

# Art. 102 TFEU - concept of dominance

Dominance constitutes a fundamental concept of Competition Law. It is a legal concept but at the same time in order to be assessed, it is necessary to take in to account some economic considerations. It is also widely accepted that the extent of harmful effects on consumer welfare, to which a particular practice can lead, depends considerably on the degree of market power that one or more firms have or will have in the market.[1]

In European Competition Law, as stated in Article 102 of the TFEU, the fact that an undertaking has a dominant position in the market does not constitute itself an infringement of competition law. What constitutes an infringement is the abuse of this dominant position. In addition, the dominant undertakings have a "special responsibility" not to allow their conduct to induce distortion of competition.[2]

In economics, a monopolist is able to profitably raise the price of his products or services above the competitive level over a period of time and reduce accordingly the quantity produced. In doing so, he will provoke severe social costs, known as "deadweight losses" because there are some consumers who would be willing to buy the product at a price which is high enough to cover the costs, but due to the monopolistic price they are being derived of this opportunity[3]. Moreover, the monopolist, due to the lack of competition suppresses innovation, reduces the quality and variety of products and finally deprives the consumer of choices. This ability of an undertaking to increase prices above competitive level without the consequence of supply or demand substitution is described by economists as substantial market power.

The "dominant position" under 102 of TFEU does not necessarily refer to a monopoly but also to undertakings with certain degree of market power. The process of determining the degree of market power required for the application of Article 102 TFEU is quite a difficult task because economics does not provide the answer to the question of how much market power is required in order for an undertaking to be considered as dominant.[4]

The ECJ's case-law describes the concept of dominance not focussing on power over price but rather on the ability of the undertaking to prevent effective competition and to behave to an appreciable effect independently of its competitors, its customers and ultimately of its consumers"[5]. In *Hoffman-La Roche* case, the Court made the definition of dominance even broader as it stated that a dominant position does not preclude some competition but the dominant undertaking should have the ability to influence the conditions of competition occurring in the market.[6] In addition, high market shares can be also evidence for the existence of market power[7].

The concept of "independence" that ECJ uses has often been criticized by scholars as wider than the economic concept of power over price and particularly because independence "to an appreciable extent" is compatible with continuing competition[8]. It may be possible that what ECJ really meant is that a dominant firm can raise prices higher than a non-dominant firm.

In the Guidance Paper on Article 102 the Commission repeats the definition of the case law but explains also dominance as "substantial market power" and links it to the economic definition of profitably raising prices above the competitive level for a significant period of time.[9] The Commission does not provide any market threshold below which dominance cannot be established. In the Paper, it is just stated that a firm with market share below 40% is not likely to be dominant. It is also suggested that in order for market power to be assessed, three factors must be taken into consideration: the constraints imposed by existed competitors, the constraints imposed by credible threat of expansion of the actual competitors or entry of potential competitors and also constraints imposed by the bargaining strength of costumers.

In conclusion, the Court focuses a lot on commercial power and on the ability of the firms to be efficient and cope with the challenges of competition and not that much on the ability to reduce output and increase prices. This thinking of the Court is mainly influenced by the ordoliberal model in which the aim of competition law is the protection of individual freedom as a value in itself[10]. However, the Discussion Paper provides some chances that dominance starts to be considered under the economic theory of substantial economic power and this is positive enough because there is a departure from ordoliberalism which cares only about the desirable process of the competition and not for its substantial results and its efficiencies.

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[1] D. Bailey and R. Whish, *Competition Law* (Oxford, 8th Ed. 2015) p.2, 26

[2] ECJ, Case 322/81 *Michelin v Commission* [1985], para 57

[3] P.R. Willis, *Introduction to EU Competition Law* (LLP, London Singapore 2005) p.22

[4] A. Jones and B. Sufrin, *EC Competition Law* (Oxford, 3<sup>rd</sup> Ed. 2008) p.303,304

[5] ECJ, Case 27/76 *United Brands Co and United Brands Continental BV v Commission*[1978] para 65

[6] ECJ, Case 85/76, *Hoffman-La Roche & Co AG v Commission* [1979] para 38-39

[7] ECJ, Case 62/86, *Akzo v Commission* [1991] para 60

[8] A. Jones and B. Sufrin, *EC Competition Law* (Oxford, 3<sup>rd</sup> Ed. 2008) p.307

[9] European Commission. Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, (2009/C 45/02), 24 February 2009, para 10-11.

[10] G. Monti. "The Concept of Dominance in Article 82" . *European Competition Journal*, Vol. 2, July 2006 Available at SSRN: <http://ssrn.com/abstract=1118385>, last accessed: 16.2.2016





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