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## **HOW DOES ONE SAY “DOMINANCE” IN EUROPEAN?**

*Mark Naftel*

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As industry continues to globally reorganize and as former state monopolies in such areas as telecommunications begin to be exposed to competition, allegations of anticompetitive conduct are likely to increase. Therefore, it is correspondingly necessary for industry and legal counsel to be familiar with European competition law. Although there are many similarities between U.S. antitrust law and E.U. competition law, there are important differences in the statutory underpinnings of the laws and how they have been interpreted. These differences should be kept in mind when examining such concepts as dominance.

### **Constitutional, Statutory and Institutional Framework**

The Treaty of Rome established the European Community and mandated that the participating nations, known as Member States, maintain a system of fair competition. Treaty Article 86 specifically forbids an “abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it ... in so far as it may affect trade between Member States.”<sup>1</sup> Through implementing regulations, the European Commission was given power to investigate alleged violations of the competition law,<sup>2</sup> grant exemptions from

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<sup>1</sup> Treaty Establishing the European Community art. 86 [hereinafter EEC Treaty].

<sup>2</sup> Council Regulation No. 17 of February 1962. First Regulation implementing Articles 85 and 86 of the Treaty amended by Regulation No. 59, by Regulation No. 118/63/EEC and by Regulation (EEC) No. 2822/71, art. 14, 1964 O.J. (L 13) 204.

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application of the competition law,<sup>3</sup> take decisions that the competition law has been violated,<sup>4</sup> levy fines for violation of the competition law of up to 10 percent of the annual worldwide turnover of the parties involved,<sup>5</sup> and approve mergers.<sup>6</sup> Commission decisions can be considered as the first level of European competition law judicial authority. From Commission decisions, it is possible to appeal to the European Court of First Instance. The court of final resort in the European Court of Justice (“ECJ”). **[\*3]**

**Methodology to Determine Dominance**

European law does not forbid a business from having a dominant position in a market. Rather, it prohibits the abuse of a dominant position. Still, an essential first step for enforcement officials to prove a violation of Article 86 is to determine whether a firm is dominant. The Treaty gives no guidance as to what constitutes a dominant position. The European Commission and the European courts have filled this vacuum through case law. Legislation and guidelines have been adopted, largely based on judicially enunciated principles, that help define what is meant by dominance.

**High Level Definition**

To those who find themselves on the receiving end of a Commission investigation, it may seem that “the concepts of dominant position and abuse of such a position in Article 86 are among the most indeterminate and vague concepts both in Community law and in the national law of the

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<sup>3</sup> *Id.* art. 9.1.

<sup>4</sup> *Id.* art. 9.2.

<sup>5</sup> *Id.* art. 15.2.

<sup>6</sup> Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings, 1990 O.J. (L 257) 14.

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Member States.”<sup>7</sup> Nevertheless, a degree of certainty can be obtained through examining enabling legislation and case law.

A dominant firm is not necessarily a complete monopoly, but it should have a position enabling it “if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it.”<sup>8</sup> In principle then, dominance consists of the ability to act independently of the market.

The ECJ defined dominant position, for purposes of Article 86, 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 consumers.”<sup>9</sup> This definition, in the context of the facts of the case before the Court, presupposes that “customers” are distributors and therefore different than consumers.

What is meant by the ability to behave independently? It is the “power to determine prices or to control production or distribution for a significant part of the products” in the market.<sup>10</sup> Imposing unfair prices or selling conditions and limiting production or markets are listed as abuses of a dominant position in Treaty Article 86. Therefore, the ability to act in an abusive manner is evidence of dominance. Part of the process to determine dominance consists of examining “facts put forward as acts amounting to abuses without necessarily having to acknowledge that they are abuses.”<sup>11</sup> In other words, it is possible determine if an undertaking is dominant [\*4] by seeing if it acts like a dominant firm - that is in an abusive manner.<sup>12</sup> There is a logical and economic appeal to this

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<sup>7</sup> Case 85/76, Hoffmann-La Roche and Co. v. Commission, 1979 E.C.R. 461, ¶ 4.

<sup>8</sup> *Id.* ¶ 39

<sup>9</sup> Case 22/76, United Brands Company v. Commission, 1978 E.C.R. 207, ¶ 65, and Case 85/76, Hoffmann-La Roche and Co. v. Commission, 1979 E.C.R. 461, ¶ 38.

<sup>10</sup> Case 22/76, United Brands Company v. Commission, 1978 E.C.R. 207, ¶ 65.

<sup>11</sup> *Id.* ¶ 68.

<sup>12</sup> Case T-30/89, Hilti v. Commission, 1991 II ECR 1439 ¶ 87.

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argument, circular though it may be. Presumably, a firm would not engage in abusive behavior, such as charging excessive high prices, unless it enjoyed a position of competitive independence.

***Market Share Definition***

While there is a high level definition of economic independence that influences conclusions regarding dominance, in reality European enforcement officials and courts employ a test based on market shares to determine the existence of dominance.<sup>13</sup> A straightforward approach is employed whereby first the relevant product market or markets is determined, then the relevant geographic market.<sup>14</sup> Once market shares are determined, the position of the alleged dominant firm on the market can be ascertained and analyzed.<sup>15</sup>

*The Relevant Product Market*

A first step in an Article 86 case is the determination of the relevant product market. The ECJ has held that competitive conditions should be judged by examining products that are “particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products.”<sup>16</sup>

On occasion, a test of the sustainability of a theoretical small price increase is used to help determine the relevant product market. If it is found that price increases of perhaps 5 to 10 percent could be sustained for one or more products, then those products will be included within the range constituting the relevant product market. This is sometimes expressed as a “cross-price-elasticity test.” The theory is that if the price

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<sup>13</sup> Case 22/76, United Brands Company v. Commission, 1978 E.C.R. 207, and Case 85/76, Hoffmann-La Roche and Co. v. Commission, 1979 E.C.R. 461.

<sup>14</sup> Case 22/76, United Brands Company v. Commission, 1978 E.C.R. 207, ¶ 11.

<sup>15</sup> Case T-30/89, Hilti v. Commission, 1991 II ECR 1439, ¶ 46.

<sup>16</sup> Case T-30/89, Hilti v. Commission, 1991 II ECR 1439 ¶ 64.

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increase could not be sustained, there exists substitutability with other products that would need to be included within the relevant product market. Purchasers would have substituted other products rather than pay the price increase. It also might have been possible that producers attracted by the price increase have entered the market. The European Commission has indicated that it will use this test to help determine the relevant product markets in the area of telecommunications.<sup>17</sup> The Commission considers that the cross-price-elasticity test is “a synthesis of all the factors that properly determine whether two different products can properly be said to be in the same relevant market.”<sup>18</sup> In fact, the cross-price-elasticity test is more of a subjective judgment of separate demand and supply side substitutability, with a heavy emphasis on demand side substitutability. [\*5] Commission Form A/B, used to notify agreements that might fall under European competition law, states that the relevant product market is determined on the basis of interchangeability from the standpoint of the consumer.<sup>19</sup>

The leading European case regarding relevant product market definition is *United Brands*,<sup>20</sup> in which the Commission concluded that bananas formed a distinct product market. “The specific qualities of the banana influence customer preference and induce him not to readily accept other fruits as a substitute.”<sup>21</sup> For a specific market to be found, “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.”<sup>22</sup> The ECJ found “no significant long

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<sup>17</sup> Draft Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector, Framework, Relevant Markets and Principles, COM(96)649 final ¶ 41 [hereinafter Draft Access Notice].

<sup>18</sup> Case T-30/89, Hilti v. Commission, 1991 II ECR 1439, ¶ 53.

<sup>19</sup> Commission Regulation (EC) No. 3385/94 of 31 December 1994 on the form, content and other details of applications and notifications provided for in Council Regulation 17, § 6, 1994 O.J. 1994 (L 377) 28.

<sup>20</sup> Case 27/76, *United Brands v. Commission*, 1978 E.C.R. 207.

<sup>21</sup> *Id.* ¶ 20.

<sup>22</sup> *Id.* ¶ 22.

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term cross-elasticity” with other fruits.<sup>23</sup> Other fruits were not substitutable or interchangeable. “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.”<sup>24</sup> The banana market was therefore distinct from that of other foods, fruits or even other fresh fruits.<sup>25</sup>

Given the special group of consumers considered, it is not surprising that a narrow relevant product market was found. Logically, the same result might could have been achieved by perhaps only considering those consumers who are allergic to or detest the taste of other fruits. This focus on only certain consumers might give enforcement officials the narrow product market they desire, but for a true picture of the product market, interchangeability from the standpoint of all consumers or at least average consumers should be determinative. The Court focused on demand-side substitutability, only considering supply-side substitutability in the context of barriers to entry.

Narrow product markets were also found in the *Hilti* case.<sup>26</sup> The Commission alleged that Hilti abused a dominant position by tying sales of its nail guns to supplies used in the gun, consisting of cartridges and nails. Hilti argued unsuccessfully that the relevant product market consisted of all power fastening systems including power drills and so forth. The Court refused to accept Hilti’s position of an integrated market, reasoning that in reality there was not a choice between the Hilti system and others. Hilti’s product was so good that it was the “the obvious choice” in many cases with “no realistic alternative.”<sup>27</sup> Although Hilti submitted economic studies showing that consumers would change systems based on price differences, the Court refused to accept the

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<sup>23</sup> *Id.* ¶ 28.

<sup>24</sup> *Id.* ¶ 31.

<sup>25</sup> *Id.* ¶ 35.

<sup>26</sup> Case T-30/89, *Hilti v. Commission*, 1991 II E.C.R. 1439.

<sup>27</sup> *Id.* ¶ 69.

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studies as conclusive as they only concerned price. The Court stated “that the choice of the consumer depends to a [\*6] large extent on unquantifiable circumstances”,<sup>28</sup> but Court does not give us any guidance as to what those circumstances are. The Commission and European courts found three distinct product markets consisting of nail guns, and the cartridges and nails used in Hilt guns.<sup>29</sup> Regarding supply-side substitutability, Hilti argued “that the general technology involved in the manufacture of power drills ... is not very different from the technology used in the manufacture of nail guns.”<sup>30</sup> Hilti also mentioned that transport costs were low for all power fastening products, and therefore they could be easily obtained from outside the Community. The Commission’s position that market entry was not easy due to investment costs and Hilti’s technical lead was accepted by the Court, and supply-side substitutability was discounted.<sup>31</sup>

The Commission has issued guidelines recognizing the difficulties inherent in defining markets in an area of rapid technological change such as telecommunications,<sup>32</sup> and stating that relevant product markets could only be determined on a case-by-case basis after examining factors of substitutability and “the competitive conditions and the structure of supply and demand on the market.”<sup>33</sup> The Commission indicated that it would tend to draw narrow product markets with distinct product markets “for terrestrial network provision, voice communication, data communication and satellites.”<sup>34</sup> Nevertheless, there was a recognition that, at least regarding services such as mobile, paging and cordless telephones, technology was causing a blurring and consequent

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<sup>28</sup> *Id.* ¶ 76.

<sup>29</sup> *Id.* ¶ 66.

<sup>30</sup> *Id.* ¶ 53.

<sup>31</sup> *Id.* ¶ 59.

<sup>32</sup> Guidelines on the Application of EEC Competition Rules in the Telecommunications Sector, ¶ 25, 1991 O.J. (C 233) 2 [hereinafter Competition Guidelines].

<sup>33</sup> *Id.* ¶ 26.

<sup>34</sup> *Id.* ¶ 27.

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heightened interchangeability from a consumer standpoint.<sup>35</sup>

The Commission has also issued guidelines for competitors' access to telecommunications facilities containing a definition of distinct markets of provision of telecommunications services and access to facilities necessary to provide such services.<sup>36</sup> In effect, the Commission asserts that telecommunications competition itself, manifested in the form of access to facilities necessary to compete, constitutes a separate market. The starting point of the Commission's market analysis, that there is only one telecommunications provider in each Member States,<sup>37</sup> ignores the reality of currently available alternatives such as cable TV networks (in Belgium there is an extremely high rate of cable TV penetration - over 97 percent of households are passed by cable TV networks<sup>38</sup>), as well as emerging technologies.<sup>39</sup> Because of the rapid application of developing technologies to telephony - witness the [\*7] Internet - the Commission should not discount the applicability of supply side substitutability.

*The Relevant Geographic Market*

Once the relevant product market has been determined, the next step is to conduct an economic assessment of the relevant geographic market. The result will be conclusive as to market shares in that area, thereby enabling a decision as to dominance.<sup>40</sup> A short definition of the relevant geographic market is that in which trading conditions are similar.<sup>41</sup> This has been expressed as an "area where the objective conditions of

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<sup>35</sup> *Id.* ¶ 30.

<sup>36</sup> Draft Access Notice, *supra* note 17, ¶ 39.

<sup>37</sup> *Id.* ¶ 11.

<sup>38</sup> Green Paper on the Liberalisation of Telecommunications Infrastructure and Cable Television Networks, Part II, A Common Approach to the Provision of Infrastructure for Telecommunications in the European Union, 25 January 1995, COM(94)682 final at 17.

<sup>39</sup> Draft Access Notice, *supra* note 17, ¶ 42.

<sup>40</sup> Case T-30/89, Hilti v. Commission, 1991 II ECR 1439, ¶ 79.

<sup>41</sup> *Id.*

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competition applying to the product in question must be the same for all traders.”<sup>42</sup>

This is not to say that the conditions of competition must be perfectly homogenous. “It is sufficient if they are ‘the same’ or ‘sufficiently homogenous’.”<sup>43</sup>

A designation of the relevant product market is colored by the European policy of promoting a single European market through breaking down national barriers to trade. Attempts to divide the market and discourage inter-Member State trade (prohibition of parallel imports) are viewed harshly. When faced with an unusual plea of national geographic markets, the ECJ held that national markets were not established in spite of the existence of national subsidiaries, customers’ practice of buying at the local level, and price differences between nations. The Court reasoned that these differences were artificial and resulted from an attempt to divide the European market along national lines rather than from genuine different national markets.<sup>44</sup> Three factors were listed as being determinative of the existence of a Community-wide relevant geographic market: significant demand was stable throughout the Community; customers could obtain machinery or cartons from other Member States; and there was low cost of transport.<sup>45</sup> National markets have been found for telecommunications, but the Commission has expressed the belief that national markets will begin to break down and a European-wide geographic market emerge.<sup>46</sup> **[\*8]**

*The Relationship of Market Shares to Dominance*

There is not a bright line test for how large a market share is necessary

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<sup>42</sup> Case 22/76, United Brands Company v. Commission, 1978 E.C.R. 207, ¶ 44.

<sup>43</sup> Case T-83/91, Tetra Pak International S.A. v. Commission, 1994 II E.C.R. 764, ¶ 92.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* ¶ 94.

<sup>46</sup> Telecommunications Competition Guidelines, *supra* note 32, ¶ 32.

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for a conclusion of dominance, but authorities have been forthcoming about the establishment of presumptions concerning the relationship of market shares to dominance. As might be expected, the existence of very large market shares is more likely to result in a determination of dominance.<sup>47</sup> The ECJ held that although large market shares, standing alone, are not always conclusive proof of dominance, they are, except in exceptional circumstances, evidence of the existence of a dominant position. A large market share held for a considerable period of time places a firm “in a position of strength which makes it an unavoidable trading partner,” giving it “that freedom of action which is the especial feature of a dominant position.”<sup>48</sup>

How large of a market share is necessary to be considered dominant in and of itself? The Commission has considered a market share of 90 percent to constitute “irrefutable evidence of dominance.”<sup>49</sup> In this neighborhood, the ECJ has held that an 87 percent market share results in an automatic determination of dominance.<sup>50</sup> Below this point, the language used to describe market shares changes. Shares of between 70 to 80 percent may be seen as “a clear indication of the existence of a dominant position.”<sup>51</sup> However, other factors might be considered in this range, including the relationship of the firm’s market share with the shares of its competitors.<sup>52</sup> Shares of between 54 and 58 percent were found to be dominant when these shares were much larger than other competitors.<sup>53</sup> There is not a strict mathematical test for comparing the size of market shares of the subject and its competitors. Yet the ECJ has held that the market share of a company “equal to the aggregate of the shares of its two next largest competitors, proves that it is entirely free to

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<sup>47</sup> Case T-30/89, Hilti v. Commission, 1991 II ECR 1439, ¶ 90.

<sup>48</sup> Case 85/76, Hoffmann-La Roche and Co. v. Commission, 1979 E.C.R. 461, ¶ 109.

<sup>49</sup> Case T-83/91, Tetra Pak International S.A. v. Commission, 1994 II E.C.R. 764, ¶ 105.

<sup>50</sup> Case 85/76, Hoffmann-La Roche and Co. v. Commission, 1979 E.C.R. 461, ¶ 55.

<sup>51</sup> Case T-30/89, Hilti v. Commission, 1991 II ECR 1439, ¶¶ 91-92.

<sup>52</sup> Case 85/76, Hoffmann-La Roche and Co. v. Commission, 1979 E.C.R. 461, ¶ 60.

<sup>53</sup> *Id.* ¶ 66.

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decide what attitude to adopt when confronted by competition.”<sup>54</sup>

As market shares decline further, other factors assume greater importance in dominance determinations. Market shares of between 40 to 50 percent have been held not to constitute dominance when there was evidence that the subject’s market shares were declining, the impact of imports was being felt in the market, and there was no other evidence or even arguments presented as to why dominance should be found.<sup>55</sup> The presumption of dominance vanishes with a market share somewhere in the 40s.<sup>56</sup> In at least one case where a European court has upheld a finding [\*9] of dominance with a market share in the specific relevant product market of around 40 percent.<sup>57</sup> However, the subject held high market shares in neighboring markets, and the Court reasoned that a finding of dominance in the neighboring market had a type of spill-over effect, reinforcing the firm’s economic power and justifying a finding of dominance.<sup>58</sup> The high market share meant that the firm could concentrate its efforts where it had a lower market share. Therefore, it acted like a dominant firm and could be considered as dominant even though it did not have the market share of a dominant firm in that particular market. This result seems contrary to other cases in which courts have examined narrow markets and submarkets within the same industrial sector and found firms to be dominant in some, but not all, of the relevant product markets.<sup>59</sup> To be fair to the Court, it did also find a disparity between the firm’s market shares and that of its nearest rival and that its position of strength was reinforced by its technological advantages.<sup>60</sup>

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<sup>54</sup> *Id.* ¶ 51.

<sup>55</sup> *Id.* ¶¶ 57-58.

<sup>56</sup> Case 22/76, United Brands Company v. Commission, 1978 E.C.R. 207, ¶ 109.

<sup>57</sup> Case T-83/91, Tetra Pak International S.A. v. Commission, 1994 II E.C.R. 764, ¶ 120.

<sup>58</sup> *Id.* ¶ 114.

<sup>59</sup> Case 85/76, Hoffmann-La Roche and Co. v. Commission, 1979 E.C.R. 461,

<sup>60</sup> Case T-83/91, Tetra Pak International S.A. v. Commission, 1994 II E.C.R. 764, ¶ 121.

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*Telecommunications*

In the telecommunications sector, there may be an exception to these general presumptions. The Commission indicated that for telecommunications organizations, it may measure market power by considering the sales of a particular undertaking compared with the total sales of substitutable services in the relevant geographic market,<sup>61</sup> with a presumption of dominance if a telecommunications company has a market share of 50 percent or greater.<sup>62</sup>

However, the emerging European telecommunications regulatory framework sets a different standard. The Interconnection Directive states that telecommunications organizations “which have significant market power” are subject to duties such as meeting interconnection requests.<sup>63</sup> The phrase “significant market power” is another way of saying “dominance.” The Directive goes on to state that “[a]n organization shall be presumed to have significant market power when it has a share of more than 25 percent of a particular telecommunications market in the geographic area in a Member State within which it is authorized to operate.”<sup>64</sup> No guidance is given as to the determination of the relevant product market for gauging this 25 percent share. Not only does this create of presumption of market power with a market share of only 25 percent, it also arbitrarily decides that the relevant geographic markets are national. This is contrary to the policy of creating European-wide markets, and goes against the promotion of technologies designed to erase national telecommunications boundaries such as the mobile GSM service with its Europe-wide roaming capabilities. The Directive allows national regulatory authorities to deviate from this presumption for telecommunications organizations with greater or less than a 25 percent market share. If the regulatory authorities choose to conduct their own

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<sup>61</sup> Draft Access Notice, *supra* note 17, ¶ 60.

<sup>62</sup> Draft Access Notice, *supra* note 17, ¶ 63.

<sup>63</sup> Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications ensuring universal service and interoperability through application of the principles on open network provision (ONP), art. 4(3), 1997 O.J. (L 199) 32.

<sup>64</sup> *Id.*

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dominance test independent of the 25 percent [\*10] presumption, the Directive specifies that they are to consider “the organization’s ability to influence market conditions, its turnover relative to the size of the market, its control of the means of access to end-users, its access to financial resources and its experience in providing products and services in the market.”<sup>65</sup>

This 25 percent presumption is found in one other proposed European telecommunications regulatory directive.<sup>66</sup> It is certainly questionable whether a market share of 25 percent can be said to grant significant market power. There is no European judicial authority finding dominance with a market share of only 25 percent. Commentators have stated that a finding of dominance with a market share of less than 25 percent is almost inconceivable, while a finding of dominance with a market share of 25 to 39 percent will be rare but possible.<sup>67</sup>

*Legal Monopolies*

Since Europe has a long tradition of state enterprises and monopolies, it is to be expected that legal monopolies might receive special treatment under European law. Indeed, there is a special article of the Treaty of Rome, specifically allowing state monopolies.<sup>68</sup> This article, however, also declares that the competition rules apply to state monopolies, unless such application would interfere with the basic mission of the state enterprise. This provision was the vehicle by which the Commission ultimately required that state telecommunications companies be exposed to full competition. Under European law, the grant of a legal monopoly results in an automatic finding of dominance over the relevant geographic

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<sup>65</sup> *Id.*

<sup>66</sup> Proposal for a European Parliament and Council Directive amending Council Directives 90/387/EEC and 92/44/EEC for the purposes of adaptation to a competitive environment in telecommunications, Recital 10, COM(95)543 final.

<sup>67</sup> Christopher Jones and Enrique Gonzáles-Díaz, *The EEC Merger Regulation* 133 (1992).

<sup>68</sup> EEC Treaty art. 90.

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area of the entire nation where the monopoly exists.<sup>69</sup> This does not mean that an abuse will be found or that the monopoly will be broken up.<sup>70</sup> Nevertheless, legal monopolies have been challenged in such areas as telecommunications,<sup>71</sup> postal services,<sup>72</sup> employment services,<sup>73</sup> and provision of port facilities.<sup>74</sup> Telecommunications competition will result in abolition of exclusive rights to provide equipment or service, but special rights (“privileged access”) granted for such things as favored access to place facilities in the right of way might still confer dominance, in the opinion of the Commission.<sup>75</sup>

Public enterprises are not the only legal monopolies considered to confer a dominant position. Intellectual property rights may also give rise to dominance, although the existence of an intellectual property right, standing alone, is not enough to lead to a conclusion of dominance. However, the existence of an intellectual property right, standing alone, is not enough to give rise to a conclusion of dominance.<sup>76</sup> The ECJ has drawn a distinction between [\*11] the existence of an intellectual property right and its exercise, which might cause competition law problems. The case law in this area is confused, with the ECJ in one case ruling that to prohibit exclusive intellectual property rights might interfere with the very basis of the right granted.<sup>77</sup> More recently, the European courts, in a series of cases dealing with television listings, have concluded that not only may intellectual property rights confer dominance, but licensing of those rights to competitors may be obliged under certain circumstances.

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<sup>69</sup> Case 41/90, Höfner v. Macrotron, 1991 I E.C.R. 1979, ¶ 28.

<sup>70</sup> Case 179/90, Porto di Genova, 1991 I E.C.R. 5889, ¶ 16.

<sup>71</sup> Case 41/83, Italian Republic v. Commission, 1985 E.C.R. 873.

<sup>72</sup> Case 320/91, Paul Corbeau v. PTT, 1993 I E.C.R. 2533, ¶ 9.

<sup>73</sup> Case 41/90, Höfner v. Macrotron, 1991 I E.C.R. 1979, ¶ 28.

<sup>74</sup> Case 179/90, Porto di Genova, 1991 I E.C.R. 5889, ¶ 16.

<sup>75</sup> Draft Access Notice, *supra* note 17, ¶ 63.

<sup>76</sup> Case C-242/91, Radio Telefis Eireann *et al* v. Commission 1995 I E.C.R. 743, ¶ 46.

<sup>77</sup> Case 238/87, Volvo v. Veng, 1988 E.C.R. 6211.

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Third parties wishing to compete with the holder of the intellectual property right holder may be in a position of economic dependence characteristic of the existence of a dominant position.<sup>78</sup> The holder could prevent “the emergence of any effective competition on the market.”<sup>79</sup> Patents have been construed as technical barriers, and in combination with other factors have justified a finding of dominance.<sup>80</sup>

**Other Evidence of Dominance**

A firm’s size is meaningful, and not only in the relevant geographic market. The ECJ has indicated that it may consider worldwide production and market shares.<sup>81</sup> If in the court’s opinion too much of a product is being produced and overcapacity exists, this can be evidence of dominance,<sup>82</sup> as can the expense to enter the market because of the necessity of large capital investments, distribution systems, long term planning, and high marketing costs.<sup>83</sup> And if large market shares have been retained for a considerable period of time, it may be evidence that a dominant position is being maintained.<sup>84</sup> This is consistent with a general prejudice under European law in favor of smaller firms. Policy considerations other than consumer welfare often enter competition law cases.

Although a large share in the relevant market is probably the most important fact in determining dominance, there are other factors that may be considered under European law. The general structure of a market and such things as production, supply, and demand may be considered

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<sup>78</sup> Case T-70/89, *British Broadcasting Corporation v. Commission*, 1991 II E.C.R. 535, ¶ 10.

<sup>79</sup> *Id.* ¶ 51.

<sup>80</sup> Case T-83/91, *Tetra Pak International S.A. v. Commission*, 1994 II E.C.R. 764, ¶ 110.

<sup>81</sup> Case 85/76, *Hoffmann-La Roche and Co. v. Commission*, 1979 E.C.R. 461, ¶ 42.

<sup>82</sup> *Id.* ¶ 51.

<sup>83</sup> Case 22/76, *United Brands Company v. Commission*, 1978 E.C.R. 207, ¶ 122.

<sup>84</sup> *Id.* ¶ 44.

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in relation to market shares,<sup>85</sup> leaving authorities free to consider almost anything they choose to consider important.

Technological advantages are repeatedly mentioned by courts as conferring dominance. Patents<sup>86</sup> and research and development<sup>87</sup> have been viewed “as helping to maintain and reinforce a dominant position in the market.”<sup>88</sup> The very success in the market as shown by technological advantages is enough to demonstrate “the consequence of the existence of obstacles preventing new competitors from having access to the market.”<sup>89</sup> A “technical lead” through patents is unacceptable.<sup>90</sup> [\*12] Advanced telecommunications technologies have been noted as a specific factor in a finding of dominance.<sup>91</sup> A firm under an accusation of dominance may not even try to improve its productivity.<sup>92</sup> This reasoning is paradoxical, as limitations on production or technical development are specifically mentioned as abuses under Article 86.<sup>93</sup> Punishing successful innovators does little to promote either technical development or consumer welfare. Technology itself can be a spur to competition as demonstrated in the telecommunications and information technology industries. As technology continues to develop, the growth of commercially feasible alternatives should also continue.

Other production and marketing successes may also be viewed suspiciously. Developing a distinctive trademark, like Chiquita, that is

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<sup>85</sup> Case 85/76, Hoffmann-La Roche and Co. v. Commission, 1979 E.C.R. 461, ¶ 40.

<sup>86</sup> Case 85/76, Hoffmann-La Roche and Co. v. Commission, 1979 E.C.R. 461, ¶ 42.

<sup>87</sup> Case T-30/89, Hilti v. Commission, 1991 II ECR 1439, ¶ 86.

<sup>88</sup> *Id.* ¶ 93.

<sup>89</sup> Case 85/76, Hoffmann-La Roche and Co. v. Commission, 1979 E.C.R. 461, ¶ 48.

<sup>90</sup> *Id.* ¶ 51.

<sup>91</sup> Telecommunications Competition Guidelines, *supra* note 32, ¶ 81.

<sup>92</sup> Case 22/76, United Brands Company v. Commission, 1978 E.C.R. 207, ¶ 82.

<sup>93</sup> EEC Treaty art. 86(b).

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identified with a product consumers desire can be proof of dominance.<sup>94</sup> European cases have also considered as dominant behavior an extensive and highly specialized sales network,<sup>95</sup> a strong and well-organized distribution system,<sup>96</sup> a diversity of sources of supply, the homogenous nature of products offered by a firm, and “the organization of its production and transport, its marketing system and publicity campaigns, the diversified nature of its operations and finally its vertical integration.”<sup>97</sup>

On the other hand, European authorities do not appear overly impressed by evidence of market failures as evidence that a dominant position does not exist. Arguments that falling prices in the market should be accepted as conclusive proof of the lack of dominance have not succeeded.<sup>98</sup> Even though the ECJ agreed that falling prices might indicate “lively competition” was present in the market, that did not necessarily preclude the existence of a dominant firm.<sup>99</sup> While falling prices were concededly incompatible with independent economic behavior, when the Court looked again at the high market shares held in a particular submarket, it convinced itself that the falling prices must have been part of the dominant firm’s strategy rather than proof it was not dominant. The ECJ concluded that price variations bore “no relation to the existence of competition.”<sup>100</sup> To this writer, the falling prices demonstrate that the relevant product market was drawn too narrowly by the Court, and the firm was probably not dominant. Even losses sustained over a period of time may not negate high market shares. There is no

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<sup>94</sup> Case 22/76, *United Brands Company v. Commission*, 1978 E.C.R. 207, ¶ 93.

<sup>95</sup> Case 85/76, *Hoffmann-La Roche and Co. v. Commission*, 1979 E.C.R. 461, ¶ 42.

<sup>96</sup> Case T-30/89, *Hilti v. Commission*, 1991 II ECR 1439, ¶ 19.

<sup>97</sup> Case 22/76, *United Brands Company v. Commission*, 1978 E.C.R. 207, ¶ 58.

<sup>98</sup> Case 85/76, *Hoffmann-La Roche and Co. v. Commission*, 1979 E.C.R. 461, ¶ 37.

<sup>99</sup> *Id.* ¶ 70.

<sup>100</sup> *Id.* ¶ 78.

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requirement that a dominant firm be profitable.<sup>101</sup> High market shares are more important.<sup>102</sup>

**[\*13]** Possession of an facility essential for competition is prima facie evidence of dominance,<sup>103</sup> which is only logical since under the European doctrine of essential facilities there must be no commercially available alternative. It should be kept in mind, however, that alternatives, perhaps offered by developing technologies, negate an automatic finding of dominance for the possessor of the facility.<sup>104</sup> For example, due to the current existence of commercially feasible alternatives to traditional telecommunications networks for potential competitors, such as cable TV networks or wireless technologies, it might not be proper to assume that dominance in the provision of telecommunications facilities exists.

Finally, it is possible that the holder of the position of sole purchaser, that is a firm in the position of a monopsony, might be considered as being in a dominant position.<sup>105</sup>

## **Merger Regulation**

As a system of formal merger approval is a relatively recent addition to the Community legal system, when the Merger Regulation<sup>106</sup> was adopted it contained many of the principles developed through European case law concerning dominance. The Merger Regulation is therefore a good source for a concise list of important factors in determining dominance under European law. The Merger Regulation provides that if certain thresholds are met, mergers - that is "concentrations" under

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<sup>101</sup> Case 22/76, United Brands Company v. Commission, 1978 E.C.R. 207, ¶ 127.

<sup>102</sup> *Id.* ¶ 128.

<sup>103</sup> Draft Access Notice, *supra* note 17, ¶ 59.

<sup>104</sup> *Id.* ¶ 63.

<sup>105</sup> Telecommunications Competition Guidelines, *supra* note 32, ¶ 82.

<sup>106</sup> Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings, 1990 O.J. (L257) 14.

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Community terminology - shall be appraised by the Commission, and mergers that would tend to create or strengthen a dominant position are forbidden.<sup>107</sup> The Commission is to consider the structure of all markets concerned and actual or potential competition from other firms.<sup>108</sup> As part of this appraisal, the Commission is to examine:

the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.<sup>109</sup>

In applying this test, the Commission's Merger Task Force has acquired a reputation for leniency, but several mergers have failed to win approval, notably in such high technology media areas as development of pay TV systems<sup>110</sup> and development and transmission of satellite TV programming.<sup>111</sup> Not only is the Commission becoming more critical, but the reach of the Merger Regulation is [\*14] extensive, as demonstrated by the recent controversy over approval of the Boeing merger. Though Europeans have complained in the past about the US application of the effects doctrine, there is an equivalent under European competition law. A wise practitioner should keep the rules regarding dominance in mind when advising clients that may be subject to European law.

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<sup>107</sup> *Id.* art. 2(3).

<sup>108</sup> *Id.* art. 2(1)(a).

<sup>109</sup> *Id.* art. 2(1)(b).

<sup>110</sup> Case IV/M.469, MSG Media Service, 1994 O.J. (L364) 1.

<sup>111</sup> Case IV/M.490, Nordic Satellite Distribution, 1996 O.J. (L53) 20.

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