

EU-China Trade Project (II)

Concept of abuse of dominance under German competition law

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Overview

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- I. Market dominance – from German law perspective
- II. Specific prohibitions of unilateral conduct in German Competition law
- III. Summary

I. Market Dominance

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- General Prohibition in sec. 19 (1) Act against Restraints of Competition (ARC):

“The abusive exploitation of a dominant position by one or several undertakings is prohibited.”

- Particular Examples in sec. 19 (2) ARC

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- Particular Examples in sec. 19 (2) ARC

“An abuse exists in particular if a dominant undertaking as a supplier or purchaser of certain kinds of goods or commercial services:

1. **unfairly impedes** an other undertaking directly or indirectly **or discriminates** it without objective justification compared to similar undertakings,
2. demands payment or other business terms which differ from those which would very likely arise if effective competition existed; [...]”

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- Particular Examples in sec. 19 (2) ARC
- “3. demands less favourable payment or other business terms than the dominant undertaking itself demands from similar purchasers in comparable markets, unless there is an objective justification for such differentiation;
4. refuses to allow another undertaking access to its own networks or other infrastructure facilities against adequate remuneration, provided that[...]

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- Historic beliefs and objectives of the ARC in the first draft in 1955:
 - objective is not to protect companies from competition, but the protection of free competition *as an institution*,
 - competition primarily serves economic functions (i.a. fair distribution of income, consumer sovereignty and economic prosperity),
 - competition also fulfils meta-economic functions, such as to control economic power and to safeguard the freedom of economic actors.

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- Historic beliefs and objectives of the in ARC in the first draft in 1955

ARC is based on “the insight supported by economic science that [...] the state should only intervene in market processes where this is necessary for maintaining market mechanisms or for monitoring those markets where unmitigated competition cannot be achieved.”

(Motivation to the ARC, 2nd Parliament, file no. 1158)

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Objectives correspond to current case law of European Court of Justice:

- “Article 101 TFEU is intended to protect not only the interests of competitors or consumers but also the structure of the market and thus *competition as such*”.

(ECJ, decision of 7 February 2013, Case C-68/12, *Slovenska sporitelna*, paragraph 18, with reference to Case C-501/06 P, *GlaxoSmithKline Services v Commission* [2009] ECR I-9291, paragraph 63)

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Formal aspects:

- until 1999: no per-se rule; national competition authority had to expressly declare an abusive conduct as illegal
- since 1999: Explicit prohibition on which private suits (injunctions or private damage claims) can be grounded
- ARC also applies to state authorities and state-owned companies as far as they perform a *commercial activity* on a market.

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- Sanctions to be impose by authority
 - cease and desist order
 - order to reimburse harmed customers
 - fines

- Civil law suits
 - injunction (to terminate illegal conduct)
 - private claim to terminate discrimination = to supply
 - private damage claim

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- Dominance played a central role in ARC
- The substantive criteria in merger control has been the dominance test (until 2013)
- Identical interpretation of market dominance under EU law and German law
- More economic approach
- Since May 2004 parallel application of national competition law and EU competition law in EU wide cases

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No divergence from EU competition law in EU-wide dominance cases:

- “Where the competition authorities of the Member States or national courts apply *national competition law* to any abuse prohibited by Article 102 of the Treaty, they *shall also apply Article 102* of the Treaty.”
(Art. 3 (1) Council Regulation (EU) No 1/2003)

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But stricter national laws for unilateral conduct (abuse) are allowed:

- “Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.”
(Art. 3 (2) Council Regulation (EU) No 1/2003)

II. Specific prohibitions of unilateral conduct

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Stricter national provisions prohibiting abusive contact apply to

- undertakings with “*relative market power*” vis-à-vis small or medium-size suppliers or customers (vertical comparison, sec. 20 (1))
- undertakings with “*superior market power*” compared to small or medium-size competitors (horizontal comparison, sec. 20 (3) ARC)

II. Specific prohibitions of unilateral conduct

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Definition of “relative market power”

- Gradual difference to dominance,
- but different concept: not market shares or indications for market power are relevant, but the assessment of alternatives for customers/ supplier
- Concept of “**dependency**”
- Assessment of power in bilateral relationship

II. Specific prohibitions of unilateral conduct

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Definition of “relative market power” (20 (1) ARC):
Special prohibition of abusive conduct applies to undertakings “*insofar as*

- small or medium-sized enterprises as suppliers or purchasers of certain kinds of goods or commercial services
- **depend on them** in such a way that *sufficient and reasonable possibilities of resorting* to other undertakings do not exist.”

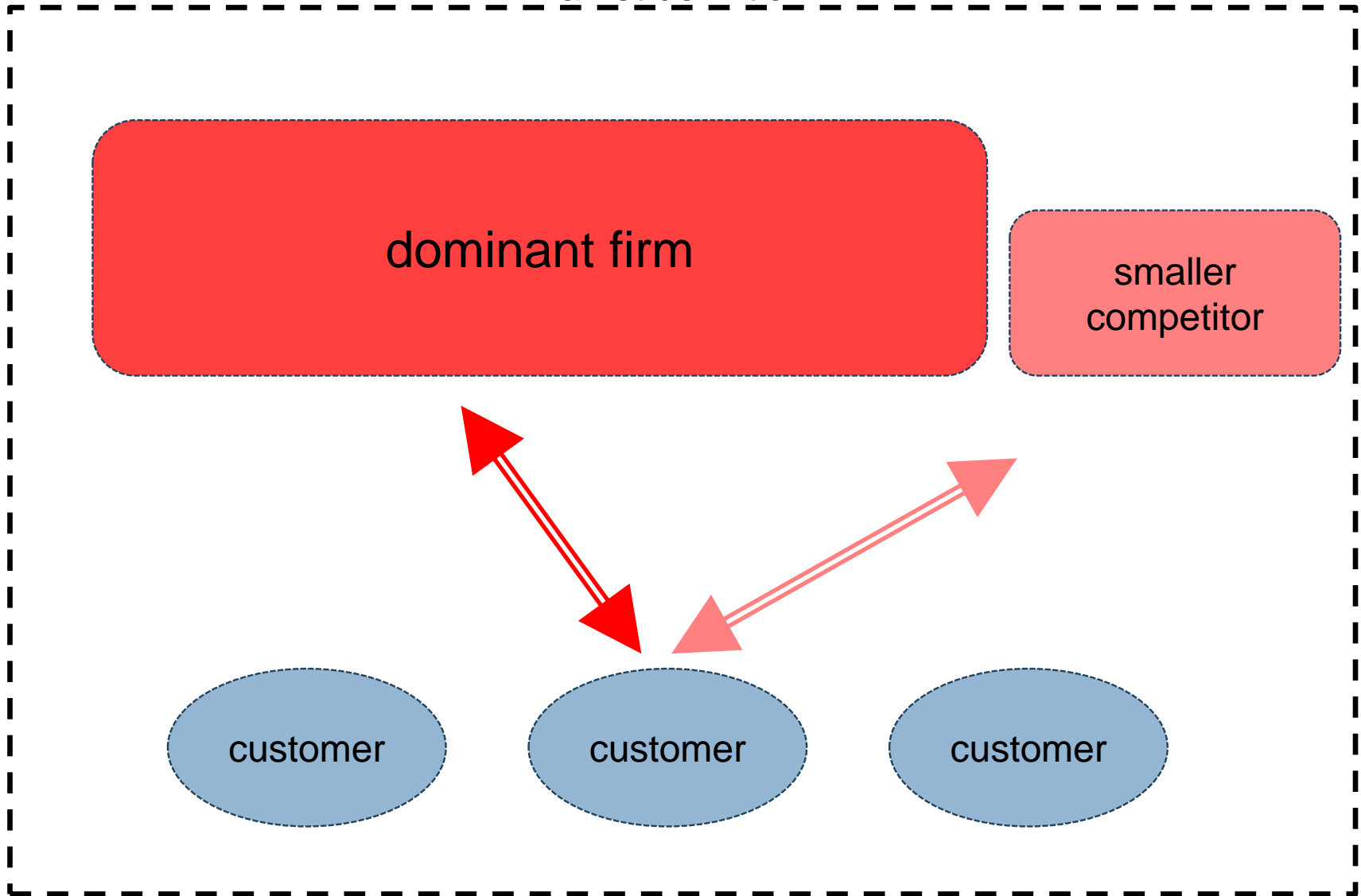
II. Specific prohibitions of unilateral conduct

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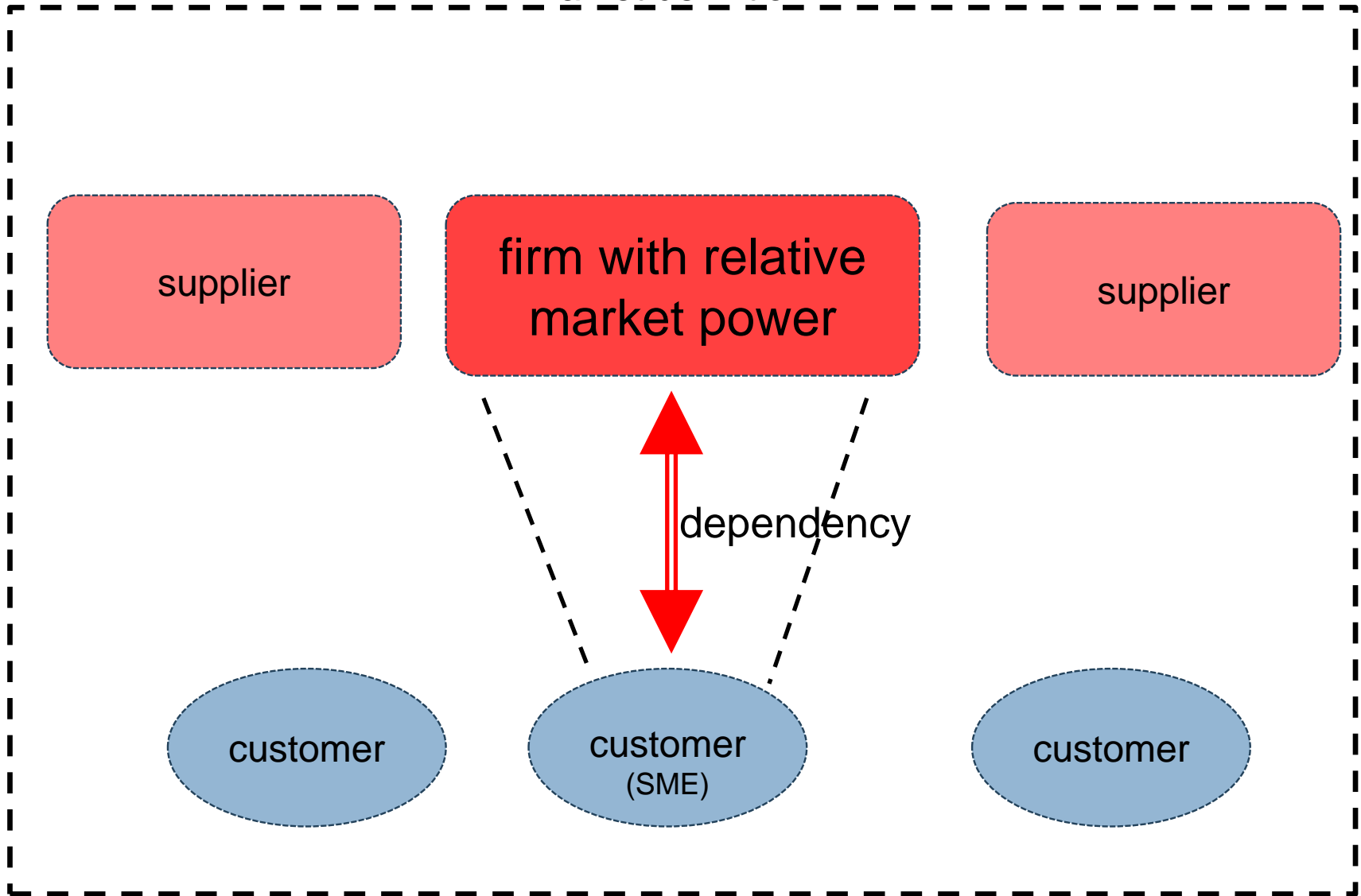
Case examples

- Retailers are dependent to offer their customers a product of a specific brand or a group of brands (“must have“- products).
- Component suppliers have specialized and designed their product/service to the needs of an particular purchaser (“lock-in effect“ after transaction-specific investments).

Market definition



Market definition



II. Specific prohibitions of unilateral conduct

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Criteria for the assessment of Dependency are:

- “sufficient and reasonable possibilities of resorting to other undertakings do not exist”
- no supply/ purchase options inside the geographic market, not even abroad
- only “reasonable” alternatives are considered
- only “small or medium-sized enterprises” are protected against “relative market power”

II. Specific prohibitions of unilateral conduct

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Limits of Application:

- No protection for infertile or vain investments
- No protection for self-inflicted dependency
- No guarantee of a long-term contract by competition law
- Termination of long-term relationships possible, but with adequate termination period
- Competition Authority will not impose fines

II. Specific prohibitions of unilateral conduct

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Countries with similar provisions:

- Austria
- France
- Germany
- Italy
- Slovak Republic

- Japan
- Korea

Source: ICN report on Abuse of Superior Bargaining Position, 2008

II. Specific prohibitions of unilateral conduct

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Forbidden unilateral conduct for Firms with “Relative Market Power” (FRMP):

- FRMP shall not **unfairly impede** another undertaking directly or indirectly **or discriminate** it directly or indirectly without objective justification.
- FRMP shall not use their market position to exploit another undertaking by demanding *advantages* without any objective justification

II. Specific prohibitions of unilateral conduct

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Prohibited conduct	Dominant firms	Firms with relative market power
Abuse in general	X	
Hindrance or discrimination	X	X (against SMEs)
Price discrimination	X	
Essential facilities	X	
Extortion, claim for unjustified advantages	X	X

II. Specific prohibitions of unilateral conduct

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Special provision in Sec. 20 (3) ARC:

- Firms with “superior market power” compared to competitors
- Prohibition of unfair hindrance vis-à-vis small or medium-size competitors
- only if conduct threatens to change competitive structure long-term

II. Specific prohibitions of unilateral conduct

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Case Examples

- Sales at prices below own purchase price – systematically and long-term
 - attempt to expel smaller firms out of the market
 - difficult to define level of purchase price
- Margin Squeeze
 - against small and medium-size undertakings
 - which are competitors on a downstream market
 - demanding higher prices for supply than the firm's selling price on the downstream market

II. Specific prohibitions of unilateral conduct

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Lessons learned:

- Very complex and burdensome assessment
- Intervention in competitive process only in exceptional cases
- Competition Authority shall only demand termination of conduct, shall not impose fines

III. Summary

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- Firms with “relative market power” have specific responsibility - below dominance level
- “Relative market power” follows a specific concept of Dependency – and is more than just a “small market share”
- Firms may have “superior market power” compared to smaller competitors
- Below dominance, interventions in horizontal competition shall be limited to exceptional cases.

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Any questions?



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