Article 102 of the TFEU

Introduction and concept

References

- O'Donoghue, Robert - Padilla, A. Jorge. *The law and economics of article 82 EC*. 1st pub. Oxford : Hart publishing, 2006.
- Bellamy, C., Child, G. European Community Law of Competiton. 6th Ed. London: Sweet & Maxwell, 2008.
- European Commission – Competition

  http://ec.europa.eu/competition/index_en.html

Legislative documents

- **Treaty on the functioning of the European Union – Art. 102** (ex Article 82 EC)
- Non-regulatory documents (soft law):
  - **Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2008)**
  - **Report by the EAGCP „An economic approach to Article 82“ (2005)**
  - **DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (2005)**

Art. 102 TFEU - Introduction

- Article 102 TFEU provides *"the protection of competition on the market as a means of enhancing **consumer welfare** and of ensuring an **efficient allocation of recourses**"*

  (see DG Competition's discussion paper on the application of Article 82 EC)

- The purpose Art. 102 TFEU is to bring about some of the results that would occur **if competition did exist**

- The general basis of Article 102 TFEU is to set **standards for the conduct of a firm with a position of such economic strength which provide the firm with a degree of immunity from the normal disciplining effect of a competitive market**

The main purposes of Art. 102

1. **promoting economic efficiency and welfare** – the prevention of practices that would harm society and consumers through the exercise of market power
   - the controversial question is what kind of welfare should be protected: consumer welfare / producer welfare / total welfare? → Consumer welfare is generally preferred standard under European competition law.
   - **Consumer welfare** = the difference between what is a person willing to pay for a product and the amount he/she is actually required to pay
   - Negative effect of exercise of market power on consumer welfare:
     - it transfers the wealth from consumers to firms
     - it destroys rents by forcing out of the market some consumers with relatively modest valuations
2. **promoting the TFEU's wider objectives**
   - market integration objectives
3. **fairness and protection of small and medium-sized enterprises („SMEs")**
   - Large, well-resourced firms would not unduly hamper the activities of SMEs

Modernization of Art. 102 (ex Art. 82)

- The European Commission adopted several documents which introduce **“more economic approach”** to the assessment of abuses of a dominant position
  - The speech of Commissioner Neelie Kroes (2005):
    - The purpose of the revision is to “*search for sensible “rules” that would enable us to reach preliminary conclusions about when conduct may exclude competition, yet at the same time allow companies to know when they are on safe ground”*
  - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings („Guidance“)
  - Staff Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses by dominant undertakings (2005)
  - Report by the EAGCP – “An economic approach to Article 82”
- Priority is given to so-called **exclusionary abuses**
- The main features of „more economic approach“
  - **Anticompetitive effect x Procompetitive effect**
  - **Effect based approach** (*rule of reason*) rather than “form-based approach” (*per se* prohibition of certain conduct)
  - **Sound economic assessment** of dominant firm´s conduct

Requirements for the application of Art. 102 TFEU

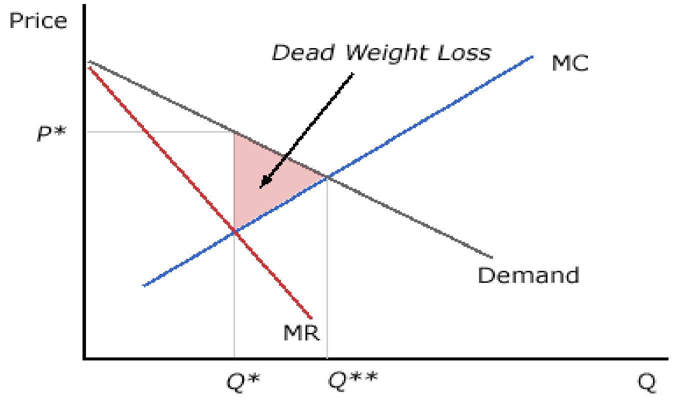
1. an undertaking (a person engaged in an economic activity) with **the dominant position** that is held in **a substantial part of the common market**
2. there is **an abuse**
3. that abuse **must affect trade between Member States**

1. „Dominant position“

- The legal term ***„Dominant position“* vs.** the economic term ***„Monopoly“***
  - **Dominant position** = position of economic strength on a properly defined relevant market
  - **Monopoly** (one of the kinds of *imperfect competition*) = a single firm owns all or nearly all of the market for a given type of product or service
    - **Absolute monopoly** = only one producer produces in the market
    - **Natural monopoly** = a type of monopoly that exists as a result of the high fixed or start-up costs of operating a business in a particular industry → there is great scope for economies of scale to be exploited over a very large range of output
    - **Legal monopoly** = a company which the government has granted exclusive rights to offer a particular service in a specific region
  - ➢ Dominant position is a broader term than monopoly
  - ➢ „Dominant position“ and „monopoly“ are usually used as synonyms

Inefficiencies of monopoly market structure

- **Allocative inefficiency**
  - the existence of **the death weight loss** → the loss in overall welfare (consumer welfare + firm's profit) → market price is above the "competitive" level



- **Production inefficiency**
  - Monopolist does not produce with minimal costs and its output is lower than in the case of firms in perfect competition market
- **X-inefficiency**
  - „quiet life“ of a monopolist – no effort to minimize costs and extending output

„Dominant position“ – possible definitions

- A high degree of immunity from the normal disciplining forces of rivals’ competitive reaction and consumer behavior
- A significant market power which enables undertaking **to charge prices significantly above competitive levels** or to **restrict output significantly below competitive levels** for **a sustained period of time**
- *“dominance relates to* ***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****”* (Case 27/76 *United Brands Co v Commission)*
- *“such a position does not preclude some competition … but enables the undertaking … if not 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”* (Case 85/76 *Hoffman-La Roche*)

Forms of dominance

1. **Single firm dominance**
   - **Dominant seller (supplier)** - the most often case
   - **Dominant buyers** - dominant position on the buying side
   - **“Superdominance”** - a firm is a near-monopolist

2. **Collective dominance**
   - in oligopolistic markets → the cooperation may be prohibited under Art. 101/1 TFEU

Indicators of dominance

1. **Market share**
   - Very high share – in excess of 70% → strong presumption of dominance
   - Large market share – between 50% and 70% → weaker presumption of dominance
   - Shares between 40% and 50% → particularly close examination of possible dominant position is needed
   - Shares below 40% → dominance is not proved
2. **Barriers to entry and expansion**
   - Factors which prevent or hinder other companies from entering a specific market or expanding in this market
3. **Countervailing buying power**
   - The negotiating position of key buyers may influence a potential dominant position of a firm
   - Buying power = *“the ability of a buyer to influence the terms and conditions on which it purchased goods”* (OECD definition)
4. **Evidence of actual competition on the relevant market**
   - Evidence of actual competition in the market may prove that an undertaking cannot exercise dominance

Characteristics specific to the dominant firm

- Access to key inputs or specific knowledge
- Spare capacity
- Vertical integration
- Brand recognition
- Financial and economic strength
- Profitability
- The undertaking's own assessment of its position

2. Abuse

- Only the abuse is banned by antitrust law → creating or having dominant position is not in itself prohibited
- **“Abuse”** = exclusionary or other strategic acts that are designed to extend or maintain the dominant firm’s market power, to the detriment of consumers
- Possible definition of the term “abuse”
  - […] conduct *“which, through recourse to* ***methods different from those governing normal competition*** *in products or services on the basis of transaction of commercial operators, has* ***the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.****”* Case 85/76 Hoffman-La Roche

Types of abuse (generally)

- **exclusionary abuses** – their enforcement is preferred in today´s European competition law
  - unlawful attempts to exclude rivals, cause indirect loss of consumers´ welfare
  - e.g., predatory pricing
- **exploitative abuses**
  - direct exploitation of consumers
  - E.g., excessive prices, unfair contractual terms and conditions
- reprisal abuses
  - a dominant undertaking injures or damages another firm to punish it for having dealt with rivals

Abuse may consist in
(in the wording of Art. 102 TFEU):

1. directly or indirectly imposing **unfair purchase or selling prices or other unfair trading conditions**
   - e.g., excessive pricing
2. **limiting production**, market or technical development to the prejudice of consumers
3. applying **dissimilar conditions to equivalent transaction** with other trading parties, thereby placing them at a competitive disadvantage
   - e.g., price discrimination
4. **making the conclusion of contract subject to acceptance by the other parties of supplementary obligations** which, by their nature or according to commercial usage, have no connection with the subject of such contract
   - e.g., tying, bundling

Concept of abuse

- Abuse can be defined as anything that is **not „legitimate competition“** or **“competition in merits”** or **„normal competition“** or **“genuine undistorted competition”**
  - competition on the basis of price, quality and functionality of products
  - the problem is that some practice may be regarded as undistorted competition in one situation, but not in others – e.g., the low prices
- On the other hand, the aggressive, legitimate competition is encouraged as beneficial
- Dominant firm's conduct may constitute abuse if it has **anti-competitive effect** (actual or likely) → The relevant criterion for the assessment of potential harm to competition (anticompetitive effect) is **consumer harm**
  - Proof of consumer harm
    - Direct impact - reduction of output and increase of prices
    - Indirect impact - can be proved by evidence as market exit, no new entry, increases in the dominant firm's market share at the expense of rivals, …

Anti-competitive effect → „foreclosure“ (1)

- Abusive conduct must have the potential **to influence the position of residual competition on the market →** negative impact on prices, quantities or innovation in the market → **anticompetitive foreclosure**
  - **foreclosure =** *situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers* (Art. 19 of the Guidance)

STOP
FORECLOSURE
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  - there must be a market **distorting foreclosure effect, not only the foreclosure of one or more competitors**

Anti-competitive effect → „foreclosure“ (2)

- The conduct creates no efficiencies but only **raises obstacles to competition**
- **The extend** of the abusive conduct is important
  - foreclosure effect is more likely when the high percentage of total sales are affected by the conduct, the conduct has the long duration,…
- Possible evidence of actual foreclosure
  - Rise of dominant firm´s market share, or slower decline of its market share
  - Actual competitors are marginalized, potential competitors fail to enter the market
- **Objective concept** of abuse – no intent is required
  - Sometimes the proof of intent may be used as an evidence of abusive conduct (e.g., predatory pricing - exclusionary intent)

Special responsibility of a dominant firm

- Dominant firm has a **special responsibility** in connection with its obligation not to abuse its position → dominant undertaking may be prohibited from conduct which is legitimate where it is carried out by non-dominant (smaller) undertakings
- *"Dominant companies have a special responsibility* ***to ensure that the way they do business doesn't prevent competition on the merits and does not harm consumers and innovation****"* (European Competition Commissioner Mario Monti)

3. Effect on trade

- The presence of **effect on trade between Member states** determines whether European competition law or national law is applicable to the particular case
- Legal conditions for effect on trade:
  1. Trade between **at least two Member states** must be affected
  2. There must be an **influence on trade patterns** → the pattern of trade or the pattern of competition structure
  3. The influence may be:
     - **actual/potentia**l → It is sufficient when the dominant firm´s practice is capable of having anticompetitive effect
     - **direct/ indirect**
  4. The influence must be **appreciable**
     - a quantitative element

Objective justification

- A kind of „immunity“ of dominant undertaking
- *„certain types of conduct on the part of a dominant undertaking do not fall within the category of abuse at all“ Opinion of Advocate General Jacobs in Case C-53/03 GlaxoSmithKline [2005]*
- Commission has to assess whether the conduct in question is **indispensable** and **proportionate** to the goal allegedly pursued by the dominant undertaking
- *The reasons for objective justification:*

1. **Objective necessity of the conduct**
   - E.g., the protection of public health or safety
2. **Reasonable steps by a dominant firm to protect its commercial interests**
   - E.g., in the case United Brands, the European Court of Justice stated that any countermeasures must still be proportionate to the threat *„taking into account the economic strength of the undertaking confronting each other“.*
3. ***Efficiency defenses***
   - The conduct of dominant firm may be justified by the fact that it enhances its efficiency. (see below)

Efficiencies – requirements for the application

1. The efficiencies are **the result** of the dominant firm’s conduct
   - The conduct must improve the production or distribution of products or promote technical or economic progress or generate another efficiency → e.g., improvement of the quality of its product, specific cost reduction,…
2. The conduct is **indispensable** to the realization of those efficiencies
   - There must be no less anti-competitive way how to reach the same result
3. The likely efficiencies must **outweigh any likely negative effect** on competitors and consumer welfare in the affected market
4. The conduct **does not eliminate effective competition** by removing all or most existing sources of actual or potential competition
   - It should be assessed whether the short-term efficiency gains will not be outweighed by longer-term losses

Art. 102 of the TFEU

Exclusionary abuses and exploitative abuses

Exclusionary abuses

- The European Commission regards exclusionary abuses as harmful to consumers, because these practices lead to higher prices, worse quality and shorter choice of new or improved goods and services.
- The main kinds of exclusionary abuses:

1. **Predation**
2. **Exclusive dealing**
3. **Tying and bundling**
4. **Refusal to supply**
5. **Margin squeeze**

Price-based exclusionary conducts

- The most common: predatory pricing, margin squeezes
- Generally, vigorous price competition is beneficial to consumers
- The European Commission intervenes when the conduct of dominant firm is capable of hampering competition from competitors which are considered to be as efficient as the dominant firm→ **Equally efficient competitors test**

- Cost benchmarks are used
  - The European Commission usually considers costs:
    - **AVC** = **average variable cost**
    - **AFC** = **average fixed cost**
    - **AAC** = **average avoidable cost** = costs that could have been avoided if the company had not produced a discrete amount of output
    - **LRAIC** = **long-run average incremental cost** – average of all the (fixed + variable) costs that a company incurs to produce a particular product

1. Predation

- A dominant undertaking engages in predatory conduct by **deliberately incurring losses** or **foregoing profits in the short term ("sacrifice")**, so as to foreclose or be likely to foreclose one or more of its actual or potential competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm.
- **Predatory pricing** = a dominant undertaking charge very low prices (below cost prices) to its consumers
- **„Sacrifice"** – a dominant undertaking by **charging a lower price** for all or a particular part of its output over the relevant time period, or by **expanding its output** over the relevant time period, incurred or incurring losses that could have been avoided
- Usually, pricing below ***LRAIC*** is capable of foreclosing as efficient competitors from the market
- It is unlikely that predatory pricing could create any efficiencies
  - Low prices may help an undertaking to achieve economies of scale or to expand in the market.

Case C-202/07 P - *France Telecom v. Commission* (1)

- European Court of Justice confirmed Court of the First instance decision and European Commission decision
- Wanadoo (at the time a subsidiary of France Télécom) was fined for charging **predatory (below cost) prices** for its Pack eXtense and Wanadoo ADSL services, as part of a plan aimed at excluding competitors from the market for high speed internet access
- the Court confirmed rules applied in the previous cases **AKZO** and **Tetra Pak**:

  *„[…]prices below **average variable costs** give grounds for assuming that a pricing practice is eliminatory and that, if the prices are **below average total costs but above average variable costs**, those prices must be regarded as abusive if they are determined as **part of a plan for eliminating a competitor**“*

Case C-202/07 P - *France Telecom v. Commission* (2)

- A plan to eliminate competition must be established on the basis of sound and consistent evidence → the Court found number of documents which attest to the existence of dominant firm's strategy of 'pre-emption' for the high-speed market
- **Recoupment test**
  - Proof of recoupment of losses from the time of „predation“ is not a precondition to making a finding of predatory pricing.
  - The rule from Tetra Pak case
    - *„it would not be appropriate, in the circumstances of the present case, to require in addition proof that Tetra Pak had a realistic chance of recouping its losses. It must be possible to penalise predatory pricing whenever there is a risk that competitors will be eliminated. “*
  - **x** Recoupment is required in U.S. case law for proving the existence of predatory pricing.

2. Exclusive dealing

- A dominant undertaking hinders its competitors from selling to customers through use of **exclusive purchasing obligations** or **conditional rebates**
- **Exclusive purchasing →** a dominant firm requires a customer on a particular market to purchase exclusively or to a large extent only from the dominant undertaking
- **Rebates →** *„Rebates and bonuses are normal commercial practices but, as confirmed by the European court, some types are illegal when they are granted by a company in a dominant position and have an exclusionary effect.“* (Commissioner Mario Monti)
  - **conditional rebates** – they are granted to customers to reward them for a particular form of purchasing behavior
    - retroactive rebates /incremental rebates/fidelity rebates
  - assessment of potential anticompetitive nature of rebates: **the effective price** should be consider
    - Effective price = the normal (list) price less the rebate the customer loses by switching, calculated over the relevant range of sales and in the relevant period of time.
    - Lower effective price (in comparison with the average price of dominant firm) → stronger loyalty enhancing effect
    - Effective price below the level of AAC → the rebate scheme is capable of foreclosing even **equally efficient competitors**
    - Effective price between AAC and LRAIC → the detailed investigation of dominant firm’s conduct is needed

Michelin II - Conditional rebates - Case T-203/01

- Michelin abused its dominant position in the market for new replacement tyres + in the market for retreaded tyres by establishing of a complicated system of loyalty-inducing rebates.

- Assessment of the nature of rebates:
  - It has to be investigated „*whether, in providing an advantage not based on any economic service justifying it, the rebates* ***tend to remove or restrict the buyer's freedom to choose his sources of supply***, ***to bar competitors from access to the market***, *to apply* ***dissimilar conditions to equivalent transactions*** *with other trading parties or to strengthen the dominant position by distorting competition*“
  - **Loyalty-inducing effect**

    „*[…] any system under which discounts are granted according to the quantities sold during a relatively long reference period has the inherent effect, at the end of that period, of increasing pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the expected loss for the entire period.*“

3. Tying and bundling

- **Tying** = customer that purchase one product (the tying product) are required also to purchase another product from the dominant undertaking (the tied product)
- **Bundling** = products are offered and priced in a „bundle“ by the dominant undertaking

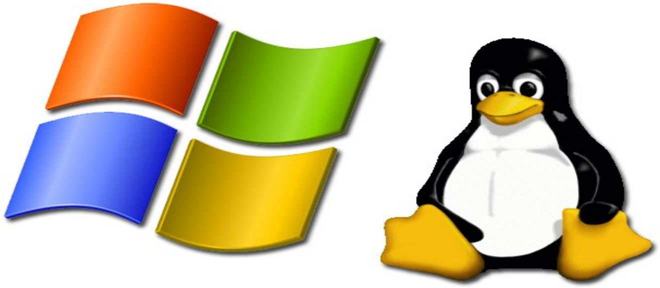
  - **pure bundling** = the products are only sold jointly in fixed proportions
  - **mixed bundling** = the products are also made available separately, but the sum of the prices when sold separately is higher than the bundled price
  - **Multi-product rebates** – they may be anticompetitive if they are so large that equally efficient competitors offering only some of the products in bundle cannot compete against the discounted bundle

Tying and bundling - conditions

- The tying and tied products are **distinct products**
  - The distinctiveness of the products depends on consumer demand, the products are regarded as distinct if, in the absence of tying or bundling, the most of consumers would purchase the tying product without also buying tied product from the same supplier
- The tying practice is likely to lead to **anticompetitive foreclosure**
  - The tied market, the tying market or both of them may be affected by this kind of dominant firm's conduct
- **Potential efficiencies**
  - Savings in production or distribution that would benefit consumers.
  - Transaction cost of consumers may be reduced.

Tying and bundling - Microsoft case

- Microsoft v Commission - Case T 201/04
- Microsoft = near monopoly position in the market for PC operating systems



- Microsoft abused its dominant position by **tying** its **Windows Media Player** (WMP), a product where it faced competition, with its ubiquitous **Windows operating system**.
  - *„[…] the investigation concluded that the ubiquity which was immediately afforded to WMP as a result of it being tied with the Windows PC OS artificially reduces the incentives of music, film and other media companies, as well software developers and content providers to develop their offerings to competing media players.“*
- As a remedy, Microsoft was required to offer to PC manufacturers a version of its Windows client PC operating system without WMP.

4. Refusal to supply

- Any undertaking (whether dominant or not) should have the right to choose its trading partners **x** But a dominant undertaking has a "special responsibility" not to abuse its position
- Types of refusal to supply:
  - Refusal to supply products to existing or new customers, refusal to license intellectual property rights, refusal to grant access to an „essential facility" or a network, …

- The conditions under that „refusal to supply" constitutes an abuse
  1. **Objective necessity of the inputs** - a product or a service is objectively necessary to be able to compete effectively on a downstream market
  2. **Elimination of effective competition** in the downstream market
  3. **Consumer harm**

Microsoft – Case T 201/04

- Microsoft had refused Sun Microsystems (another US company) to provide interface information necessary for Sun to be able to develop products that would "talk" properly with the ubiquitous Windows PCs, and hence be able to compete on an equal footing in the market for work group server operating systems.
- The non-disclosures by Microsoft were part of a **broader strategy designed to shut competitors out of the market**.

  → Microsoft abused its market power by deliberately **restricting interoperability between Windows PCs and non-Microsoft work group servers**.
- As a remedy, Microsoft was required to disclose complete and accurate interface documentation which would allow non-Microsoft work group servers to achieve full interoperability with Windows PCs and servers

5) Margin squeezes

- May be regarded as refusal to supply or as predatory pricing
- Margin squeeze may be used by **vertically integrated** dominant firm that is **an essential supplier of inputs** necessary for producers in the downstream market

- **Margin squeeze** = an insufficient margin between the price of an “upstream” product (A) and the price of a “downstream” product (A+B) of which A is a component.
  - ➢ The dominant firm could rise its upstream price (input price) to levels at which rivals could not sustain a profit downstream.
  - ➢ The dominant firm lowers its price (below costs) in the downstream market.
  - ➢ The dominant firm uses its position as an essential supplier to its rivals and a seller in the downstream market to cause a reduction of downstream competitors´ profit margin.

Telefónica

- **Wanadoo España vs. Telefónica -** Case COMP/38.784

- Telefónica had a dominant position in the Spanish broadband market
- ADSL was the main technology used in Spain to provide broadband internet access services. As the only Spanish telecommunications operator that has a nation-wide fixed telephone network, Telefónica controls the entire ADSL value chain in Spain.
- Exclusionary conduct: unfair prices in the form of a **margin squeeze** between the **prices** for wholesale broadband access it charged to competitors and the **retail prices** it charged to its own customers
- Competitors were forced to make losses if they wanted to match Telefónica's retail prices

Telefónica – methods for the assessment of margin squeeze

- **Equally efficient competitor test**
  - Abusive nature of „margin squeeze“ may be demonstrated *„by showing that the dominant company' s own downstream operations could not trade profitably on the basis of the upstream price charged to its competitors by the upstream operating arm of the dominant company“*
- **The cost standard** - long run average incremental costs (LRAIC)
  - **LRAIC** of a dominant firm in the downstream market **>** dominant firm's downstream price **minus** dominant firm's wholesale price → margin squeeze
- **The profitability analysis** - the Commission has analyzed profitability on the basis of two methods
  - period-by-period method
  - discounted cash flow ("DCF") method
- **The level of aggregation**
  - the margin squeeze has been conducted on the basis of a mix of the retail services marketed by Telefónica
- **Replicability of the downstream prices**
  - Telefónica's retail prices must be replicable by an equally efficient operator on the basis of at least one Telefónica's product in each relevant wholesale market

Exploitative conduct

- Direct exploitation of market power → it leads to the decrease of consumer welfare but not necessary to harm of dominant firm's rivals

- Types of exploitative abuses:
  - Excessive pricing
  - Other unfair terms and conditions
    - Unfair and exploitative contract terms
    - Abuse of monopsony purchasing power

Excessive pricing

- **Excessive = unfairly high** price
- May have a form of refusal to deal (through unreasonably high upstream price) or margin squeeze
- There is no generally accepted definition of what an unfair – excessive price is.
- May be defined through cost-based theory.
- There are only few decisions defining excessive pricing as abuse of a dominant position

- **x** in U.S. case law – excessive prices is not regarded as anticompetitive → excessive prices of a lawful monopolist are considered to be pro-competitive because they encourage innovation and new entry into the market (U.S. Supreme Court *Verizon Communication, Inc. v. Law Office of Curtis V. Trinko, LLP)*

Excessive prices - definitions

- **United Brands** – Case 27/76
  - United Brands was the largest banana company in the world through its Chiquita brand of bananas

  - The conduct consisted in *“charging a price which is excessive because it has no reasonable relation to the* ***economic value*** *of the product supplied […]“*
  - Two stages test:
    - 1) is the difference between the costs actually incurred and the price charged excessive?
    - If the question is affirmative – 2) is the price unfair in itself or in comparison with competing products?
    - **x** the mere fact that revenues may exceed costs actually incurred is not sufficient to conclude that the difference is „excessive“

Excessive pricing – Benchmarks (1)

- Abusive nature of „excessive pricing“ may be assessed by using appropriate **benchmark :**

a) **Price-cost comparison** – it is difficult to determine which kind of cost should be used

b) **Price comparison across markets or competitors**

  - **United Brands** - the price of Chiquita bananas was about 7% higher than the price of other bananas sellers – ECJ stated that the difference is not sufficient as an evidence of excessive pricing

c) **Comparison over time**

- **British Leyland** - Case 226/84 - British Leyland (held a legal monopoly to issue national certificates of conformity for vehicles in GB) abused its dominant position by charging unfair prices for type approval certificate
  - The Court looked at the evolution of prices over time → fees had increase 600% during the period under examination → **sufficient proof for abuse of a dominant position in form of excessive pricing**

Excessive pricing – Benchmarks (2)

d) **Geographic price comparison**

- **United Brands –** ECJ stated that prices may differ across the regions for objective reasons – a dominant firm is not obliged to adopt uniform pricing in each Member State
- **Port of Helsingborg –** Case COMP/A.36.568/D3
  - Port Helsingborg - was used for short ferry crossings between Denmark and Sweden – levied excessive charges in comparison with other ports
  - The European Commission („EC") stated that geographic price comparison is not appropriate in this case because of the differences in conditions and cost structure of different ports
  - The EC considered whether the price is excessive in itself → EC considered **the economic value** of the service provided
  - *„In assessing the "economic value of the product supplied" the Commission considered […] that account must be taken not only of the costs actually incurred by the port in providing these services, but also **additional costs** and **other factors** which are not reflected in the audited profits and losses of HHAB"*
  - Other factors for the consideration of the economic value: sunk costs, location of the port of Helsingborg, opprotunity costs for the city Helsingborg

Other types of exploitative abuses

- **Unfair and exploitative contract terms**
  - **Unfair trading conditions**
  - But the role of Art. 102 TFEU is limited on this field
- **Abuse of monopsony purchasing power** (=market power on the buying side on the market)
  - it relates to ability of a dominant purchaser of goods or services
    - to pay a too low price for inputs purchased
    - to pay a too high price for inputs → ***overbuying*** → that may lead to a loss in the output market („predatory overbuying“) or dominant buyer may remain profitable but use overpaying as a mean of raising rival´s costs