



**The Competition Authority**

An tÚdarás Iomaíochta

**INVESTIGATIVE PROCESS**  
**Specific Issues in Abuse of**  
**Dominance Cases**

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# Issues to cover

1. Abuse of dominance: legal framework
2. Evidence collection
3. Relevant market
4. Dominance
5. Abuse
6. Remedies/commitments



# 1. Legal EU framework

- **Art. 102** TFEU prohibits an **abuse** of a dominant position by one or more “*undertakings*”.
- Such abuse may consist in:
  - Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.
  - Limiting production, markets or technical development to the prejudice of consumers.
  - Applying dissimilar conditions to equivalent transaction with other trading parties, thereby placing them at a competitive disadvantage.
  - Making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.



# 2.a Evidence collection

## What needs to be proved?

### **By the Enforcement Agency**

- Relevant product and geographic market(s)
- Dominance
- Practices such as those listed in Art. 102 TFEU

### **By the company(ies) under investigation**

- Objective justification defense



# 2.b Evidence collection

## What to look for?

- Any books, documents, records relating to an activity in connection with the business of supplying or distributing goods or providing a service
- Written and electronic based evidence
- Oral evidence will be recorded in an statement



# 2.c Evidence collection

## Potential sources

- Complainant
- Company(ies) under investigation
- Third parties: competitors, customers, government bodies, trade associations, etc.
- Informal fact finding: current and historical news, statistics, studies, internet, etc.



# 2.d Evidence collection

## How?

- Inspections (e.g. *Deutsche Bahn* case)
- Requests for information
- Oral interviews
- Witness summons procedure (Ireland)



# 3.a Relevant market

- A finding of dominance requires, first, to identify the relevant market.
- Economic concept.
- The definition of the relevant market may have a decisive impact on the outcome of a case.
- An Art. 102 case may require the definition of:
  - one market: when dominance and the abuse occur in one market; or
  - two markets, for example, where the abuse affects a neighboring market.
- The relevant market includes the product market and the geographic market.





# 3.b Relevant market

## Relevant product market

### ■ **Interchangeability**

- Demand-side substitutability: the SSNIP test
- Supply-side substitutability
- Potential competition

### ■ **Evidence that may be used**

- Evidence of substitution in the recent past
- Quantitative tests (econometric and statistical tests)
- Views of customers and competitors
- Marketing studies and consumer surveys
- Barriers and costs associated with switching demands to potential substitutes



# 3.c Relevant market

## Relevant geographic market

- A relevant geographic market comprises the area in which the firms concerned are involved in the supply of products or services and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those areas.
  
- **Evidence that may be used**
  - Past evidence of diversion of orders to other areas
  - Basic demand characteristics (e.g. national preferences)
  - Views of customers and competitors
  - Current geographic pattern of purchases
  - Trade flows
  - Barriers and switching costs associated with the diversion of orders to companies located in other areas



# 4.a Dominance

## Substantial market power

- **Key threshold to apply Art. 102** – it only applies where one company has a “*dominant position*” or where two or more companies are “*collectively dominant*”.
- **Does a firm have substantial market power?**
  - Competitive constraints exerted by actual and potential competitors and/or customers on the company(ies) under investigation are ineffective.
  - The company(ies) under investigation are capable of profitably increasing prices above the competitive level for a significant period of time.



# 4.b Dominance

## Constraints by actual competitors

- **Statutory monopolies**
- **Market shares:** Not the only factor!
  - < 40% dominance “unlikely”
  - Evidence: data on market shares provided by the company(ies) under investigation, third parties (e.g. trade associations, customers or suppliers), market research reports
  - Usually sales data by value and volume are informative



# 4.c Dominance

## Constraints by potential competitors

### ■ **Barriers to entry and expansion**

- Sunk costs
- Legal barriers (e.g. licences)
- Economic advantages (e.g. privilege access to an essential facility or holds an intellectual property right)
- Network effects
- Exclusionary behaviour
- Own statements

### ■ **Evidence on barriers to entry and expansion**

- Complex
- Companies under investigation or potential new entrants might be asked for their views on (i) the sunk costs associated with entry, (ii) the relative ease of obtaining the necessary inputs and distribution outlets, (iii) how regulation affects the prospects of new entry and (iv) information on any other factors which may impede entry or expansion.



# 4.d Dominance

## Constraints by customers

- **Countervailing buyer power (bargaining strength)**
  - Size of the customer – not the only factor!
  - Customer well informed about alternative sources of supply and could switch supplier at a little cost
  - Customer is an important outlet for the seller
  - Customer could commence production of the item itself or “sponsor” new entry by another supplier (e.g. through a long-term contract) relatively quickly and without incurring substantial sunk costs
- **Evidence on buyer power**
  - A careful analysis of vertical relationships in the market, on a case-by-case basis is often required to assess buyer power



# 4.e Dominance

## Evidence on behaviour and performance

- A company's conduct in a market or its financial performance may provide evidence that it possess market power, mainly where:
  - It has set prices consistently above an appropriate measure of costs
  - It has persistently earned an excessive rate of profit
- Persistent significantly high returns, relative to those which would prevail in a competitive market of similar risk and rate of innovation, may suggest that market power does exist.
- High returns do not stimulate new entry or innovation.



# 5.a Abuse

## Issues to bear in mind

- Dominance is not an offence - what is offensive is to abuse the position of dominance.
- The purpose of Art. 102 is to protect competition; and competition is for the benefit of consumers.
- Art. 102 gives examples of conduct that is abusive:
  - Charging unfair prices or trading conditions
  - Limiting production, markets or technical development
  - Discrimination
  - Tying
- There is no exhaustive list of abusive conducts.
- The choice of either a “*formalistic*” or an “*effects-based*” approach will have an impact on the evidence gathering/assessment process.





# 5.b Abuse

## “Formalistic” approach

- Some judgments of the European Courts suggest that some unilateral practices are *per se* illegal: there is no need to prove anticompetitive foreclosure effects.
- General Court in *Michelin v Commission* case (T-203/01):

“[I]t 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]**”.

[Conduct can be abusive if it] “**tends to restrict competition** or, in other words, that **the conduct is capable of having that effect**”.
- Less burdensome in terms of human and administrative resources.



# 5.c Abuse

## “*Effects-based*” approach

- Shift from a “*formalistic*” approach towards an “*effects-based*” approach.
- Introduced by the Commission mainly in three cases:
  - *Microsoft* - 24 March 2004 - tying behaviour
  - *Wanadoo* - 16 July 2006 - predatory pricing
  - *Telefónica* - 4 July 2007 - margin squeeze
- Advocated in the “*Guidance Communication of the Commission’s enforcement Priorities in Applying Article 82 of the EC Treaty (now Art. 102) to Abusive Exclusionary Conduct by Dominant Undertakings*” published on 24 February 2009 (the 2009 *Guidance Paper*).



# 5.c Abuse

## “*Effects-based*” approach

### A) Key Principles

- It is necessary to demonstrate actual and/or potential **anticompetitive foreclosure effects** through a sound economic analysis and strong and convincing evidence.
- Pricing conducts (e.g. rebates and predatory pricing) raise concerns when they are capable of foreclosing competitors “**as efficient**” as the dominant firm.
- Strong emphasis is placed in the protection of **consumer welfare**.
- Exclusionary behaviour can be justified on the grounds of **efficiencies** defences put forward by the dominant firm.



# 5.c Abuse

## “*Effects-based*” approach

### **B) Anticompetitive foreclosure**

- Anticompetitive foreclosure is foreclosure that results in consumer harm or adverse impact on consumer welfare.
- Actual and/or potential foreclosure must be demonstrated.
- Potential foreclosure is understood as “*credible*” or “*likely*” risk of foreclosure.
- The *2009 Guidance Paper* includes a list of **general factors** and **factors specific for each type of abuse** that should be taken into consideration when assessing potential abusive conducts.



# 5.c Abuse

## “*Effects-based*” approach

### General Factors

- 1) Position of the dominant company
- 2) Conditions on the relevant market
- 3) Position of the dominant company’s competitors
- 4) Position of the customers or input suppliers
- 5) Extent of the alleged abusive conduct
- 6) Possible evidence of actual foreclosure
- 7) Direct evidence of any exclusionary strategy



# 5.c Abuse

## “*Effects-based*” approach

### C) The “as efficient” competitor test

- Pricing conducts must restrict competition from competitors which are **as efficient as** the dominant company before such conducts can be regarded as abusive.
- Price-cost test.
- Soft safe harbour where the prices of the dominant company cover its long-run average incremental costs (LRAIC).
- There maybe intervention against conduct that can exclude less efficient rivals in certain particular circumstances.

# 5.c Abuse

## “Effects-based” approach

### D) Endorsement by the Court of Justice

- *TeliaSonera*, 17 February 2011, C-52/09 (margin squeeze):  
*“in order to establish whether [margin squeeze] is abusive, that practice **must have an anti-competitive effect** on the market”*
- *Post Danmark*, 27 March 2012, C-209/10 (selective price cutting and discriminatory pricing):  
*“to assess the existence of anti-competitive effects in circumstances such as those of that case, it is necessary to consider whether that pricing policy, without objective justification, **produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers’ interests**”*



# 5.c Abuse

## “*Effects-based*” approach

### **E) Implications**

- More detailed and sophisticated economic analysis is required in abuse of dominance cases.
- Increased use of economic experts.

### **F) Challenges**

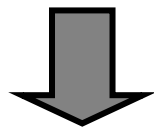
- Some degree of legal uncertainty.
- Competition agencies may be tempted to follow the less burdensome formalistic approach.





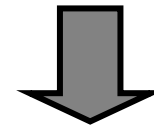
# 6.a Remedies/Commitments

- When the evidence points towards an abuse of dominance, the Commission and many competition authorities can follow one of these two main paths:



**Prohibition decision**

- “Cease and desist” order
- Fines
- **Remedies imposed**



**Commitment decision**

- **Accepts commitments voluntarily offered**
- Makes commitments offered legally binding

- Competition agencies do not usually separate the procedure for finding an infringement and designing suitable remedies.



# 6.b Remedies

## Structural

- Imply changes to the structure of a company (e.g. divestiture of an existing business).
- **Advantages**
  - Most effective where there is a direct link between the abuse and the holding of certain assets by the dominant company
  - Able to eliminate market power rapidly
  - Require less monitoring by courts and competition agencies
- **Disadvantages**
  - May initially be more disruptive to the defendant's business than other remedies, and they sometimes create immediate inefficiencies
  - Not always easy to design and administer



# 6.c Remedies

## Behavioural

- Oblige a company to do something or to stop doing something.
- **Examples** - an obligation to:
  - Provide third parties with access to certain facilities
  - Unbundle two or more goods previously offered jointly
- **Advantages**
  - Can be tailored more easily to fit individual defendants and market circumstances
  - Generally less controversial than divestitures
- **Disadvantages**
  - Do not attack market power directly
  - Require ongoing monitoring
  - More susceptible to evasion by defendants



# 6.d Remedies

## Structural or Behavioural?

- Most national courts and competition agencies can impose both behavioural and structural remedies.
- The assessment of the effectiveness of any remedy must be based on the facts and circumstances of the individual case.
- There is a **preference for behavioural remedies** over structural ones in abuse of dominance cases because they are viewed as a more “light handed” approach.



# 6.e Remedies

## Market Testing

- Commitment decision – the Commission must market test the commitments offered to verify whether they appropriately addresses the competition concerns.
- Market testing involves the invitation to third parties (e.g. customers, competitors and suppliers) to make observations on the commitments offered – so-called “invitations to comment”:
  - publication of a concise summary of the case and the main content of the commitments
  - interested third parties may submit their observations within a time limit which is fixed by the Commission in its publication and which may not be less than one month
- New market testing will be necessary if the commitments are substantially altered.



# 6.f Remedies

## EU experience - 2012 and 2013

|                  |                        |  |
|------------------|------------------------|--|
| 10 April 2013    | <i>CEZ</i>             | <b>Commitments</b> in relation to the reservation of capacity in the Czech electricity transmission network – <b>divestiture</b> of generation capacity. |
| 6 March 2013     | <i>Microsoft</i>       | €561 million <b>fine</b> to Microsoft for <b>non-compliance with</b> browser choice <b>commitments</b> .   |
| 20 December 2012 | <i>Alcan</i>           | <b>Commitments</b> in relation to tying concerns in the market for aluminium smelting equipment.   |
| 20 December 2012 | <i>Thomson Reuters</i> | <b>Commitments</b> in relation to the use of Reuters Instrument Codes for data sourced from Reuter's competitors.  |



# 6.f Remedies

## EU experience

- **Pending Commitment Decisions**

|                      |   |
|----------------------|---|
| <i>Google</i>        | Commission market testing commitments submitted by Google to address competition concerns in the markets for web search, online search advertising and online search advertising intermediation . |
| <i>Deutsche Bahn</i> | Commission market testing commitments regarding Deutsche Bahn's pricing system for traction current in Germany.   |



**Thank you  
Questions?**



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