

Abuse of dominance

From a form-based approach to an effect-based approach

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Introduction

- From the end of the 90s the Commission has clarified the goal of the EU's competition policy: **Economic efficiency**
 - ⇔ Protect consumer welfare rather than competitors
- The EC's [discussion paper](#) of 2005 on exclusionary abuses states :
“The essential objective of Article 82 when analysing exclusionary conduct is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.”
- **This clarification drives the development of an effect-based approach of the abuse of dominance :**
 - Some conducts have the potential to restrict competition without generating any economic efficiency ⇔ **They must be condemned**
 - Some other conducts may take the form of an illegal conduct but their effects on competition are insignificant. Furthermore, they can also generate efficiency gains ⇔ **Need for an effect-based approach**

Introduction

- According to the [EC's guidelines of 2009](#), an abuse may be qualified if, on the basis of cogent and convincing evidence, the conduct is **likely to lead to foreclosure harming consumers...**

... if the conduct is capable of hampering competition from competitors as efficient as the dominant firm

⇔ The “as-efficient-competitor-test”

= Can a competitor compete effectively with the conduct of the dominant firm?

- If yes, the conduct may not harm consumers and there is consequently no abuse of dominance
- If no, the conduct has at least the potential for reducing competition and therefore harms consumers

Outline of the presentation

I. Market dominance and its abuses

- a) European standards and definition*
- b) A special responsibility conferred to dominant firms*
- c) Two kinds of abuses*

II. Form-based approach and naked restrictions

- a) Definition*
- b) Example: Schering-plough case (denigration)*

III. Effect-based approach and other restrictions

- a) Definition*
- b) Example: Eurostar / British Airways case (predatory pricing)*
- c) Counter-example: Intel case (exclusivity rebates)*

IV. Conclusion

I. a. European standards and definition

Hoffman-Laroche standard:

*“The concept of abuse is an **objective concept** relating to the behavior 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**”* C-85/76 Hoffmann- La Roche (§541)

I. a. European standards and definition

- Market power defines a firm's ability to act independently from its competitors
- Example: a price maker, that is, an undertaking that fixes price on a market independently
- No anticompetitive effects may result from a unilateral conduct of a non-dominant firm...

... but dominant firms do not necessarily have anticompetitive conducts!

⇔ **Only abuses are condemned but it is necessary to determine a dominant position before analyzing any potential abuse**

I. b. A special responsibility

- Detention of the dominant position triggers a **special responsibility** upon the undertaking:

“A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market”

(see Michelin I, EC case n° 322/81)

- Commenting on Michelin I case, Competition Commissioner Mario Monti said : *“Dominant companies must be careful not to engage in practices that exclude other players from the market. 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”*

I. c. Two kinds of abuse

1. So called « naked abuse »

- Considered as systematically harmful to consumers
- No plausible source of efficiency gains
- Allows for a formalistic approach based on the presumption of anticompetitive effects

⇒ **Consequence: no need for an in-depth economic analysis, the conduct is presumed to be harmful to consumers**

2. All other abuses

- Possible source of efficiency gains or of greater consumer surplus
- The anticompetitive effects must be demonstrated since the conduct is not presumed to be harmful to consumers

⇒ **In such cases, an economic analysis of the potential effects of the conduct is required**

II. a. Naked restrictions

- “Naked abuses” are quite easy to qualify
 - ⇔ It is obvious that the conduct has **the potential to harm consumers...**
 - ... It is therefore **not necessary** to make a detailed analysis of the effects of the conduct
- Nevertheless, in France, the calculation of the fine requires to assess the importance of the harm to the economy
 - ⇔ In France, antitrust fines must be **proportionate** to economic damage
- **Example of “naked abuse”**: denigration...

II. b. Naked restrictions: example

Schering-plough (French case n° 13-D-21): 1/2

- Abuse sanctioned by the French Competition authority:
 - **Denigration**: The Subutex distributor in France, Schering-Plough, denigrated Subutex's generics upon their entry onto the market
 - ⇔ Schering-Plough has notably said that the generics were dangerous
- **No plausible efficiency gains**:
 - ⇔ **Denigration** : disinformation displayed to consumers, physicians and pharmacists who may use, prescribe or distribute Subutex's generics
- The anticompetitive effects can be presumed since the denigration targeted a large number of pharmacists ...
 - ... But an economic analysis still needed to analyze the damage caused by the abuse

II. b. Naked restrictions: example

Schering-Plough (French case n° 13-D-21): 2/2

- **How important is the damage caused by the abuse?**

Had the practice by of Schering-Plough not taken place,

⇔ What would be the market shares of the generics for Subutex?

⇔ Would the penetration of generics have been really higher?

- **Counterfactuals used to conclude that the damage was important:**

- Healthcare system forecast on Subutex's generics penetration
- Comparison of effective Subutex's generics penetration with several counterfactuals:
 - Other molecules' generics penetration in same therapeutic class
 - Other dosages of Subutex than that most targeted by denigration

III. a. Effect-based approach

- Since some conducts **cannot be presumed to be harmful** to consumer (all potential abuses except “naked abuses”), one needs to make the economic demonstration of the anticompetitive effects of the conduct
- It requires an **examination of how competition works** in the scrutinized market in order to evaluate how the conduct of the dominant firm **affects, or may affect, consumer welfare**
- The identification of ***potential effects*** is enough to qualify an abuse of dominance
 - **Actual effects:** difference between observed situation and the situation that would have had occurred absent the conduct
 - **Potential effect:** description of how the conduct may harm competition and therefore may harm consumer welfare

III. a. Effect-based approach

- ✓ **Rule of reason** rather than *per se* analysis (as for cartels)
 - ⇔ Rejection of form-based approach to competition policy
- ✓ **Assess the effects of the conduct** rather than the conduct itself
 - ⇔ Based on the examination of each specific case, based on sound economics and related to the facts
- ✓ Reference to **consumer impact**
 - ⇔ To focus on the presence of anti-competitive effects that harm consumers
 - ⇔ To avoid mixing the protection of the competition process with the protection of competitors

III. b. Effect-based approach: example

Eurostar / British Airways (French case n° 07-D-39): 1/3

- **Case of predatory pricing** : in 2004, British Airways alleged an abuse of dominant position of SNCF (the national railway group) and Eurostar Group on the market for passenger transport between Paris and London
 - ⇔ **British Airways argued that:**
 - 1) Eurostar offered abnormally low prices $<$ its costs (predation)
 - 2) Eurostar implemented a policy to saturate its capacities in order to foreclose British Airways from the market
- According to British Airways, that business policy was financed by SNCF subsidies, that the company was able to pay to its unprofitable Eurostar subsidiary due to its monopoly on the French railway network

⇔ **Cross subsidies**

III. b. Effect-based approach: example

Eurostar / British Airways (French case n° 07-D-39): 2/3

- However, it appears Eurostar's pricing policy **did not have an anticompetitive effect** on the market:
 - ⇔ Each Eurostar train **covers its variable costs but not its total costs because of the fixed costs** for the use of the Channel tunnel and of the British high speed railway lines
 - ⇔ Eurostar committed itself to pay fixed costs over a very long period, **even if it stopped operating**
- Under these circumstances, SNCF and Eurostar seek to **optimize the occupancy rate and total revenues for each train**
- To do so, they use **various management and price fixing tools in order to best cover the costs: because every passenger and each train generate positive revenues**, the surplus is being used to partly cover the infrastructure's fixed costs and thus reduce total loss.

III. b. Effect-based approach: example

Eurostar / British Airways (French case n° 07-D-39): 3/3

- Finally, it was considered that the alleged market disruption resulting from cross-subsidies within the SNCF was not established
 - ⇔ If air lines have lost market shares, the market has increased considerably as a result of the new services offered by Eurostar
 - ⇔ As a result, consumer welfare did not decrease
- **Conclusion:**
 - Eurostar has not implemented a predatory strategy with the aim to disrupt or eliminate all competition on the Paris-London line
 - The effect-based demonstration shows that although SNCF's total costs were not covered by its pricing policy, its effects are not significant because of the increase in market size

III. b. Effect-based approach: example

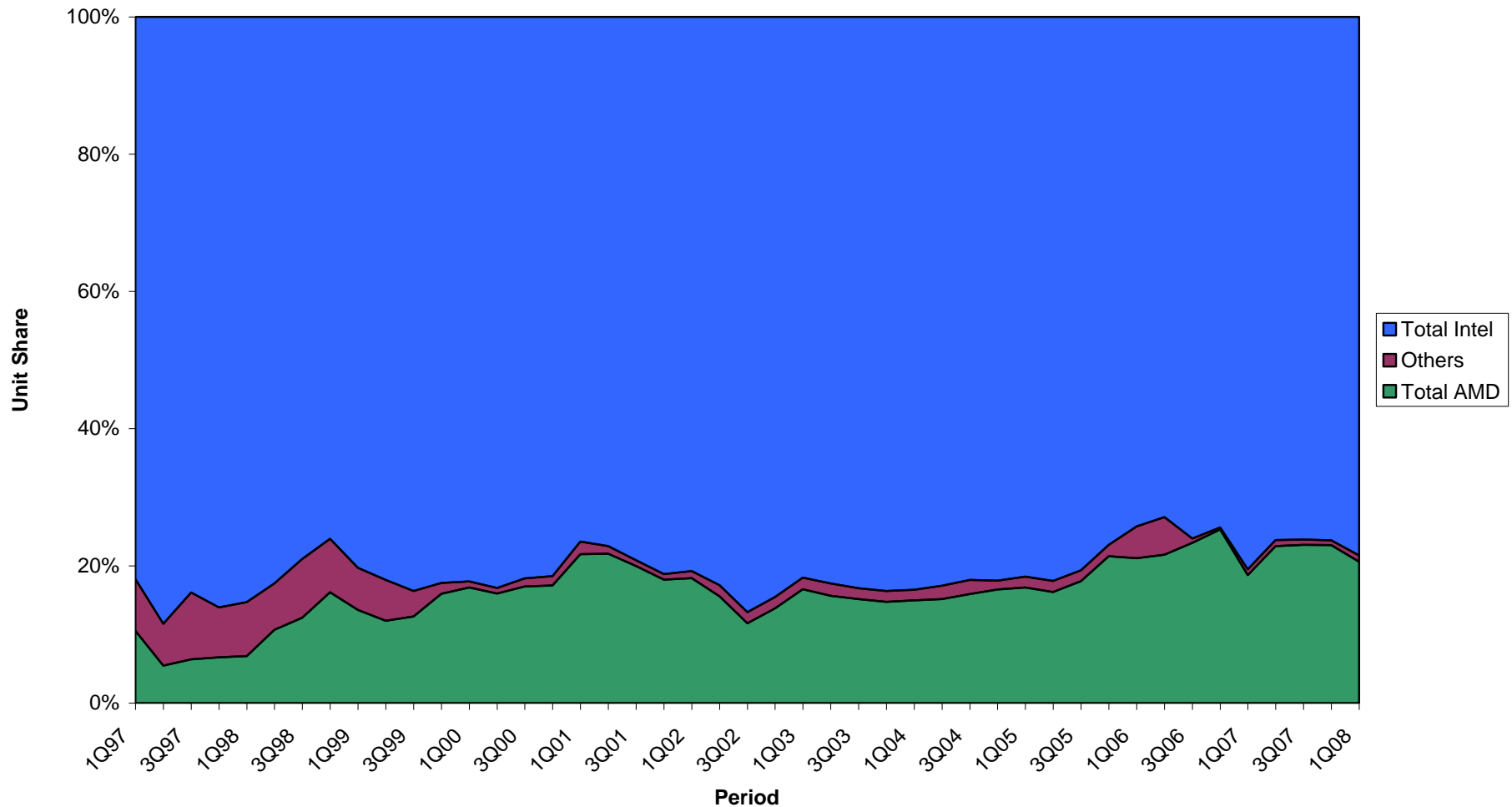
Intel case (EC case [COMP/C-3/37.990](#)) 1/5

- **Case of “exclusivity / loyalty rebates” and “exclusivity payments”**
Intel has been condemned by the EC in 2009 for abuse of dominance:
 - Exclusivity or quasi-exclusivity rebates with computer manufacturers
 - Payments to a computer distributor (MSH) for exclusivity
- **Test of the as-efficient-competitor** to establish whether an equally efficient competitor (AMD) would have been able to offer its products at a price that compensates the customer for the loss of the dominant firm (Intel)’s rebates
 - The test reveals such a competitor would have to sell its products **below cost**
 - ⇔ The EC thus concluded that **Intel was abusing its dominant position**
 - ⇔ **EC condemned Intel to a fine of 1.06 billion €**
- This was the first EC’s decision following the [EC’s guidelines of 2009](#)

III. b. Effect-based approach: example

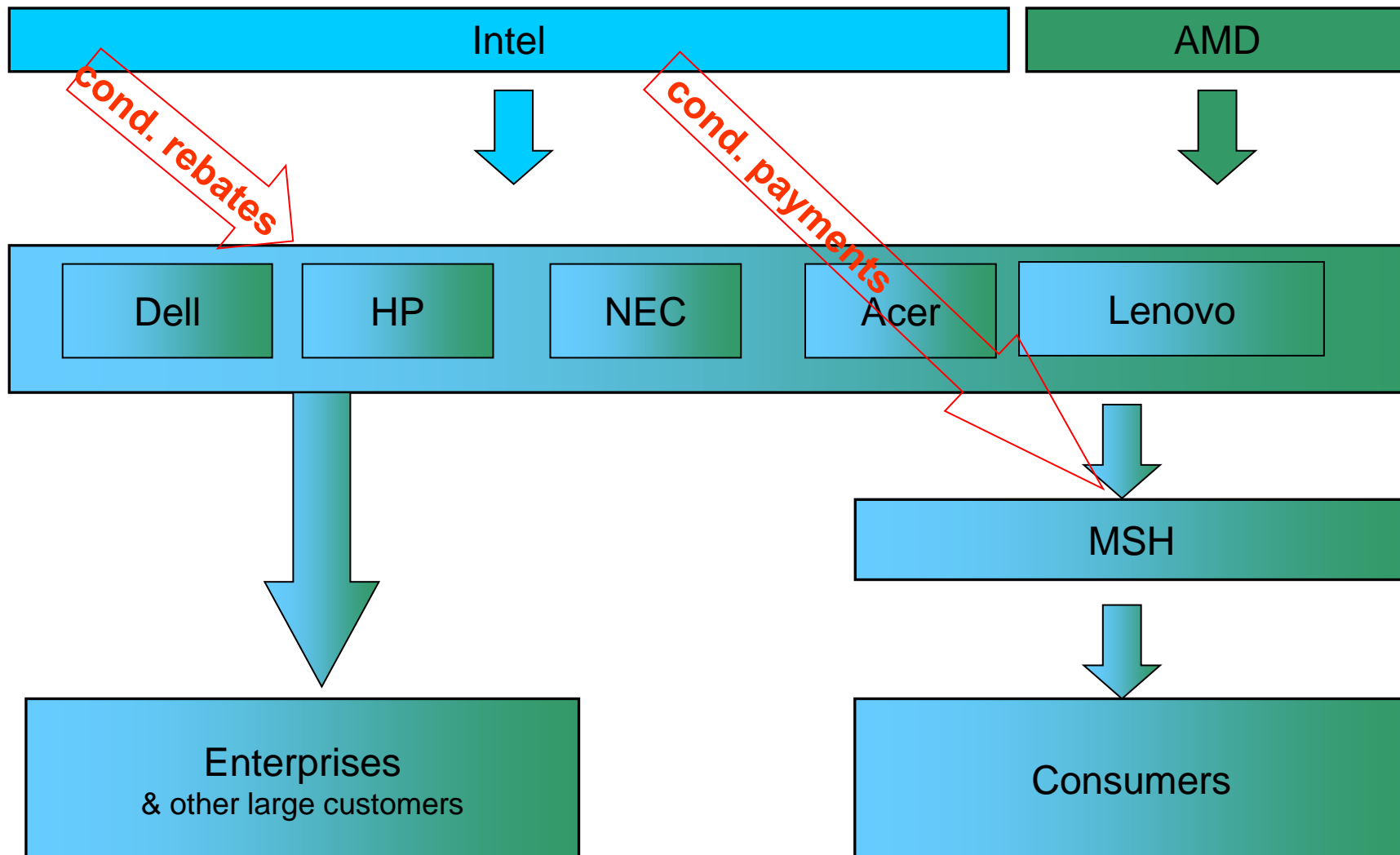
Intel case (EC case [COMP/C-3/37.990](#)) 2/5

Total Unit Share



III. b. Effect-based approach: example

Intel case (EC case [COMP/C-3/37.990](#)) 3/5



III. b. Effect-based approach: example

Intel case (EC case [COMP/C-3/37.990](#)) 4/5

- General Court's decision: 1st judicial test of the effect-based approach...
- The General Court's decision (2014) rejected Intel's appeal and upheld the fine **but it deemed the effect-based approach to be irrelevant in this case** (since Intel had a very strong dominant position)...
 - ⇔ Intel is an unavoidable trading partner
 - ⇔ There is a “non-contestable share” of the market
 - ⇔ Intel's competitors don't compete for the full supply of customers
- ⇔ Intel's rebates thus make it more difficult for competitors to deal with its customers: **if an Intel's customer obtains supplies from a competitor by failing to comply with the exclusivity or quasi-exclusivity condition, it risks losing not only the rebates for the units that it switched to that competitor, but the entire exclusivity rebate**

III. b. Effect-based approach: example

Intel case (EC case [COMP/C-3/37.990](#)) 5/5

- Finally, the General Court drew a distinction between 3 kinds of rebates:
 - ⇔ **Quantity rebates:** presumed to be legal because they result from cost savings which are passed on to customers
 - ⇔ **Loyalty / Exclusivity and Quasi-exclusivity rebates:** presumed to be illegal as long as there is a loyalty mechanism (a non-contestable share of the market)
 - ⇔ **Others (individualized, retroactive rebates...):** more detailed effect-based approach needed since circumstances of the case need to be taken into account

Conclusion

- **The use of the effect-based analysis depends on the features of the case:**
- **Intel case** : the features of the practice (high thresholds for rebates = exclusivity) and of the sector (strong dominant position with evidence showing that Intel was an unavoidable commercial partner) are such that **no detailed analysis of the effects was needed** to consider the practice as anticompetitive.
- ⇒ **Demonstrating the non-contestable share and the level of rebates**
- **In other cases**, e.g. where the practice is related to low prices such as predation, and where the dominant position is not so strong or where the threshold for rebates is not so high, **effects need to be more carefully scrutinized**.
- ⇒ **Factors which can be taken into account are:** share of the market covered by the practice, price-cost test or existence of a sacrifice, existence of barriers to entry, importance of the dominant position (unavoidable trading partner?), etc.

Thank you for your attention!

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