Award in Principles of Competition Law

Lecture Title: Article 102 TFEU

Diploma in Law (Malta)

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Article 102 TFEU: The Prohibition

The Text Reads:

"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 … in so far as it may affect trade between Member States (MS)."

i. Unilateral market behaviour (*by an undertaking (or more*)
ii. Abuse (*see indicative list under Art. 102*) of a
iii. Of a Dominant position (*this has to do with market power*)
iv. Within the internal market (*there must be a "relevant market" in respect of which a company is a dominant operator*)
v. Having an effect on trade between MS (*jurisdictional element for application of TFEU*)

Article 102 TFEU: Indicative List of Abuse

Article 102 TFEU does not define the concept of "abuse". Instead, it lists four categories of abusive behaviour:

i. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

ii. limiting production, markets or technical development to the prejudice of consumers;

iii. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

iv. 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: Indicative List of Abuse

- The EU Courts have said that it is impossible to set out an exhaustive list of conduct that might violate Article 102
- Many cases finding an abuse involve conduct of more than one kind or that can be classified under more than one heading. (EG., Refusal to supply access to my storage facility may be excessive pricing or a margin squeeze, it may even be an illegal agreement of excessive duration!)
- It is inappropriate to seek to 'pigeon-hole' conduct as one type of abuse Reference to earlier decisions is only an imperfect guide as to how the principles underlying Art. 102 should be applied to the facts of an individual case.
- In each case it will be important to consider, among other matters:

i. the theory of harm arising from the conduct in question;

ii. the actual and likely effects of the conduct on competition;

iii. the objective justifications and efficiency gains, if any, associated with the conduct.

Article 102 TFEU: Non-Exhaustive List

Over the past decade, a new form of abusive conduct has been pursued by different NCAs, namely the practice of dominant companies excluding or reducing competition by instituting strategic campaigns to influence the purchasing behaviour of customers, typically by portraying competing products or services as unsafe and/or inefficient or of significantly lower quality - "**Denigration**"

By way of illustration, in 2019 the Danish CA found Falck (a supplier of ambulance services) had implemented a non price exclusionary strategy to exclude BIOS from the market by creating uncertainty and concern about BIOS as a (supplier of ambulance services

"Falck's strategy targeted BIOS and consisted, among other things, of - secretly - conveying negative stories about BIOS to the press and to Falck's employees, and purposefully influencing those paramedics who considered jobs at BIOS, in order to prevent them from applying for jobs at BIOS. Overall, Falck's behavior made it difficult for BIOS to recruit paramedics, and ultimately BIOS had to leave the market"

Article 102 v Article 101 TFEU

- The prohibition in Article 102 is fundamentally different from Article 101 of the TFEU in that there is no requirement for there to be an agreement or concerted practice between participants in the market.
- Conduct by a single company will suffice (although 2 companies may be "collectively" dominant).
- Another major difference is that, unlike Article 101, Article 102 does not apply to all companies. Only companies that are dominant in a relevant market are subject to the higher standards of competitive behaviour. Dominant companies must not abuse their dominant position.
- Further, Article 102 is much less certain in its area of application than Article 101. A price-fixing agreement entered into between competitors with even modest market shares will be a serious breach of Article 101. It may be relatively easy to prove, and if the evidence is sufficiently clear, there is unlikely to be much defence.

Article 102 v Article 101 TFEU

- An Article 102 case, on the other hand, will routinely involve substantial disputes (and more analytical assessments) regarding the following questions:

i. What is the relevant market? In order to ascertain whether a firm is dominant for the purpose of Article 102, complex questions about whether one product is in the same market as another will usually need to be examined in detail

ii. Is the undertaking dominant? Once the relevant market has been defined, market shares must be determined which, again, may be far from easy, depending on the availability of data

iii. Is the conduct complained of an abuse? Dominant players are permitted to compete actively. The line between permissible and undesirable competition is uncertain - for example, a price reduction following production economies, on the one hand, and unlawful predatory pricing, on the other, may well be unclear.

An Quick e.g. Article 102 TFEU

Facts

According to Spotify, Apple has been using their control over the Apple devices' ecosystem to give their own streaming service, Apple Music, an unfair advantage.

Spotify accused Apple of:

- Being pressured to adopt Apple's In-App Payment (IAP) system - they are unwilling to pay the 30% commission that Apple charges for using the payment service.

- Barring Spotify from sharing their deals and promotions in-app, or even through email for users who registered via the app - effectively stifling their ability to fairly compete with Apple's own competing service (anti-steering).

- Arbitrarily changing rules for their competitors; rejecting bug fixes and app updates submitted by Spotify unreasonably; and hindering Spotify's attempts to be on new Apple devices, such as the HomePod.

How does this translate into an **Article 102 TFEU** case?

An Quick e.g. Article 102 TFEU case requires the following elements:

- What is the relevant market? - The Commission believes Apple is distorting competition in the distribution of music streaming apps through its App Store market
- Is the undertaking dominant? - Apple users can only download apps via the App Store, an exclusivity that effectively turns the store into a "gatekeeper" of users of iPhones and iPads via the App Store. Apple's devices and software form a 'closed ecosystem' in which Apple controls every aspect of the user experience. "*When you have an iPhone you can't go anywhere else," said Margrethe Vestager, "Apple holds a monopoly on the App Store*." Therefore, in Apple's case, there is no other app marketplace available for an iOS device
- Is the conduct complained of an abuse?

- Apple charges developers a 30% commission fee on all digital subscriptions bought through the mandatory IAP. Apple Music, the company's own music streaming service is exempted of this fee.
- The so-called "anti-steering provisions" prevent app developers from informing users of alternative and cheaper subscription offers that may be located outside of the apps.

The combination of these two rules, the Commission explained, raises costs for consumers and distorts competition in the market. For example: an app developer may be forced to increase the overall subscription price in order to offset the 30% commission fee, putting Apple Music at an advantage. (See https://blog.ipleaders.in/apple-music-breached-eu-competition-law/)

Article 102 TFEU : The Criteria

- An Article 102 case will involve the assessment of the following criteria:

i. What is the relevant market? In order to ascertain whether a firm is dominant for the purpose of Article 102, a relevant product and geographic market must be defined.

ii. Is the undertaking dominant? Once the relevant market has been defined, the undertaking must be found to be dominant on the market through the assessment of market shares etc.

iii. Is the conduct complained of an abuse? What is the theory of harm - Dominant players are permitted to compete actively. The line between permissible and undesirable competition is uncertain - for example, a price reduction following production economies, on the one hand, and unlawful predatory pricing, on the other, may well be unclear.

The First Criterion: Dominance, Is Big Bad?

- Competitive pressure from rival firms usually 'keeps firms honest', preventing them from charging prices which are excessively above costs

- Markets on which a firm occupies a dominant position are presumed insufficiently competitive. No further restrictions of competition are tolerated

- Without competitive pressure a dominant firm has market power and so is able to profitably raise prices and restrict output

- The European Court also held that:

"such a position does not preclude some competition...but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence under which competition will develop, and in any case to act largely in disregard of it so long as such conduct does not act to its detriment" Case 85/76 Hoffman La Roche

The First Criterion: Dominance

It is perfectly legitimate for a firm to hold a dominant position under Article 102 TFEU: the Article prohibits abuse of a dominant position, not the mere holding of that position.

- The CJEU has established very consistently in the case law that, regardless of the reasons why a firm holds a dominant position, it *'has a special responsibility [owed to the market and consumers] not to allow its conduct to impair genuine undistorted competition on the common market'* (see Case 322/81 *Michelin NV v Commission)*

- The "dominant position" under Article 102 TFEU does not necessarily refer to a monopoly but also to undertakings with certain degree of market power.

Illustration: Gozo Channel

This service provider may enjoy a 100% market share on the transport of passengers and cargo by ferry between Malta and Gozo. However, its market power would be constrained if a helicopter service on the same route or if a fast ferry passenger service enters the market and drastically increases the level of competition

The First Criterion: What is Dominance?

The legal definition of a dominant position in EU law was given by the ECJ in United Brands and Hoffmann-La Roche: *"a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers*" Case 85/76 Hoffmann-La Roche & Co AG, para. 38-39, Case 2/76 United Brands para. 65.

- This has been repeated and applied by the Court ever since …
- In the Guidance Paper on Article 102 the European Commission starts with the UB/HLR definition, but explains it as "*substantial market power*" and links it to the economic definition of substantial market power as the capability of profitably increasing prices above the competitive level for a significant period of time rather than identifying dominance with the ability to prevent effective competition See Guidance Paper, paras 10-11
- Therefore, the acid test is = market power and the ability to act independently on the market exists, rather than whether a particular size of market share exist

Establishing Dominance

"The existence of a dominant position may derive from several factors which taken separately are not necessarily determinative (…)" (Hoffman/La Roche para 39):

- Markets shares
- Competitive constraints imposed by existing competitors
- Countervailing buyer power
- Barriers to Entry or expansion

Market Shares

- Neither the law nor the case law refers to any threshold above which an undertaking must be considered to be dominant.
- While market shares are not in themselves determinative of dominance, they are very important Case 322/81 Michelin v Commission. The Commission makes it clear in the Article 102 Paper that market shares are merely a "useful first indication" of the market structure
- As a Rule of Thumb

➢ Share > 70% = dominant

➢ 70% > Share > 50% = presumed dominant

➢ Share < 40% = dominance unlikely

- That said, even above the 50 % threshold, it is necessary to consider the nature and dynamics of a particular market. In markets subject to a high degree of innovation or where services are offered for free, shares (even above 90 %) may not be a good proxy for market power (case T-79/12 Cisco v Commission and case COMP/M.7217 Facebook/WhatsApp)
- Assess relative market shares - 3 firms each with a third of the market is more likely to be competitive than 1 firm

with 30% and 7 firms each with 10%

- Look at how market shares change over time. If market shares are volatile it could be that firms are

constantly innovating to get ahead (eg. IPR)

Other Factors for Assessment

- **Competitive Constraints**: existing market dynamics and the differentiation of products, as well as considering the development of market shares over time.

- **Expansion or new entry**: constraints imposed by the threat of expansion of existing competitors and entry by potential competitors, taking into account barriers to entry or expansion, the likely reactions of the allegedly dominant undertakings and other competitors and the risks and costs of failure. Barriers to entry or expansion could be legal (for example, patents, tariffs or quotas) or economic (for example, economies of scale, technologies and established distribution and sales networks). The Commission notes that the dominant undertaking's own conduct could create barriers to entry, for example, where it has made significant investments which entrants or competitors would have to match.

- **Countervailing buyer power**: a firm may have a substantial market share, and a number of other advantages over its competitors, and yet still not have a dominant position if its customers have such power themselves that the undertaking cannot "behave to an appreciable extent independently of its competitors and its customers". However, the Commission states that buyer power may not be enough of a constraint if only a segment of customers are shielded from the market power of the dominant undertaking.

Other barriers to expansion and entry

- **Brand or customer loyalty:** At one end of the spectrum is the international consumer *product brand*, registered as a trade mark around the world. NB Even a brand as strong as "Coca-Cola" has not prevented competitors from entering the market. A more subtle but potentially even stronger factor may be *customer loyalty*. In the engineering sector, for example, a customer looking to purchase expensive equipment, which he hopes to keep in service for many years, may be reluctant to order from a new entrant rather than a long-established and reputable concern.
- **Access to markets:** Another entry barrier may exist if, for example, an allegedly dominant firm is vertically integrated (in that, as a manufacturer, it also owns a highly-developed distribution network) and its distribution operations cannot economically be duplicated. Similarly, the existence of long-term contracts between a supplier and its customers may act as a barrier to entry.
- **Excess capacity**: This can work in several ways. For example, if A (allegedly dominant) knows that B has excess capacity, this may deter A from seeking to increase its prices since B may bring its excess capacity into production. This, therefore, militates against A being dominant. On the other hand, if A has excess capacity, this may deter B from increasing capacity (or entering the market) since, if B does so, A will bring its excess capacity into operation. This, therefore, militates in favour of A being dominant.

Pop Quiz!

1. The main elements of EU competition policy are:

A. ensure that firms do not abuse a dominant position in the market.

B. ensure that no firm attains a dominant position in the market

C. ensure that firms do not engage in anticompetitive practices

D. a) and c)

2. What does Article 102 TFEU prohibit?

A. Anti-competitive agreements between undertakings.

B. Agreements between undertakings operating at different levels of the production/distribution chain.

C. Abuse of a dominant position within the internal market.

D. Agreements between undertakings operating at the same level of the production/distribution chain.

Pop Quiz!

3. A firm holds a dominant position if it:

A. enjoys a monopoly on a particular market

B. can operate without taking account of the reaction of its competitors or of intermediate or final consumers

C. enjoys a market share of 40%

4. A key difference between Arts 101 and 102 TFEU is that:

A. there is no requirement for there to be an agreement or concerted practice between participants in the market

B. there is no flexibility whatsoever in the application of art 102 TFEU, as the concept of abuse is very narrowly defined

C. art 102 TFEU may be applied to individuals, not just undertakings

Article 102 TFEU : The Criteria

- An Article 102 case will involve the assessment of the following criteria:

i. What is the relevant market? In order to ascertain whether a firm is dominant for the purpose of Article 102, a relevant product and geographic market must be defined.

ii. Is the undertaking dominant? Once the relevant market has been defined, the undertaking must be found to be dominant on the market through the assessment of market shares etc.

iii. Is the conduct complained of an abuse? What is the theory of harm - Dominant players are permitted to compete actively. The line between permissible and undesirable competition is uncertain - for example, a price reduction following production economies, on the one hand, and unlawful predatory pricing, on the other, may well be unclear.

A Pre-Condition: The Relevant Market

- In practice, market power can only exist in relation to the supply or acquisition of a particular class of goods or services. Therefore, the inquiry under Article 102 begins with an assessment of the market share of the firm or firms concerned, which, in turn, requires the relevant market

- A necessary pre-Condition: "For the purposes of Article [102], the appropriate definition of the relevant market is a necessary precondition for any judgment concerning allegedly anti-competitive behaviour (…), since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market." Case T-61/99 Adriatica di Navigazione para 27

- Purpose: "Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. …and to identify in a systematic way the competitive constraints that the undertakings involved face." see Commission Guidance on Defining the Relevant Market

Basic Principles

- The relevant market is established by a combination of the market's two dimensions:

i. the relevant **product** market = "comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."

ii. the relevant **geographic** market = "comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas." (Commission Guidance on RM, para 7)

- The test involves looking at the narrowest set of products which might plausibly form a market, and asking what would happen if a hypothetical monopolist of that set of products sought to increase the price of the products by a small but significant, permanent (in other words, non-transitory) amount of, say, 5% to 10%.
- Would customers then switch to the closest available substitute products? If not, that set of products forms the relevant product market.
- If, on the other hand, customers would switch to other products in the event of such a price increase, the relevant product market includes those other products.
- The process is continued until no further products are added, as they are not effective substitutes, at which point the relevant product market is identified.

Basic Principles – A very simple example

A farmer is the only grower and seller of organic cherry tomatoes in a small village. She sells these tomatoes only in her village. What is the relevant market and is she dominant?

Product market

- If the product market is defined as 'organic cherry tomatoes sold in the village', then the answer is yes.
- But this market definition might be too narrow, for instance one might query whether organic tomatoes are in a separate market from non-organic tomatoes; or whether cherry tomatoes are really in a different market from other varieties of tomato.

Geographic Market

- Others may argue that the geographical market is too narrow: if the next village is only five minutes away and there is another seller of organic tomatoes there, then she does not monopolise the market but competes against the other farmer.
- Some might point out that while at present she is the only seller of organic tomatoes, her neighbour has spare capacity in his garden to grow organic tomatoes as well, so she lives in fear of him entering the market and competing against her.

Basic Principles – A very simple example

This example illustrates that three principal considerations inform the definition of the market.

i. The first consists in identifying what the relevant product is from the perspective of consumers (technically known as '**demand-side substitutability**'). This entails deciding whether organic cherry tomatoes are a different product from the consumers' perspective.

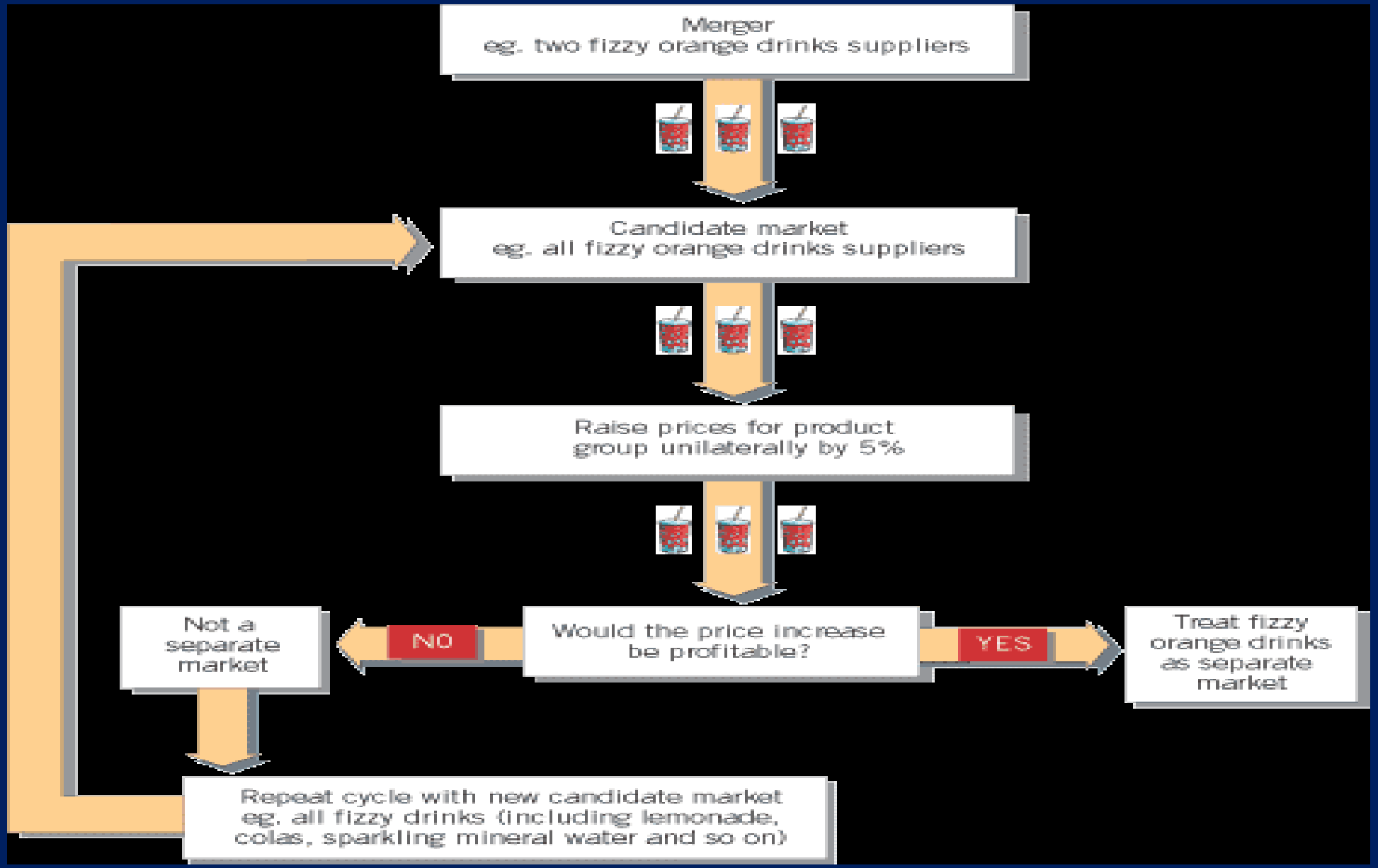
ii. The second requires determining, again from the perspective of the consumer, what the relevant geographical market is – do consumers see the shop in the neighbouring village as a substitute for the shop in this village?

iii. And the final consideration is an inquiry into whether there are any persons who might enter the relevant market in the future (in the jargon, a search for '**supply substitutability**').

iv. Clearly, under the narrowest market definition (organic cherry tomatoes in the village) the farmer has 100 per cent of the market and a dominant position, while under the widest (tomatoes sold within a five-minute drive from the village, and taking into account the potential entry into the tomato market from other farmers) it is unlikely that she has a significant share of the market.

v. Accordingly, a competition authority will draw markets narrowly to facilitate a finding of dominance, while defendants will opt for a wider market definition to escape the application of Article 102.

Source practical law company: The Relevant Product Market



A Simple Illustration: The Relevant Product Market

- It is on **demand-side** and **supply-side substitution** that the Commission focuses and on which it is often possible to collect reliable market-based evidence.

- Demandside substitution = when consumers switch from one product to another in response to a change in the relative price of those products.

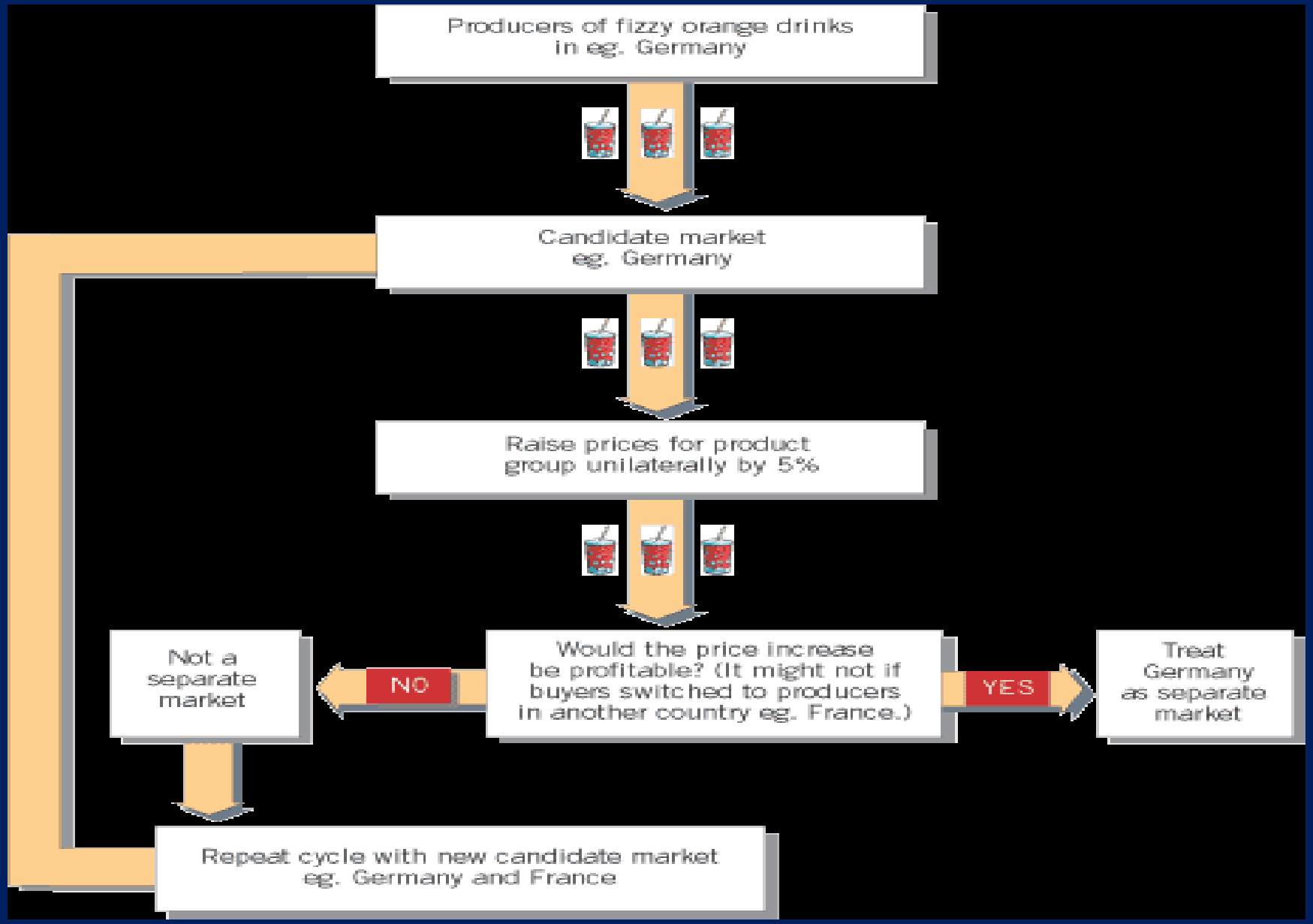
Eg. fizzy orange drinks, demand-side substitution would occur if enough customers declined to buy fizzy orange at the new higher price and bought, for example, colas instead.

- Even if there are no alternatives to a particular set of products currently available to consumers, the products concerned may still not necessarily constitute a relevant product market. This is because of the possibility of **supply-side substitution**.

- If other producers respond to an increase in the price of a set of products by switching existing assets, such as buildings, machinery and know-how, into the production of the products whose price has risen, then this increased level of supply may render any attempted price increase unprofitable, without the need for any demand-side substitution.

Eg. fizzy drinks, even if customers were unwilling to switch significant volumes of sales away from fizzy orange to colas or lemonades in response to an increase in the price of fizzy orange, the suppliers of the colas and lemonades might be able to start supplying fizzy orange. They might be able to do so by using their existing equipment and making minor modifications to their production schedules by replacing the cola or lemon syrup with orange syrup in the production process.

Source practical law company: The Relevant Geographic Market



Article 102 TFEU : The Criteria

- An Article 102 case will involve the assessment of the following criteria:

i. What is the relevant market? In order to ascertain whether a firm is dominant for the purpose of Article 102, a relevant product and geographic market must be defined.

ii. Is the undertaking dominant? Once the relevant market has been defined, the undertaking must be found to be dominant on the market through the assessment of market shares etc.

iii. Is the conduct complained of an abuse? What is the theory of harm - Dominant players are permitted to compete actively. The line between permissible and undesirable competition is uncertain - for example, a price reduction following production economies, on the one hand, and unlawful predatory pricing, on the other, may well be unclear.

The Second Criterion: Abuse

- The Commission has explained that such behaviour is prohibited under competition law because it:
  - damages true competition between firm
  - exploits consumers
  - makes it unnecessary for dominant firms to compete with other firms on the merits.

- Broadly, the categories of abuse can be grouped into
- (i) **exclusionary abuses** (where a dominant company strategically seeks to exclude its rivals and thereby restricts competition such as predatory pricing), and
- (ii) **exploitative abuses** (where a dominant firm uses its market power to extract rents from consumers such as excessive prices). Exclusionary abuses are by far the most common type of abuse (although the Commission and national authorities have recently begun to pursue more exploitative abuse cases).

- Dominance, abuse, and effect can be in different markets.

The Second Criterion: Abuse

- When dealing with the concept of abuse, we must always start with the wording of Article 102 TFEU, which contains a non-exhaustive list of examples of abuse in paras. (a)–(e).
- The concept of abuse is objective and conduct may be abusive even in the absence of any intention to exploit customers or exclude competitors.
- A number of abuses have been based on what can be seen to be a per se approach, without a need to demonstrate their actual effect on competition (such as predatory pricing and margin squeezing).
- Although the concept of abuse has not been defined as such, we can get a good idea by considering how it has been applied by the EU Courts and the Commission.
- The Commission's own view on the meaning of the concept of abuse is that the concept refers to anti-competitive business behaviour of a dominant firm which is intended to maintain or increase its position.

In Hoffmann-La Roche v Commission the CJEU defined the concept of abuse as follows:

"…is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different…, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

The Second Criterion: Abuse

- Case law qualifies certain categories of conduct as 'by nature' abuses. However according to Intel (Case T-286/09): by nature abuses remain presumptively unlawful, but if a dominant firm submits evidence that its conduct is not capable of restricting competition, the Commission must assess all the circumstances to decide whether the conduct is abusive.
- Outside the 'by nature' exceptions, the Commission has to perform a fully-fledged effects analysis. This will apply, for example, to tying, product design, pricing abuses and refusals to supply. An effects analysis for exclusionary conduct requires proving at least the following four elements.

i. First, the dominant company's abusive conduct must hamper or eliminate rivals' access to supplies or markets (Guidance Paper, paragraph 19). In other words, the abusive conduct must create barriers to independent competition (case T-201/04 Microsoft para 1088)

ii. Second, the abusive conduct must cause the anticompetitive effects (case C-23/14 Post Danmark II para 47). Causation should be established by comparing prevailing competitive conditions with an appropriate counterfactual where the conduct does not occur (Guidance Paper, para 21).

The Second Criterion: Abuse

iii. Third, the anticompetitive effects must be reasonably likely (Microsoft, para1089). If conduct has been ongoing for some time without observable anticompetitive effects, that suggests the conduct is not likely to cause anticompetitive effects in the first place (case T-70/15 Trajektna luka para 24).

iv. Fourth, the anticompetitive effects must be sufficiently significant to create or reinforce market power (Guidance Paper, paragraph 11, 19). See(case T-691/14, Servier, EU:T:2018:922). While those findings relate to article 101 of the TFEU, the same reasoning should apply to article 102 of the TFEU because the concept of a restriction of competition is the same, as the English High Court found in Streetmap v Google [2016] EWHC 253.

https://www.simmons-simmons.com/en/publications/ck0aoac8gnhl40b33aunrcktm/03-streetmap-fails-in-private-abuse-of-dominance-action-against-google

Pricing Abuse Red Flags

- Excessive Pricing - Charging prices which are unfairly high
- Predatory Pricing - Setting prices at unfairly low levels with the object of eliminating a competitor
- Discriminatory Pricing - dominant company applies different terms to different customers for equivalent transactions
- Fidelity Pricing - Making the prices of goods or services, or the availability of discounts, dependent on retaining all or part of a customer's business
- Margin Squeeze - Charging a price on the upstream market which, when compared to the price the dominant undertaking charges on the downstream market, does not allow an as-efficient competitor to trade profitably in the downstream market on a lasting basis

Non-Pricing Abuse Red Flags

- Tying/Bundling- Tying occurs when a supplier sells one product, the 'tying product', only together with another product, the 'tied product.'
- Predatory product design or a failure to disclose new technology - the design must be introduced solely to render rivals' products incompatible or to exclude rivals from the market
- Refusal to Supply - Refusing to supply goods or services (or refusing to supply them except on clearly unacceptable terms)
- Exclusive Dealing - an action by a dominant undertaking to foreclose its competitors by hindering them from selling to customers through use of exclusive purchasing obligations or rebates
- Mergers and acquisitions as exclusionary practices – "killer acquisitions"
- Abusive use of litigation - aim behind any 'sham' litigation is to either subdue a competitor by increasing operational costs or to delay the entry of a competitor in the market

Article 102 TFEU: Indicative List of Abuse

Article 102 TFEU does not define the concept of "abuse". Instead, it lists four categories of abusive behaviour:

i. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

ii. limiting production, markets or technical development to the prejudice of consumers;

iii. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage (Discrimination);

iv. 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 (Tying)

Article 102 TFEU (iii): Discrimination

According to Art 102 (c) TFEU, it may be deemed an abuse of market power when a dominant undertaking:

"appl[ies] dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage"

- What are dissimilar conditions?
- What are equivalent transactions?
- Does it place a firm at a competitive disadvantage?

Article 102 TFEU (iii): Discrimination

Facts [2011] EWHC 987 (Ch)

- Heathrow Airport Limited (HAL) is the owner and operator of Heathrow Airport, as part of which it operates a number of car parks on the Heathrow Airport site as an "on-airport" car parking provider.
- Trading Partners: Purple and Meteor (“P&M”), offer valet parking service activities at HAL Terminal 1, 3 and 5 in competition with HAL

Alleged Abuse

- In 2010, HAL sought to change the arrangements so that only it would operate from the terminal forecourts and the off-airport operators would be relocated to operate from the car parks. HAL would, therefore, be the only forecourt operator.

Market Definition

- It was presumed that the upstream market was the "Facilities Market", and that HAL was dominant in it. The Facilities Market is the provision of access to Heathrow's facilities, including its roads and forecourts.

Article 102 TFEU (iii): Discrimination

Equivalent Transaction/Dissimilar Conditions?

- The relevant transaction was access to Heathrow facilities for the purpose of conducting meet and greet activities.

- There was a dissimilarity between the basis on which HAL and Purple/Meteor have the benefit of the forecourt (access for meet and greet purposes): HAL would operate from the forecourt; Purple and Meteor would operate from the car park for all activities. HAL had a permit, for no payment. Purple and Meteor would have to operate from the car park, for a charge.

- Material dissimilarity. There was a charge, which was not insignificant, and the position from which the two services were offered was different. The differences between operating from the forecourt and operating from the car parks was not merely geographical ones with no consequences. They affected the nature of the service, both in real terms and in terms of customer perception.

Article 102 TFEU (iii): Discrimination

Anticompetitive Effect on the Consumer?

- The essential question was, therefore, what would happen if P&M were required to operate from the car parks and HAL was left on the forecourts
- The Court concluded that this would have an anti-competitive effect:

  - The proposed changes (i.e. discrimination) would leave HAL as the only meet and greet supplier on the forecourts.
  - Being on the forecourt confers very substantial advantages to an operator when compared with those who are operating from the car park. Customers prefer it, and such a service contains important elements which the consumer seeks to have when compared with a car park-based service.
  - The off-airport operators would not be able to compete on quality in the car parks as they would not have the same product to sell. It was not apparent that, in those circumstances, they would be able to compete on price either as it was not clear what the future pricing of the short-stay car parks would be, but in any event they would still be selling a fundamentally different product

Article 102 TFEU (iii): Discrimination

Anticompetitive Effect on the Consumer:

- Therefore, for the real meet and greet customer there would be no competition.

- The result would be an effective monopoly on the meet and greet service, and a serious risk to competition as far as the consumer was concerned. The customer would only have one product to buy; HAL could charge monopolist prices. Those prices would be higher than the off-airport suppliers' current prices; and the meet and greet customers would have to pay those prices if they want that distinct product.

- This would operate to the detriment of the consumer who would be very likely to have to pay significantly higher, and unconstrained, prices for the forecourt meet and greet service

An e.g., Article 102 TFEU (iv): Tying

According to Art 102 (d) TFEU, it may be deemed an abuse of market power when a dominant undertaking makes:

"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."

- Tying occurs when a supplier makes the sale of one product (the *tying product*) conditional upon the purchase of another (the *tied product*) from the supplier (i.e. the tying product is not sold separately).

An e.g., Article 102 TFEU (iv): Tying

Facts

- The Italian NCA has slapped a €1.3 billion fine on Amazon after finding that the US giant holds a position of absolute dominance in the Italian e-commerce market, which has allowed it to favour its own logistics service - **FBA**.
- **Fulfilment by Amazon** (FBA), suppliers store their products in Amazon's fulflment centres, and Amazon then picks, packs, ships, and provides customer service for these products.
- Amazon had leveraged its dominant position in the Italian market for intermediation services on marketplaces or “marketplace services” to favour the adoption of its own logistics service by third-party retailers active in its marketplace

Article 102 TFEU (iv): Market Definition

Following the well-established case law on "tying" conduct, the AGCM identified two (2) relevant markets in the case at hand.

Product Market Definition (i) Marketplace services

- First, the NCA singled out the Italian market for e-commerce intermediation services via "horizontal" (i.e., generalist) marketplaces, where Amazon is deemed to hold a (super) dominant position.
- The NCA pointed out that the relevant market encompasses a set of intermediation services offered by an internet marketplace to third-party sellers to reach consumers with their own commercial offers and that allow transactions and ancillary services to be conducted.
- Therefore, it excluded from this market other e-commerce activities (direct e-commerce, non-transactional comparison shopping websites; and so on)

Geographic Market Definition

- Competition between marketplaces available in the local language and targeting national demand characteristics is considered national in nature, though a chain may be formed with relevant markets in neighbouring countries, as well as with EU-wide competition between international marketplaces.

Article 102 TFEU (iv): Market Definition

Product Market Definition (ii) e-commerce logistics services

- The NCA defined the second relevant market as the market for *e-commerce logistics s*ervices in Italy, which allegedly differs from the product market of *traditional logistics services* offered to retailers that operate offline. FBA, is a global network of warehouses and delivery services. This network of warehouses and delivery services may be used by Sellers, in exchange for payment of "pay per use" fees, to store their products and fulfill orders made on the Platform by their customers—while also managing the processing of returns and related customer service.
- The NCA argued that e-commerce logistics services differ from the traditional ones – which form a separate market – as the former are specifically designed for Business-to-Consumer commercial relationships, whereas the latter tailor their offerings for Business-to-Business transactions.
- Moreover, according to the NCA other factors differentiate e-commerce logistics services from traditional ones, namely vertical integration of the services with marketplace and direct sales; and the demand for specific logistics services for e-commerce by online retailers - which require one or more logistics "modules" depending on size and business model etc.

Article 102 TFEU (iv): Abuse

Tying as an Abuse

- According to the NCA, Amazon violated Article 102 TFEU by unduly leveraging its dominant position in the market for *marketplace services* to strengthen its position in the adjacent market of *e-commerce logistics services*, where it offers FBA services.
- Specifically, the abusive conduct—according to the NCA—consists of Amazon's unjustified tying of FBA to a set of exclusive advantages for Sellers on Amazon.it, a strategy that Amazon—again, according to the NCA—carried out with an anticompetitive, exclusionary strategy toward competing marketplaces.
- The advantages at issue are strictly conditioned by the use of FBA and cannot be obtained otherwise. The most relevant advantage for Sellers is the Prime label (the annual volume of purchases of Prime members is 100 to 200% higher than that of non-Prime members).

Article 102 TFEU (iv): Abuse

Tying as an Abuse

- The Prime label allows Sellers to participate in popular special events promoted by Amazon as the Black Friday, the Prime Day, and the Cyber Monday sales – which the ICA found to be "essential for gaining visibility and increase sales on Amazon.it". Sellers that use FBA are not subject to the Amazon evaluation process, designed to monitor the level and quality of Sellers' offers on the Platform—and which can lead to the exclusion of a retailer from Amazon.it if its score falls below a certain threshold (for example, too many negative comments related to a retailer's delivery services).

- Finally, using FBA also increases the likelihood that a Seller's offer will be selected as a "Featured Offer" displayed in the Buy Box that users see at the top of their queries (collectively, the "Benefits").

Article 102 TFEU (iv): Abuse

- The abusive conduct was defined as “tying” and in principle it should only affect the market for the tied product/service (i.e., e-commerce logistics services), but the NCA found that it also has the effect of damaging competition in the market for marketplace services (i.e., the market of the tying product/service), where Amazon is deemed dominant = because of the cost of duplicating warehouses and logistics services and the high cost of FBA, Sellers who adopt FBA are discouraged from offering their products on other online marketplaces (multi-homing), even with a product range as wide as the one on Amazon.it.

Pop Quiz!

MegaClean lowers the price of its household bleach product to a level where it is producing a loss. At the same time, it raises the price of its window-cleaning product, a market on which it is dominant. Two of MegaClean's competitors on the household bleach market are forced out of that market. MegaClean subsequently raises the price of bleach to above what it was originally charging. Which of the following red flags does MegaClean's conduct signal?

A. Tying.

B. English Clause.

C. Predatory pricing.

D. Exclusivity arrangement.

E. Refusal to supply.

How might predatory pricing be characterised?

A. As an exploitative abuse.

B. As an exclusionary abuse.

C. As an indicator of dominance.

D. As a feature of the relevant product market.

The Banana Case

You go to the grocery store and see the price of bananas went up 2 euros each. Would you be more likely to buy one of these other fruits or nothing at all:

- Peaches: _____ (seasonal)
- Grapes: _____ (seasonal)
- Apples: _____
- Oranges: _____

Now Pretend you are either very young or very old. Would your answer change at all?

United Brands 27/76 : Practical Application of the Theory

- The case relates to alleged abuses of a dominant position by US Co. United Brands. UBC was the main supplier of bananas in Europe, using mainly the Chiquita brand. UBC forbade its distributors/ripeners to sell bananas that UBC did not supply. Also, it charged a higher price in different Member States, and imposed unfair prices upon customers in Belgo-Luxembourg Economic Union, Denmark, The Netherlands and Germany.

- United Brands supplied these bananas unripe and in bulk to distributor/ripeners operating in various EU countries. The distributors would buy them while still green, ripen them using their own facilities and distribute them to retailers across their national markets:

1. The first abuse identified by the Commission was United Brands' restriction on its distributors from reselling its bananas while still green. Since ripe bananas have short shelf lives, the effect of this restriction was to prevent distributors from selling in other countries.

2. The second abuse was the refusal to supply bananas to Olesen, a long-standing distributor in Denmark. United Brands argued that this refusal was justified by Olesen's decision to promote a rival brand (Dole) to the detriment of sales of Chiquita bananas

The Banana case: Facts

3. The third abuse was the differential pricing charged by United Brands to distributors in different member states. Bananas were generally supplied by United Brands to distributors in Rotterdam so the transactions were directly comparable. United Brands argued that the differences were justified because the prices applied to distributors were directly linked to the final market price for bananas in each country.

The Court found that this argument provided no justification for discriminatory prices, which were imposed by United Brands, and affected cross-border trade, thus amounting to abuse irrespective of any commercial logic underpinning them

The Banana case: How was the Relevant Market defined?

- The ripening of bananas takes place the whole year round; non-seasonality Throughout the year production exceeds demand and can satisfy it at any time; no unavoidable seasonal substitution
- The studies of the banana market on the Court's file show that on the latter market there is no seasonal substitutability in general between the banana and all the seasonal fruits, as this only exists between the banana and two fruits (peaches and table grapes)
- As far as prices are concerned studies show that the banana is only affected by falling prices of peaches and table grapes during the summer months and mainly in July and then by an amount not exceeding 20%
- As far as concerns the two fruits available throughout the year (oranges and apples) the first are not interchangeable and in the case of the second there is only a relative degree of substitutability.
- 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.

The Banana case: Relevant Market

- Although it cannot be denied that during these months and some weeks at the end of the year this product is exposed to competition from other fruits, the flexible way in which the volume of imports and their marketing on the relevant geographic market is adjusted means that the conditions of competition are extremely limited and that its price adapts without any serious difficulties to this situation where supplies of fruit are plentiful.

- 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 fresh fruit on the market and that even the seasonal peak periods only affect it for a limited period of time and to a very limited extent from the point of view of substitutability.

The Banana case: Was United Brands Dominant?

The main facts relied on to confirm United Brands' dominant position were:

- **Market Share -** United Brands had a market share consistently between 40% and 45%. The next largest competitor had only 16% and the next after that only 10%.
- **Vertical Integration-** United Brands had control of (or easy access to) all its inputs: it is "vertically integrated to a high degree" (paragraph 70) with effective control over all stages of transport and ripening (paragraph 71, paragraphs 78-86), "owns large plantations" (paragraph 72), "can obtain supplies without any difficulties from independent planters" (paragraph 73) is sufficiently diversified to withstand natural disasters (paragraphs 75-76).
- **Brand Loyalty** - These capabilities have enabled it to develop Chiquita as a trusted must-have brand, thereby placing distributors and ripeners in a degree of dependency. United Brands had "attained a privileged position by making Chiquita the premier banana brand name on the relevant market with the result that the distributor cannot afford not to offer it to the consumer" (paragraph 93).
- **Barriers to Entry/Expansion** - The robustness of United Brands' business has enabled it to withstand competitive attacks by rivals (paragraph 121). Given the inherent challenges of entry into the market (paragraph 122), this means that new entrants "come up against almost insuperable practical and financial obstacles" (paragraph 123).

Don’t Forget: Effect on Trade

- Trade between Member States must be affected for Article 102 (and 101) to apply: decides the borderline between TFEU and national competition rules

- If trade is not affected, an agreement will be regulated by national competition law exclusively

- Parallel application above the limit

- Case 56/65, STM

“It must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States”

Objective Justification

- Although Article 102 contains no equivalent to Article 101(3), it equally does not operate on a wholly rigid or per se basis, outlawing specific types of conduct.

'… it is clear that the [EU] case-law provides dominant undertakings with the possibility of demonstrating an objective justification for their conduct, even if it is prima facie an abuse, …

- In practice the concept of 'objective justification' is often considered as a distinct element and the absence of any such justification has been identified by the CJEU as a legal requirement in a number of cases.

- It follows that a dominant firm can argue that apparently anti-competitive conduct is in fact justified, provided that the grounds relied on are more than simply the commercial advantage of the undertaking

Thank you

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