Complete EU Law: Text, Cases, and Materials (5th edn)
Elspeth Berry, Barbara Bogusz, Matthew Homewood, and Sophie Strecker

14. Competition law: Article 102 TFEU

Elspeth Berry, Reader in Law, Nottingham Trent University, Barbara Bogusz, Lecturer in Law, University of Leicester, Matthew Homewood, Deputy Dean, Nottingham Trent University, and Sophie Strecker, Principal Lecturer in Law, Nottingham Trent University

https://doi.org/10.1093/he/9780192846419.003.0014
Published in print: 04 August 2022
Published online: September 2022

Abstract

Titles in the Complete series combine extracts from a wide range of primary materials with clear explanatory text to provide readers with a complete introductory resource. This chapter focuses on Article 102 TFEU, which prohibits as incompatible with the internal market 'any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it … in so far as it may affect trade between Member States'. It also discusses the enforcement of Article 102 by the European Commission, national competition authorities, and national courts under powers conferred by Regulation 1/2003. Finally, it mentions the current impact of Brexit on EU competition law.

Keywords: EU law, anti-competitive behaviour, Article 102 TFEU, competition law, internal market, trade, market power, demand substitutability, supply substitutability, Brexit

Key Points

By the end of this chapter, you should be able to:

- explain the key elements of an abuse of a dominant position contained in Article 102 TFEU;
- explain and analyse the concept of dominance;
- explain, analyse, and apply the concept of relevant markets, including economic indicators;
- identify and apply abusive behaviour; and
- recognize the impact of Brexit on EU competition law.

Introduction

Whereas Article 101 TFEU applies to restrictive arrangements and concerted practices between businesses, the focus of Article 102 TFEU is on the abuse of market power, or 'dominance', within the internal market. It is important to note that dominance itself is not prohibited; the emphasis is upon an abuse of such a position to the extent that it is capable of affecting trade. Like Article 101 TFEU, Article 102 is enforced by the European Commission, national competition authorities (NCAs), and national courts under powers conferred by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU], OJ 2003 L1/1.

For example, suppose that Bagsaflavour, a German teabag manufacturer with a 70 per cent share of the relevant market supplying teabags across the European Union (EU), becomes alarmed to hear of a potential competitor emerging in Western Europe. It therefore contacts each of its customers in Germany, offering loyalty discounts for those willing to commit to only buying teabags from Bagsaflavour. However, such discounts are not available in Romania, where demand for German tea is exceptionally high. As a result, Bagsaflavour has been charging wholesalers in Romania prices three times as high as those in Germany.

Bagsaflavour appears to have an erratic pricing structure aimed at removing competition and exploiting customers in countries in which competition does not exist or is reduced. Such behaviour is likely to be a breach of Article 102 TFEU.

14.1 Outline of Article 102 TFEU

Article 102 TFEU

> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
>
> p. 600 ↵ Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 102 TFEU is similar in approach to Article 101 in that a clear prohibition is set out, followed by examples of behaviour that would amount to a breach. It prohibits, as incompatible with the internal market, '[a]ny abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it … in so far as it may affect trade between Member States'.

14.2 Article 102 TFEU: the prohibition

The undertaking (a) must have a dominant position within the internal market or in a substantial part of it, which (b) it must have abused, and (c) the abuse must be capable of affecting trade between Member States.

Thinking Point

> Article 102 TFEU can be broken into three distinct elements. Can you identify them?

If all three elements are satisfied, a breach of Article 102 TFEU is established. If any one of the three elements is not satisfied, the behaviour does not fall within the prohibition within Article 102.

As with the application of Article 101 TFEU, it is therefore important in applying Article 102 to take a structured approach.

14.2.1 Undertakings

The term 'undertakings' has the same meaning as in Article 101 TFEU. Thus, with reference to Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, it can be said that it has been interpreted widely and includes any legal or natural person engaged in some form of economic or commercial activity.

> *Cross-Reference*
>
> For more detail on the term 'undertaking' see 13.2.1.1.

p. 601

14.3 Dominant position

In Case 27/76 *United Brands Co v Commission ('Chiquita Bananas')* [1978] ECR 207, at para 65, the Court of Justice set out its classic definition of a dominant position as 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'.

It is important to appreciate that the definition given in *Chiquita Bananas* draws attention to a number of things. First, it identifies the fact that the position of dominance may enable the undertaking to affect competition. This could be done by using short-term price cuts, for example, leading to competitors losing business and being forced out of business. It also identifies the fact that a dominant position may enable an undertaking to exploit customers, for example by linked sales or by charging unfair prices.

In addition to this, the definition in *Chiquita Bananas* makes it clear that dominance is assessed in relation to a relevant market. To simply talk of dominance in the abstract is meaningless, but by looking first for the relevant market and only then assessing an undertaking's dominance in relation to that market, a true picture of the dominance or otherwise of an undertaking can be found.

14.3.1 Relevant market

There are three aspects to the relevant market:

- the relevant product market (RPM);
- the relevant geographic market (RGM); and
- the relevant temporal (or seasonal) market (RTM).

The RPM and RGM will always be key considerations in determining the applicability or otherwise of Article 102 TFEU, but only rarely has an RTM been identified by the Court of Justice. However, this has not prevented undertakings from making the argument.

Of course, if dominance is assessed according to a relevant market, it seems clear that an undertaking will always seek to define it in the widest possible terms. In this way, the undertaking is less likely to be dominant and, in turn, dominance not having been established, its behaviour will not be further considered under Article 102 TFEU. However, the Commission will seek to define the relevant market in the narrowest terms such that dominance can be established and the undertaking's behaviour can be assessed against the Article 102 prohibition.

14.3.2 Relevant product market

How do we establish what product market a product actually falls into? It might at first seem to be a relatively straightforward question.

Take, for example, Poshchox, a (fictitious) manufacturer of high-quality chocolate products with a large
p. 602 market share. A potential competitor emerges that is rapidly increasing its own ↵ market share and Poshchox responds by slashing its prices below cost, with the intention of driving the competitor out of the market. Such behaviour would demand consideration under Article 102 TFEU, with the first factor to be established being the dominance or otherwise of Poshchox.

Thinking Point

> What do you think is the RPM of Poshchox?

If the relevant market is the high-quality chocolate market, Poshchox is likely to be dominant as it has a large market share of this market.

However, if it could be argued that the RPM is general chocolate products, the likelihood that Poshchox is dominant is reduced. Indeed, it may even be possible to argue that the relevant product market is general confectionary products. In this scenario, the likelihood of Poshchox being dominant is reduced further still.

Review Question

> Why do you think such emphasis is placed upon the establishment of the RPM?
>
> *Answer*: The RPM is likely to be the crucial factor in determining whether or not an undertaking is dominant. If there is no dominance, there is no breach of Article 102 TFEU.

Therefore, Poshchox is likely to argue that it is in the general confectionary market as the likelihood of it being dominant in this market is far less than if the RPM is the high-quality chocolate market.

14.3.2.1 Establishing the RPM

The Commission uses a consideration of product substitutability to determine the RPM. This comprises two distinct elements and an analysis of both is required. The first, demand substitutability, is concerned with the behaviour of customers, whilst the second, supply substitutability, is concerned with the behaviour of other suppliers.

14.3.2.2 Demand substitutability

Demand substitutability (often referred to as cross-elasticity of demand) requires a consideration of the extent to which a customer would be willing, and indeed able, to substitute the product in question for an alternative product—in other words, whether a customer would consider one product to be a substitute for another. Where two products are considered to be substitutable in this way, they can be seen to be in the same product market and the RPM will include both products.

Thus, considering Poshchox, would a consumer be willing to accept a candy bar as a substitute? If not, the products are in different product markets.

Case 27/76 *United Brands Co v Commission ('Chiquita Bananas')* [1978] ECR 207 is a useful case with which to
p. 603 illustrate demand substitutability. In this case, a Commission Decision had ↵ found United Brands, a banana producer, to have abused its dominant position contrary to Article 102 TFEU. United Brands sought annulment of the Decision and, in so doing, sought to define the RPM more widely as fresh fruit generally. The Commission argued, however, that the RPM was the narrower market for bananas.

Case 27/76 *United Brands Co v Commission ('Chiquita Bananas')* [1978] ECR 207

12. As far as the product market is concerned it is first of all necessary to ascertain whether, as the applicant maintains, bananas are an integral part of the fresh fruit market, because they are reasonably interchangeable by consumers with other kinds of fresh fruit such as apples, oranges, grapes, peaches, strawberries, etc. Or whether the relevant market consists solely of the banana market which includes both branded bananas and unlabelled bananas and is a market sufficiently homogeneous and distinct from the market of other fresh fruit.
13. The applicant submits in support of its argument that bananas compete with other fresh fruit in the same shops, on the same shelves, at prices which can be compared, satisfying the same needs: consumption as a dessert or between meals.
14. The statistics produced show that consumer expenditure on the purchase of bananas is at its lowest between June and December when there is a plentiful supply of domestic fresh fruit on the market.
15. Studies carried out by the Food and Agriculture Organization (FAO) (especially in 1975) confirm that banana prices are relatively weak during the summer months and that the price of apples for example has a statistically appreciable impact on the consumption of bananas in the Federal Republic of Germany.
16. Again according to these studies some easing of prices is noticeable at the end of the year during the 'orange season'.
17. The seasonal peak periods when there is a plentiful supply of other fresh fruit exert an influence not only on the prices but also on the volume of sales of bananas and consequently on the volume of imports thereof.
18. The applicant concludes from these findings that bananas and other fresh fruit form only one market and that [United Brands]'s operations should have been examined in this context for the purpose of any application of Article 86 of the Treaty [now Article 102 TFEU].
19. The Commission maintains that there is a demand for bananas which is distinct from the demand for other fresh fruit especially as the banana is a very important part of the diet of certain sections of the Community [now Union].
20. The specific qualities of the banana influence customer preference and induce him not to readily accept other fruits as a substitute.
21. The Commission draws the conclusion from the studies quoted by the applicant that the influence of the prices and availabilities of other types of fruit on the prices and availabilities of bananas on the relevant market is very ineffective and that these

effects are too brief and too spasmodic for such other fruit to be regarded as forming part of the same market as bananas or as a substitute therefor.

p. 604

22. For the banana to be regarded as forming a market which is sufficiently differentiated from other fruit markets it must be possible for it to be singled out by such special features distinguishing it from other fruits that it is only to a limited extent interchangeable with them and is only exposed to their competition in a way that is hardly perceptible.

23. The ripening of bananas takes place the whole year round without any season having to be taken into account.

24. Throughout the year production exceeds demand and can satisfy it at any time.

25. Owing to this particular feature the banana is a privileged fruit and its production and marketing can be adapted to the seasonal fluctuations of other fresh fruit which are known and can be computed.

[...]

31. The banana has certain characteristics, appearance, taste, softness, seedlessness, easy handling, a constant level of production which enable it to satisfy the constant needs of an important section of the population consisting of the very young, the old and the sick.

[...]

34. It follows from all these considerations that a very large number of consumers having a constant need for bananas are not noticeably or even appreciably enticed away from the consumption of this product by the arrival of other fresh fruit on the market and that even the personal peak periods only affect it for a limited period of time and to a very limited extent from the point of view of substitutability.

35. Consequently the banana market is a market which is sufficiently distinct from the other fresh fruit markets.

Thus, having considered product substitution and cross-elasticity of demand, the Court of Justice agreed with the Commission. It held that bananas are unique, that no other fruit are acceptable as substitutes, and that there is little cross-elasticity of demand. The RPM was therefore the banana market and the dominance of United Brands would be assessed in this particular market.

The consideration of the RPM in *Chiquita Bananas* was governed by the specific qualities of bananas, which meant that no perfect substitute existed. However, there are cases in which it is not the uniqueness of the product itself that has determined the RPM, but rather the specific use for which it is intended. Where a product has a very limited range of uses, it is likely that the RPM will be defined narrowly.

14.3.2.3 The Commission's 1997 Notice on the definition of relevant market

The Commission's Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997 C372/5, represents a more quantitative approach (evaluating numerical, measurable information) to product substitutability and the definition of the relevant market. The Commission's test, known as the small, but significant, non-transitory increase in ↵ price (SSNIP) test, considers the effect upon consumer choice following a small, but significant (5–10 per cent) permanent increase in the price of a product.

p. 605

Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997 C372/5

> 13. Firms are subject to three main sources of competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions. A firm or a group of firms cannot have a significant impact on the prevailing conditions of sale, such as prices, if its customers are in a position to switch easily to available substitute products or to suppliers located elsewhere. Basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers.
>
> [...]

Demand substitution

15. The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. One way of making this determination can be viewed as a speculative experiment, postulating a hypothetical small, lasting change in relative prices and evaluating the likely reactions of customers to that increase. The exercise of market definition focuses on prices for operational and practical purposes, and more precisely on demand substitution arising from small, permanent changes in relative prices. This concept can provide clear indications as to the evidence that is relevant in defining markets.

16. Conceptually, this approach means that, starting from the type of products that the undertakings involved sell and the area in which they sell them, additional products and areas will be included in, or excluded from, the market definition depending on whether competition from these other products and areas affect or restrain sufficiently the pricing of the parties' products in the short term.

17. The question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5 per cent to 10 per cent) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographical areas is such that small, permanent increases in relative prices would be profitable. The equivalent analysis is applicable in cases concerning the concentration of buying power, where the starting point would then be the supplier and the price test serves to identify the alternative distribution channels or outlets for the supplier's products. [...]

p. 606

18. A practical example of this test can be provided by its application to a merger of, for instance, soft-drink bottlers. An issue to examine in such a case would be to decide whether different flavours of soft drinks belong to the same market. In practice, the question to address would be whether consumers of flavour A would switch to other flavours when confronted with a permanent price increase of 5 per cent to 10 per cent for flavour A. If a sufficient number of consumers would switch to, say, flavour B, to such an extent that the price increase for flavour A would not be profitable owing to the resulting loss of sales, then the market would comprise at least flavours A and B. The process would have to be extended in addition to other available flavours until a set of products is identified for which a price rise would not induce a sufficient substitution in demand.

Thus, if such a permanent, significant increase in relative price would result in customers substituting one product for another, the relevant market should be drawn to include both products. Conversely, if such an increase in price would not have these effects, the products are in separate markets and the RPM should be drawn accordingly.

Thinking Point

> Can you identify any problems with such an approach, given the potential for an already distorted market?

The limitations of the SSNIP test are clear when prices are already in excess of competitive prices. This will often be the case when dealing with an allegedly dominant undertaking that has been able to set its prices unaffected by competitive pressures. In such circumstances, to consider the effects of a yet further increase in price between 5–10 per cent may be to distort things considerably. Such an increase may have the result that it would cause customers to switch to a product that would not ordinarily be considered to be in the same product market. Such an argument is referred to by academics as the cellophane fallacy, after the famous US case of *United States v El Du Pont de Nemours and Co*. 351 US 377 (1956), which involved a consideration of the RPM for cellophane products. However, the SSNIP test continues to be applied to Article 102 TFEU cases.

14.3.2.4 Intermediate markets

It is not necessarily the case that the RPM is considered to be the end product or service. Indeed, in Joined Cases 6 & 7/73 *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v Commission* [1974] ECR 223, Commercial Solvents argued that its refusal to supply aminobutanol—a raw material used in the production of certain anti-tuberculosis drugs—to an Italian pharmaceutical company did not fall within what is now Article 102 TFEU, as it was not dominant within the relevant market. Commercial Solvents argued that the RPM was the market for the drug supplied to the ultimate consumer (the end product) and not, as the Commission had found, the market for the supply of the raw material.

p. 607

Joined Cases 6 & 7/73 *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v Commission* [1974] ECR 223

> 22. Contrary to the arguments of the applicants it is in fact possible to distinguish the market in raw material necessary for the manufacture of a product from the market on which the product is sold. An abuse of a dominant position on the market in raw materials may thus have effects restricting competition in the market on which the derivatives of the raw material are sold and these effects must be taken into account in considering the effects of an infringement, even if the market for the derivative does not constitute a self-contained market. The arguments of the applicants in this respect and in consequence their request that an expert's report on this subject be ordered are irrelevant and must be rejected.

The Court of Justice therefore held that the RPM was Commercial Solvent's raw material, aminobutanol. The decision can be seen as emphasizing the fact that the Court of Justice and the Commission will protect not only the end consumer, but also small and medium-sized enterprises (SMEs) at intermediate levels of the process.

14.3.2.5 Supply substitutability

Supply substitutability (often referred to as the cross-elasticity of supply) is concerned with the ability of manufacturers to switch production from one product to another in order to produce a substitutable product. Thus, if an undertaking can quickly and relatively inexpensively switch its production process to enter the product market in question, the RPM may include its product as well as that of the alleged dominant product.

The Commission's 1997 Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997 C372/5, provides a useful explanation of this concept.

Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997 C372/5

20. Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved. Such an impact in terms of effectiveness and immediacy is equivalent to the demand substitution effect.

21. These situations typically arise when companies market a wide range of qualities or grades of one product; even if, for a given final customer or group of consumers, the different qualities are not substitutable, the different qualities will be grouped into one product market, provided that most of the suppliers are able to offer and sell the various qualities immediately and without the significant increases in costs described above. In such cases, the relevant product market will encompass all products that are substitutable in demand and supply, and the current sales of those products will be aggregated so as to give the total value or volume of the market. The same reasoning may lead to group different geographic areas.

p. 608

22. A practical example of the approach to supply-side substitutability when defining product markets is to be found in the case of paper. Paper is usually supplied in a range of different qualities, from standard writing paper to high quality papers to be used, for instance, to publish art books. From a demand point of view, different qualities of paper cannot be used for any given use, i.e. an art book or a high quality publication cannot be based on lower quality papers. However, paper plants are prepared to manufacture the different qualities, and production can be adjusted with negligible costs and in a short time-frame. In the absence of particular difficulties in distribution, paper manufacturers are able therefore, to compete for orders of the various qualities, in particular if orders are placed with sufficient lead time to allow for modification of production plans. Under such circumstances, the Commission would not define a separate market for each quality of paper and its respective use. The various qualities of paper are included in the relevant market, and their sales added up to estimate total market glut and volume.

23. When supply-side substitutability would entail the need to adjust significantly existing tangible and intangible assets, additional investments, strategic decisions or time delays, it will not be considered at the stage of market definition. Examples where supply-side substitution did not induce the Commission to enlarge the market are offered in the area of consumer products, in particular for branded beverages.

> Although bottling plants may in principle bottle different beverages, there are costs and lead times involved (in terms of advertising, product testing and distribution) before the products can actually be sold. In these cases, the effects of supply-side substitutability and other forms of potential competition would then be examined at a later stage.

In Case 6/72 *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR 215, the Court of Justice found that when the Commission defined the RPM in its Decision against Continental Can, it had neglected to consider supply substitutability. Continental Can made light metal containers and lids for fruit and vegetables. The Commission, however, had not determined how difficult it would have been for potential competitors from other sectors of the market for light metal containers to enter this market by switching their production by simple adaptation to substitutes acceptable to the consumer.

In Commission Decision 2007/53/EC of 24 May 2004 relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corporation (Case COMP/C-3/37.792—*Microsoft*), OJ 2004 L32/23, the Commission considered supply substitutability of client personal computer (PC) operating systems.

p. 609

Commission Decision 2007/53/EC of 24 May 2004 relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corporation (Case COMP/C-3/37.792—*Microsoft*), OJ 2004 L32/23

> 335. It should be highlighted that developing a new operating system is very costly and time consuming. This is because modern operating systems are very large and sophisticated software products. For example, Windows XP includes several tens of millions of lines of code. Any undertaking which might account for such supply-side substitutability needs to already have access to and the ability to modify the source code of an operating system in order to be able to switch production effectively and immediately to PC operating systems.

In this case, it was held that a new product would have to be substantially modified, entailing a development and testing process involving a large amount of time, expense, and commercial risk. As such, it was found that competitors could not easily enter the market and the RPM was defined accordingly by excluding such competitors.

14.3.3 Relevant geographic market (RGM)

In Case 27/76 *United Brands Co v Commission ('Chiquita Bananas')* [1978] ECR 207, at para 44, the Court of Justice gave consideration to the RGM and defined it as 'an area where the objective conditions of competition applying to the product in question must be the same for all traders'.

Thinking Point

> What is meant by the 'objective conditions of competition'?

Such conditions would include the cost and ease of transportation, purchasing behaviour, and preferences of consumers.

The RGM is normally the whole of the EU. For example, in Commission Decision 88/138/EEC of 22 December 1987 relating to a proceeding under Article 86 of the EEC Treaty (IV/30.787 and 31.488—*Eurofix-Bauco v Hilti*), OJ 1988 L65/19, given that the goods (nails) could be easily and cheaply transported, the RGM was held to be the whole of the EU. However, the 'objective conditions of competition' can differ and the RGM is reduced accordingly.

In *Chiquita Bananas*, the RGM was judged to be all of the Member States except France, Italy, and the UK. It was decided that these Member States should be excluded because the effect of the national organization of these markets meant that United Brands' bananas did not compete on equal terms with the other bananas sold in these states.

The Commission's 1997 Notice on the definition of the relevant market provides useful guidance on the factors that the Commission takes into account.

p. 610

Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997 C372/5

> 44. The type of evidence the Commission considers relevant to reach a conclusion as to the geographic market can be categorized as follows:
>
> 45. Past evidence of diversion of orders to other areas. In certain cases, evidence on changes in prices between different areas and consequent reactions by customers might be available. Generally, the same quantitative tests used for product market definition might as well be used in geographic market definition, bearing in mind that international comparisons of prices might be more complex due to a number of factors such as exchange rate movements, taxation and product differentiation.
>
> 46. Basic demand characteristics. The nature of demand for the relevant product may in itself determine the scope of the geographical market. Factors such as national preferences or preferences for national brands, language, culture and life style, and the need for a local presence have a strong potential to limit the geographic scope of competition.

In this regard, the *TV Listings* cases provide a useful example of an RGM being defined with reference to the area in which the goods or services are limited (Joined Cases C-241 & 242/91 P *RTE v Commission* (Case T-69/89); *BBC v Commission* (Case T-70/89); *ITP Ltd v Commission* (Case T-76/89); *Radio Telefis Eireann v Commission* (Joined Cases C-241 & 242/91 P) (Decisions upheld on appeal to the Court of Justice in *RTE & ITP v Commission*) [1995] ECR I-743).

Joined Cases C-241 & 242/91 P *RTE v Commission* (Case T-69/89); *BBC v Commission* (Case T-70/89); *ITP Ltd v Commission* (Case T-76/89); *Radio Telefis Eireann v Commission* (Joined Cases C-241 & 242/91 P) (Decisions upheld on appeal to the Court of Justice in *RTE & ITP v Commission*) *('TV Listings')* [1995] ECR I-743

47. Views of customers and competitors. Where appropriate, the Commission will contact the main customers and competitors of the parties in its enquiries, to gather their views on the boundaries of the geographic market as well as most of the factual information it requires to reach a conclusion on the scope of the market when they are sufficiently backed by factual evidence.

48. Current geographic pattern of purchases. An examination of the customers' current geographic pattern of purchases provides useful evidence as to the possible scope of the geographic market. When customers purchase from companies located anywhere in the Community [now Union] or the EEA [European Economic Area] on similar terms, or they procure their supplies through effective tendering procedures in which companies from anywhere in the Community or the EEA submit bids, usually the geographic market will be considered to be Community-wide.

p. 611

49. Trade flows/pattern of shipments. When the number of customers is so large that it is not possible to obtain through them a clear picture of geographic purchasing patterns, information on trade flows might be used alternatively, provided that the trade statistics are available with a sufficient degree of detail for the relevant products. Trade flows, and above all, the rationale behind trade flows provide useful insights and information for the purpose of establishing the scope of the geographic market but are not in themselves conclusive.

50. Barriers and switching costs associated to divert orders to companies located in other areas. The absence of trans-border purchases or trade flows, for instance, does not necessarily mean that the market is at most national in scope. Still, barriers isolating the national market have to be identified before it is concluded that the relevant geographic market in such a case is national. Perhaps the clearest obstacle for a customer to divert its orders to other areas is the impact of transport costs and transport restrictions arising from legislation or from the nature of the relevant products. The impact of transport costs will usually limit the scope of the geographic market for bulky, low-value products, bearing in mind that a transport disadvantage might also be compensated by a comparative advantage in other costs (labour costs or raw materials). Access to distribution in a given area, regulatory barriers still existing in certain sectors, quotas and custom tariffs might also constitute barriers

> isolating a geographic area from the competitive pressure of companies located outside that area. Significant switching costs in procuring supplies from companies located in other countries constitute additional sources of such barriers.

14.3.3.1 'Within the internal market or a substantial part of it'

Article 102 TFEU provides that abuse of dominance must be 'within the internal market or a substantial part of it'. However, although at first this may seem to be a considerable burden to satisfy, the case law of the Court of Justice has shown it to be less of a burden in practice. Thus, in Case 27/76 *United Brands Co v Commission ('Chiquita Bananas')* [1978] ECR 207, a number of Member States were held by the Court of Justice to satisfy the condition, whilst in Case 322/81 *Nederlandsche Banden-Industrie Michelin NV v Commission* [1983] ECR 3461 even a single Member State was deemed sufficient.

Michelin NV, the Netherlands subsidiary of the Michelin group, sought annulment of a Commission Decision finding that it had breached Article 102 TFEU by granting selective discounting arrangements and applying dissimilar conditions in respect of equivalent transactions in the market for new replacement tyres for heavy vehicles in the Netherlands. In considering the RGM, the Court of Justice stated as follows.

Case 322/81 *Nederlandsche Banden-Industrie Michelin NV v Commission* [1983] ECR 3461

> 26. The Commission's allegation concerns Michelin NV's conduct towards tyre dealers and more particularly its discount policy. In this regard the commercial policy of the various subsidiaries of the groups competing at the European or even the world level is generally adapted to the specific conditions existing on each market. In practice dealers established in the Netherlands obtain their supplies only from suppliers operating in the Netherlands. The Commission was therefore right to take the view that the competition facing Michelin NV is mainly on the Netherlands market and that it is at that level that the objective conditions of competition are alike for traders.
>
> 27. This finding is not related to the question whether in such circumstances factors relating to the position of the Michelin group and its competitors as a whole and to a much wider market may enter into consideration in the adoption of a Decision as to whether a dominant position exists on the relevant product market.
>
> 28. Hence the relevant substantial part of the common market in this case is the Netherlands and it is at the level of the Netherlands market that Michelin NV's position must be assessed.

p. 612

The Court of Justice held that the RGM was the Netherlands and that this amounted to a substantial part of the internal market.

Perhaps more surprisingly still, there are cases in which single ports have been deemed to be the RGM and yet satisfy the requirement of being 'within the internal market or a substantial part of it'. In Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, the Court of Justice drew attention to certain factors to be considered when determining whether a market may be regarded as constituting a substantial part of the internal market.

Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889

> 15. As regards the definition of the market in question, it may be seen from the order for reference that it is that of the organization on behalf of third persons of dock work relating to ordinary freight in the Port of Genoa and the performance of such work. Regard being had in particular to the volume of traffic in that port and its importance in relation to maritime import and export operations as a whole in the Member State concerned, that market may be regarded as constituting a substantial part of the common market.

14.3.4 Relevant temporal (or seasonal) market

The consideration of the existence of any RTM recognizes the fact that markets may change from time to time. However, in most cases, no such market exists and therefore it is not often raised before the Court of Justice.

The argument was advanced in Case 27/76 *United Brands Co v Commission ('Chiquita Bananas')* [1978] ECR 207 that demand for bananas was affected by the availability at certain times of the year of other seasonal fruit. Thus, in the summer, alternatives were plentiful and market power was therefore reduced. Had the argument been accepted, the dominance or otherwise of United Brands would have had to be considered in relation to each of the temporal ↵ markets proposed. The Commission and the Court of Justice, however, both identified a single temporal market.

p. 613

Commission Decision 77/327/EEC of 19 April 1977 relating to a proceeding under Article 86 of the EEC Treaty (IV/28.841—*ABG/Oil companies operating in the Netherlands*), OJ 1977 L117/1, provides one of the few cases in which an RTM has been identified. In this Decision, the Commission identified a temporal market for oil at the time of the 1970s oil shortage.

14.4 Dominance

Having established the context in which dominance is to be assessed, consideration should be given to those factors that indicate a dominant position within the relevant market.

As was made clear in Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, at para 39: 'The existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative but among these factors a highly important one is the existence of very large market shares.'

Thus several factors may combine to indicate dominance, but market share is the primary indicator. Other relevant factors/barriers to entry include:

- market structure;
- duration of market share;
- financial and technological resources;
- vertical integration;
- intellectual property rights; and
- conduct.

Thinking Point

> The last of these factors has been considered to be controversial. In view of the other requirements of Article 102 TFEU, can you identify why?

14.4.1 Market share

Market share is perhaps the only factor taken by itself that could indicate dominance.

In practice, total monopoly situations (comprising a 100 per cent market share) are rare. An example of such was, however, identified in Case 226/84 *British Leyland plc v Commission* [1986] ECR 3263, in which a dispute arose as to the requirement of UK law that a person who wishes to register a vehicle for use on the roads must, unless they are importing the vehicle for personal use, produce a 'certificate of conformity' certifying that the vehicle conforms to a previously type-approved vehicle. The Court of Justice considered whether this amounted to an abuse of a dominant position, but first addressed the issue of dominance by reference to the market share.

p. 614

Case 226/84 *British Leyland plc v Commission* [1986] ECR 3263

> 4. That certificate is issued by the manufacturer of the vehicle on the basis of the National Type Approval Certificate (NTA certificate) which it has obtained from the Department of Transport, or by the holder of a Primary Minister's Approval Certificate (PMAC), which can be obtained from the Department of Transport only if the manufacturer provides the necessary technical information.
>
> 5. In the light of those rules, the relevant market is not that of the sale of vehicles, as BL claims, but a separate, ancillary market, namely that of services which are in practice indispensable for dealers who wish to sell the vehicles manufactured by BL in a specific geographical area (see judgment of 13 November 1975, Case 26/75 *General Motors v Commission* (1975) ECR 1367, at p. 1378).
>
> [...]
>
> 7. In order to show that it does not occupy a dominant position in the market of the services described above, BL claims that private individuals may register vehicles purchased abroad in the United Kingdom without having to produce a certificate of conformity.
>
> 8. It appears from the British rules that that facility is exceptional and is reserved exclusively for private individuals. It is subject to strict conditions and accorded exclusively in respect of personal use, and, although it has been used by certain dealers to obtain vehicles for their customers, it cannot be regarded as a regular procedure for registering cars imported commercially.
>
> 9. The British rules therefore confer on BL a form of administrative monopoly in the relevant market and, with regard to the issue of certificates of conformity, place the dealers in a position of economic dependence which is characteristic of a dominant position.

British Leyland had a statutory monopoly and was able to fix its own prices. This amounted to a dominant position within Article 102 TFEU.

In Case T-201/04 *Microsoft Corporation v Commission* [2007] ECR II-3601, Microsoft was found to have a market share of over 90 per cent of one of the identified markets. This was deemed by the European Commission to be clear evidence of dominance.

Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461 related to an undertaking involved in the production of vitamins. The Court of Justice drew attention to market share, but also focused on the duration for which that market share had been held.

Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461

> 41. An undertaking which has a very large market share and holds it for some time ... is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, already because of this secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position.

p. 615 ↵ In Case T-30/89 *Hilti AG v Commission* [1991] ECR II-1439, the Court of First Instance (now the General Court) considered Hilti's market share.

Case T-30/89 *Hilti AG v Commission* [1991] ECR II-1439

> 89. The Commission has proved that Hilti holds a market share of around 70 per cent to 80 per cent in the relevant market for nails ...
>
> [...]
>
> 91. With particular reference to market shares, the Court of Justice has held (*Hoffmann-La Roche* judgment [Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461], paragraph 41) that very large shares are in themselves, and save in exceptional circumstances, evidence of a dominant position.
>
> 92. In this case it is established that Hilti holds a share of between 70 per cent and 80 per cent in the relevant market. Such a share is, in itself, a clear indication of the existence of a dominant position in the relevant market ...

Thus a market share of between 70 and 80 per cent is, in itself, a clear indication of dominance.

14.4.2 Market structure

Market structure is another important factor that must be considered because the significance of market share varies from market to market, according to the structure of the market.

It is entirely possible that a relatively modest market share may lead to the expectation that the undertaking cannot possibly be dominant. However, in a fragmented market, when considered alongside the market share of the nearest and other competitors, the picture may be quite different from that initially painted.

The market structure of the banana market was analysed in Case 27/76 *United Brands Co v Commission ('Chiquita Bananas')* [1978] ECR 207, with the Court of Justice comparing the large, but not overwhelming, market share of United Brands to that of its nearest competitor, Castle and Cooke.

Case 27/76 *United Brands Co v Commission ('Chiquita Bananas')* [1978] ECR 207

> 107. A trader can only be in a dominant position on the market for a product if he has succeeded in winning a large part of this market.
>
> 108. Without going into a discussion about percentages, which when fixed are bound to be to some extent approximations, it can be considered to be an established fact that [United Brands]'s share of the relevant market is always more than 40 per cent and nearly 45 per cent.
>
> 109. This percentage does not however permit the conclusion that [United Brands] automatically controls the market.
>
> p. 616 110. It must be determined having regard to the strength and number of the competitors.
>
> 111. It is necessary first of all to establish that on the whole of the relevant market the said percentage represents *grosso modo* a share several times greater than that of its competitor Castle and Cooke which is the best placed of all the competitors, the others coming far behind.

Thus, given the structure of the banana market, the Court of Justice held that a market share of between 40 and 45 per cent was an indicator of dominance.

Thinking Point

> Do you think there is a minimum share beyond which it seems strange to define an undertaking as 'dominant'?

14.4.3 Financial and technological resources and intellectual property rights

It is important to appreciate that there is nothing inherently wrong in an undertaking having such resources, but that ownership of such does act as an indicator of dominance and undoubtedly acts as a barrier to entry for potential competitors. Such resources may be used to further invest in the undertaking such that its market position becomes entrenched, whilst intellectual property rights, such as copyright and patents, may be used to prevent competitors from reproducing information or making products that the rights protect.

Furthermore, such resources often enable a dominant undertaking to engage in the sort of behaviour that would be deemed to be an abuse of a dominant position.

Chiquita Bananas provides an example of the way in which such resources can act as barriers to entry.

Case 27/76 *United Brands Co v Commission ('Chiquita Bananas')* [1978] ECR 207

> 82. In the field of technical knowledge and as a result of continual research [United Brands] keeps on improving the productivity and yield of its plantations by improving the draining system, making good soil deficiencies and combating effectively plant disease.
>
> 83. It has perfected new ripening methods in which its technicians instruct the distributor/ripeners of the Chiquita banana.
>
> 84. That is another factor to be borne in mind when considering [United Brands]'s position since competing firms cannot develop research at a comparable level and are in this respect at a disadvantage compared with the applicant.
>
> p. 617 ↵ [...]
>
> 122. The particular barriers to competitors entering the market are the exceptionally large capital investments required for the creation and running of banana plantations, the need to increase sources of supply in order to avoid the effects of fruit diseases and bad weather (hurricanes, floods), the introduction of an essential system of logistics which the distribution of a very perishable product makes necessary, economies of scale from which newcomers to the market cannot derive any immediate benefit and the actual cost of entry made up inter alia of all the general expenses incurred in penetrating the market such as the setting up of an adequate commercial network, the mounting of very large-scale advertising campaigns, all those financial risks, the costs of which are irrecoverable if the attempt fails.
>
> 123. Thus, although, as [United Brands] has pointed out, it is true that competitors are able to use the same methods of production and distribution as the applicant, they come up against almost insuperable practical and financial obstacles.
>
> 124. That is another factor peculiar to a dominant position.

14.4.4 Vertical integration

Extensive vertical integration concerns the extent of control in the production and supply chain, and presents another barrier to entry. Simply stated, the greater the extent of vertical integration, the greater the likelihood of dominance in the relevant market. However, it is important once more to remember that vertical integration is merely an indicator of dominance and is not problematic in itself.

The Court of Justice subjected United Brands' operations to extensive analysis in terms of its integration.

Case 27/76 *United Brands Co v Commission ('Chiquita Bananas')* [1978] ECR 207

70. United Brands is an undertaking vertically integrated to a high degree.

71. This integration is evident at each of the stages from the plantation to the loading on wagons or lorries in the ports of delivery and after those stages, as far as ripening and sale prices are concerned, [United Brands] even extends its control to ripener/distributors and wholesalers by setting up a complete network of agents.

72. At the production stage [United Brands] owns large plantations in central and south America.

73. In so far as [United Brands'] own production does not meet its requirements it can obtain supplies without any difficulty from independent planters since it is an established fact that unless circumstances are exceptional there is a production surplus.

p. 618

74. Furthermore several independent producers have links with [United Brands] through contracts for the growing of bananas which have caused them to grow the varieties of bananas which [United Brands] has advised them to adopt.

75. The effects of natural disasters which could jeopardize supplies are greatly reduced by the fact that the plantations are spread over a wide geographic area and by the selection of varieties not very susceptible to diseases.

[...]

78. At the stage of packaging and presentation on its premises [United Brands] has at its disposal factories, manpower, plant and material which enable it to handle the goods independently.

79. The bananas are carried from the place of production to the port of shipment by its own means of transport including railways.

80. At the carriage by sea stage it has been acknowledged that [United Brands] is the only undertaking of its kind which is capable of carrying two thirds of its exports by means of its own banana fleet.

81. Thus [United Brands] knows that it is able to transport regularly, without running the risk of its own ships not being used and whatever the market situation may be, two thirds of its average volume of sales and is alone able to ensure that three regular consignments reach Europe each week, and all this guarantees it commercial stability and well being.

Similarly, in Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, the Court of Justice recognized that the company's highly efficient sales network was a factor indicating a dominant position.

14.4.5 Conduct

Case 27/76 *United Brands Co v Commission ('Chiquita Bananas')* [1978] ECR 207 is an example of a case in which an undertaking's conduct has been deemed to be an indicator of a dominant position. Thus the charging of unfair prices based upon the ability of traders in a Member State to pay was evidence of United Brands' dominance in the banana market.

Thinking Point

> Can you appreciate why this indicator has often been argued to result in a circular argument?

The traditional view of Article 102 TFEU demands the establishment of dominance with reference to relevant markets, followed by a consideration of whether the behaviour of the undertaking concerned amounts to an abuse. The consideration of conduct or behaviour as another indicator of dominance is therefore controversial and has been criticized, as it presents a ↵ somewhat circular argument—that is, because an undertaking engages in abusive behaviour, it is therefore dominant and, because it is dominant, its behaviour amounts to an abuse under Article 102 TFEU. However, any undertaking engaging in abusive behaviour is, in itself, outside Article 102 TFEU. It is only when the undertaking is dominant that attention is paid to the abusive behaviour and therefore to say that the behaviour is an indicator of dominance is a challenging argument to accept. However, *Chiquita Bananas* provides clear authority for such a proposition.

p. 619

14.4.6 Collective dominance

Whilst this chapter has focused on the more common position of single undertakings in a dominant position within a relevant market, Article 102 TFEU refers also to an abuse of a dominant position by one or *more* undertakings. The concept of *collective* dominance requires three conditions to be satisfied, as the Court of First Instance (now the General Court) set out in Case T-342/99 *Airtours/First Choice* [2002] ECR II-2585.

Case T-342/99 *Airtours/First Choice* [2002] ECR II-2585

> 62. [...]
>
> - [F]irst, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy. In that regard, it is not enough for each member of the dominant oligopoly to be aware that interdependent market conduct is profitable for all of them but each member must also have a means of knowing whether the other operators are adopting the same strategy and whether they are maintaining it. There must, therefore, be sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other members' market conduct is evolving;
> - second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market. It is only if all the members of the dominant oligopoly maintain the parallel conduct that all can benefit. The notion of retaliation in respect of conduct deviating from the common policy is thus inherent in this condition. In that context, the Commission must not necessarily prove that there is a specific retaliation mechanism involving a degree of severity, but it must none the less establish that deterrents exist, which are such that it is not worth the while of any member of the dominant oligopoly to depart from the common course of conduct to the detriment of the other oligopolists. For a situation of collective dominance to be viable, there must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy, which means that each member of the dominant oligopoly must be aware that highly competitive action on its part designed to increase its market share would provoke identical action by the others, so that it would derive no benefit from its initiative;
> - third, it must also be established that the foreseeable reaction of current and future competitors, as well as of consumers, would not jeopardise the results expected from the common policy.

p. 620

14.5 Abuse

Having identified the relevant market and determined dominance with reference to the indicators listed at 14.4, it is then necessary to consider what behaviour would amount to an abuse of such a position. It is important to note that, without such abuse, Article 102 TFEU will not be breached. Article 102 does not

prohibit undertakings being successful in a marketplace and realizing a position of dominance. Indeed, it is almost inevitable that, in any given market, dominant undertakings will emerge. However, if a dominant undertaking abuses that position of dominance, Article 102 TFEU becomes relevant.

Abuse of such a position of dominance can take many forms. Article 102 TFEU sets out a non-exhaustive list of examples.

Article 102 TFEU

> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

This list is not exhaustive, but merely gives examples of abusive behaviour. Often, abuses are classified into two categories: **exploitative abuses** and **anti-competitive, or exclusionary, abuses**.

exploitative abuses

Exploitative abuses of a dominant position manipulate consumers.

anti-competitive, or exclusionary, abuses

Anti-competitive abuses of a dominant position prevent or weaken competition or potential competition from other undertakings.

It must be noted, however, that often abusive behaviour both exploits consumers *and* prevents or weakens competition.

Thinking Point

> In considering the following types of abuse, do you think they can be described as exploitative, anti-competitive, or both?

14.5.1 Unfair pricing

Charging unfair prices, at least where such prices are excessive, is a clear exploitative abuse. However, difficulty arises in determining exactly what a 'fair price' is. Any consideration of the fairness of a price has an inevitable element of subjectivity.

In Case 27/76 *United Brands Co v Commission ('Chiquita Bananas')* [1978] ECR 207, the issue of excessive prices
p. 621 was considered by the Court of Justice. In setting out an objective test ↵ `of excessiveness of prices could be made, the Court of Justice clarified as follows.

Case 27/76 *United Brands Co v Commission ('Chiquita Bananas')* [1978] ECR 207

> 251. This excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin; however the Commission has not done this since it has not analysed [United Brands]'s costs structure.
>
> 252. The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products.

Thus the fairness of the price can be determined by comparing the price charged *less* both the costs (fixed and variable) of production.

Whilst the pricing policy of United Brands was found to be an exploitative abuse, abuses of this kind can also be anti-competitive abuses. Case 226/84 *British Leyland plc v Commission* [1986] ECR 3263 provides an example. In this case, British Leyland sought to discourage imports into the UK by charging unfair prices for the issue of approval certificates for imported left-hand-drive vehicles. In judging the price excessive in comparing the cost of the certificates with the service provided, the Court of Justice upheld the Commission's Decision finding of abuse.

Interestingly, pricing that is unnaturally low may also be deemed to be an abuse of a dominant position. Usually referred to as 'predatory pricing', such a scheme involves reducing prices below the costs of production to prevent potential competitors from gaining sufficient market share to present a competitive challenge. New undertakings are unlikely to have the resources to be able to compete on price for very long while making no profit or indeed actually making a loss. This anti-competitive abuse also has adverse impacts upon consumers and therefore can also be classified as an exploitative abuse. Once potential competitors have been driven out of the market, the dominant undertaking is then in a position to recoup its short-term losses. It has the market at its mercy and is ultimately able to charge whatever price the market will bear, free from the usual effects of competitive pressures.

Such predatory pricing was defined in Case C-62/86 *AKZO Chemie v Commission* [1991] ECR I-335, following the activity of AKZO in reacting to a potential competitor entering the market for organic peroxides for use in the plastics industry.

Case C-62/86 *AKZO Chemie v Commission* [1991] ECR I-335

p. 622

> 71. Prices below average variable costs (that is to say, those which vary depending on the quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced.
>
> 72. Moreover, prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.

The Court of Justice held that prices were predatory and therefore an abuse of a dominant position if they were intended to eliminate competition. Such an intention is deemed to exist if prices are below average variable costs, whilst where prices are below average total costs, but above average variable costs, prices are abusive 'if determined as part of a plan for eliminating a competitor'.

In addition to charging excessive or unnaturally low prices, the act by a dominant undertaking of charging different prices to different customers for identical products can also amount to an abuse under Article 102 TFEU unless such differences are objectively justified.

In *Chiquita Bananas*, United Brands charged different prices to different traders in Member States dependent upon what the market could bear.

Case 27/76 *United Brands Co v Commission ('Chiquita Bananas')* [1978] ECR 207

> 208. The Commission blames the applicant for charging each week for the sale of its branded bananas—without objective justification—a selling price which differs appreciably according to the Member State where its customers are established.
>
> [...]
>
> 212. The price customers in Belgium are asked to pay is on average 80 per cent higher than that paid by customers in Ireland.
>
> 213. The greatest difference in price is 138 per cent between the delivered Rotterdam price charged by [United Brands] to its customers in Ireland and the f.o.r Bremerhaven price charged by [United Brands] to its customers in Denmark, that is to say the price paid by Danish customers is 2.38 times the price paid by Irish customers.
>
> 214. The Commission treats these facts as an abuse of a dominant position in that [United Brands] has applied dissimilar conditions to equivalent transactions with the other trading parties, thereby placing them at a competitive disadvantage.

p. 623 ↵ Objectively justifiable reasons, such as transport costs and labour costs, could potentially justify different pricing for different customers, but arguments of such will be subject to intense scrutiny, as the Court demonstrated in *Chiquita Bananas*.

Case 27/76 *United Brands Co v Commission ('Chiquita Bananas')* [1978] ECR 207

215. The applicant states that its prices are determined by market forces and cannot therefore be discriminatory.

[...]

222. According to the applicant as long as the Community institutions have not set up the machinery for a single banana market and the various markets remain national and respond to their individual supply/demand situations differences in prices between them cannot be prevented.

223. [United Brands'] answers to the Commission's requests for particulars (the letters of 14 May, 13 September, 10 and 11 December 1974 and 13 February 1975) show that [United Brands] charges its customers each week for its bananas sold under the Chiquita brand name a different selling price depending on the Member State where the latter carry on their business as ripener/distributors according to the ratios to which the Commission has drawn attention.

224. These price differences can reach 30 to 50 per cent in some weeks, even though products supplied under the transactions are equivalent [...]

225. In fact the bananas sold by [United Brands] are all freighted in the same ships, are unloaded at the same cost in Rotterdam or Bremerhaven and the price differences relate to substantially similar quantities of bananas of the same variety, which have been brought to the same degree of ripening, are of similar quality and sold under the same 'Chiquita' brand name under the same conditions of sale and payment for loading on to the purchaser's own means of transport and the latter have to pay customs duties, taxes and transport costs from these ports.

[...]

227. Although the responsibility for establishing the single banana market does not lie with the applicant, it can only endeavour to take 'what the market can bear' provided that it complies with the rules for the Regulation and coordination of the market laid down by the Treaty.

228. Once it can be grasped that differences in transport costs, taxation, customs duties, the wages of the labour force, the conditions of marketing, the differences in the parity of currencies, the density of competition may eventually culminate in different retail selling price levels according to the Member States, then it follows those differences are factors which [United Brands] only has to take into account to a limited extent since it sells a product which is always the same and at the same place to ripener/distributors who—alone—bear the risks of the consumers' market.

p. 624

229. The interplay of supply and demand should, owing to its nature, only be applied to each stage where it is really manifest.

230. The mechanisms of the market are adversely affected if the price is calculated by leaving out one stage of the market and taking into account the law of supply and demand as between the vendor and the ultimate consumer and not as between the vendor ([United Brands]) and the purchaser (the ripener/distributors).

231. Thus, by reason of its dominant position [United Brands], fed with information by its local representatives, was in fact able to impose its selling price on the intermediate purchaser. This price and also the 'weekly quota allocated' is only fixed and notified to the customer four days before the vessel carrying the bananas berths.

232. These discriminatory prices, which varied according to the circumstances of the Member States, were just so many obstacles to the free movement of goods and their effect was intensified by the clause forbidding the resale of bananas while still green and by reducing the deliveries of the quantities ordered.

233. A rigid partitioning of national markets was thus created at price levels, which were artificially different, placing certain distributor/ripeners at a competitive disadvantage, since compared with what it should have been competition had thereby been distorted.

234. Consequently the policy of differing prices enabling [United Brands] to apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, was an abuse of a dominant position.

Thinking Point

> Can you think of any circumstances in which there may be a legitimate reason for charging different prices for the same product?

14.5.2 Discounting

Discounting is another price-based form of discrimination. It can be an exploitative abuse if customers may not benefit from the discounts introduced and it can be anti-competitive where discounts are offered to ensure that 'loyal' customers do not stray, thereby affecting the ability of potential competitors to penetrate the market. Of course, in many instances, it is both.

Discounts can take many different forms. The most often encountered are **quantity discounts**, **loyalty/fidelity discounts**, and **target discounts**.

quantity discounts

Quantity discounts are offered to customers who buy minimum quantities.

loyalty/fidelity discounts

Loyalty/fidelity discounts are offered to customers who agree to purchase all or most of their requirements from the supplier.

target discounts

Target discounts are offered to customers who reach specific sales targets.

The first of these, quantity discounts, are acceptable as long as they are available to all and justified by some objective ground. Thus, where a discount is offered to a customer in return for a large order, there may be objectively justifiable economies of scale to be enjoyed, involving a reduction in transport and administrative costs.

Fidelity discounts and target discounts, however, are likely to amount to abuse within Article 102 TFEU.

p. 625 ↵ Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461 concerned fidelity discounts.

Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461

> 89. An undertaking which is in a dominant position on a market and ties purchasers—even if it does so at their request—by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article 86 of the Treaty [now Article 102 TFEU], whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate.
>
> The same applies if the said undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, that is to say discounts conditional on the customer's obtaining all or most of its requirements—whether the quantity of its purchases be large or small—from the undertaking in a dominant position.
>
> 90. Obligations of this kind to obtain supplies exclusively from a particular undertaking, whether or not they are in consideration of rebates or of the granting of fidelity rebates intended to give the purchaser an incentive to obtain his supplies exclusively from the undertaking in a dominant position, are incompatible with the objective of undistorted competition within the common market, because—unless there are exceptional circumstances which may make an agreement between undertakings in the context of Article 85 [EC, now Article 101 TFEU] and in particular of paragraph (3) of that Article, permissible—they are not based on an economic transaction which justifies this burden or benefit but are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market.
>
> The fidelity rebate, unlike quantity rebates exclusively linked with the volume of purchases from the producer concerned, is designed through the grant of a financial advantage to prevent customers from obtaining their supplies from competing producers.
>
> Furthermore the effect of fidelity rebates is to apply dissimilar conditions to equivalent transactions with other trading parties in that two purchasers pay a different price for the same quantity of the same product depending on whether they obtain their supplies exclusively from the undertaking in a dominant position or have several sources of supply.

What the Court of Justice recognized in *Hoffmann* is that, in the absence of justification for an agreement under Article 101(3) TFEU, the only reason to offer fidelity discounts was to provide a financial incentive designed to prevent the natural effects of competition taking place. Such behaviour inevitably results in a reduction or restriction in choice for the consumer.

In addition to the fidelity discounts, all but five of the contracts in question contained an interesting clause, referred to as 'the English clause'. This clause allowed customers to ask Roche to reduce its prices if they obtained cheaper offers from Roche's competitors. In this way, Roche was given information about its competitors' prices which allowed them to quickly reduce their prices in response, thus undermining competition.

p. 626 ↵ As such, the Court of Justice thus found that the company's practices were abusive.

14.5.3 Tie-ins

A tie-in is a clause within an agreement that requires or encourages a customer to buy other goods or services from the same supplier.

A modern example of tying-in can be found in Case T-201/04 *Microsoft Corporation v Commission* [2007] ECR II-3601, in which the bundling of the Windows operating system and Windows Media Player was held to be an abuse of a dominant position.

The case is significant in its consideration of abuse as it focuses on the dominance of the operating system and the tying-in of a lesser product which was bundled without charge and, indeed, alternatives could be used. However, the existence of Windows Media Player as part of a package and the inability to purchase the Windows operating system without it amounted to an abuse of a dominant position.

14.5.4 Refusal to supply

In Case 27/76 *United Brands Co v Commission ('Chiquita Bananas')* [1978] ECR 207, United Brands refused to continue to supply green bananas to Olesen, a Danish ripener and distributor, because Olesen had taken part in an advertising campaign for one of United Brands' competitors. United Brands contended that even a dominant undertaking should be entitled to protect its interests. The Court of Justice's response was less than sympathetic to United Brands' plight.

Case 27/76 *United Brands Co v Commission ('Chiquita Bananas')* [1978] ECR 207

189. Although it is true, as the applicant points out, that the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests, such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it.

190. Even if the possibility of a counter-attack is acceptable that attack must still be proportionate to the threat taking into account the economic strength of the undertakings confronting each other.

191. The sanction consisting of a refusal to supply by an undertaking in a dominant position was in excess of what might, if such a situation were to arise, reasonably be contemplated as a sanction for conduct similar to that for which [United Brands] blamed Olesen.

192. In fact [United Brands] could not be unaware of the fact that by acting in this way it would discourage its other ripener/distributors from supporting the advertising of other brand names and that the deterrent effect of the sanction imposed upon one of them would make its position of strength on the relevant market that much more effective.

p. 627

193. Such a course of conduct amounts therefore to a serious interference with the independence of small and medium sized firms in their commercial relations with the undertaking in a dominant position and this independence implies the right to give preference to competitors' goods.

194. In this case the adoption of such a course of conduct is designed to have a serious adverse effect on competition on the relevant banana market by only allowing firms dependent upon the dominant undertaking to stay in business.

Chiquita Bananas concerned a refusal to supply an existing customer. The *TV Listings* cases (Joined Cases C-241 & 242/91 P *RTE v Commission* (Case T-69/89); *BBC v Commission* (Case T-70/89); *ITP Ltd v Commission* (Case T-76/89); *Radio Telefis Eireann v Commission* (Joined Cases C-241 & 242/91 P) (Decisions upheld on appeal to the Court of Justice in *RTE & ITP v Commission*) [1995] ECR I-743) were concerned with a refusal to supply to new customers. The Commission found that three television companies had abused their dominant position on the market for weekly programme listings by relying on their copyright in those listings to prevent third parties from publishing complete weekly guides to the programmes broadcast by different television channels.

14.6 Effect on trade between Member States

Article 102 TFEU requires not only that a Member State has abused a dominant position, but also that the abuse 'may affect trade between Member States'. This has the same meaning as set out in Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235 in relation to Article 101 TFEU. Thus the effect must be 'direct or indirect, actual or potential'. This final element of Article 102 TFEU is generally easy to satisfy since it is not dependent upon showing an actual effect. However, Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission* [1979] ECR 1869 provides an example of a case in which this element was not satisfied. The refusal of a Swedish company, at a time when Sweden was not a Member State of the EU, to supply a company in London that had the intention of extending its business beyond the very limited area within which it operated meant that no inter-State trade effect could be established.

Cross-Reference

See 13.2.2 on the effect on trade between Member States.

14.6.1 The Commission's 2009 Guidance

In 2009, the European Commission published its Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ 2009 C45/7. The 2009 Guidance sets out the Commission's determination to prioritize those cases in which the exclusionary conduct of a dominant undertaking is liable to have harmful effects on consumers.

p. 628 ↵ The main principles of the effects-based approach were articulated in the accompanying press release.

European Commission, 'Antitrust: consumer welfare at heart of Commission fight against abuses by dominant undertakings', Press release IP/08/1877, 3 December 2008

> The main principles of the effects-based approach to Article 82 [now Article 102 TFEU] are the following:
>
> - fair and undistorted competition is the best way to make markets work better for the benefit of EU business and consumers. Healthy competition, including by dominant undertakings, should be encouraged
> - the focus of the Commission's enforcement policy should be on protecting consumers, on protecting the process of competition and not on protecting individual competitors
> - the Commission does not need to establish that the dominant undertaking's conduct actually harmed competition, only that there is convincing evidence that harm is likely
> - since the focus of the Commission's enforcement policy is on conduct that harms the competitive process rather than individual competitors, for pricing conduct the Commission examines whether the conduct is likely to prevent competitors that are as efficient as the dominant undertaking from expanding on or entering the market and that can be expected to be most relevant to consumer welfare
> - since the focus of the Commission's enforcement policy is on the likely effects of a dominant undertaking's conduct on consumers, the Commission will examine claims put forward by dominant undertakings that their conduct is justified on efficiency grounds—as is already the case under Article 81 [now Article 101 TFEU] and for merger control.

14.7 Competition Law: Article 102 TFEU and Brexit

As mentioned in Chapter 13, EU competition law no longer applies in the UK post Brexit. UK businesses operating in the EU are still bound by EU competition law, however, and the Political Declaration makes reference to open and fair competition and a level playing field between the UK and the EU in its future relationship. That being said, it remains to be seen what any future agreement will look like and in how far UK domestic law will change.

Cross-Reference

For more detail on competition law post Brexit, see 13.5.

Summary

- Article 102 TFEU prohibits as incompatible with the internal market 'any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it … in so far as it may affect trade between Member States'.
- The term 'undertakings' has the same meaning as in Article 101 TFEU and includes any legal or natural person engaged in some form of economic or commercial activity.

p. 629

- *Chiquita Bananas* provides a general definition of a 'dominant position' as 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.
- More specifically, dominance requires a consideration of the relevant market, comprising the relevant product market (RPM), relevant geographic market (RGM), and relevant temporal market (RTM).
- The RPM is established with consideration of both demand and supply substitutability.
  - Demand substitutability concerns the willingness of a consumer to substitute the product in question for a different product.
  - Supply substitutability concerns the capability of other producers to supply.
- RGM was defined in *Chiquita Bananas* as an area in which the objective conditions of competition applying to the product in question must be the same for all traders.
- The RGM needs to be within the internal market or a substantial part of it.
- Dominance is assessed with reference to a number of indicators. These include market share, market structure, the length of time for which the undertaking has held its market share, its financial and technological resources, vertical integration, intellectual property rights, and behaviour.
- Dominance in itself is not prohibited. Having found a dominant position, consideration must then be given to examples of abuse of such a position.
- Abuses can be classified into two categories: exploitative and anti-competitive abuses. These include unfair prices, discriminatory pricing, certain discounting arrangements, tie-ins, predatory pricing, refusals to supply, and import/export bans.
- Finally, an effect on trade between Member States must be established. This rarely proves problematic.

Brexit

- As mentioned in the previous chapter also, the UK is no longer bound by EU competition law. It remains to be seen, however, whether UK competition law will depart significantly from EU competition law in the future. Furthermore, UK businesses operating in the EU will remain bound by EU competition law.

Further Reading

Articles

S Baker and L Wu, 'Applying the Market Definition Guidelines of the EC Commission' (1998) 19(5) ECL Rev 273

An interesting look at the guidelines and, in particular, supply substitutability.

T Eilmansberger, 'How to Distinguish Good from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Anti-Competitive Abuses' (2005) 42 CML Rev 129

Consideration of guiding principles in relation to abuses under what is now Article 102 TFEU.

G Monti, 'The Scope of Collective Dominance under Article 82' (2001) 38 CML Rev 131

Further reading on collective dominance.

J Ysewyn and C Caffara, 'Two's Company, Three's a Crowd: The Future of Collective Dominance after the *Kali & Salz* Judgment' (1998) 19(7) ECL Rev 468

A detailed and progressive look at the collective dominance issue.

p. 630

Books

P Craig and G de Búrca, *EU Law: Text, Cases, and Materials*, 7th edn (Oxford: Oxford University Press, 2020), esp ch 28

Focused and accessible account of relevant cases and materials.

C Graham, *EU and UK Competition Law* (London: Pearson, 2013)

A specialized competition law text, with substantive coverage of Article 102 TFEU and the EU/UK approach.

R Whish, *Competition Law*, 10th edn (Oxford: Oxford University Press, 2021)

A comprehensive account of all aspects of EU competition law.

Question

LazyGurl plc (LazyGurl) is an Italian manufacturer of high-quality TV viewing chairs combining massage facilities, built-in speakers, and a drinks refrigerator. LazyGurl supply the chairs across the EU. LazyGurl have been the best-selling high-quality chair producer for each of the last eight years, enjoying a 78 per cent market share.

However, a Belgian company, SuperChairz, has emerged as a competitive threat to LazyGurl. SuperChairz is rapidly increasing its market share by offering an equivalent quality, but cheaper, chair.

LazyGurl has embarked upon an EU-wide marketing campaign and has slashed prices in a special promotion. It has spoken to all of its retailers to offer discounts for bulk purchases and further discounts if they agree to buy chairs only from LazyGurl. Many retailers have been warned that if they stock the SuperChairz products, supplies of LazyGurl chairs will cease.

Advise SuperChairz.

Visit the online resources for an outline answer to this question *<https://iws.oupsupport.com/ebook/access/content/eulaw-complete5e-student-resource/eulaw-complete5e-chapter-14-guidance-on-answering-assessment-questions?options=showName>*, **and additional self-test questions** *<https://iws.oupsupport.com/ebook/access/content/eulaw-complete5e-student-resource/eulaw-complete5e-chapter-14-self-test-questions?options=showName>* **with feedback.**

www.oup.com/he/eulaw-complete5e *<https://www.oup.com/he/eulaw-complete5e>*