

EU-China Trade Project (II)

Evidentiary issues in antimonopoly cases

- Beijing, 17 March 2015 -

- SESSION III -

EXPERIENCE WITH COURTS ON EVIDENTIARY STANDARDS FOR ESTABLISHING AN ABUSE

- Vivien Terrien -

Experience with courts on evidentiary standards for establishing an abuse

- CONTENT -

EU courts' impact on EU law application in abuse of dominance cases

- I. The role of the Court in abuse of dominance cases**
- II. The court's appraisal of evidence to prove dominance**
- III. The court's appraisal of evidence to prove an abuse**

Experience with courts on evidentiary standards for establishing an abuse

I/. **THE ROLE OF THE COURT IN ABUSE OF DOMINANCE CASES**

I/. The role of the Court in abuse of dominance cases

Quantitative

Activity of EU Courts

- General Court in 2014:
 - 814 completed cases
 - 912 new cases
 - 1423 pending cases
- Court of Justice in 2014:
 - 719 completed cases
 - 622 new cases
 - 787 pending cases
- Abuse of dominance completed cases in EU Courts:
 - in 2014: 4 cases
 - since 1952: 200 cases approx. = <1% of total cases

I/. The role of the Court in abuse of dominance cases

Qualitative (1/2)

Standard of review

In competition cases → **two** types of review

- Legality review
 - full (or comprehensive) review
 - marginal (or limited) review
 - applied to complex economic assessments
 - → judicial deference

- Unlimited jurisdiction
 - competence to substitute its appreciation to the Commission's
 - only as to the sanction in itself

I/. The role of the Court in abuse of dominance cases

Qualitative (2/2)


Marginal (or limited) review

- The judge must
 - establish that the evidence used is
 - factually accurate
 - reliable
 - consistent
 - determine that the evidence
 - contains all the relevant data to be taken into account to assess complex situation
 - is capable of substantiating the conclusions drawn from it



Case T-201/04, Microsoft I, 17 September 2007

AND

-  The judge cannot use Commission's discretion
 - as a basis for dispensing with the conduct of an in-depth review of the law and the facts

Case C-272/09 P, KME, 8 December 2011

I/. The role of the Court in abuse of dominance cases

Case T-427/08, *CEAHR*, 15.12.2010

Market definition

- **Complaint** to Commission from watch repairers vs manufacturers
 - Claim: refusal to supply spare parts to independent repairers → abuse?
- Commission **rejected** the complaint → lack of Community interest
 - Market of limited size and economic importance
 - Repair services and spare parts not in the same market
 - market of luxury watches

I/. The role of the Court in abuse of dominance cases

Case T-427/08, *CEAHR*, 15.12.2010

Market definition

■ Judgment

- Market definition → complex economic assessments → **limited review**
- **BUT**: Commission's discretion in dealing w/ complaints is **not unlimited**
- Examination **in detail** of all reasons put forward by the Commission
- Conclusion: **manifest error of assessment!**
- Strict scrutiny → **annulment** of Commission decision

Experience with courts on evidentiary standards for establishing an abuse

III. THE COURT'S APPRAISAL OF EVIDENCE TO PROVE DOMINANCE

II/. Court's appraisal of evidence to prove dominance



Introductory observations (1/2)

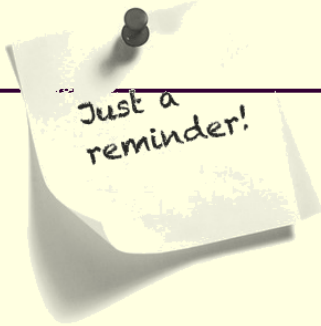
Dominance has to be proven

- Dominance is assessed on a specific market → “relevant market”
 - Relevant product market; and
 - Relevant geographic market

- Dominance = economic strength allowing to behave independently
 - Case 27/76, *United Brands*, 14.2.78, para. 65
 - Case 85/76, *Hoffmann-La Roche*, 13.2.79, para. 39

- If there is no dominance, there is no abuse
 - Non-dominant firm can do whatever it pleases
 - ≠ US legal regime → Section 2 of Sherman Act: monopolization attempt

II/. Court's appraisal of evidence to prove dominance



Introductory observations (2/2)

Evidence to prove dominance

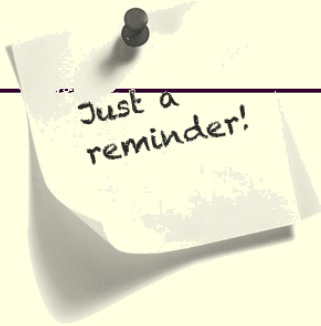
- Assessment of a firm's ability to behave independently of competitive constraints
 - “in light of all relevant market circumstances”
 - Case 27/76, *United Brands*, 14.2.78, paras 66-67
 - = combination of several factors, none has to be determinant in itself
- Steps:
 - First step: **market shares** held by the company on the relevant market
 - Second step: **barriers to entry or expansion** preventing competitors
 - Third step: **countervailing buyer power** that can offset seller power
 - Final check: evidence of **actual competition** on the market

II/. Court's appraisal of evidence to prove dominance

#1

**EU COURTS
HAVE SET THE APPROACH
TO MARKET SHARES**

II/. Court's appraisal of evidence to prove dominance



Market shares

- Proxy to measure **market power** enjoyed by companies
- Market share **of the firm** under investigation must be examined
- Market share **of the company's rivals** must be examined
- Calculation based on **companies' sales** on the relevant market
 - sales' volume; or
 - sales' value

II/. Court's appraisal of evidence to prove dominance

Ideas usually inferred as to dominance

- Very high market shares: > 70% → strong presumption
- Large market share: 70%-50% → weaker presumption
- Market share between 50%-40% → close examination
- Market shares < 40% → strong presumption of no dominance



However no safe harbor

≠ US legal approach focused on 70% threshold

II/. Court's appraisal of evidence to prove dominance

EU Courts' approach re market shares

Market shares as a proxy
BUT
NOT EVEN A PRESUMPTION

II/. Court's appraisal of evidence to prove dominance

EU Courts' approach re market shares

Large market shares

Case C-62/86, AKZO Chemie BV/Commission, 3.7.91

Rebuttable presumption?

- In *AKZO* case, the Commission determined dominance through:
 - market shares (50%);
 - stability of AKZO's market share
 - AKZO's aggressive and successful response to entry
 - AKZO's high margins and price or volume increases even in periods of economic downturn

II/. Court's appraisal of evidence to prove dominance

EU Courts' approach re market shares

Large market shares

Case C-62/86, AKZO Chemie BV/Commission, 3.7.91

Rebuttable presumption?

BUT

the Court mainly looked at AKZO's market share of **50%**

→ in itself = evidence of the existence of a dominant position

II/. Court's appraisal of evidence to prove dominance

EU Courts' approach re market shares

Large market shares

Case T-321/05, AstraZeneca/Commission, 1.7.10

Indication!

- Market share almost invariably above 50%
- Court emphasizes the Commission's in-depth analysis re dominance (≠ reliance only on market share level)
 - IP rights
 - Other rights of a regulatory nature
 - R&D investments
 - Promotional activities and financial resources

II/. Court's appraisal of evidence to prove dominance

EU Courts' approach re market shares

Very high market shares

Case 85/76, *Hoffman-La Roche*, 13.2.79

Very large shares are in themselves

- save in exceptional circumstances -

evidence of the existence of a dominant position

II/. Court's appraisal of evidence to prove dominance

EU Courts' approach re market shares

Very high market shares

Case 85/76, *Hoffman-La Roche*, 13.2.79

HOWEVER

→ Must be held for some time

→ Rivals must be unable to meet rapidly the demand from those who want to break away

II/. Court's appraisal of evidence to prove dominance

EU Courts' approach re market shares

Very high market shares

Case 85/76, *Hoffman-La Roche*, 13.2.79

MOREOVER

Mere fact that market shares are stable

≠

No evidence of dominance

II/. Court's appraisal of evidence to prove dominance

EU Courts' approach re market shares

Very high market shares

Case T-30/89, *Hilti*, 2.3.94

Indication!

- Market share between 70% and 80%
- “a clear indication of the existence of a dominant position”
- Judge examined other factors
 - Patent holder
 - Non-dominant supplier could behave the same way as Hilti

II/. Court's appraisal of evidence to prove dominance

EU Courts' approach re market shares

Large market shares

&

Very high market shares

- Presumption → burden of proof on the company to rebut it
- Indication → obligation for the authority to bring more evidence

 **Presumption**

 **Indication**

II/. Court's appraisal of evidence to prove dominance

EU Courts' approach re market shares

Extremely large market share

Case T-228/97, *Irish Sugar*, 7.10.99

Presumption

BUT

Rebuttable

- Market share at more than 90%
- Court went on examination of
 - alleged absence of barriers to entry and expansion
 - presence of buyer power

II/. Court's appraisal of evidence to prove dominance

#2

**EU COURTS
HAVE SET THE REASONING
RE BARRIERS TO ENTRY**

II/. Court's appraisal of evidence to prove dominance



Barriers to entry and expansion

**Dominance is incompatible
with the absence of
significant
barriers to entry and expansion**

II/. Court's appraisal of evidence to prove dominance

Barriers to entry and expansion

- Inherent in the relevant market
- Specific to the company under investigation

II/. Court's appraisal of evidence to prove dominance

Barriers to entry and expansion

- Inherent in the relevant market
 - Regulatory barriers to entry
 - State monopolies *Case T-139/98, AAMS, 22.11.01*
 - Authorization or licensing requirements *Case COMP/38.096, Clearstream, 2.06.04*
 - Intellectual property rights *Case T-321/05, AstraZeneca/Commission, 1.7.10*
 - Economic barriers to entry
 - Sunk costs of entry *Case COMP/38.784, Telefónica, 4.07.07*
 - Economies of scales *Case IV/31.900, BPB Industries, 4.12.88*
 - Network effects *Case COMP/37.792, Microsoft, 24.03.04*
 - Switching costs for consumers *Case T-201/04, Microsoft, 17.9.07*
- Specific to the company under investigation

II/. Court's appraisal of evidence to prove dominance

Barriers to entry and expansion

- Inherent in the relevant market
- Specific to the company under investigation
 - Access to key input *Case IV/34.689, Sea Containers, 21.12.93*
 - Special knowledge *Case T-203/01, Michelin, 30.9.03*
 - Spare capacity *Case IV/M.315, Mannesmann, 31.01.94*
 - Vertical integration *Case C-202/07 P, France Télécom, 2.04.09*
 - Brand recognition *Case COMP/37.990, Intel, 13.05.09*
 - Financial and economic strength *Case C-457/10 P, AstraZeneca, 6.12.12*
 - Profitability *Case 322/81, Michelin I, 9.11.83*
 - Company's own assessment *Case IV/32.279, BBI/Boosey, 29.07.87*

II/. Court's appraisal of evidence to prove dominance

EU Courts' approach re barriers

The principle (1/2)

Case 6/72, Continental Can, 21.2.73

- Continental Can = company active in food packaging industry
 - acquired a company active on the same market
- Commission found that the acquisition = abuse of dominant position
 - had the effect of practically eliminating competition in packaging product market
- Commission found dominance on 3 different markets for light containers
- **However**, the Court notes that, in the decision, there is:
 - no analysis on how these 3 markets differ from each other; and
 - no analysis on how these 3 markets differ from other markets for light containers

II/. Court's appraisal of evidence to prove dominance

EU Courts' approach re barriers

The principle (2/2)

Case 6/72, Continental Can, 21.2.73

A dominant position on a market **cannot be decisive** as long as it has not been proved that **competitors** from other sectors of the market are not in a position to **enter** this market, by simple adaptation, with sufficient strength to create a serious counterweight

(point 33)

→ Annulment of Commission decision

II/. Court's appraisal of evidence to prove dominance

EU Courts' approach re barriers

Inherent in the relevant market

- Sunk costs of entry -

Case 27/76, *United Brands*, 14.2.78

Principles

Costs that a firm must incur to enter a market

or

Costs that competitors may have to commit to expand capacity

that are NOT RECOVERABLE upon exit of the market

II/. Court's appraisal of evidence to prove dominance

EU Courts' approach re barriers

Inherent in the relevant market

- Sunk costs of entry -

Case 27/76, *United Brands*, 14.2.78

Application

- Exceptionally large capital investments required for the creation and running of banana plantations
- Need to increase sources of supply in order to avoid the effects of fruit diseases and bad weather
- Introduction of an essential system of logistics necessary to distribute a very perishable product
- Setting up of an adequate commercial network
- Mounting of very large-scale advertising campaigns

→ All those financial risks bear irrecoverable costs if the attempt fails

II/. Court's appraisal of evidence to prove dominance

EU Courts' approach re barriers

Specific to the company under investigation

- Spare capacity -

Case 85/76, Hoffmann-La Roche, 13.2.79

Principles

If an alleged dominant firm is able to **increase its output at short notice**
and **without substantial capacity maintenance costs**
because it has spare production capacity



It may be in a position to **deter any potential competition**

II/. Court's appraisal of evidence to prove dominance

EU Courts' approach re barriers

Specific to the company under investigation

- Spare capacity -

Case 85/76, Hoffmann-La Roche, 13.2.79

Application

- Hoffmann-La Roche = producer of vitamins for pharmaceutical & food industry
- Commission found an abuse in H-LR's rebates practice applied to purchasers
- Commission found H-LR dominant on markets in certain vitamins, proved by:
 - retention of market shares → **rejected** by the Court
 - production of far wider range of vitamins than competitors → **rejected** by the Court
 - world's largest vitamin manufacturer with largest turnover → **rejected** by the Court
- What about the existence of considerable unused manufacturing capacity?
 - Court notes that all market participants have excess capacity
 - **BUT** H-LR has a "privileged position" → **capable of meeting the entire WW demand**
 - **without placing it in difficult economic situation**

II/. Court's appraisal of evidence to prove dominance

#3

**EU COURTS' INSISTENCE
ON FULL ANALYSIS**

- COUNTERVAILING POWER EXAMPLE -

II/. Court's appraisal of evidence to prove dominance



Countervailing buyer power

Principles

- Competitive constraints exercised by buyers
 - ≠ actual or potential competitors
- Need sufficiently credible alternatives
 - Switching to existing suppliers
 - Sponsoring new entry
 - Vertical integration
- A few large customers able to negotiate lower prices
 - Not sufficient

II/. Court's appraisal of evidence to prove dominance

EU Courts' approach re countervailing buyer power

Importance in the reasoning

Joined Cases T-68/89, 77/89 and 78/89, *Italian Flat Glass*, 10.3.92

- Commission's finding on collective dominance
- General Court set aside the Commission's reasoning
 - The Commission has failed to examine whether the presence of a powerful buyer could neutralize the economic power of the three allegedly collectively dominant oligopolists

Experience with courts on evidentiary standards for establishing an abuse

III. THE COURT'S APPRAISAL OF EVIDENCE TO PROVE AN ABUSE

III/. Court's appraisal of evidence to prove an abuse



Introductory observations (1/3)

Dominance is not an abuse (1/2)

Settled case law

- To have a dominant position is not a ground of criticism
in itself

Case 322/81, Michelin/Commission, 9.11.83, para. 57

- It is in no way the purpose of EU law to prevent an undertaking from acquiring the dominant position on a market
on its own merits

Case C-52/09, TeliaSonera Sverige, 17.2.11, para. 24

III/. Court's appraisal of evidence to prove an abuse



Introductory observations (2/3)

Dominance is not an abuse (2/2)

Settled case law

- It is in no way the purpose of EU law to seek to ensure that competitors **less efficient** than the dominant company should remain on the market

Case C-209/10, *Post Danmark*, 27.3.12, para. 21

- Not every exclusionary effect is necessarily detrimental to competition
→ **normal competitive game**
(e.g., price, choice, quality, innovation)

Case C-52/09, *TeliaSonera Sverige*, 17.2.11, para. 43

III/. Court's appraisal of evidence to prove an abuse



Introductory observations (3/3)

Dominance comes with duties

Settled case law

- Dominant company has
a special responsibility
not to impair genuine, undistorted competition on the internal market

Case C-202/07 P, France Telecom/Commission, 2.4.09, para. 105

- This is especially important when dominance comes from
former legal monopoly

Case C-209/10, Post Danmark, 27.3.12, para. 23

III/. Court's appraisal of evidence to prove an abuse

EU Courts' recent approach re main abuses

- **Individualized target rebates**
 - Case C-549/10 P, *Tomra*, 19 April 2012

- **Tying and bundling**
 - Case T-201/01, *Microsoft I*, 17 September 2004

- **Refusal to supply**
 - C-418/01, *IMS Health*, 29 April 2004

III/. Court's appraisal of evidence to prove an abuse

INDIVIDUALIZED TARGET REBATES

III/. Court's appraisal of evidence to prove an abuse

CASE C-549/10 P

TOMRA v. COMMISSION

19 April 2012

III/. Court's appraisal of evidence to prove an abuse

Case C-549/10 P, *Tomra v. Commission*, 19.4.12

Procedure

- 29.6.06: Commission decision
 - Infringement from 1998 to 2002 on different geographic markets
 - Exclusionary strategy on reverse vending machines (RVM) market
 - Exclusivity agreements
 - Individualized quantity commitments
 - Individualized retroactive rebate schemes
 - → Market foreclosure: fine of €24 M

- 9.9.10: General Court judgment → Dismissal

- 19.4.12: ECJ judgment → upheld GC decision

III/. Court's appraisal of evidence to prove an abuse

Case C-549/10 P, *Tomra v. Commission*, 19.4.12

1. Proof of foreclosure

- Threshold -

Need to establish a precise threshold beyond which Tomra's practices would be capable of excluding its competitors from the market?

NO

III/. Court's appraisal of evidence to prove an abuse

Case C-549/10 P, *Tomra v. Commission*, 19.4.12

1. Proof of foreclosure

- Issue -

Foreclosure by dominant company of **substantial part**

BUT

contestable part still sufficient to accommodate a limited number of competitors

→ Justification ?

NO

III/. Court's appraisal of evidence to prove an abuse

Case C-549/10 P, *Tomra v. Commission*, 19.4.12

1. Proof of foreclosure

- Reasons -

Customers on the foreclosed part

should have the opportunity to benefit from whatever degree of competition possible

III/. Court's appraisal of evidence to prove an abuse

Case C-549/10 P, *Tomra v. Commission*, 19.4.12

1. Proof of foreclosure

- Reasons -

Competitors

should be able to compete on the merits for the entire market

III/. Court's appraisal of evidence to prove an abuse

Case C-549/10 P, *Tomra v. Commission*, 19.4.12

1. Proof of foreclosure

- Reasons -

Dominant company

Not its role to dictate how many viable competitors are allowed to compete for the remaining contestable part

III/. Court's appraisal of evidence to prove an abuse

Case C-549/10 P, *Tomra v. Commission*, 19.4.12

1. Proof of foreclosure

- Analysis of the circumstances of the case -

Determination of the foreclosed proportion of total demand

→ 2/5

considerable

→ No need to apply the “minimum viable scale” test

III/. Court's appraisal of evidence to prove an abuse

Case C-549/10 P, *Tomra v. Commission*, 19.4.12

2. Proof of abusive retroactive rebates

- Price/Cost analysis -

Need to compare prices charged by the dominant company with its costs (LRAIC)?

NO

III/. Court's appraisal of evidence to prove an abuse

Case C-549/10 P, *Tomra v. Commission*, 19.4.12

2. Proof of abusive retroactive rebates

- Price/Cost analysis -

- No need to show negative price (i.e., below costs)
 - to prove exclusionary effect of retroactive rebates
 - because cost of rebate is spread across many units
- Average price obtained may well be far above costs
 - ensure a high average profit margin
- Retroactive rebates ensure very low effective price for the last unit → “suction effect”

III/. Court's appraisal of evidence to prove an abuse

Case C-549/10 P, *Tomra v. Commission*, 19.4.12

2. Proof of abusive retroactive rebates

- Analysis of the circumstances of the case -

Sufficient to identify whether rebates tend to:

- remove/restrict **buyer's** freedom to choose supply sources
- bar **competitors** from access to the market
- strengthen the **dominant position** by distorting competition

III/. Court's appraisal of evidence to prove an abuse

Case C-549/10 P, *Tomra v. Commission*, 19.4.12

2. Proof of abusive retroactive rebates

- Analysis of the circumstances of the case -

- combination of threshold and application of bonus to all purchases
 - not exclusively to purchasing volume exceeding threshold
- rebates scheme was individual to each customers
 - threshold established re estimated requirements/past purchasing volume → strong incentive for buying (almost) all equipment
 - → artificial rise of the switching costs
- retroactive rebates often applied to largest customers
 - aim at ensuring loyalty

III/. Court's appraisal of evidence to prove an abuse

Case C-549/10 P, *Tomra v. Commission*, 19.4.12

2. Proof of abusive retroactive rebates

- Analysis of the circumstances of the case -

- No objective justification
- No evidence of significant efficiency gains
 - outweighing anticompetitive effect on consumers

III/. Court's appraisal of evidence to prove an abuse

Case C-549/10 P, *Tomra v. Commission*, 19.4.12

2. Proof of abusive retroactive rebates

- Conclusion -

- Loyalty mechanism is inherent in the supplier's ability to drive out its competitors
 - by means of the suction effect to itself of the contestable part of the demand
- When such trading instrument exists
 - unnecessary to undertake an analysis of actual effects of the rebates on competition
- Sufficient to demonstrate that conduct has effect on competition

III/. Court's appraisal of evidence to prove an abuse

TYING AND BUNDLING

III/. Court's appraisal of evidence to prove an abuse

CASE T-201/04

MICROSOFT I

17 September 2007

III/. Court's appraisal of evidence to prove an abuse

Case T-201/04, *Microsoft v. Commission*, 17.9.07

Procedure

- 23.3.04: **Commission** decision → fine of €497 M approx.
 - Abuse → tying of Windows Media Player w/ Windows PC OS
 - Remedy → obligation imposed on MS to sell Windows w/o WMP
- 17.9.07: **General Court** → essentially upheld the decision
- **No appeal** before the Court of justice

III/. Court's appraisal of evidence to prove an abuse

Case T-201/04, *Microsoft v. Commission*, 17.9.07

1. The two-product test (1/2)

- Type of demand -

Could the test be whether there would be demand for the tying product without the tied product?

NO

→ *Complementary products can be separate products*

Should the demand be the one of the final consumer?

NO

→ *Level of the distribution chain where the tying took place*

III/. Court's appraisal of evidence to prove an abuse

Case T-201/04, *Microsoft v. Commission*, 17.9.07

1. The two-product test (2/2)

- Time frame -

Should the test consider the evolution of the market?

YES

→ Test must be applied in a dynamic way

BUT

→ Test must be applied at the time when abuse occurred

III/. Court's appraisal of evidence to prove an abuse

Case T-201/04, *Microsoft v. Commission*, 17.9.07

2. Proof of foreclosure (1/3)

- Coercion -

No foreclosure when customers do not pay for the tied product and are not prevented to use competitors' products?

NO

→ *Customers may be coerced to such an extent
= foreclosure*

III/. Court's appraisal of evidence to prove an abuse

Case T-201/04, *Microsoft v. Commission*, 17.9.07

2. Proof of foreclosure (2/3)

- Always necessary \neq *per se* abuse -

No need to prove foreclosure when customers can easily obtain competitors' products and for free?

NO

- Product free of charge
- Strong disincentives to obtain competing product
→ *may indicate anticompetitive foreclosure*

III/. Court's appraisal of evidence to prove an abuse

Case T-201/04, *Microsoft v. Commission*, 17.9.07

2. Proof of foreclosure (3/3)

- Assessment of exclusionary effect -

Test → whether tying had a negative effect on structure of competition

- Consumers had no or low incentives to obtain similar products
- OEMs had no incentive to install an additional competing product
- Content providers had no incentive to develop for competitors

Foreclosure → effect of affecting relations on the market by appreciably altering the balance of competition in favor of MS (**weaken** others)

+

Tying gave MS a **significant** market penetration advantage

→ **not** based on competition on the merits

III/. Court's appraisal of evidence to prove an abuse

Case T-201/04, *Microsoft v. Commission*, 17.9.07

3. Possible efficiencies (1/3)

- Reduction of transaction costs -

No need to prove foreclosure when customers can easily obtain competitors' products and for free?

NO

III/. Court's appraisal of evidence to prove an abuse

Case T-201/04, *Microsoft v. Commission*, 17.9.07

3. Possible efficiencies (2/3)

- Dynamic efficiency -

Legitimate objective justification?

Unbundling Windows and Media Player would result in lower performance and degradation of the system

YES

BUT → *no evidence*

III/. Court's appraisal of evidence to prove an abuse

Case T-201/04, *Microsoft v. Commission*, 17.9.07

3. Possible efficiencies (3/3)

- Standardization -

Legitimate objective justification?

Tying Windows and Media Player allows software developers to avoid extra cost of ensuring compatibility

UNLIKELY

- *Proportionality: conduct → proportionate to achievement of legitimate objective*
- *Capacity to increase social welfare and productivity in the long term*
- *Cooperative standardization is less restrictive than unilateral standardization*
- *Benefits > anticompetitive effects*

III/. Court's appraisal of evidence to prove an abuse

REFUSAL TO SUPPLY

III/. Court's appraisal of evidence to prove an abuse

CASE C-418/01

IMS HEALTH

29 April 2004

III/. Court's appraisal of evidence to prove an abuse

Case C-418/01, *IMS Health*, 29.4.04

Facts and Procedure

- Copyright-protected data analysis structure designed by IMS
 - used to divide customers' groups and report German pharma sales
- 3.1.01: **Commission** interim decision
 - IMS system = de facto industry standard → essential facility
 - Must be made available → duty to grant licenses
- 26.10.01: **stay of proceedings**
 - *Case T-184/01 R* confirmed by *Case C-481/01 P(R)*
- 29.4.04: **Preliminary ruling**

III/. Court's appraisal of evidence to prove an abuse

Case C-418/01, *IMS Health*, 29.4.04

1. Indispensability (1/2)

To be indispensable the input has to be a product on an existing upstream market?

NO

→ *Sufficient to identify a potential or even hypothetical market*

III/. Court's appraisal of evidence to prove an abuse

Case C-418/01, *IMS Health*, 29.4.04

1. Indispensability (2/2)

Indispensable only if impossible to replicate the input due to legal or technical reasons?

NO

- input = de facto industry standard
- duplication: not economically viable for production on similar scale

III/. Court's appraisal of evidence to prove an abuse

Case C-418/01, *IMS Health*, 29.4.04

2. Foreclosure effect

Is restriction of effective competition enough?

NO

→ *In IP rights abuses, all effective competition must be eliminated*

III/. Court's appraisal of evidence to prove an abuse

Case C-418/01, *IMS Health*, 29.4.04

3. Consumer harm

To prevent the emergence of a new product = prejudice to consumers?

POSSIBLY

BUT

→ *not a new product, just new variations of the same service*

Case T-184/01 R, IMS Health, 26.10.01

Confirmed on appeal: *C-481/01 P(R), NDC Health/IMS, 11.4.02*

Experience with courts on evidentiary standards for establishing an abuse

CONCLUSION

Conclusion

REMEMBER

EU courts' impact on EU law application in abuse of dominance cases

- Through the case law, the EU Courts **set the principles**
 - it gives guidelines and meaning of concept
 - for both the economic operators and the competition authorities

- Through the case law, the EU Courts **provide legal certainty**
 - Commission's practice is on shaky grounds...
 - ... as long as it hasn't been confirmed by the Court

- Through the case law, the EU Courts **fix the shortcomings**
 - economic operators can get a better idea of the right behavior to adopt
 - reinforce future decisions taken by competition authorities

Experience with courts on evidentiary standards for establishing an abuse

Thank you for your attention!

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