



Abuse of dominance

Evidentiary issues: European overview

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Authority for
Consumers & Markets



The authority with combined powers in consumer protection, competition and sector-specific oversight, since April 2013

Combined powers

Consumer protection:

- Protecting and empowering consumers

Competition:

- Cartels
- Merger review
- Abuse of dominance

Regulation of specific industries:

- Energy, telecommunication, postal services, transport

Outline

- Article 102 TFEU
- Dominance
 - Market power assessment
 - Identifying dominance
- Abuse
 - Types of abuse
- Final remarks
- Case: evidence of dominance in Dutch pharmaceutical industry

General meaning of the Article 102 TFEU prohibition

- “Any abuse
- by one or more undertakings
- of a dominant position
- within the common market
- or in a substantial part of it
- *shall be prohibited as incompatible with the common market*
- insofar as it may affect trade between Member States”

General meaning of the Article 102 TFEU prohibition II

- List of Article 102 abuses is not exhaustive, no closed categories, just examples
 - Limiting production, markets, innovation
 - Discrimination
 - Tying
 - Unfair pricing and other unfair trading conditions
- Ongoing process of modernisation in all areas of EU competition law
- 2009 Enforcement priorities: from ‘form based approach’ to ‘effects based approach’
- Focus on exclusionary abuse

Burden of proof

- Council regulation 1/2003, Article 2: The burden of proving an infringement of Article 102 TFEU shall rest on the party or the authority alleging the infringement: *“sufficiently precise and coherent proof”*
- Enforcement priorities pt. 31: It is incumbent upon the dominant undertaking to provide all the evidence necessary to demonstrate that the conduct concerned is objectively justified (objective necessity or efficiency)
- It then falls to the Commission to make the ultimate assessment
 - Objectively necessary?
 - Balancing apparent anti-competitive effects and efficiencies
 - Likely to result in consumer harm

Burden of proof II

- EU courts have long allowed the Commission a ‘margin of appreciation’ in its assessment of complex economic matters and declined to substitute their own assessment for that of the Commission (Microsoft case T-201/04, pts. 87-89)
- *The [...] Courts must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it.”*

Evidence in 102 TFEU – Intel (T-286/09)

- Per undertaking, every piece of evidence.
- Collection of evidence:
 - Duty to keep records of different kinds of information (pts. 620-621, 629)
 - Access to the file, rights of defence
- Value of collected evidence:
 - Reliability of accusations by customers (pts. 684, 720-724)
 - Other than in cartels: one statement can be sufficient on its own in 102 TFEU case
- Interpretation of evidence
 - Exclusivity rebate?: existence of incentive does not depend on whether the rebate is actually reduced or annulled. It is the impression that counts (pts. 511, 527). Burden of proof on Intel (pt. 999).

Dominance – general concept

United Brands (1978), Hoffmann La Roche (1979):

- “A position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market...
- ...by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.”

Dominance – general concept

- Dominance not just any degree of market power (power to influence market prices, output, quality for a significant period of time): higher threshold
- Dominance *as such* is not prohibited (and *big* is not necessarily *bad*)
- But the fact that the functioning of the market is already weakened because of the dominance, is taken into account
- Therefore dominant companies have a special responsibility to keep effective competition in place
- If not dominant, the same behaviour would not be considered abusive
- Successful abuse may act as proof of dominance

Relevant market

- Test: competitive constraint

1. Demand side substitution
2. Supply side substitution
3. Potential competition

- Market definition: necessary framework for establishing and analyzing dominance

- Commission 1997 Notice on Market definition (97C 372/03)
- Relevant product market, relevant geographic market, relevant time frame
- The idea of substitution (of demand and supply)
- SSNIP-test (merger cases) in dominance cases: cellophane fallacy
- Actual versus potential competitors (contestability of the market)

Dominance – relevant factors

- “...a combination of factors which, taken separately, are not necessarily determinative”
- Article 102 Enforcement priorities : looking for constraints on Domco’s behaviour
- Competitive structure as well as dynamics taken into account
- Market shares as a proxy: < 40% (not likely) > 50% (likely, assumption of dominance); Enforcement priorities : “useful first indication”
- Sustainability of the market share, relative strength of competitors and customers.

Dominance – relevant factors II

- Intra-concern relations, financial power, vertical integration
- Countervailing power
- Barriers to expansion and entry:
 - legal/regulatory/administrative barriers
 - IP rights
 - economies of scale and scope, sunk costs
- Barriers to expansion and entry may to some extent be influenced/manipulated by the dominant company (→ abuse)
- Direct evidence of market power: prices above competitive level

Abuse – general concept

Hoffmann La Roche:

- Behaviour of a dominant undertaking
- 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, [competition on the merits]
- has the effect of hindering the maintenance of the degree of competition still existing in the market
- or the growth of that competition

Abuse - classification

- Exploitative abuses
 - Exploitation of the opportunities provided by the dominant company's strength.
- Exclusionary abuses
 - Likely to limit the remaining competitive constraints:
 - through foreclosure (forcing the exit or limiting entry/expansion of competitors)
 - ultimately harming consumers

Anticompetitive foreclosure

- Enforcement priority: exclusionary abuses
- Foreclosure leading to consumer harm = anticompetitive foreclosure, Enforcement priorities pt. 19
- Consumer harm: higher prices, limiting quality or reducing choice
- Test: *Identification of likely consumer harm can rely on qualitative and, where possible and appropriate, quantitative evidence*

Anticompetitive foreclosure II

- Relevant factors to assess, Enforcement priorities pt. 20:
 - Position of dominant undertaking, competitors, customers and suppliers
 - Conditions on the relevant market
 - Extent of the conduct (sales affected)
 - Possible evidence of actual foreclosure
 - Direct evidence of exclusionary strategy
- No detailed assessment: *“If it appears that conduct can only raise obstacles to competition and that it creates no efficiencies, its anti-competitive effect may be inferred.”* (pt. 22)

Counterarguments

- Meeting competition
- Objective necessity
- Efficiencies – 101 (3) TFEU
- Undertakings are expected to provide the evidence

Abuse

- Refusal to supply
 - Test: guidance paper pt. 81
 - Essential facilities (*Bronner/Magill/IMS Health*)
 - IP rights (*Samsung/Motorola/Lundbeck/Servier*)
 - Interface information (*Microsoft T-201/04*)
- Exclusive dealing
- Tying and bundling (*Hilti/Tetra Pak II/Microsoft T-201/04*)
- Discounts (*Intel*)
- Predatory pricing (*AKZO*)
- Excessive pricing
- Margin squeeze (*Telia Sonera/Deutsche Telekom/Telefonica*)
- Discrimination (*transport infrastructure cases*)

Economic approach vs legal certainty

- Is the economic approach suitable for the national (civil) courts?
- Predictability: no penalty without a law?
- Possible solution in 'hard cases': commitment decision (article 9 Reg. 1/2003); no finding of infringement, but acceptance of remedies after 'market test'
- Examples:
 - Motorola, Samsung : no fine + commitment
 - Buma/Stemra (copyright collecting society)
 - Microsoft (tying of internet browser); high fine for non-compliance!

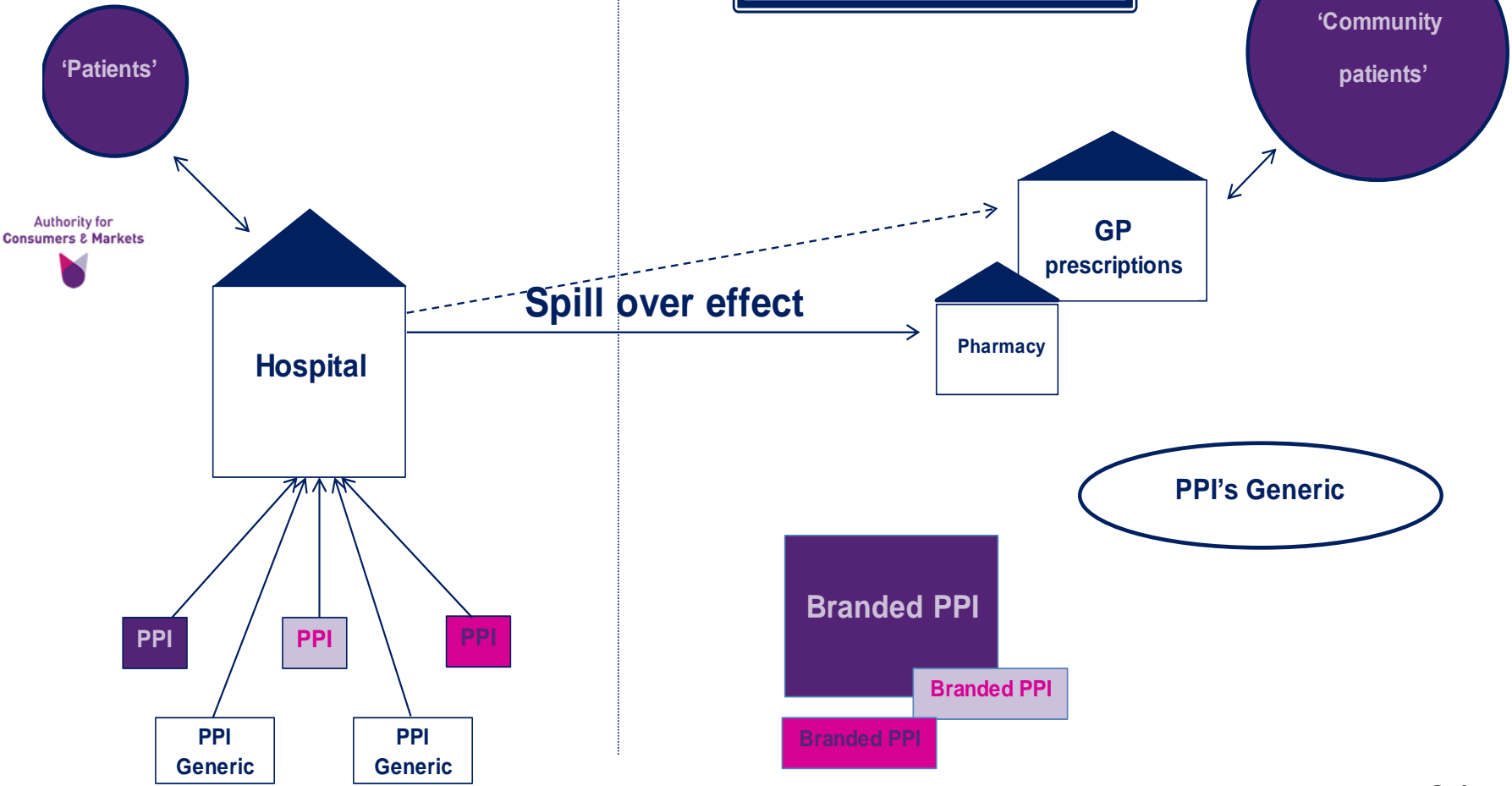
Final considerations

- Article 102 objective is to protect the competition process as a means to protect consumer welfare
- Central concern is foreclosure that hinders competition and thereby causes harm to consumers; test: likely harm rather than actual harm
- Protection of competition, *not* protection of competitors against competition
- Equal right of dominant firms and of residual competitors to *compete on the merits*
- But special responsibility to keep the process of workable competition on the internal market in place (where it is already weakened by the mere existence of dominance)

Nexium - AstraZeneca

- ACM Decision 24 september 2014

- Patent vs. generics
- Reimbursement system
- Preferred supplier policy
- Spill over effect



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