structure

Monopoly as Dominant Position.

A monopolist who does not face any competition at all is dominant by definition.¹⁰⁸ The monopoly may be based on exclusive rights granted by government ('statutory monopoly'),¹⁰⁹ or may be held as a result of economic or technical factors. Examples include:

- National copyright collecting societies, which have monopolies on their territory, owing either to reciprocal exclusive agreements with other national societies or to the economics of managing the exploitation of copyright abroad. This means that copyright holders cannot turn to foreign collecting societies to manage their copyrights.¹¹⁰
- Undertakings to which a member state grants exclusive rights in each of its departments or states, thereby establishing a contiguous series of monopolies territorially limited but together covering the entire territory of a member state that create a collective dominant position in a substantial part of the Common Market.¹¹¹
- Undertakings to which member states grant exclusive rights enjoy a dominant position¹¹² and are subject to Article 82 insofar as its application does not obstruct the performance, in law or in fact, of the particular tasks assigned to them (Article 86 (1) and (2) of the EC Treaty). Even after formal abolition of the exclusive rights (liberalization) such undertakings may, in the absence of any realistic alternatives, continue to occupy a dominant position for a certain time period.¹¹³

108. *BRT/SABAM II*, ECJ March 27, 1974, 1974 ECR 313, paras 3–5.

109. *German Post/GZS, Citicorp*, ECJ Feb. 10, 2001, 2001 ECR I-825, para. 38; *French Post*, D. Comm. Oct. 23, 2001, 2002 OJ L 120/19, point 60 (with further references). See also *INNO/ATAB*, ECJ Nov. 16, 1977, 1977 ECR 2115, 2145, para. 35; *British Telecommunications*, ECJ March 20, 1985, 1985 ECR 873, paras 21–22; *SACEM I*, ECJ April 9, 1987, 1987 ECR I 747, para. 5; *SACEM II*, ECJ July 13, 1989, 1989 ECR 2811, paras 10–20; *SACEM III*, ECJ July 13, 1989, 1989 ECR 2521, paras 16–26; *Deutsche Post*, D. Comm. July 25, 2001, 2001 OJ L 331/40, points 88–96.

110. *GEMA I*, D. Comm. June 2, 1971, 1971 OJ L 134/15, 20; *GVL*, ECJ March 2, 1983, 1983 ECR 483, para. 44; *SACEM II*, ECJ July 13, 1989, 1989 ECR 2811, paras 10–20; *SACEM III*, ECJ July 13, 1989, 1989 ECR 2521, paras 16–26.

111. *Bodson – Funeral Services*, ECJ May 4, 1988, 1988 ECR 2479, para. 13 (funeral services enjoying exclusive rights limited to communes); *Crespelle*, ECJ Nov. 5, 1994, 1994 ECR I-5077, para. 17 (approved bovine insemination centers); *Almelo*, ECJ April 27, 1994, 1994 ECR I-1477, para. 42 (regional electricity distributors even if vested with non-exclusive rights); *Porto di Genova (employment)*, D. Comm. Oct. 21, 1997, 1997 OJ L 301/17, points 20–21.

112. *General Motors*, ECJ Nov. 13, 1975, 1975 ECR 1367, paras 5–10; *British Leyland*, ECJ Nov. 11, 1986, 1986 ECR 3263, paras 3–10; *Deutsche Bahn*, CFI Oct. 21, 1997, 1997 ECR II-1689, para. 57; *ITT/Promedia*, CFI July 17, 1998, 1998 ECR II-2937, paras 92–98.

113. Commission Notice on Access in Telecommunications, 1997 OJ C 76/9, para. 71.

101. *GEMA*, D. Comm. June 2, 1971, 1971 OJ L 134/15; *BRT/SABAM*, ECJ March 27, 1974, 1974 ECR 313, paras 3–5.

102. Commission Guidelines on the Application of EC Competition Rules in the Telecommunication Sector, 1991 OJ C 233/2, points 116–120.

103. *Porto di Genova*, ECJ Dec. 10, 1991, 1991 ECR I-5889, paras 13–15.

104. *Airport of Frankfurt*, D. Comm. Jan. 14, 1998, 1998 OJ L 72/30, points 61–68; *Aéroports de Paris II*, D. Comm. June 11, 1998, 1998 OJ L 230/10, points 56–58; *Portuguese Airports*, D. Comm. Feb. 10, 1999, 1999 OJ L 69/3 1, point 21 (*aff'd* ECJ March 29, 2001, 2001 ECR I-2613). See Directive 96/67/EC on ground-handling services, 1996 OJ L 272/36.

105. Commission Notice on the definition of the relevant market, 1997 OJ C-372/3, point 53.

106. See in particular, under the merger control regulation: *BP/Erdölchemie*, D. Comm. March 22, 2001, M.2345, point 40; *Shell/DEA*, D. Comm. Dec. 20, 2001, M.2389, points 22–23.

107. *United Brands*, ECJ Feb. 14, 1978, 1978 ECR 207, para. 65; *Hoffmann-La Roche*, ECJ Feb. 13, 1979, 1979 ECR 461, paras 38, 41; *Alpha Flight/Aéroports de Paris*, D. Comm. June 11, 1998, 1998 OJ L 230/10, point 72; *aff'd* CFI Dec. 12, 2000, 2000 ECR II-3929, para. 147–150 and ECJ Oct. 24, 2002, 2002 ECR I-9297, para. 105; *British Airways*, CFI Dec. 17, 2003, T-219/99, para. 189.

- Factual monopolies, such as *essential facilities* that may be defined as 'a facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business and which cannot be duplicated by any reasonable means.'¹¹⁴ Examples have included electricity grids, telecommunications networks, harbours and airports.¹¹⁵

Importance of Market Share.

A high market share is necessary, though rarely sufficient alone, to prove the existence of a dominant position.¹¹⁶ In the *Hilti* case, the Court of First Instance held that

'in this it is established that Hilti holds a share of between 70 and 80% in the relevant market. Such a share is, in itself, a clear indication of the existence of a dominant position.'¹¹⁷

Market share is therefore always an important factor in assessing dominance.¹¹⁸ In *Hoffmann-La Roche* the Court of Justice explicitly accepted a very high market share of 75% or more maintained over a relatively long period as such strong evidence of dominance that no further investigation is necessary.¹¹⁹ Strong evidence

114. Commission Notice on Access in Telecommunications, 1997 OJ C 76/9, para. 68.

115. See *infra* section D.6 (e) and Chapter VIII.C., E and F.

116. *United Brands*, ECJ Feb. 14, 1978, 1978 ECR 207, para. 107: 'A trader can only be in a dominant position on the market for a product if he has succeeded in winning a large part of this market.'

117. *Hilti*, CFI Dec. 12, 1991, 1991 ECR II-1439, para. 92, *aff'd* ECJ March 2, 1994, 1994 ECR I-667; reaffirmed in *Van den Bergh Foods*, CFI Oct. 23, 2003, T-65/98, paras 90 and 154 (market share of 89%, the remainder being shared between several small suppliers).

118. *Hoffmann-La Roche*, ECJ Feb. 13, 1979, 1979 ECR 461, paras 39-41: 'The existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative but among these factors a highly important one is the existence of very large market shares. An undertaking which has a very large market share and holds it for some time, by means of the volume of production and the scale of the supply which it stands for - without those having much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share - is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, already because of this secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position.' On the other hand, a decline in market shares cannot in itself prove the absence of dominance: *TACA II*, D.Comm. Sept. 16, 1998, 1999 OJ L 95/1, point 533; see, however, *CEWAL*, CFI 8 Oct. 1996, 1996 ECR II-1201, para. 103-104 (progressive erosion of market shares does not exclude dominance).

119. *Hoffmann-La Roche*, ECJ Feb. 13, 1979, 1979 ECR 461, paras 41, 53-56, 59-60 and 67. See *British Plasterboard*, D.Comm. Dec. 5, 1988, 1989 OJ L 10/50, 64, *aff'd* ECJ April 6, 1995, 1995 ECR I-865, and ECJ April 6, 1995, 1995 ECR I-865. However, it has to be noted that under the merger regulation high market shares may, unlike the short-term view on behavioral abuses under Article 82, be compensated or attenuated by a longer-term evaluation of potential competition. See e.g. *Mannesmann-Hoesch*, D.Comm. Nov. 12, 1992, 1993 OJ L 114/34;

of a dominant position is also provided by market shares of between 40% and 55%, but this must be confirmed by data on the relative market shares of competitors and other evidence of competitive conditions on the market and the firm's own structure, resources and conduct.¹²⁰ Further evidence is especially necessary if the definition of the relevant market is complex.¹²¹ In *Hoffmann-La Roche*, the Court found that in one vitamin market a market share varying from year to year between 20 and 50%, with a Japanese competitor accounting for 30% in one year, was insufficient evidence of a dominant position in the absence of other confirmatory data.¹²² Under the merger control regulation the Commission tends to use the Herfindahl-Hirschman Index (HHI) as a first indication of the competitive pressure in the relevant market, in particular for evaluating the relative size of the leading firm compared to its nearest rivals.¹²³

Dominance Unlikely at Market Shares under 25%.

A firm with a market share below 25% is unlikely to have a dominant position.¹²⁴ In *SABA II* the Court of Justice found such a position virtually impossible with a market share of only 10%.¹²⁵ This is confirmed by the combined market share limit of 20-30% which the Commission has laid down for exemption under some of the block exemption regulations, although it is a condition that the parties do not eliminate all competition between them at the marketing level but remain as independent sellers.¹²⁶

Procter & Gamble/Schickedanz, .Comm. June 21, 1994, 1994 OJ L 354/34; *Siemens/Italtel*, D.Comm. Feb. 12, 1995, 1995 OJ L 161; *Nestle/Dalgety*, D.Comm. April 2, 1998, M.1127.

120. *Hoffmann-La Roche*, ECJ Feb. 13, 1979, 1979 ECR 461, paras 50-52 and 61-63 (vitamins A and C, market shares of 47% and 63-66%); *United Brands*, ECJ Feb. 14, 1978, 1978 ECR 207, 282-285, paras 108-129 (market share of 40-45%); *AKZO*, ECJ July 3, 1991 ECR I-3359, para. 60 (50% market share); *Sabena*, D.Comm. Nov. 4, 1988, 1988 OJ L 317/47, 52 (50% market share); Commission Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector, 1998 OJ C 365/2, point 73 (50%); *Irish Sugar*, CFI Oct. 7, 1999, 1999 ECR II-2969, para. 70 (50%); *DSD*, D.Comm. April 20, 2001, 2001 OJ L 166/1, point 94.

121. *Michelin I*, ECJ Nov. 9, 1983, 1983 ECR 3461, paras 32-52.

122. *Hoffmann-La Roche*, ECJ 13 Feb. 1979, 1979 ECR 461, 527-528, paras 57-58, vitamin B₃.

123. Commission Notice on horizontal mergers, points 19-21. See Chapter VI. at pp. 577-578.

124. See recital 32 to Regulation 139/2004 on merger control.

125. *SABA II*, ECJ Oct. 22, 1986, 1986 ECR 3021, paras 85-86. In *Grundig*, D.Comm. July 10, 1985, 1985 OJ L 233/1, 7, the Commission considered that market shares of 23% of the German color TV market held by the Thomson-Brandt group and 33% by Philips-Grundig did not indicate dominance. In *Alsattel/Novasam*, ECJ Oct. 5, 1988, 1988 ECR 5987, paras 11 and 18-19, Alsattel held a market share of one third on a regional market which did not constitute a dominant position within the Common Market or in a substantial part of it.

126. See Article 3 (3) of Regulation 2659/2000 on R&D cooperation agreements (2000 OJ L 304/7).

Further Market Structure Criteria.

Other market structure variables relevant to the question of whether the leading firm on a market has a dominant position are:

- The relative size of the market shares of the leading firm's nearest rivals, or, in other words, the size of its lead over them.¹²⁷
- Competition from surplus production capacity: Low market shares held by competitors are not necessarily indicative of a lack of competition if there is substantial surplus production capacity in the industry.¹²⁸
- Stability of the leader's market share over a period of time: Although the ability to retain a large market share over long periods despite intermittent fierce competition from smaller rivals is not conclusive evidence of dominance because a stable market may reflect competition as well as lack of competition.¹²⁹ Fluctuating market shares are rather an indication of the lack of a dominant position.¹³⁰
- Vertical integration both upstream and downstream.¹³¹
- Existence of well-known trademarks¹³² and a powerful distribution network.¹³³
- Barriers to entry, such as prohibitive transport costs,¹³⁴ government regulation,¹³⁵ technological advantages leading to high technical entry barriers,¹³⁶ and high capital cost of entry.¹³⁷

127. *United Brands*, ECJ Feb. 14, 1978, 1978 ECR 207, paras 108-129; *Hoffmann-La Roche*, ECJ Feb. 13, 1979, 1979 ECR 461, paras 57-58; *Hilti*, D.Comm. Dec. 22, 1987, 1988 OJ L 65/19, 34; *aff'd* CFI Dec. 12, 1991, 1991 ECR II-1439; *British Sugar*, D.Comm. July 18, 1988, 1988 OJ L 284/41, 52-53.

128. *Hoffmann-La Roche*, ECJ Feb. 13, 1979, 1979 ECR 461, paras 33-34, 48. *Cf. Commercial Solvents*, ECJ March 6, 1974, 1974 ECR 223, paras 13-15 (pilot plants for other processes not genuine potential competition).

129. *United Brands*, ECJ Feb. 14, 1978, 1978 ECR 207, paras 113-121; *Hoffmann-La Roche*, ECJ Feb. 13, 1979, 1979 ECR 461, paras 42-44; *ECS/Akzo II*, D.Comm. Dec. 14, 1985, 1985 OJ L 374/1, 18.

130. *Hoffmann-La Roche*, ECJ Feb. 13, 1979, 1979 ECR 461, paras 57-58.

131. *United Brands*, ECJ Feb. 14, 1978, 1978 ECR 207, paras 94-96.

132. *United Brands*, ECJ Feb. 14, 1978, 1978 ECR 207, paras 88-93.

133. *Omnitel Pronto Italiana*, D.Comm. Oct. 4, 1995, 1995 OJ L 270/49, point 16; *Michelin II*, D.Comm. June 20, 2001, 2002 OJ L 143/1, points 193-196, *aff'd* CFI Sept. 30, 2003, T-203/01.

134. *See supra* pp. 393-395.

135. *British Sugar*, D.Comm. July 18, 1988, 1988 OJ L 284/41, 52-53; *British Telecommunications*, ECJ March 20, 1985, 1985 ECR 873, paras 21-22. *See also supra* sections 2 (a) and (b).

136. *Tetra Pak I*, CFI July 10, 1990, 1990 ECR II-309, para. 23; *Hilti*, CFI Dec. 12, 1991, 1991 ECR II-1439, para. 93; *British Sugar*, D.Comm. July 18, 1988, 1988 OJ L 284/41, 52-53.

137. *Hoffmann-La Roche*, ECJ Feb. 13, 1979, 1979 ECR 461, para. 48; *DSD ('Green Dor')*, D.Comm. April 20, 2001, 2001 OJ L 166/1, point 96.

- Mature v. dynamic, rapidly changing markets: On mature markets firms may be better able and more determined to protect a dominant position than on dynamic, rapidly changing markets.¹³⁸
- Countervailing buying power, i.e. the ability of large and sophisticated customers within a reasonable timeframe to resort to credible alternatives if the supplier decides to increase prices or deteriorate the conditions of delivery.¹³⁹ The commercial strength of such customers is capable of counterbalancing the dominant position, provided they absorb a substantial part of the supply.¹⁴⁰
- Product characteristics that tie customers to a particular supplier.¹⁴¹

Relevance of Potential Competition.

Potential competition, although not measurable in terms of market share and therefore not a criterion for defining the relevant market,¹⁴² is likely to reduce market power.¹⁴³ However, the assessment of the abuse of a dominant position under Article 82 must consider the competitive constraints at the time the alleged abuse was committed which includes future competition only if there are relatively short-term effects which are likely to reduce the alleged firm's ability to abuse its market position,¹⁴⁴ whereas the assessment under the merger control regulation includes a prospective analysis of the foreseeable reactions of current and future competitors and consumers.¹⁴⁵ The Commission's prohibition decision in the case *Continental Can* was reversed by the Court of Justice, *inter alia*, because it had not been proved 'that competitors from other sectors of the market for light metal containers are not in a position to enter this market, by simple adaptation, with sufficient strength to create a serious counterweight.'¹⁴⁶

Concept of 'Obligatory Trading Partner'

A dominant position can be inferred if the supply conditions on the relevant market indicate that a firm is an 'obligatory trading partner' for its customers because they depend closely on the supplier and do not have sufficient or reasonable alternative sources of supply.¹⁴⁷ The concept of 'obligatory trading partner' was developed under French law ('*partenaire obligatoire*'). Under Article 8 of Ordon-

138. *Hilti*, CFI Dec. 12, 1991, 1991 ECR II-1439, para. 93.

139. Commission Notice on horizontal mergers, points 64-67.

140. *Tetra Pak II*, CFI Oct. 7, 1999, 1999 ECR II-2969, paras 97-100.

141. *E.g.*, the need for constant quality in plaster deliveries: *British Plasterboard*, D.Comm. Dec. 5, 1988, 1989 OJ L 10/50, 68.

142. *See* Chapter I.C.

143. *See* Commission Notice on horizontal mergers, points 58-60.

144. *UFEX*, CFI May 25, 2000, 2000 ECR II-2167, para. 49.

145. *Airtours*, CFI June 6, 2002, 2002 ECR II-2585, para. 210.

146. *Continental Can*, ECJ Feb. 21, 1973, 1973 ECR 215, para. 33.

147. *Hoffmann-La Roche*, ECJ Feb. 13, 1979, 1979 ECR 461, paras 57-58; *GVZ*, ECJ March 2, 1983, 1983 ECR 483, para. 42. *Cf.* section 20 (2) of the German Act Against Restraints of Competition (GWB): 'relative dominance' of firm for dependent trading partners.

nance No. 86–1243 on Freedom in Pricing and Competition, which is succeeded by Article L.420–2 du Code de Commerce, a dominant position is tantamount to a situation where a client or supplier is economically dependent upon it and which has no equivalent alternative. It is in this sense that the Court of First Instance has applied the ‘obligatory trading partner’ concept. The *Deutsche Bahn* case¹⁴⁸ concerned the application, by the German Railways having a statutory monopoly on the sub-market for rail transport services, of discriminatorily low prices for combined rail and sea transport services if the ports of origin or destination were located in Germany (and not in Belgium or the Netherlands), thereby favouring the German ports. The Court of First Instance stated:

‘that where, as in the present case, the services covered by the sub-market are the subject of a statutory monopoly, placing those seeking the services in a *position of economic dependence on the supplier*, the existence of a dominant position on a distinct market cannot be denied, even if the services provided under a monopoly are linked to a product which is in itself in competition with other products.’ (emphasis added).

The concept of an ‘obligatory trading partner’ is therefore only a means of defining the dominant position in a vertical or conglomerate context. The Commission studied the possibility of employing the concept of ‘obligatory trading partner’ as ‘a supplementary tool’ when considering dominant positions of a vertical or conglomerate nature.¹⁴⁹ In its Guidelines on the Application of the EC Competition Rules in the Telecommunications Sector,¹⁵⁰ the Commission referred to the dependence which ‘could exist when the supplier cannot sell to other customers a substantial part of its production or change a production.’¹⁵¹ However, the Commission has not expressly used the term ‘obligatory trading partner’ in its decisions even when dealing with long-term economic dependence of customers on a supplier. Examples include:

- A monopoly supplier of a raw material needed by a processor.¹⁵²
- A manufacturer of soda ash that concludes long-term exclusive supply contracts with its most important customers.¹⁵³

148. *Deutsche Bahn (German Railways)*, CFI Oct. 21, 1997, 1997 ECR II-1689, para. 57; *aff’d* ECJ April 27, 1999, 1999 ECR I-2387.

149. Sixteenth Report on Competition Policy, point 340.

150. 1991 OJ C 233/2, point 82.

151. ‘Change a production’ probably means shifting production to produce other products.

152. *Commercial Solvents*, ECJ March 6, 1974, 1974 ECR 223, paras 9–18.

153. *Soda Ash – Solvay*, D.Comm. Dec. 19, 1990, 1991 OJ L 152/21, points 56–59, *rev’d* on procedural grounds CFI June 29, 1995, 1995 ECR II-1825 (although the Commission decision does not use the term ‘economic dependence’), and restated in the Commission decision Dec. 13, 2000, 2003 OJ L 10/10.

– A purchaser of non-interruptible gas supplies¹⁵⁴ who depends on regular deliveries.

– A car importer that depends on a car manufacturer that has been assigned the function of issuing conformity certificates stating that a car meets the importing country’s regulatory requirements.¹⁵⁵

– Service providers that may depend on lines leased from a telecommunications monopoly.¹⁵⁶

– A cash register or car manufacturer, for service or repair firms dependent on supplies of its spare parts to carry on their business.¹⁵⁷

– An already established ferry service operator that depends on the continuing access to the port facilities.¹⁵⁸

– Owners of technical interface information needed to permit competitive products to be used with the owner’s system.¹⁵⁹

– A subcontractor or materials processor that has undertaken substantial investment in order to meet the specific needs of his principal (e.g., a car manufacturer) or the specifications of his supplier.¹⁶⁰

Dependence on an ‘obligatory trading partner’ and, consequently, a dominant position has been *denied* under the following circumstances:

- An occasional customer does not ‘depend’ on a particular supplier even during a severe shortage, and therefore Article 82 does not require this supplier to allocate an equitable portion of the available supplies to it, whereas a longstanding

154. *Industrial Gases*, Nineteenth Report on Competition Policy, point 62.

155. *General Motors*, ECJ Nov. 13, 1975, 1975 ECR 1367, paras 4–10; *British Leyland*, ECJ Nov. 11, 1986, 1986 ECR 3263, paras 3–10.

156. *British Telecommunications*, ECJ March 20, 1985, 1985 ECR 873, paras 21–22.

157. *Hugin/Liptons*, ECJ May 31, 1979, 1979 ECR 1869, paras 9–10; *Renault*, ECJ Oct. 5, 1988, 1988 ECR 6039, paras 15–16; *Volvo/Veng*, ECJ Oct. 5, 1988, 1988 ECR 6211, para. 9; *Boosey & Hawkes*, D.Comm. July 29, 1987, 1987 OJ L 286/36,40. See also *United Brands*, ECJ Feb. 14, 1978, 1978 ECR 207, para. 182 (withdrawal of supplies to Olesen, a Danish ripener of bananas).

158. *B&I/Sealink*, D.Comm. (interim measure) June 11, 1992, Twenty-second Report on Competition Policy, point 219. The Commission rejected, however, an interim measure in *Sea Containers/Stena Sealink*, D.Comm. Dec. 21, 1993, 1994 OJ L 15/8.

159. *IBM*, Fourteenth Report on Competition Policy, point 94; *Microsoft*, Twenty-fourth Report on Competition Policy, p. 417.

160. *EUROFIMA*, Third Report on Competition Policy, points 68–69. See *Filtrona/Tabacalera*, Nineteenth Report on Competition Policy, point 61, in which the Commission rejected a complaint by a cigarette filter manufacturer against the monopoly of the Spanish cigarette manufacturer which had begun making all its own filters and had therefore stopped buying from the filter manufacturer. The issue was not reviewed in the appeal as this was judged to be beyond the statute of limitations: *Filtrona*, CFI July 10, 1990, 1990 ECR II-393.

ongoing customer may hold such a right to continued supply of the scarce product, such as in the case of an oil shortage.¹⁶¹

An exhibitor does not depend on a major trade fair organizer if there are alternatives (parallel trade fairs).¹⁶²

Where the economic dependence of customers is the result of long-term exclusive purchasing agreements, the Commission acts against these restraints on turning to alternative supplies under Article 81 in order to reduce the duration and the exclusivity of the agreements and thereby the degree of dependence.¹⁶³

The examples show that the concept of 'obligatory trading partner' is only the other side of the coin of dominance and is not intended to extend the scope of Article 82¹⁶⁴ but rather to corroborate the evidence of a dominant position.¹⁶⁵ The concept should not be used to expand the concept of dominance, but rather to explain it in a specific factual context where a dominant position exists *vis-à-vis* a purchaser that does not have viable alternative sources of supply reasonably available.¹⁶⁶

(b) Firm Structure and Performance

Corroborative Value.

Data on the structure and resources of the firm in question is not sufficient on its own to establish a dominant position, but may corroborate evidence of a dominant position indicated by an analysis of market structure.¹⁶⁷ Relevant factors for assessing the commercial strength of a firm,¹⁶⁸ i.e. its structure and resources, include:

- technological lead over competitors,¹⁶⁹

161. *BP*, ECJ June 29, 1978, 1978 ECR 1513, paras 18–34. See also *Lederle-Praxis Biological*, Twenty-fourth Report on Competition Policy, p. 353.

162. *ANCIDES*, ECJ July 9, 1987, 1987 ECR 3131, paras 12–14.

163. E.g., *Industrial Gases*, Nineteenth Report on Competition Policy, point 62. See also Chapter IV.B. and C.

164. §20 (2) of the German Law on Restraints of Competition is different to the extent that it adds to the provision on abuse of a dominant position (§19) a prohibition that addresses to enterprises on which small or medium-sized suppliers or purchasers depend 'to the extent that sufficient and reasonable possibilities to deal with other enterprises do not exist.'

165. *Michelin II*, D.Comm. June 20, 2001, 2002 OJ L 143/1, points 200–208.

166. However, under national competition laws, such as the French and the German law, the concept of an 'obligatory trading partner' may be broader than the concept of dominance.

167. *Hoffmann-La Roche*, ECJ Feb. 13, 1979, 1979 ECR 461, paras 42–49; *Michelin*, ECJ Nov. 9, 1983, 1983 ECR 3461, paras 53–60.

168. *Irish Sugar*, CFI Oct. 7, 1999, 1999 ECR II-2969, para. 100.

169. *United Brands*, ECJ Feb. 14, 1978, 1978 ECR 207, paras 82–84: 'In the field of technical knowledge, ... UBC keeps on improving the productivity and yield of its plantations ... That is another factor to be borne in mind when considering UBC's position since competing firms

- large production capacity and long-term security of supply that are effectively unattainable by competitors,¹⁷⁰
- management of premises and services which are indispensable to the marketing¹⁷¹ or the exercise of groundhandling services,¹⁷²
- superior access to raw materials,¹⁷³
- diversification of production,¹⁷⁴
- strong presence on adjacent markets,¹⁷⁵ portfolio of products capable of accentuating the market position to the disadvantage of competitors,¹⁷⁶
- vertical integration both upstream and downstream,¹⁷⁷
- existence of well-known trademarks¹⁷⁸ and a powerful distribution network,¹⁷⁹ thereby creating customer preferences,¹⁸⁰ or even dependence,¹⁸¹
- decisive commercial advantages, for example, a well-known trademark,¹⁸² a very strong and well-organized distribution network,¹⁸³ or an integrated transport infrastructure,¹⁸⁴

cannot develop research at a comparable level and are in this respect at a disadvantage compared with the applicant.' See also *Michelin*, ECJ Nov. 9, 1983, 1983 ECR 3461, para. 55; *Tetra Pak I*, D.Comm. July 26, 1988, 1988 OJ L 272/27, 39, *aff'd* CFI Oct. 6, 1994, 1994 ECR II-755; *Hilti*, D.Comm. Dec. 22, 1987, 1988 OJ L 65/19, 34; *aff'd* CFI Dec. 12, 1991, 1991 ECR II-1439; *Michelin II*, D.Comm. June 20, 2001, 2002 OJ L 143/1, points 182–183. Even after the expiration of a patent the patentee may keep a decisive technological advantage: *Racal Decca*, D.Comm. Dec. 21, 1988, 1989 OJ L 43/27, 41.

170. *United Brands*, ECJ Feb. 14, 1978, 1978 ECR 207, paras 69–77.

171. *British Leyland*, ECJ Nov. 11, 1996, 1996 ECR 3263, para. 5.

172. *Aéroports de Paris*, CFI Dec. 12, 2000, 2000 ECR II-3929, para. 138.

173. *United Brands*, ECJ Feb. 14, 1978, 1978 ECR 207, paras 69–77; *British Sugar*, D.Comm. July 18, 1988, 1988 OJ L 284/41, 53; *Soda Ash II*, D.Comm. Dec. 13, 2000, 2003 OJ L 10/10 and 33.

174. *Michelin I*, ECJ Nov. 9, 1983, 1983 ECR 3461, para. 59.

175. *Michelin II*, D.Comm. June 20, 2001, 2002 OJ L 143/1, points 186–190, *aff'd* CFI Sept. 30, 2003, T-203/01.

176. *Michelin I*, Nov. 9, 1983, 1983 ECR 3461, paras 127–151. Under the merger control regulation: *BaByliss*, CFI April 3, 2003, T-114/02, paras 354.

177. *United Brands*, ECJ Feb. 14, 1978, 1978 ECR 207, paras 94–96.

178. *Ibid.*, paras 88–93.

179. *Omnitel Pronto Italia*, D.Comm. Oct. 4, 1995, 1995 OJ L 280/49, para. 16; *AAMS*, CFI Nov. 22, 2001, 2001 ECR II-3413, para. 52, 191–196.

180. *British Sugar*, D.Comm. July 18, 1988, 1988 OJ L 284/41, point 44.

181. *Michelin II*, D.Comm. June 20, 2001, 2001 OJ L 143/1, points 200–208.

182. *United Brands*, ECJ Feb. 14, 1978, 1978 ECR 207, paras 88–93.

183. *Ibid.*, para. 93; *Hilti*, D.Comm. Dec. 22, 1987, 1988 OJ L 65/19, 34; *aff'd* CFI Dec. 12, 1991, 1991 ECR II-1439. See Commission Guidelines on the Application of the EC Competition Rules in the Telecommunications Sector, 1991 OJ C 233/2, para. 80.

184. *United Brands*, ECJ Feb. 14, 1978, 1978 ECR 207, paras 69–96; *United Brands*, D.Comm. Dec. 17, 1975, 1976 OJ L 95/1, 13; *British Sugar*, D.Comm. July 18, 1988, 1988 OJ L 284/41, 53.