

Horizontally related markets  
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# HORIZONTALLY RELATED MARKETS

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TRAINING OF NATIONAL JUDGES IN EU COMPETITION LAW

**ECONOMIC SESSION**

# OUTLINE OF THE PRESENTATION

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  - Abuse
- AIM OF THE PRESENTATION
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# INTRODUCTORY NOTIONS

- Relevant market
  - Product market
  - Geographical market
  - \*temporal market
- Delimiting the relevant market is not an end in itself. Definition is undertaken as the first step in every potential unlawful conduct assessment in order to:
  - Determine which undertakings do participate in the market
  - Weight of those undertakings

# INTRODUCTORY NOTIONS

- Relevance of the market of reference for:
  - (Collusion):
    - Horizontal/vertical agreements
  - Abuse of dominance
    - Identify undertakings participating in that market and their weight in that market
    - Depending on how narrowly/widely markets are defined dominant positions will be more or less likely to be found
  - Mergers
    - Monopolize the market where undertakings are merging

# INTRODUCTORY NOTIONS

- Once Competition Authorities or Courts have established the relevant market and the weight of undertakings participating in that market second step of the anticompetitive conduct assessment is analyse whether there is and **abusive conduct**
- **Abusive conduct:** No legal definition/ECJ definition
  - Hoffman LaRoche & Michelin “The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those governing normal competition in products or services based on trader’s performance, have the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition”
  - Summing up: conduct that deviates from what is normal, fair or undistorted competition/conduct that deviates from “competition on the merits”

# AIM OF THE PRESENTATION

Trying to show that Competition authorities and Courts should take a broader look at the market and go beyond the boundaries of the relevant market in order to more accurately (sounder economic analysis) establish the existence of:

- A dominant position
- An abuse

# CONNECTED MARKETS

- Common situation:
  - Dominance should be considered and determined in the relevant market
  - Anticompetitive mergers or anticompetitive abusive practices cause negative effects in the very same relevant market to which undertakings under scrutiny belong.
    - If an undertaking sets an excessive price → affects primarily the market of the product with the excessive price
    - If two undertakings merge, competition may be restricted in the market where they merge



# CONNECTED MARKETS

- However, there are specific circumstances where there might be a **dissociation** between several elements.
- **DOMINANT POSITION, ABUSE AND EFFECTS OF THE ABUSE** may take place in different markets
  - Reason:
    - They can be touched by conducts undertaken in a different market because they are close to the relevant market
    - They have an influence in the position of certain firms that have a high market share of the relevant market giving or taking economic power necessary to determine the existence of a dominant position
  - **RELATED/CONNECTED/NEIGHBOURING MARKETS**
    - They are **different markets** that fall outside the already defined relevant market

# CONNECTED MARKETS

It is not a requirement for enforcing the prohibition that all three elements meet in the same relevant market → Telia Sonera (C-52/09) judgement the court said that Art. 102 provides for no guidance concerning the market in which the abuse has to take place.

- Commission Notice on the definition of relevant market for the purposes of Community competition law
- Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings

# CONNECTED MARKETS

“There are certain areas where the application of the principles above has to be undertaken with care. This is the case when considering primary and secondary markets, in particular, when the behaviour of undertakings at a point in time has to be analysed pursuant to Article 86. The method of defining markets in these cases is the same, i.e. assessing the responses of customers based on their purchasing decisions to relative price changes, **but taking into account as well, constraints on substitution imposed by conditions in the connected markets.** A narrow definition of market for secondary products, for instance, spare parts, may result when compatibility with the primary product is important. Problems of finding compatible secondary products together with the existence of high prices and a long lifetime of the primary products may render relative price increases of secondary products profitable. A different market definition may result if significant substitution between secondary products is possible or if the characteristics of the primary products make quick and direct consumer responses to relative price increases of the secondary products feasible” (COMMISSION NOTICE on the definition of relevant market for the purposes of Community competition law, para 56)

# CONNECTED MARKETS

- “The Commission may **also pursue predatory practices by dominant undertakings on secondary markets on which they are not yet dominant.** In particular, the Commission will be more likely to find such an abuse in sectors where activities are protected by a legal monopoly. While the dominant undertaking does not need to engage in predatory conduct to protect its dominant position in the market protected by legal monopoly, it may use the profits gained in the monopoly market to cross-subsidize its activities in another market and thereby threaten to eliminate effective competition in that other market” (Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, footnote 39).

# CONNECTED MARKETS

Relevant Market	Connected Market
Dominance + Abuse + Benefits	
Dominance + Abuse	Benefits
Dominance + Benefits	Abuse
Dominance	Abuse + Benefits

# CONNECTED MARKETS

Name suggests relations of closeness, connection, association or bond between them that makes it rational from an economic perspective to take a look at them:

- They can be influenced by what happens in the relevant market
- Relevant market can be affected by what happens in the connected market

Types of related markets from a position/location perspective

- Vertically related markets
  - Upstream or downstream. Located in different levels of the supply or production chain. Aftermarkets\*.
    - Aftermarket is the expression used to describe a market of complementary products (secondary) that are to be bought after main one (primary) to which they relate.
      - In a supply chain: providers of spare parts of a product
  - **Horizontally related markets**

# CONNECTED MARKETS

Nevertheless, it will be wrong to assume that such markets should always be considered independent markets.

- It may be that consumers meet the decision of buying a primary product, will take into account the price of the secondary product that will be needed in the future → whole life costing
  - This happens when prices in the secondary market act as a constraint when making the decision for buying the primary product
  - E.g. Gasoil/electricity/gas for cars
  - E.g. Commission Case No IV/34.330 Kyocera/Pelikan where Kyocera was not considered to hold a dominant position in the tonner cartridges (cartuchos) for printers since consumers took the price of the tonner into account when deciding which printer to buy.
- Question of how far should competition authorities go in delimiting the relevant market.
- This issue has a decisive impact in the assessment of abusive practices such as tying or bundling.
  - E.g. Info-Lab/Ricoh, Commission declines to accept that there was a separate market for empty toner cartridges compatible with a specific photocopy machine. Info-Lab produced toner for photocopiers and alleged that Ricoh, manufacturer of photocopiers, abused its dominant position by refusing to supply Info-Lab with empty toner cartridges for Ricoh machines which it could refill and sell.
    - It was not a separate product market

# CONNECTED MARKETS

## HORIZONTALLY RELATED MARKETS

- They are located in at the same level in the production or supply chain
- They may have two types of relations towards the relevant market:
  - **Substitutable/ Interchangeable\***
    - Two alternative goods that could be used for the same purpose.
    - Not too close to be considered part of the market
    - Careful with the cellophane fallacy and other problematic fallacies when delimiting the markets too widely or too narrowly
    - a positive cross elasticity of demand
  - **Complementary\*\***
    - They are usually implemented or used together
      - DVD player and DVD disks to play in it, Tennis balls and tennis rackets, Mobile phones and mobile phone credit for making calls, iPhone and Apps to use with an iPhone, Petrol and car.
    - Goods with a negative cross elasticity of demand, in contrast to a substitute goods
      - a good's demand is increased when the price of another goods is decreased



# CONNECTED MARKETS

## INTERCHANGEABILITY\*

- Perfect Substitutes → belong to the same product market
  - Two goods are perfect substitutes if the utility consumers get from one good is the same as another.
  - Therefore, in theory, if one good was more expensive, there would be no demand as people would buy the cheaper alternative.
- Close Substitute Goods → probably will belong to the same product market
  - If two goods are close substitutes, there will be a high cross-elasticity of demand.
  - To consumers, there is little difference between the two goods.
- Weak Substitute Goods → lower probability to belong to the same market
  - If goods are weak substitutes, there will be a low cross elasticity of demand.
  - If the price of margarine increases 10%, demand for butter may rise 2%, same happens to the relation of Oil/butter

# CONNECTED MARKETS

## COMPLEMENTARITY\*\*

- Complementary goods will have a negative cross elasticity of demand. If the price of one good increases, demand for both complementary goods will fall. The more closely linked the goods are, the higher will be the cross elasticity of demand.
- If they are weak complementary goods then there will be a low cross elasticity of demand. For example, if the price of coffee increases it will only have a marginal impact on reducing demand for tea and consumption of milk or sugar.
- However, if the price of iPhones increases, it will negatively affect sales and therefore reduce demand for iPhone cases.

# CASE STUDY: AIRTOURS

Merger proposed by two British companies (Airtours and First Choice): UK companies with core activities in tour operating, travel agencies, and charter airlines.

- DEFINITION OF RELEVANT MARKET: only short-haul destinations (both UK domestic holidays and long haul destinations where excluded )
- CONNECTED MARKETS:
  - Commission explains the importance of the distribution channel (travel agencies) and the supply of airseats for the tour operators. Thus the Commission highlights vertical links to be important for evaluating the horizontal effects of the proposed merger.
  - Other horizontally connected markets that were not considered as important for the Commission as the vertical connected markets: markets for long-haul, the hotel and accommodation market, the domestic market, the market for other types of holidays, the markets for other types of leisure, the advertisement market etc. Commission provided data showing that these markets do not play a vital role for the assessment of the merger and do therefore not belong to the relevant market “relevant market” in a broad sense. Therefore, the relevant market cluster consists of three markets.
- The merger did not lead to a dominant position for the merged firm on the relevant market defined in the traditional way.
- However, and this is the reason why the Commission denied the merger, it would lead to a situation of **collective dominance** in short-haul foreign package holidays.
- In this analysis, connected markets play a decisive role: control of airline seats and the agency sector by the large firms create a major barrier to entry. players can take advantage of their position on the connected markets (distribution and airseats) to leverage market power to the relevant market.

# CASE STUDY: AIRTOURS

Court of First Instance overturns Commission decision: decided that Commission erred when establishing that the merger will grant a collective dominant position.

- Dominant position can be either from one undertaking or a **collective dominance**:
- Check whether effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular because of factors giving rise to a connection between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers'.
- Three conditions need to be met:
  - Each member of the oligopoly must have the ability to know the other members' behaviour in order to monitor
  - Tacit coordination strategy must be sustainable over time. Retaliation in case of deviation (deterrence tools to ensure long term incentive)
  - **Future competitors' conduct would not jeopardise results expected.**

# CASE STUDY: AIRTOURS

## **Future competitors' conduct would not jeopardise results expected**

- **members of the alleged dominant oligopoly do not control individually or collectively the markets for the raw materials or services necessary for preparing and distributing the product concerned.**
- The applicant claims that the Commission underestimated the likely reaction of smaller operators (also referred to as 'independent' or 'secondary' tour operators), **potential competitors (in particular those offering long-haul foreign package holidays)** and **consumers** as a countervailing force capable of counter-acting the creation of a collective dominant position.
  - Consider whether, were the large tour operators to restrict capacity put on to the market to anti-competitive levels, tour operators in other countries of the Community **or in the United Kingdom long-haul foreign package holiday market** would be capable of entering the United Kingdom short-haul foreign package holiday market.
  - What is important here is whether there is scope for such competitors to take advantage of opportunities afforded by the large operators restricting capacity put onto the relevant market to below a competitive level. In that context, the Commission cannot contend that, merely because they would have difficulty expanding beyond a certain size, tour operators offering other products (such as long-haul foreign package holidays) or carrying on business in other countries could not enter the United Kingdom short-haul foreign package holiday market fast and effectively if the large tour operators decided to restrict competition significantly.
  - fact that long-haul foreign package holidays are becoming increasingly attractive to consumers or the fact that the market studies cited by the applicant in its reply to the statement of objections draw attention to the tendency of United Kingdom consumers to go further afield for their holidays, in particular to the other side of the Atlantic. That fact lends weight to the applicant's
  - proposition that demand might partly switch to other types of holidays if there were sufficient price convergence, inasmuch as the studies concerned clearly show that consumer tastes are evolving and that consumers do not appear in any way to regard the Mediterranean coast as the only place to go on holiday.

# CASE STUDY: TETRA PAK

## Parties:

- Tetra Pak (applicant)
  - Switzerland
  - Activity: coordinates the policy of a group of companies, originally Swedish, which has acquired a global dimension. The Tetra Pak group specializes in equipment for the packaging of liquid or semi-liquid food products in cartons. Its activities cover both the aseptic and the non-aseptic packaging sectors. They consist essentially in manufacturing cartons and carton-filling machines.
- COMMISSION (defendant)

Topic: ABUSE OF DOMINANCE

DECISION COURT: ECJ (C-333/94 P - Tetra Pak/Comisión)

# CASE STUDY: TETRA PAK

- There are two/four different markets for packaging products.
  - 79% of cartons were used for packaging for aseptic products (milk and other liquid dairy products).
    - Tetra pak manufactures tetra brick system for packaging UHT milk. Only has one competitor in the market. Possession of and aseptic filling technique is key for entering the market for machines and cartons.
  - 16% were used for packaging fruit juice and the other 5% for other products.
    - Less sophisticated tools. Tetra Rex is in direct competition with Pure Pak.
- Tetra pak has contracts for provision and lease of cartons and machines.

# CASE STUDY: TETRA PAK

- Court declared that Tetra Pak infringed art. 102 by tying practices and predatory pricing in the market for **non-aseptic liquid repackaging machinery and non aseptic cartons**.
- It was **not dominant in this market**, but the abusive conduct was intended to benefit its position in that market.
- Tetra pak was dominant in the horizontally related market for aseptic machinery and cartons.
- The CJ held that in special circumstances, there could be an abuse of a dominant position where a specific conduct on a market distinct from the dominated market produces effects on that distinct market.
- The Court described the close associative links between the aseptic and non aseptic markets which amounted to sufficiently circumstances to enforce art. 102.
  - Tetra Pak had customers in both markets
  - Had a favoured status in the non-dominated market because of its position in the dominated one
  - It could concentrate its efforts on the non-aseptic markets



# CASE STUDY: DE POST-LA POST

- De Post-la Post → Commission decided on the conduct undertaken by the Belgian post office
- There are “two relevant markets” in the case:
  - market for the general letter post service intended for correspondence with the general public (B2B normal mail is also included here)
    - De Post had a dominant position in the delivery of normal letters market (protected by a postal monopoly)
  - A business-to-business mail service provided to a closed group of users
- La Post abused its dominant position in the 1st market in order to eliminate a competitor in the business-to-business neighbor market
  - Granting of a preferential tariff for business-to-private mail covered by the monopoly subject to the acceptance of the additional business-to-business mail service

# CASE STUDY: BRITISH GYPSUM V COMMISSION

- BG was dominant in the plasterboard market, but not dominant in the plaster market.
- Among other abuses
  - at a time of temporary shortage for building plasters British Gypsum had implemented a policy of more favourable plaster delivery periods for merchants in Britain who stocked exclusively British Gypsum plasterboard.
  - scheme of fidelity payments to major builders merchants in Britain who agreed to obtain plasterboard supplies exclusively from British Gypsum
- This abuse was committed in the non-dominanted market for excluding competitors in the connected market

# CASE STUDY: AB INBEV

- The European Commission has informed AB InBev of its preliminary view that the company has abused its dominant position on the Belgian beer market, by hindering cheaper imports of its Jupiler and Leffe beers from the Netherlands and France into Belgium.
- Anheuser-Busch InBev SA (AB InBev) is the world's biggest beer brewer, with a very strong position on the Belgian beer market. Its most popular beer brands in Belgium are Jupiler and Leffe. AB InBev also sells these two brands in the Netherlands and France, where he sells them at lower prices than in Belgium due to the increased competition there.
- The Commission's preliminary view, outlined in its Statement of Objections, is that AB InBev is dominant on the Belgian beer market. It alleges that AB InBev has abused this dominant market position by pursuing a deliberate strategy to prevent supermarkets and wholesalers from buying Jupiler and Leffe at lower prices in the Netherlands and France, and from importing them into Belgium.
- Practices:
  - Changed the packaging of Jupiler and Leffe beer cans in the Netherlands and France to make it harder to sell them in Belgium
  - AB In Bev limited access of Dutch retailers to key products and promotions, in order to prevent them from bringing less expensive beer products to Belgium

# Case study: Microsoft (T-201/04)

Microsoft had infringed Article 82 of the EC Treaty by abusing its dominant position concerning two conducts:

- Microsoft's refusal to supply its competitors with 'interoperability information' and to authorise them to use that information to develop and distribute products competing with its own products on the work group server operating system market where it was dominant.
- Tying of Windows Media Player with the Windows PC operating system

# Case study: Microsoft (T-201/04)

Microsoft's refusal to supply its competitors with 'interoperability information'

- Court considers that the Commission was correct to conclude that the work group server operating systems of Microsoft's competitors must be able to interoperate with Windows domain architecture on an equal footing with Windows operating systems if they are to be capable of being marketed viably.
- The absence of such interoperability has the effect of reinforcing Microsoft's competitive position on the market and creates a risk that competition will be eliminated.

# Case study: Microsoft (T-201/04)

## Typing of Windows Media Player with the Windows PC operating system

- Court considers that the factors on which the Commission based its conclusion that there was abusive tying are correct: first, the undertaking concerned must have a dominant position on the market for the tying product; second, the tying product and the tied product must be two separate products; third, consumers must not have a choice to obtain the tying product without the tied product; and, fourth, the practice must foreclose competition.
- In respect of each of those factors, the Court considers that the Commission's decision is well founded.
- First, the Court observes that it is not disputed that Microsoft had a dominant position on the client PC operating systems market.
- Second, the Court, noting that that the question as to whether products are distinct must be assessed by reference to consumer demand, finds that a number of factors based on the nature and the technical features of the products concerned, the facts observed on the market, the history of the development of the products concerned and also Microsoft's commercial business practice, demonstrate the existence of separate consumer demand for media players. In that regard, the Court notes, inter alia, that the Windows operating system is system software, whereas Windows Media Player is application software; that there are independent companies, like RealNetworks, who design and supply competing products independently of operating systems; that Microsoft develops and markets Windows Media Player for other operating systems; that Windows Media Player can be downloaded independently of the Windows operating system; and that, in spite of the bundling, a not insignificant number of consumers continue to acquire competing media players separately.

# Case study: Microsoft

- Third, the Court observes that it is beyond dispute that, in consequence of the tying, consumers are unable to acquire the Windows operating system without simultaneously acquiring Windows Media Player. In that regard, the Court considers that neither the fact that Microsoft does not charge a separate price for Windows Media Player, nor the fact that consumers are not obliged to use that media player, is relevant for the purposes of the examination of that factor.
- Fourth, the Court finds that the Commission clearly demonstrated in the contested decision that the fact that Microsoft offered OEMs only the version of Windows bundled with Windows Media Player had the inevitable consequence of affecting relations on the market between Microsoft, OEMs and suppliers of third-party media players by appreciably altering the balance of competition in favour of Microsoft and to the detriment of the other operators. The Court considers that that practice enabled Microsoft to obtain an unparalleled advantage with respect to distribution of its product and to ensure the ubiquity of Windows Media Player on client PCs
- throughout the world, thus providing a disincentive for users to use third-party media players and for OEMs to pre-install such media players on client PCs. The Court concludes that the Commission was correct to find that there was a significant risk that the tying would lead to a weakening of competition in such a way that the maintenance of an effective competitive structure would not be ensured in the near future.

# CONCLUSION

- Relevant market plays a dominant role in competition law
  - Basis to assess on which market we can find an competition problem
- However: once the relevant market is defined → take some perspective, a step back and a look at the situation beyond its borders
  - Consider de relevant market in a broader sense
- Although the situation might seem to be fine in the relevant market in the traditional or narrow sense, there might be trouble in other markets:
  - Conducts that might fall under the radar, are more likely to be detected
  - firms can use market power on connected markets to lower competition on their relevant product market.
- Nevertheless, “more economic approach”, which allows for a sounder economic analysis has consequences in terms of legal certainty