Article 102 TFEU

THE ABUSE
Learning Outcomes

• Have an understanding of the definition of abuse;
• Be able to identify the type of behavior capable of amounting to an abuse;
• Appreciate the doctrine of ‘special responsibility’ and be aware of the limits, if any, this has;
• Understand the ability to affect a primary and a secondary market;
• Be aware of the any defence available for dominant companies.
Lecture Structure

① Refresher [dominance];
② Abuse under 102TFEU;
③ Framework of abuse;
④ Assessing abusive behaviour;
⑤ Justifying abuse.
Recap [Dominance]

- Any abuse
- by one or more undertakings
- of a dominant position
- within the internal market or
- in a substantial part of it
- shall be prohibited as incompatible with the internal market
- in so far as it may affect trade between Member States.
Special Responsibility

• In assessing whether the conduct of the dominant undertaking amounts to an abuse, the case law has traditionally and repeatedly affirmed that a dominant undertaking has a ‘special responsibility’ not to impair undistorted competition in the internal market.

• Must compete on the merits. Should not engage in any conduct that is capable of harming competitors’ market shares, incentives to innovate, or profitability; or

• Engage in any pricing practices that would result in the dominant firm earning profits greater than those that would be earned if the market were characterized by more effective competition.
Across Markets

It is not necessary for the dominance, the abuse and the effects of the abuse all to be in the same market. In a simple case, X may be dominant in the market for widgets and charge high prices to exploit its customers or drop its prices in order to eliminate competitors from the widget market: clearly Article 102 can apply to this behaviour. However more complex situations may occur. X might be present on both the widget market and the downstream widget dioxide market, and may act on one of those markets in order to derive a benefit in the other: as we have just seen, there may be a horizontal or a vertical foreclosure of the market.

Commercial Solvents

Commercial Solvents supplied a raw material in which it was dominant to a customer which used it to make an anti-tuberculosis drug. The raw material was the upstream product; the drug was the downstream product. Commercial Solvents decided to produce the drug itself and ceased to supply the customer. Commercial Solvents was found to have abused its dominant position: it refused to supply the raw material in relation to which it was dominant, but this was done to benefit its position in the drug market, where it was not yet present at all.
Objectives

Before considering the jurisprudence of the EU Courts and the practice of the Commission on the meaning of abuse of dominance, it is necessary to give some consideration to the underlying purpose of Article 102.

Remember: the objectives often dictate the manner of enforcement, i.e. what behaviour is it that needs to be regulated?
What is Abuse?

- The concept of abuse is not defined by Article 102 TFEU, although that provision provides a non-exhaustive list of examples in Article 102(a)–(d).
- The Court of Justice has interpreted Article 102 as applying not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on competition.
'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 which condition normal competition in products or services on the basis of the transactions 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.'
Post Danmark

Article 102 applies, in particular, to the conduct of a dominant undertaking that, through recourse to methods different from those governing normal competition on the basis of the performance of commercial operators, has the effect, to the detriment of consumers, of hindering the maintenance of the degree of competition existing in the market or the growth of that competition.
Article 102 TFEU

Article 102 TFEU provides:

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market insofar as it may affect trade between Member States. Such abuse may, in particular, consist in:
Article 102TFEU

a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

b) Limiting production, markets or technical development to the prejudice of consumers;

c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

d) Making the conclusion of contracts 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 contracts.
Abuse

- Exploitative
- Exclusionary
- Discriminatory/Reprisal
Categories of Abuse

Three ways of describing abuses:

- **exploitative abuse**: conduct whereby the dominant undertaking takes advantage of its market power to exploit its customers;
- **exclusionary abuse**: conduct whereby it prevents or hinders competition on the market;
- **discriminatory abuse**: in which competition is harmed by discriminatory prices or trading conditions charged or applied by the dominant undertaking on an intermediate market with the effect of placing certain suppliers or customers of the dominant undertaking at a ‘competitive disadvantage’.
Theory of Harm

• A theory of harm is an economic narrative that enables a competition authority or court to apply sound economic principles to the facts of the case.

• However, there is no one size fits all, theories of harm are likely to be case specific and will turn largely on the facts.

• One must be able to identify the harm or potential harm caused by the action of a dominant undertaking.

• Should not apply to competition on the merits.
Protection of Competitors or Protection of Competition

• A specific criticism of Article 102 is that it is used to protect competitors, including inefficient ones, rather than the process of competition, which is a quite different matter. According to this view Article 102, in effect, subjects dominant firms to a handicap: competitive acts, such as price reductions or the bundling of different products, that are perfectly legal for non-dominant firms, become illegal when a firm is dominant.

• The complaint is that this means that firms that possess superior efficiency are restrained in order to provide a place in the competitive arena for less efficient ones. This characteristic of Article 102 would be exacerbated if it is, indeed, the case that institutions in the EU have a tendency to be more concerned about false negatives than false positives.
In paragraph 5 the Commission says that:

- The Commission . . . will direct its enforcement *to ensuring that markets function properly* and that *consumers benefit* from the efficiency and productivity which result from effective competition between undertakings.

In paragraph 6 it says that:

- *The Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors.* This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market (emphasis added).

The Commission adds, in paragraph 23, that:

- *The Commission will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking.*
Competition on the merits

Behaviour that becomes abusive
Per Se [Michelin v Commission]

It is apparent from a consistent line of decisions that a loyalty rebate, which is granted in return for an undertaking by the customer to obtain his stock exclusively or almost exclusively from an undertaking in a dominant position, is contrary to Article [102 TFEU].

It may be inferred generally from the case law that any loyalty-inducing rebate system applied by an undertaking in a dominant position has foreclosure effects prohibited by Article [102 TFEU]. Discounts granted by an undertaking in a dominant position must be based on a countervailing advantage which may be economically justified.

If these statements are correct, then it would seem that there are, indeed, per se rules under Article 102, at least for some types of rebates and discounts. In particular it is noticeable that the General Court says here that foreclosure effects can be inferred: that is to say that they do not need to be proved; in the language of Article 101(1), this would suggest that a loyalty-inducing rebate system abuses by object, so that there is no need to prove effects.
Abuse Test

- Antitrust decisions are taken based on incomplete information. An effects-based approach to Article 102 requires decision rules that increase predictability and minimize the risk of regulatory mistakes. A commentator put this fundamental question in the following way: ‘But what are, or should be, the underlying principles by reference to which conduct that distorts and harms competition can be distinguished from normal competition on the merits?’
To Effect or Not?

There has been much criticism that the law and practice of Article 102 has been insufficiently aligned with sound economic principles.

In recent years there have been several occasions on which the Commission has accepted that, where unilateral behaviour of a dominant firm is in issue, something more than proving the existence of that behaviour is needed to determine whether it is abusive.

There is much to be said for condemning alleged exclusionary conduct as abusive only where it can convincingly be demonstrated that there have been or will be adverse effects on the market. Judgments such as Deutsche Telekom and TeliaSonera endorse this approach.
Guidance on Article 102 Enforcement Priorities

- Commission considers that it should concentrate its enforcement activity on practices likely to have seriously anti-competitive effects on the market; and, in its recent decisions under Article 102, the Commission has sought evidence of anti-competitive effects, even where it considered that it was not legally obliged to do so.
Foreclosure

• The Commission's *Guidance on Article 102 Enforcement Priorities* explains, at paragraph 19, that the aim of its enforcement activity in relation to exclusionary abuses is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way: the concern is that such behaviour would have an adverse effect on consumer welfare, whether in the form of higher price levels than would otherwise have prevailed, or in some other form such as limiting the quality of goods or services or reducing consumer choice.
Commission’s Guidance

• The publication of the Article 102 Enforcement Priorities Guidance was a significant step forward in the development of the Commission’s policy in this respect. Given the current state of the law, it is unsurprising that the Commission has not adopted a single test to identify abusive exclusionary conduct. Instead, the Commission adopts a two-step approach to the issue: (a) examining whether the conduct is likely to restrict competition and harm consumers; and (b) considering whether the anti-competitive effects are outweighed by efficiencies.
# Competition on the Merits

<table>
<thead>
<tr>
<th>Point</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Market Foreclosure</td>
<td>The Commission explains this test as requiring the likelihood that, as a result of the exclusion or marginalization of competitors, the dominant undertaking will be in a position profitably to increase or maintain prices above the competitive level or negatively to affect the non-price parameters of competition such as choice, innovation, and quality. Such an exercise can rely on qualitative as well as on quantitative evidence.</td>
</tr>
</tbody>
</table>
Foreclosure

Position of the undertaking

Conditions of the relevant market

Position of competitors, competitive restraints

Position of customers/suppliers

The extent of the conduct

Evidence of actual foreclosure

Direct evidence of strategy
## Competition on the Merits

<table>
<thead>
<tr>
<th>Point</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Consumer Harm</td>
<td>What distinguishes anti-competitive exclusion from competition on the merits is whether, as a result of the exclusion, consumers are likely to be harmed. Thus, to amount to anti-competitive foreclosure under the Guidance, the conduct must meet this criterion.</td>
</tr>
</tbody>
</table>

In the *Post Danmark* case, it appears that the Court of Justice has lent some support to this approach, by holding that Article 102: applies, in particular, to the conduct of a dominant undertaking that, through recourse to methods different from those governing normal competition on the basis of the performance of commercial operators, has the effect, *to the detriment of consumers*, of hindering the maintenance of the degree of competition existing in the market or the growth of that competition.

It is not clear, however, what the significance of this different formulation of the test in *Post Danmark* will actually mean. *British Airways*, also a Court of Justice case, is unequivocal in ruling that proof of consumer harm is not a requirement for a finding of exclusionary abuse under Article 102.
## Specific Abuses

<table>
<thead>
<tr>
<th>Point</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Predatory pricing</td>
<td>The Guidance emphasizes both ‘profit-sacrifice’ (and opens the door for a more general application of the ‘no economic sense’ test to pricing that, although above cost, involves a loss compared to the short-run profit-maximizing price) as well as the ‘as-efficient competitor’ test, which serves as a safeguard, as the Commission normally only considers pricing below long-run average incremental cost as capable of foreclosing an equally efficient competitor.</td>
</tr>
<tr>
<td>Conditional rebates</td>
<td>The Commission proposes to evaluate whether an ‘as-efficient competitor’ would be excluded on the basis of the ‘effective price’ (i.e., the price a rival has to match to win the contestable portion of a customer’s demand). A similar analysis will be applied to multi-product rebates by comparing the incremental price with the incremental costs of each of the bundled products.</td>
</tr>
</tbody>
</table>
## Competition on the Merits

<table>
<thead>
<tr>
<th>Test</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘profit sacrifice’ test</td>
<td>Anti-competitive exclusion is a willingness to sacrifice short-run revenues for the future benefits of high prices in a market from which rivals have been excluded.</td>
</tr>
<tr>
<td>‘no economic sense’</td>
<td>Conduct by a dominant firm is abusive only if it makes no economic sense unless it is understood as a mechanism for excluding rivals in order to earn monopoly as a result or if it would not have been engaged in but for its exclusionary effect.</td>
</tr>
<tr>
<td>‘as-efficient competitor’</td>
<td>This test has found acceptance in predatory pricing cases, particularly in discussions of how to identify a price as predatory. The reasoning is that a firm should not be penalized for having lower costs than its rivals and pricing accordingly. As a result, a price is predatory only if it is reasonably calculated to exclude a rival who is at least as efficient as the defendant.</td>
</tr>
<tr>
<td>‘raising rivals’ costs</td>
<td>Strategies to deny rivals market access by increasing their costs may succeed in situations where more aggressive ones involving the complete destruction of rivals might not.</td>
</tr>
</tbody>
</table>
As Efficient Competitor

- The most fundamental criticism of the ‘as-efficient competitor’ test is that economic efficiency and consumer welfare can, in some circumstances, benefit from the existence of less efficient competitors; either in a static sense by the restraint that inefficient rivals may exert on the dominant firm’s pricing, or in a dynamic sense where new rivals have the potential, but need time, to reach sufficient efficiency. The Commission acknowledges this in its Guidance, and allows a more dynamic approach in its enforcement of pricing conduct if exceptional circumstances so require.

- The Guidance does not refer to the ‘as-efficient competitor’ principle in the context of the non-price-based abuses, namely exclusive dealing, tying and bundling, and refusal to supply, with the exception of margin squeeze (a pricing conduct discussed in the Guidance as a variation on refusal to supply), where the Commission describes the practice as a scheme which does not allow an equally efficient competitor to trade profitably on a lasting basis. Absent unusual evidence, there is no direct, workable extension of the price-cost approach to these non-price-based practices.
Guidance on Article 102 Enforcement Priorities

• The Commission stressed that it now adopts an effects-based approach to its decision-making under Article 102. Of course the Commission does not establish what the law is (although it can help to influence it): the law is determined by the EU Courts.

• Some judgments have applied Article 102 in a formalistic manner. However it is noticeable that other judgments have stressed the need for a demonstration of anti-competitive effects.

• For example in two recent judgments, Deutsche Telekom v Commission and in TeliaSonera, the Court of Justice stated that potential anti-competitive effects must be demonstrated before a margin squeeze is condemned as unlawful.

• TeliaSonera it said that: ‘in order to establish whether [a margin squeeze] is abusive, that practice must have an anti-competitive effect on the market.’
The law on abusive pricing practices is complex and controversial. Dominant firms may infringe Article 102 where they raise their prices to unacceptably high levels; they may also be found to have abused their dominant position where they cut their prices, if such cuts can be characterised not as normal, competitive responses on the merits, but as strategic behaviour intended to eliminate competitors.

Not unnaturally a dominant firm, or one that is anxious that it might be found to be dominant, may feel itself to be on the horns of a dilemma where both a price rise and a price cut might be considered to be abusive; the dilemma might become a trilemma if leaving prices where they are might be considered to be evidence of a concerted practice with the other operators on the market, and if the word trilemma were to exist.
Compagnie Maritime Belge v Commission

• The Commission investigated the policy of ‘fighting ships’, whereby members of a liner conference in the maritime transport sector, Cewal, reduced their charges to the level, or to below the level, of their one competitor, Grimaldi and Cobelfret; they also operated the fighting ships on the same route and at the same time as Grimaldi's. The Commission concluded that the policy was one of selective price cutting intended to eliminate the competitor and that Article 102 was infringed.
Deutsche Post AG

• In *Deutsche Post AG – Interception of cross-border mail* the Commission considered that Deutsche Post's prices for the onward transmission of cross-border mail were excessive. In doing so the Commission said that, as it could not make a detailed analysis of Deutsche Post's costs, it would have to use an alternative benchmark to determine whether it was guilty of abuse; this it did by comparing Deutsche Post's prices for cross-border mail with its domestic tariff, and it decided that there was indeed an abuse.
Predatory Pricing

The idea of predatory price cutting is simple enough: that a dominant firm deliberately reduces prices to a loss-making level when faced with competition from an existing competitor or a new entrant to the market; the existing competitor having been disciplined, or the new entrant having been foreclosed, the dominant firm then raises its prices again, thereby causing consumer harm.

Attempts to eliminate an existing competitor may be more expensive and difficult to achieve than deterring a new one from entry, especially where the existing competitor is committed to remaining in the market. Where a dominant undertaking has a reputation for acting in a predatory manner, this in itself may deter new entrants: not only predatory pricing itself but also the reputation for predation may be a barrier to entry.
In *Aéroports de Paris*, the operator of the Paris airports charged different prices for a licence to provide groundhandling services to aircraft, as between those who provided such services to third parties and those airlines that provided the services themselves (self-handling). The General Court upheld the Commission’s finding of infringement of Article 102(c).

In some cases, the dominant supplier is itself a competitor of its customer in a downstream market, and the resulting disadvantage to that customer therefore arises in competing with the dominant firm itself.
Other Types of Abuse

<table>
<thead>
<tr>
<th>Abuse</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exclusive Dealing</td>
<td>Hoffman-La Roche</td>
</tr>
<tr>
<td>Refusal to Deal</td>
<td>Commercial Solvents</td>
</tr>
<tr>
<td>Tying and Bundling</td>
<td>Microsoft</td>
</tr>
<tr>
<td>Predatory Design Changes</td>
<td>Decca Navigator</td>
</tr>
<tr>
<td>Abusive Discrimination</td>
<td>Irish Sugar</td>
</tr>
</tbody>
</table>
Objective Justification

• The term ‘abuse’ bears great intellectual strain, particularly as there is no equivalent in Article 102 to Article 101(3) whereby an agreement that restricts competition can nevertheless be permitted because it produces economic efficiencies. Over a number of years the Commission and the EU Courts came to recognise that there was some conduct which, although presumptively abusive, in fact did not amount to a violation of Article 102 because it had an ‘objective justification’.
Objective Necessity

At paragraph 29 of the *Guidance on Article 102 Enforcement Priorities* the Commission says that a claim to objective necessity would have to be based on factors external to the dominant undertaking: for example, health or safety considerations.

At paragraph 30 of the *Guidance* the Commission says that it will also consider arguments to the effect that conduct which apparently forecloses competitors can be defended on efficiency grounds. The Commission explains that four cumulative conditions would have to be fulfilled before an efficiency ‘defence’ could succeed:

- the efficiencies would have to be realised, or be likely to be realised, as a result of the conduct in question
- the conduct would have to be indispensable to the realisation of those efficiencies
- the efficiencies would have to outweigh any negative effects on competition and consumer welfare in the affected markets; and
- the conduct must not eliminate all effective competition.
Burden of Proof

In *Microsoft v Commission* the General Court stated that:

“it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification cannot be accepted”

See also *Wanadoo de España v Telefónica* from paragraphs 641 to 663.
Undertaking

Objective Justification

Relevant Market

Relevant Geographical Market

Product Substitutability

Abuse

Dominance in the Relevant Market

Exclusionary (Assessment of foreclosure and harm)

Exploitative (Assessment of foreclosure and harm)