POLICY ROUNDTABLES

Evidentiary Issues in Proving Dominance

2006

Introduction

The OECD Competition Committee debated issues related to proving dominance / market power in June 2006. This document includes an executive summary and the documents from the meeting: an analytical note by Mr. Andreas Reindl for the OECD and written submissions from Canada, Chinese Taipei, the Czech Republic, Denmark, the European Commission, Hungary, Ireland, Japan, Korea, Lithuania, Mexico, the Netherlands, Poland, Romania, the Russian Federation, Switzerland, Turkey, the United Kingdom, the United States as well as an aide-memoire of the discussion.

Overview

Different jurisdictions use different definitions and tests to identify firms that are subject to single firm conduct provisions. Overall, competition regimes are converging toward the notion that single firm conduct provisions should be applied only to firms that have "substantial market power", since Unilateral acts by a firm with a high degree of market power are much more likely to distort the competitive process and ultimately harm consumer welfare than conduct by a firm that has no or little market power.

Typically there is no single factor that will provide conclusive answers on whether a firm has substantial market power. Competition authorities and courts rely primarily on indirect evidence such as market shares, barriers to entry and expansion, buyer power and the nature of competition in the market. Direct evidence of substantial market power, such as a firm's profitability, is not frequently used in single firm conduct cases. Methods for directly measuring market power, however, are very data-intensive; and even if the necessary data are available, they are typically subject to different interpretations and therefore will not conclusively establish that a firm has the requisite degree of market power.

Related Topics

Guidance to Businesses on Monopolisation and Abuse of Dominance (2007)
Competition on the Merits (2005)
Barriers to Entry (2005)
Predatory Foreclosure (2004)
Oligopoly (1999)
Abuse of Dominance and Monopolisation (1996)

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TECHNIQUES AND EVIDENTIARY ISSUES IN PROVING DOMINANCE/MONOPOLY POWER

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Techniques and Evidentiary Issues in Proving Dominance/Monopoly Power held by the Competition Committee (Working Party No. 3 on Co-operation and Enforcement) in June 2006.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les Techniques et les Difficultés concernant la Détermination Probante d'une Position Dominante ou d'un Pouvoir de Monopole qui s'est tenue en juin 2006 dans le cadre du Comité de la concurrence (Groupe de Travail No. 3 sur la coopération et l'application de la loi).

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

By the Secretariat

(1) Different jurisdictions use different definitions and tests to identify firms that are subject to single firm conduct provisions. Overall, competition regimes are converging toward the notion that single firm conduct provisions should be applied only to firms that have "substantial market power".

Unilateral acts by a firm with a high degree of market power are much more likely to distort the competitive process and ultimately harm consumer welfare than conduct by a firm that has no or little market power. Competition laws and judicial practice use a wide range of different terms and definitions to identify firms that are subject to single firm conduct provisions, including "dominance", "monopoly power" and "substantial degree of market power". But whatever they call them, different competition regimes are converging toward the notion that single firm conduct provisions should be applied only to firms that have "substantial market power".

Substantial market power" can be said to exist when competitive constraints imposed by other firms are relatively ineffective on the dominant firm. In this situation, the dominant firm's decision about its own output and price can influence market outcomes. To distinguish between instances of "normal, everyday" non-substantial market power and the type of market power that should trigger heightened scrutiny under single-firm conduct provisions, it is important to determine whether market power is durable, *i.e*., whether it can be maintained for a considerable period of time. The emphasis on durability of market power explains why the question of entry barriers and barriers to expansion is an essential step in determining whether a firm has substantial market power.

(2) Competition authorities and courts rely primarily on indirect evidence to determine whether a firm has substantial market power such as market shares, barriers to entry and expansion, buyer power and the nature of competition in the market. Typically there is no single factor that will provide conclusive answers. Entry barriers and barriers to expansion are widely considered the most important factors in determining whether a company's ability to exercise market power is effectively constrained.

Entry barriers are arguably the single most important factor in assessing whether a firm has substantial market power. If other firms can enter or rivals can expand, a firm will not be able to maintain market power in the long run; hence its market power will not be durable. Barriers to entry and expansion are thus a necessary, but not a sufficient condition, for the finding of substantial market power. Markets can be competitive and characterized by vigorous price competition even if entry barriers are high.

The assessment of entry barriers requires a thorough analysis of the likelihood, extent and timeliness of entry or expansion that can constrain the exercise of market power. A decision-maker might conclude too hastily and incorrectly that entry barriers are low, for example, when entry appears possible but in fact would not constrain market power. Conversely, there is a risk

that once high market shares have been found, the existence of entry barriers is assumed without sufficient factual inquiry.

(3) There can be types of indirect evidence that allow competition authorities and courts to draw conclusions from structural market characteristics for the question of whether a firm's market power is substantial and durable. Other important types of indirect evidence include competitive conditions in the market and countervailing buyer power.

An economically strong customer can deny a firm the ability to exercise substantial market power and to engage in anticompetitive conduct. It is not necessarily the economic strength of the buyer that counts, however. Buyer power is most relevant when the buyer has an effective alternative choice, for example, because of the ability to switch to another supplier, to vertically integrate, or to "sponsor" entry of a new supplier. Thus, buyer power can be recast to a certain extent in terms of barriers to entry and expansion. Further to that, a buyer's threat to switch to another supplier may have a considerable disciplinary effect on a supplier that sells a major part of its production to a single buyer. The unilateral anticompetitive act itself, for example an act that ties up all existing distributors of a product, may act as a barrier to entry or expansion, if a rival cannot find cost-effective alternatives for distribution.

(4) Market share data continue to be the "high priest" in assessing whether a firm has substantial market power, although the limitations of market shares as proxy of market power are widely acknowledged.

Meaningful market share data depend on the ability to define a relevant market with some degree of accuracy. Where market boundaries are difficult to draw, market concentration data are close to arbitrary. This problem is particularly acute in single firm conduct cases because competition law and policy has not yet developed a generally applicable economic model to determine a relevant market where a firm already has exercised market power and raised price. Although in this situation one could try to define the relevant market based on an "otherwise prevailing, competitive price level", this method has a high risk of leading to unreliable and inaccurate results.

Even with accurate market definition, high market shares are not necessarily proof of substantial market power. Any presumed correlation between high shares and market power will depend on how competitors or customers can react when a firm restricts output, the reasons why the firm maintained high market shares, and whether there are any other conditions that limit the firm's ability profitably to raise price. These factors may ultimately become more relevant than market shares in establishing substantial market power. High market share alone should therefore not be conclusive proof that a firm has substantial market power.

Market shares can nevertheless be a useful first step in competition analysis. In particular, they can inform a decision maker as to whether a given case is more likely to raise oligopoly issues or single firm conduct issues, thus leading the inquiry in the right direction.

(5) Although market share based presumptions of substantial market power might be a convenient tool for a decision maker, their use raises many of the same problems as the use of market shares in general. Market shares can fail to correctly predict whether a firm has substantial market power. Thus, market share-based presumptions must be used with great caution.

As market share data depend critically on an accurate market definition, and high market shares alone do not reliably identify cases of substantial market power, there is a risk that presumptions

will not be borne out in the sense that they capture firms that do not have substantial market power. There is also the risk that market share-based presumptions strongly influence any further analysis and that a decision-maker, once satisfied that market share-based presumptions have been triggered, analyzes remaining evidence selectively with a view to confirming the initial result. Conversely, market share-based presumptions with unreasonably high thresholds may create *de facto* "safe harbours" that benefit firms which may well possess substantial market power and therefore have the ability to engage in unilateral conduct that harms consumers.

In practice, much depends on how presumptions are used and how they influence the analysis of other evidence of substantial market power. Market share can be valuable in establishing safe harbours, although to date there is little consensus on where the relevant threshold for a meaningful, but not excessive, market share should be set. Nevertheless, safe harbours can provide certainty for business and help to promote efficiency. In addition, market share-based presumptions can be useful if they are used to indicate that a case requires further analysis, without influencing the thoroughness and result of such inquiry.

(6) *Direct evidence of substantial market power, such as a firm's profitability, is not frequently used in single firm conduct cases. Methods for directly measuring market power are very data-intensive; and even if the necessary data are available, they are typically subject to different interpretations and therefore will not conclusively establish that a firm has the requisite degree of market power. However, direct evidence may be useful to support a finding of substantial market power in the appropriate circumstances, provided it is used in conjunction with other evidence.*

One econometric method to directly measure a firm's market power is to estimate a firm's demand elasticity. Elasticity of demand is the percentage change in quantity demanded for a particular product in response to a one percent change in price. Estimating a firm's demand elasticity with respect to a product attempts to measure how customers will react to a price change and to what extent the firm's sales are sensitive to changes in rivals' sales. A firm will face lower demand elasticity (that is, more inelastic demand) if competitors cannot react "effectively" by increasing their output in response to a firm's increase in price or decrease in output. Thus, low firm's price elasticity suggests greater market power. Although this methodology could in principle provide more precise and reliable evidence to gauge market power than using market definition and market shares, it raises a series of problems, including the need to gather large amounts of data and the difficulty in determining whether a firm that is found to have some degree of market power has "substantial market power" under the applicable competition laws. In addition, demand elasticities do not refer to the relationship between prices and long-run marginal costs which would be more relevant to assess whether a firm's market power is durable.

One can also try to examine whether a firm's profitability is consistent with the finding that the firm has substantial market power. There are a number of significant concerns associated with this methodology, including the difficulty in obtaining accurate economic profitability data from accounting data, the difficulty in ascertaining the competitive norm for a comparison, the possibility that supra-competitive profits may be explained by factors other than substantial, durable market power, and the difficulty in obtaining data about long-term profitability. Profitability data therefore also play a limited role in the analysis of substantial market power.

Nevertheless, if high profits have been persistent and are consistent with other evidence, they could in certain circumstances be used as an indicator of substantial market power. For example, some competition authorities have found that unusually high profits could be relevant in a

mature, capital-intensive commodity industry in which brand name, innovation and advertising are not important and investments appear to have been earned back. By the same token, low profitability should not automatically be regarded as evidence of the absence of substantial market power, as it could be the result of a firm's inefficiency.

Conduct of a firm can also be considered as evidence in the analysis of substantial market power. However, conduct in itself cannot be evidence of substantial market power without analysis of the circumstances in which it occurred. The analysis of price discrimination – charging different customers different prices for the same item – illustrates this point. Price discrimination is a common practice, and can be perfectly compatible with a competitive market. Thus, the fact that a firm engages in price discrimination cannot in itself demonstrate that the firm has a degree of market power that should trigger scrutiny under single firm conduct provisions. This does not exclude, however, the possibility that persistent and systematic price discrimination can in the appropriate circumstances be one indicator that a firm has substantial market power.

Competition authorities and courts should also be willing to consider conduct of a firm as relevant evidence that a firm lacks market power. For example, bidding wars for customers where smaller competitors win new customers or the alleged monopolist/dominant firm is forced to lower its prices in response to market entry are inconsistent with the finding of substantial market power.

(7) The analysis of substantial market power is an important element in single firm conduct cases. If there is no substantial market power, there is no need to look at anticompetitive effects. Analysis of substantial market power, however, is only one step in the analysis of single firm conduct. Even if a firm is found to have substantial market power, competition authorities must still find that the firm's conduct has anti-competitive effects. Evidence that a firm has substantial market power does not short-circuit the need to do a full analysis of the competitive effects of the firm's conduct before a violation is found.

Some have argued that competitive effects should play a more immediate role in the analysis and should be given greater weight than market shares and other structural factors and that the assessment of market power should be an integrated component of the overall analysis in a single firm conduct case, rather than a preliminary step. However, there is value in having a separate analysis of a firm's market power.

A separate analysis of market power can help decision-makers eliminate cases where anticompetitive effects are either highly unlikely or not feasible. Furthermore, without reference to the market in which competition takes place, there is a risk in many cases that harm to the competitive process cannot be adequately distinguished from harm to competitors. Moreover, in cases where competition authorities or courts assess the likely future effects of certain conduct, the inquiry into market power will be a necessary step to predict probable competitive effects. Last, if a separate step to examine and prove substantial market power is eliminated and a competition authority adopted a "lenient" level of proof to show anticompetitive effects, the threshold of intervention could be lowered, making it more likely that conduct that does not harm consumer welfare will be condemned.

SYNTHÈSE

Par le Secrétariat

(1) Les différentes juridictions n'utilisent pas toutes les mêmes définitions et critères pour identifier les firmes qui tombent sous le coup des dispositions relatives aux pratiques unilatérales d'une entreprise. De manière générale, les régimes de concurrence tendent à considérer que ces dispositions ne devraient s'appliquer qu'aux entreprises disposant d'un « pouvoir de marché substantiel ».

Les pratiques unilatérales d'une entreprise qui détient un fort pouvoir de marché risquent beaucoup plus de fausser la concurrence et donc de nuire au bien-être des consommateurs que celles d'une entreprise qui dispose d'un pouvoir de marché faible voire nul. Le droit de la concurrence et la pratique judiciaire utilisent une grande variété de termes et définitions pour identifier les entreprises qui tombent sous le coup des dispositions relatives aux pratiques unilatérales d'une entreprise, dont ceux de « position dominante », « pouvoir de monopole » et « degré substantiel de pouvoir de marché ». Mais quelle que soit la terminologie employée, tous les régimes de concurrence tendent à considérer que ces dispositions ne devraient s'appliquer qu'aux entreprises disposant d'un « pouvoir de marché substantiel ».

Un pouvoir de marché substantiel peut être réputé exister dès lors que les contraintes concurrentielles imposées par d'autres entreprises restent pratiquement sans effet sur l'entreprise en position dominante. Dans ce cas, les décisions de cette dernière concernant sa propre production et ses prix peuvent influer sur l'état du marché. Afin de distinguer entre les situations de pouvoir de marché non substantiel, « normal et courant », et celles qui devraient faire l'objet d'un examen approfondi dans le cadre des dispositions relatives aux pratiques unilatérales d'une entreprise, il importe de déterminer si le pouvoir de marché est durable, c'est-à-dire s'il peut se maintenir sur une longue période. L'importance accordée au caractère durable du pouvoir de marché explique pourquoi la question des barrières à l'entrée et à l'expansion constitue une étape essentielle pour établir si une entreprise détient un pouvoir de marché substantiel.

(2) Pour déterminer si une entreprise dispose d'un pouvoir de marché substantiel, les autorités de la concurrence et les tribunaux se fondent principalement sur des preuves indirectes telles que les parts de marché, les barrières à l'entrée et à l'expansion, le pouvoir d'achat et la nature de la concurrence sur le marché. La prise en compte d'un seul de ces facteurs ne suffira généralement pas à aboutir à un résultat probant. Les barrières à l'entrée et à l'expansion sont communément considérées comme les facteurs principaux servant à déterminer si la capacité d'une société d'exercer un pouvoir de marché est effectivement soumise à des limites.

Les barrières à l'entrée sont probablement le principal facteur à prendre en compte pour déterminer si une entreprise détient un pouvoir de marché substantiel. Si d'autres entreprises sont en mesure de pénétrer sur le marché ou si les concurrents peuvent augmenter leur production, une entreprise ne pourra conserver son pouvoir de marché à long terme ; par conséquent, son pouvoir de marché ne sera pas durable. Les barrières à l'entrée et à l'expansion constituent donc une condition nécessaire, quoique non suffisante, pour établir l'existence d'un pouvoir de marché

substantiel. Un marché peut en effet être concurrentiel et caractérisé par une forte concurrence par les prix même en présence d'importantes barrières à l'entrée.

L'évaluation des barrières à l'entrée requiert une analyse approfondie de la probabilité, de la portée et du moment de l'entrée sur le marché ou de l'expansion d'un concurrent qui soient de nature à empêcher l'exercice du pouvoir de marché. Les instances de décision pourraient par exemple conclure trop hâtivement et à tort à la faiblesse des barrières à l'entrée lorsque l'accès au marché paraît possible, bien qu'il ne soit en fait pas à même de limiter l'exercice du pouvoir de marché. À l'inverse, il faut veiller à ce que, une fois établie l'importance des parts de marché, l'existence de barrières à l'entrée ne soit pas présumée sans qu'un examen factuel suffisant ait été réalisé.

(3) Certains types de preuves indirectes correspondent aux conclusions que les autorités de concurrence et les tribunaux peuvent tirer d'une analyse de la structure du marché visant à déterminer si une entreprise détient un pouvoir de marché substantiel et durable. D'autres catégories sont les conditions de concurrence qui règnent sur le marché et le pouvoir compensateur des acheteurs.

Un client puissant sur le plan économique peut empêcher une entreprise d'exercer un pouvoir de marché substantiel à des fins anticoncurrentielles. La puissance économique de l'acheteur n'est toutefois pas toujours l'élément déterminant. Le pouvoir de l'acheteur joue surtout un rôle si ce dernier a réellement un autre choix possible, résultant par exemple de sa capacité à opter pour un autre fournisseur, à s'intégrer verticalement ou encore à « soutenir » l'entrée sur le marché d'un autre fournisseur. Ainsi, le pouvoir des acheteurs peut, dans une certaine mesure, être envisagé en termes de barrières à l'entrée et à l'expansion. Par ailleurs, la pression exercée par un acheteur ayant la possibilité de changer de fournisseur peut avoir un fort effet de discipline sur un fournisseur vendant la majorité de sa production à ce seul acheteur. Une pratique anticoncurrentielle unilatérale elle-même, comme un accord exclusif conclu avec tous les distributeurs d'un produit, peut produire le même effet qu'une barrière à l'entrée ou à l'expansion, en ce qu'elle empêche les concurrents de trouver d'autres solutions rentables pour la distribution de leurs produits.

(4) Les informations concernant les parts de marché restent l'« *oracle* » *de l'évaluation du caractère substantiel du pouvoir de marché d'une entreprise, bien que les limites de ce facteur en tant qu'indicateur du pouvoir de marché soient communément reconnues.*

Pour être significatives, les informations concernant les parts de marché exigent qu'un marché pertinent puisse être défini avec un certain degré d'exactitude. Lorsque les contours du marché sont difficiles à tracer, les données relatives à la concentration de ce marché sont alors quasi-arbitraires. Cela pose plus particulièrement problème dans le cas de pratiques unilatérales d'une entreprise car le droit et les politiques de la concurrence n'ont pas encore élaboré de modèle économique unique permettant de définir un marché pertinent lorsqu'une société a déjà exercé son pouvoir de marché pour augmenter ses prix. Bien qu'il soit possible, dans une telle situation, d'essayer de définir le marché pertinent sur la base du « niveau de prix qui prévaudrait en l'absence de pratiques anticoncurrentielles », cette méthode risque fort de produire des résultats peu fiables voire erronés.

Quand bien même le marché serait défini de manière exacte, une part de marché élevée ne prouve pas forcément l'existence d'un pouvoir de marché substantiel. Une corrélation entre l'importance des parts de marché et le pouvoir de marché ne pourra être présumée qu'en fonction de la manière dont les concurrents ou les clients peuvent réagir à une diminution de la production de

l'entreprise, des raisons pour lesquelles l'entreprise a pu conserver une part de marché élevée et de l'existence éventuelle d'autres conditions venant limiter la possibilité pour l'entreprise d'augmenter ses prix de manière rentable. Ces facteurs peuvent même s'avérer finalement plus pertinents que les parts de marché pour prouver l'existence d'un pouvoir de marché substantiel. La seule existence d'une part de marché élevée ne saurait donc servir à établir de manière probante qu'une entreprise détient un tel pouvoir.

Les parts de marché peuvent néanmoins constituer une première étape utile dans l'analyse des conditions de concurrence. Elles peuvent notamment permettre aux instances de décision de constater si elles ont plutôt affaire à une situation d'oligopole ou de comportement unilatéral d'une entreprise, et d'orienter alors leurs investigations dans la bonne direction.

(5) Bien que la présomption de pouvoir de marché substantiel fondée sur l'évaluation des parts de marché puisse constituer un outil commode pour les instances de décision, cette méthode soulève de nombreux problèmes analogues à ceux posés par l'utilisation du calcul des parts de marché en général. Lorsqu'il s'agit de déterminer si une entreprise dispose d'un pouvoir de marché substantiel, les parts de marché peuvent s'avérer trompeuses. C'est pourquoi il convient de traiter les présomptions fondées sur ce critère avec la plus grande prudence.

Du fait que les données relatives aux parts de marché dépendent fortement de l'exactitude de la définition du marché et que la seule existence d'une part de marché élevée ne permet pas de conclure avec certitude à une situation de pouvoir de marché substantiel, il faut veiller à ce que les présomptions de pouvoir correspondent à la réalité, c'est-à-dire qu'elles ne portent pas sur des entreprises ne disposant pas d'un pouvoir de marché substantiel. Les présomptions fondées sur les parts de marché risquent par ailleurs d'influer fortement sur toute analyse ultérieure : une fois convaincue que la part de marché permet de présumer l'existence d'un pouvoir de marché substantiel, une instance de décision aura tendance à procéder à un examen sélectif des autres preuves, dans la seule fin de confirmer la présomption initiale. À l'inverse, des présomptions fondées sur des seuils de parts de marché excessivement élevés peuvent donner lieu *de facto* à des « régimes de protection » dont bénéficieront des entreprises pourtant susceptibles de détenir un pouvoir de marché substantiel et de se livrer à des pratiques unilatérales préjudiciables aux consommateurs.

En pratique, la manière dont les présomptions sont utilisées et dont elles influent sur l'analyse des autres preuves d'un pouvoir de marché substantiel constitue un facteur déterminant. Les parts de marché peuvent présenter l'avantage d'instaurer des régimes de protection, bien qu'à ce jour, il n'existe guère de consensus quant au seuil à retenir pour que la part de marché soit significative sans pour autant être excessive. Ces régimes de protection peuvent néanmoins assurer une plus grande sécurité juridique aux entreprises et contribuer à promouvoir leur efficacité. En outre, les présomptions fondées sur les parts de marché peuvent servir à signaler qu'une situation requiert une analyse plus approfondie, sans influer sur la rigueur ni le résultat d'une telle analyse.

(6) Les preuves directes de l'existence d'un pouvoir de marché substantiel, telles que la rentabilité d'une entreprise, sont rarement utilisées dans les affaires de pratiques unilatérales d'une entreprise. Les méthodes permettant de mesurer directement le pouvoir de marché reposent sur une grande quantité de données ; quand bien même ces données seraient disponibles, elles peuvent généralement faire l'objet de diverses interprétations et ne peuvent donc servir à établir de manière probante qu'une entreprise détient un pouvoir de marché excessif. Les preuves directes peuvent toutefois, dans certaines circonstances, corroborer l'existence d'un pouvoir de marché substantiel, à condition d'être utilisées en complément d'autres preuves.

L'une des méthodes économétriques pour mesurer directement le pouvoir de marché d'une entreprise consiste à estimer l'élasticité de la demande de cette entreprise, définie comme la variation en pourcentage de la quantité demandée d'un produit donné en réponse à une variation de un pour cent du prix de ce produit. L'estimation de l'élasticité de la demande d'un produit donné d'une entreprise vise à mesurer la réaction des clients à une variation du prix ainsi que le degré de sensibilité des ventes de l'entreprise à la variation des ventes des concurrents. L'élasticité de la demande d'une entreprise sera plus faible (autrement dit, la demande sera plus inélastique) si ses concurrents ne sont pas en mesure de réagir « réellement » en augmentant leur production en réponse à une hausse des prix ou à une baisse de la production de l'entreprise. Ainsi, une faible élasticité-prix indique que l'entreprise dispose d'un pouvoir de marché plus important. Bien que cette méthode permette en principe de se fonder sur des éléments plus précis et plus fiables pour apprécier le pouvoir de marché que celles qui font appel à la définition du marché et au calcul des parts de marché, elle soulève un certain nombre de problèmes, dont le besoin de collecter une grande quantité de données et la difficulté de déterminer si une société réputée avoir un certain degré de pouvoir de marché dispose, selon le droit de la concurrence applicable, d'un « pouvoir de marché substantiel ». En outre, l'élasticité de la demande ne renvoie pas à la relation entre les prix et les coûts marginaux à long terme, qui serait plus pertinente pour évaluer le caractère durable du pouvoir de marché d'une entreprise.

Il est également possible d'examiner si la rentabilité de l'entreprise indique qu'elle détient un pouvoir de marché substantiel. Cette méthode soulève toutefois un certain nombre de problèmes majeurs, dont la difficulté de déduire la rentabilité économique exacte à partir de données comptables, celle d'établir une norme concurrentielle à des fins comparatives, le fait que des bénéfices supraconcurrentiels puissent s'expliquer par des facteurs autres qu'un pouvoir de marché substantiel et durable, et enfin la difficulté d'obtenir des données sur la rentabilité à long terme. C'est pourquoi les chiffres de rentabilité ne jouent, eux aussi, qu'un rôle limité pour déterminer si une entreprise dispose d'un pouvoir de marché substantiel.

S'ils sont continuels et vont dans le même sens que d'autres preuves, des bénéfices élevés peuvent néanmoins être le signe d'un pouvoir de marché substantiel. Certaines autorités de la concurrence ont par exemple observé que des bénéfices anormalement élevés peuvent constituer une preuve plus pertinente dans un secteur de produits de base, parvenu à maturité et à forte intensité capitalistique, dans lequel les marques, l'innovation et la publicité n'ont guère d'importance et l'investissement semble avoir été récupéré. De même, une faible rentabilité ne devrait pas systématiquement être interprétée comme une preuve de l'absence d'un pouvoir de marché substantiel, puisqu'elle pourrait résulter d'un manque d'efficacité de l'entreprise.

Le comportement d'une entreprise peut également servir de preuve dans l'analyse d'une situation de pouvoir de marché substantiel, à condition toutefois que les circonstances dans lesquelles il s'inscrit soient aussi étudiées. L'analyse de la discrimination par les prix – pratique qui consiste à ne pas facturer le même montant à différents clients pour un même produit – permet d'illustrer ce point. La discrimination par les prix est une pratique courante, qui peut tout à fait être compatible avec un marché concurrentiel. C'est pourquoi le seul fait qu'une entreprise pratique ce type de discrimination ne peut servir à démontrer qu'elle dispose d'un degré de pouvoir de marché justifiant l'introduction d'une procédure de contrôle en vertu des dispositions relatives aux pratiques unilatérales d'une entreprise. Il n'en reste pas moins possible qu'une discrimination durable et systématique par les prix puisse, dans certaines circonstances, être le signe d'un pouvoir de marché substantiel d'une entreprise.

Les autorités de la concurrence et les tribunaux peuvent par ailleurs considérer le comportement d'une entreprise comme une preuve pertinente de l'absence d'un pouvoir de marché. Ainsi, les

guerres des prix permettant aux concurrents de plus petite taille de conquérir de nouveaux clients ou contraignant le présumé monopoleur/l'entreprise en position dominante à baisser ses prix en réaction à une entrée sur le marché vont à l'encontre de la thèse de l'existence d'un pouvoir de marché substantiel.

(7) *L'analyse du caractère substantiel du pouvoir de marché est un élément important de l'étude de pratiques unilatérales d'une entreprise. En l'absence d'un pouvoir de marché substantiel, il n'est pas utile de rechercher des effets anticoncurrentiels. L'analyse du pouvoir de marché substantiel ne constitue toutefois que l'une des étapes de l'examen des pratiques unilatérales d'une entreprise. Quand bien même il serait avéré qu'une entreprise dispose d'un pouvoir de marché substantiel, les autorités de la concurrence doivent encore établir que le comportement de cette entreprise a des effets anticoncurrentiels. La preuve du pouvoir de marché substantiel d'une entreprise ne dispense pas de mener une analyse complète des effets du comportement de cette entreprise sur la concurrence avant de pouvoir conclure à une violation du droit de la concurrence.*

Certains estiment qu'il conviendrait, pour l'analyse, de prendre plus directement en compte les effets du comportement d'une entreprise sur la concurrence et de leur donner plus de poids qu'aux parts de marché ou à d'autres facteurs structurels, et que l'évaluation du pouvoir de marché devrait faire partie intégrante de l'analyse globale d'une affaire de pratiques unilatérales d'une entreprise, au lieu d'en constituer une étape préliminaire. L'analyse séparée du pouvoir de marché d'une entreprise présente toutefois certains avantages.

Une analyse séparée du pouvoir de marché peut aider les instances de décision à éliminer les affaires dans lesquelles l'existence d'effets anticoncurrentiels est hautement improbable voire impossible. En outre, si l'analyse des effets anticoncurrentiels ne renvoie pas au marché sur lequel règne la concurrence, il risque d'être difficile de distinguer le préjudice causé au processus concurrentiel de celui causé aux concurrents. De plus, lorsque les autorités de la concurrence ou les tribunaux doivent apprécier les effets que certains comportements sont susceptibles d'avoir dans l'avenir, l'analyse du pouvoir de marché sera une étape nécessaire pour prévoir les effets probables de ces pratiques sur la concurrence. Enfin, si l'analyse et l'établissement de l'existence d'un pouvoir de marché substantiel ne font plus l'objet d'une démarche spécifique et si les autorités de la concurrence se montrent « peu exigeantes » quant au niveau de preuve requis pour établir l'existence d'effets anticoncurrentiels, le seuil d'intervention risque d'être abaissé, rendant plus probable la condamnation de pratiques ne risquant guère de nuire au bien-être des consommateurs.

BACKGROUND NOTE

By the Secretariat

1. Introduction

Single firm conduct provisions in competition laws typically consist of two parts: one part identifies to which firms the provisions apply; a second part addresses prohibited conduct. The first part typically defines the scope of application of single firm conduct provisions rather narrowly. Unilateral conduct by a firm that has no or little market power is unlikely to be anticompetitive. Conversely, unilateral acts by a firm with high degree of market power are much more likely to distort the competitive process as such a firm can impose its choices on competitors, and engage in practices that might foreclose competitors from competing effectively. Thus, to focus enforcement activities on conduct most likely to lead to serious anticompetitive results, but also as an administrative necessity, single firm conduct provisions require competition authorities and courts to distinguish between firms that have substantial market power (or considerable economic strength according to some other standard) [1] and those that do not.

Making this distinction is not a straightforward task as there is no single test that could always be used to accurately determine whether or not a firm has the requisite degree of market power. This background note describes what methods competition authorities and courts have developed to make that determination and what types of evidence they most commonly rely on. As in other areas of competition law, the choice among different methods involves a trade-off between simplicity and at least the perception of greater predictability and legal certainty, and greater accuracy based on a more detailed analysis.

The main points addressed in this paper are:

- Different jurisdictions use different concepts and language to identify which firm should be subject to single firm conduct provisions. Overall, it appears that competition regimes are converging toward the notion that single firm conduct provisions should be applied only to firms that have "substantial market power."

- The economic concept of "market power" does not provide a precise standard to determine whether a firm should be subject to single firm conduct provision. But by highlighting that market power must be both substantial and durable to raise competition concerns in unilateral conduct cases, it can provide a good framework for the analysis. In this framework, evidence on entry barriers and barriers to expansion is considered most important because actual or potential entry or expansion can most effectively prevent a firm from exercising market power. Other important factors include competitive conditions in the market and buyer power.

[1] This note will generally use the term "substantial market power" to generally refer to the amount of economic strength required under applicable single firm conduct provisions, and will use terms such as "monopoly power" or "dominance" primarily when reference is made to a specific statutory framework.

- Market share analysis continues to be pivotal in many single firm conduct cases, even though the limitations of market shares as predictor of market power are widely acknowledged. Market share analysis should be the beginning of the analysis and not the end of it, and evidence related to market shares alone generally should not be sufficient to prove that a firm has substantial market power.

- Direct evidence of market power related to a firm's demand elasticities or a firm profitability has rarely been used in single firm conduct cases. Even if the necessary data are available, this type of evidence normally will not conclusively establish that a firm has the requisite degree of market power. However, in the appropriate circumstances such evidence could be useful in conjunction with consistent other evidence to show that a firm has substantial market power.

- Conduct of a firm and the effects of a firm's conduct could also be evidence that the firm has substantial market power, although conduct alone, without analysis of the circumstances in which it occurred, should not be considered as evidence. Some have argued that competitive effects should play a greater and more immediate role in the analysis and have greater relative importance than market shares and other structural factors. A greater focus on competitive effects would not eliminate the need to define relevant markets or at least identify the relevant competitive constraints, but would make this assessment an integrated component of the overall analysis. However, such an approach that focuses more immediately on competitive effects might not always be workable or desirable.

2. Dominance/Monopoly Power and the Concept of "Substantial Market Power"

What evidence a jurisdiction considers relevant, necessary or sufficient to prove dominance/monopoly power or their equivalents in other competition laws will depend on the concepts behind these terms. Typically, competition statutes provide little guidance in this respect. It was left to enforcement practice and judicial interpretation to develop these concepts and to determine evidentiary requirements in connection with them. This section will first summarize how economic theory can contribute to the interpretation of these concepts. It will then provide a brief overview over single firm conduct provisions in a few, selected jurisdictions.

2.1 The Concept of "Substantial Market Power"

There is a vast amount of economic literature on the notion of market power and its application in single firm conduct cases. This should not come as a surprise: Commentators have observed that as competition regimes consider consumer welfare as their key goal, market power is brought to center stage.[2] Economic theory of market power does not provide precise definitions and bright line tests that courts and competition authorities can apply in single firm conduct cases. But it does provide a useful framework for evaluating evidence that is offered to establish whether a firm should be subject to single firm conduct provisions.

In economic theory, a firm is said to exercise market power when it prices above its short-run marginal costs. Unlike the demand curve faced by a firm in a perfectly competitive market, the demand

[2] Thomas G. Krattenmaker et al., *Monopoly Power and Market Power in Antitrust*, 76 Geo L. J. 241, 245 (1987).

curve faced by a firm with market power would not be not flat, but negatively sloped. The slope of the demand curve a firm faces determines a firm's market power.[3]

There is general agreement that this description of market power is too broad to be a useful guidepost to competition law. In practice, almost all firms have some degree of market power and are able to raise price above short-run marginal cost. Moreover, a firm may have market power for a variety of benign reasons. For example, in industries characterized by scale economies, even efficient companies would be unprofitable if they did not exercise market power and price above short-run marginal cost. Some degree of market power therefore is the norm and can be compatible with competitive markets, rather than the exceptional case that should trigger heightened scrutiny under competition law. Both as a question of policy and of administrability of competition laws, the focus of competition law enforcement should be on single firm conduct cases where the firm has a high degree of market power as it is much more likely that the exercise of such market power could have harmful effects on consumer welfare.

As it is difficult in the above system to find a definition of market power that is distinct from "normal, every day" market power and therefore could provide useful guidance for competition policy and enforcement in single firm conduct cases, many commentators have concluded that it is more fruitful to focus on sources of market power and the ways in which it can be exercised. In considering the conditions in which the exercise of market power can have welfare reducing effects which are the concerns of competition laws, they have pointed out that market power will be harmful only if it can be maintained for a considerable period.[4] To emphasize the durability requirement, some have proposed that while market power could be exercised by either reducing a firm's own output or by excluding competitors (i.e., reducing competitors' output), the type of market power that is the concern of single firm conduct provisions should be found only if a firm can raise price above competitive level *and* exclude competitors (or other barriers

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3 *See, e.g.,* MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE (2003); DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANISATION, (X ed. 2004); SIMON BISHOP & MIKE WALKER, THE ECONOMICS OF EC COMPETITION LAW*: Concepts, Application and Measurement* (2d ed. 2002); William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937 (1981). An important insight from economic theory is that the existence and degree of market power depends in the first place on demand side constraints. No firm can act independently of its customers. As one commentator observed, "market power exists at the whim of consumer preferences." Thus, determining the demand conditions faced by a firm can be a useful method to assess its market power. S*ee,* Gregory J. Werden, *Demand Elasticities in Antitrust Analysis*, 66 Antitrust L. J. 363, 371, 380-84 (1998) (discussing methods to assess firm's market power by estimating a firm's own elasticity of demand).

For a slightly different approach *see* John Fingleton, *Undefining Market Power*, Trinity Economic Paper Series, Paper No. 2000/4, at 21-23 (arguing that in certain circumstances welfare-reducing market power can exist where firms face flat demand curves, and that in such a situation testing for market power by looking at firm demand elasticities may not be sufficient).

4 To distinguish "every day market power" from the degree of market power antitrust laws should be concerned about, Werden suggests that the definition of monopoly power (i.e., substantial market power) should refer to a profit maximizing firm's ability to price above *long-run marginal cost*, rather than short run marginal cost. Werden, *Demand Elasticities, supra* note 3, at 371-73. Another commentator emphasized that the focus in single firm conduct cases should be on the firm's ability to "*maintain"* price, rather than to *raise* price, above the competitive level to highlight that market power must be durable, and to emphasize that dominant firms are expected to have already raised their prices above competitive levels. *See* Lawrence J. White, *Market Definition in Monopolization Cases: A Paradigm is Missing* 4 (NYU Working Paper 2005). *See also infra* at 23.

to entry and expansion exist).[5] This approach suggests, as many commentators have emphasized, that the finding of substantial market power will critically depend on the existence of entry barriers and barriers to mobility that can prevent firms from responding to an output reduction of a firm.[6]

Other economists have offered a different view and suggested that market power which is relevant for the enforcement of single firm conduct provisions should not be defined in terms of demand elasticities and related concepts, but should be found only where it can be shown that a firm can affect market outcomes when it reduces its own output. In this view, market power would not depend on whether a firm can raise its own prices, but whether its decision to reduce its output would lead to a market-wide output reduction and price increase.[7] It is unclear, however, whether in practice this approach would lead to significantly different results. First, the methods to determine whether a firm could affect prices in the market relies much on the same methods that are used under the more "traditional" approach: the focus would be primarily on market shares and barriers to entry and expansion.[8] Second, if substantial market power is defined as a firm's ability to raise price above competitive level *and* exclude competitors, the focus is equally on whether a firm's competitors are prevented from responding to an attempted output reduction/price increase of a particular firm. If that is the case, the particular firm's reduction of its own output would affect output and price levels in the entire market.

2.2 Dominance and Monopoly Power: Tests and Definitions in Selected Jurisdictions

The following section briefly examines how terms such as "monopoly power," "dominance," or similar terms in single firm conduct provisions have been interpreted in some, selected competition regimes. The overview suggests that labels matter little. Competition regimes with different statutory language in their single firm conduct provisions can use largely the same concept of "substantial market power." On the other hand, jurisdictions that use the same statutory language may apply to some extent different concepts. This is true in particular with respect to the concept of "dominance" which a great number of jurisdictions use in their single firm conduct provisions.

2.2.1 Dominance[9]

The following section will use two jurisdictions, Canada and the European Union, to illustrate how the concept of dominance has been interpreted.[10]

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5 PHILLIP AREEDA & HERBERT HOVENKAMP, IIA ANTITRUST LAW, ¶501 (2004) (explaining that the second part of the formula refers not only to the ability to exclude competitors, but includes any barrier to entry and expansion); Werden, *Demand Elasticities, supra* note 3, at 377-78 (arguing that the power to control price would be considered as a reference to "market power," and the "power to exclude competitors" would be used as added condition to distinguish market power from substantial market power/monopoly power).

6 Some economists have therefore argued that an inquiry into entry barriers should be the first step in single firm conduct cases. Fingleton, supra *note* 3, at 20-21.

7 Benjamin Klein, *Market Power in Antitrust: Economic Analysis After Kodak*, 3 Sup. Ct. Econ. Rev. 43, 76-85 (1993) (arguing that (antitrust) market power should depend on the ability of a firm to influence market conditions). *See also* Joao Pearce de Azevedo & Mike Walker, *Dominance: Meaning and Measurement*, 23 ECLR 363, 366 (2002) (proposing to define dominance as the ability to restrict total output in the market place substantially below its *current* level).

8 Pearce de Azevedo and Walker, *supra* note 7, also list variability of market shares, existence of substitutes, existence of scarce capacity and the nature of competitive interaction in the market.

9 This note will discuss only evidence to establish single firm dominance, and will not examine whether joint dominance would require different evidentiary standards.

Canada

Canada's single firm conduct provision is based on an "abuse of dominance" concept. "Dominance" is defined as a firm's ability to "control" a market." According to Section 79 of the Competition Act, dominance requires a finding that one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business.[11]

The requirement that "a person substantially or completely *control* a class of species of business" has been interpreted as requiring that the person is able to profitably set prices above competitive levels for a considerable period of time. For example, in *NutraSweet,* the Competition Tribunal held:

> *The respondent's view is that "control" is most meaningfully treated as synonymous with "market power". Market power is generally accepted to mean an ability to set prices above competitive levels for a considerable period. While this is a valid conceptual approach, it is not one that can readily be applied; one must ordinarily look to indicators of market power such as market share and entry barriers. The specific factors that need to be considered in evaluating control or market power will vary from case to case.*[12]

The same approach can be found in the Competition Bureau's Enforcement Guidelines on the Abuse of Dominance Provisions which specify that the term "control" is synonymous with "market power," which in turn is defined as the ability to set prices above competitive levels for a considerable period of time. The Guidelines also specify that "considerable time" normally means at least one year.[13] Commentators believe that the Canadian concept of "dominance" is largely similar to the U.S. notion of monopoly power, and essentially equivalent to the concept of "substantial market power." They also suggest that in enforcement practice the concept of dominance might to some extent be applied differently in Canada than under EC competition law.[14]

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10 There are of course many more jurisdictions which use the same concept in their single firm conduct provisions, and the term "dominance" is subject to a range of different interpretations. On the one end of the spectrum one can find, for example, the United Kingdom which appears to have fully integrated the economic notion of "substantial market power" in the analysis of dominance. The OFT Market Power Guidelines state that "an undertaking will not be dominant unless it has substantial market power." Office of Fair Trading, Assessment of Market Power (2004) ¶2.9. On the other end of the spectrum are countries where the concept of dominance explicitly does not rely on the notion of "substantial market power." In South Africa, for example, firms with a share between 35% and 45% can rebut the presumption of dominance by showing that they do not have substantial market power. But for firms with a share of more than 45% such a defence is not possible. In other words, the statutory presumption of dominance cannot be rebutted, regardless of whether or not they have substantial market power.

11 Competition Act, Section 79(a). Section 79 has been interpreted as requiring that a firm must (1) be "dominant" in a product and geographic market (i.e., possess market power); (2) have engaged in a "practice" of "anti-competitive acts" that (3) has the actual or likely effect of "preventing or lessening competition substantially." *See, e.g.,* MICHAEL TREBILCOCK ET AL., THE LAW AND ECONOMICS OF CANADIAN COMPETITION POLICY 507 (2002); D. Jeffrey Brown et al., *The Aspen Skiing Case From a Canadian Perspective*, 73 Antitrust L. J. 235, 254 (2005).

12 Canada (Director of Investigation and Research) v. NutraSweet Co., [1990] 32 C.P.R. (3d) 1 (Comp. Trib.); Canada (Commissioner of Competition) v. Canada Pipe, 2005 Comp. Trib. 3, at ¶122.

13 Competition Bureau, Enforcement Guidelines on the Abuse of Dominance Provisions (2001), at 13-14.

14 Brian A. Facey & Dany H. Assaf, *Monopolization and Abuse of Dominance in Canada, The United States and the European Union: A Survey*, 70 Antitrust L. J. 513, 537-38 (2002) (stating that in the European Union market shares may in practice carry more weight and create a stronger presumption of dominance than in Canada). See also Competition Bureau, Abuse of Dominance Guidelines, *supra* note 13, at 15-16.

EC Competition Law

Article 82 of the EC Treaty refers to an "abuse by one or more undertakings of a dominant position within the Common market or a substantial part of it…" The Court of Justice's traditional definition of "dominance" focuses on the ability of a firm to act independently from market forces:

> *The dominant position referred to in this article relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.*[15]

This definition, which continues to be regarded as authoritative statement on the notion of "dominance,"[16] has puzzled commentators for a long time.[17] They have noted in particular that the concept notion of "independence" did not have well-defined economic meaning.[18] In particular it was pointed out that even a dominant firm cannot act independently of its customers and therefore independence from customers/consumers is not a useful criterion to distinguish between firms that are dominant and those that are not.[19] On the other hand, commentators noted that the notion of "independence from competitors" could refer to the fact that a firm has been able to profitably raise price above competitive levels. It could be said that the dominant firm was able to act independently from competitors at the competitive price level, and therefore had a certain freedom from competitive restraints that would have prevented a non-dominant firm from profitably increasing price. In this interpretation, dominance would be closely related to the concept of substantial market power.[20]

The recent Commission decision in *Microsoft* provided a more detailed discussion of the concept of "independence" of a dominant firm, in which the Commission addressed all three dimensions of independence and discussed evidential support for each of them. The Commission found that Microsoft acted independently from its competitors, emphasizing that despite the emergence of competing OS programs, Microsoft's financial performance was not affected, Microsoft did not alter its pricing policy and business model, and remained successful. The Commission also found that Microsoft was independent of customers on the ground that that MS Windows was a must carry product for PC manufacturers. It also noted that Microsoft was independent from end-consumers, emphasizing several statements that highlighted the high switching costs faced by customers which prevented them from using

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15 Case 27/76, United Brands v. Commission, 1978 ECR 207, ¶65; Case 85/76, Hoffmann-La Roche v. Commission, 1979 ECR 461.

16 OECD, Competition Law and Policy in the European Union 26 (2005).

17 RICHARD WHISH, COMPETITION LAW 179 (5th ed. 2003) (noting that the Court never explained how the two elements - the ability to prevent effective competition; the ability to behave independently of competitors, customers, and consumers - relate to each other, and what their respective importance was).

18 *See, e.g.*, Fingleton, *supra* note 3, at 27 (commenting that it was difficult to relate the Court's dominance test to any single economic concept). *See also* Pearce de Azevedo & Walker, *Dominance, supra* note 7, at 363 (observing that "dominance" has neither a well defined meaning nor a standard of measurement); Joao Pearce Azevedo & Mike Walker*, Market Dominance, Measurement Problems and Mistakes*, 24 ECLR 640 (2003) (commenting that lack of economic concept behind the definition of dominance was not conducive to good competition law enforcement).

19 *See, e.g.*, Pearce de Azevedo & Walker, *Dominance: Meaning and Measurement*, *supra* note 7, at 364 (arguing that it is not economically coherent to think of firms acting independently of its customers to an appreciable extent since all firms are subject to the discipline of the demand curve, indicating that a change in price will effect the firms output).

20 BISHOP & WALKER, *supra* note 3, at 184; WHISH, *supra* note 17, at 179.

competing operating software.[21] It remains to be seen how influential the detailed analysis of "independence" will be in future cases.[22]

Even though there can be some uncertainty about the notion of "independence," it appears that the concept of dominance in EC competition law is more explicitly adopting the concept of substantial market power. This development is reflected in the European Commission's Discussion Paper on Article 82 which interprets the case law concerning "independence" as an inquiry into whether a firm holds substantial market power.[23] One commentator observed that the concepts of dominance and monopoly power are already largely aligned and focus on the same notion of substantial market power.[24]

2.2.2 Super-dominance

There is an additional question as to whether a meaningful distinction can be made between various degrees of "substantial market power," and whether such a distinction can provide a useful benchmark in an analysis of single firm conduct cases. In particular in European competition law, more recent cases have introduced the concept of a "superdominant" firm. The concept implies that firms with an extremely high, near monopolistic share of the relevant market could be considered "superdominant" and that special standards apply to examine whether their conduct violates the antitrust laws. For example, in *Cewal*, the Advocate General opined that:

> *To my mind, Article 86 cannot be interpreted as permitting monopolists or quasi-monopolists to exploit the very significant market power which their superdominance confers so as to preclude the emergence either of a new or additional competitor. Where an undertaking, or group of undertakings whose conduct must be assessed collectively, enjoys a position of such overwhelming dominance verging on monopoly, comparable to that which existed in the present case at the moment when G & C entered the relevant market, it would not be consonant with the particularly onerous special obligation affecting such a dominant undertaking not to impair further the structure of the feeble existing competition for them to react, even to aggressive price competition from a new entrant, with a policy of targeted, selective price cuts designed to eliminate that competitor.*[25]

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21 Commission Decision COMP/C-3/37.792, Microsoft, March 24, 2004, at ¶¶460-63.

22 Importantly, the Commission relied also on other criteria to establish dominance. In addition to an analysis of market share and entry barriers, the Commission referred to Microsoft's profitability as evidence of its dominant position. Moreover, the issue of dominance was not contested at the time the decision was adopted as Microsoft had conceded that it held a dominant position in the supply of PC operating systems. Commission Decision COMP/C-3/37.792, Microsoft, ¶¶ 429-64. The use of profitability as evidence of dominance is discussed *infra*, at 23.

23 DG Competition, Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses (December 2005), ¶¶ 24-28.

24 Fingleton, *supra* note 3, at 28 (commenting that the dominance and monopoly power have converged toward a concept that is close to a welfare economics based concept of market power). *See also* Ronald W. Davis & Jennifer M Driscoll, *The Urge to Converge – The New Discussion Paper on Abuse of a Dominant Position*, 20 Antitrust (Spring 2006) 82, 83 (observing ambiguity concerning the notion of "dominance" in Commission Discussion Paper on Article 82, but expressing hope that "high degree of market power" will be the decisive factor in determining whether a firm is dominant).

25 Case 395/96 P, Compagnie Maritime Belge Transports v. Commission, Opinion of October 29, 1998, at ¶137 (emphasis added).

Along the same lines, in *Microsoft* the Commission referred to Microsoft as a firm with an "*overwhelmingly dominant position.*"[26] As the Advocate General in *Cewal*, the Commission used the concept to refer to a firm that was found to hold a near monopoly in the relevant market.

Some authors have opined that the concept of "super dominance" could be useful to identify firms that face a higher risk than "dominant" firms to be found to be violating Article 82 EC Treaty. The obligations on such firms could be more onerous, and their "special responsibility" might be greater. The concept could thus be helpful to understand why certain types of behaviour, such as selective price cutting or refusals to deal, are treated more seriously in some cases than in others.[27]

In principle, the concept of "super-dominance" could merely express the idea that certain firms will have a greater degree of substantial market power than others. In other words, there can be different levels of "substantial" or "significant."[28] It is unclear, however, whether the concept of super-dominance provides a useful analytical tool in single firm conduct cases. "Super-dominance," if established merely as a function of very high market shares, might focus too much on market share computation and divert attention from the analysis of other factors, such as entry barriers, competitive dynamics, and purchaser power.[29] In addition, even if anticompetitive effects of certain conduct might be more likely to exist if – all other factors equal - a firm has a higher degree of substantial market power, this should be picked up by a robust analysis of the competitive effects of a firm's conduct.

2.2.3 Monopoly Power (United States)

In the United Sates, the monopolization offense in Section 2 has two components: (1) the possession of monopoly power in the relevant market; and (2) the wilful acquisition of maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[30]

Although the statute does not provide further guidance as to the concept of "monopoly power," courts, agencies, and most commentators appear to agree that "monopoly power" is related to the economic concept of "market power," and that the monopolization offence in Section 2 requires a large degree of market power, or "substantial market power."[31] Commentators have suggested that the concepts of market

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26 Commission Decision COMP/C-3/37.792, Microsoft, ¶435. See also Case 1001/1/1/01, Napp Pharmaceuticals Holdings Ltd. v. Director General of Fair Trading, [2002] CAT 1, ¶219 (finding that "the special responsibility of a dominant undertaking is particularly onerous where it is a case of a quasi-monopolist enjoying "dominance approaching monopoly", "superdominance" or "overwhelming dominance verging on monopoly").

27 WHISH, *supra* note 17, at 190.

28 *See also* BISHOP & WALKER, *supra* note 3, at 186 (finding that from an economic perspective, a "graduation" of dominance would be unobjectionable).

29 It should be noted, however, that in the few cases where the concept of "super-dominance" has been used (*Cewal, Microsoft, Napp),* the analysis did not focus solely on market shares, but assessed a range of other factors as well, including entry barriers, buyer power, and the effects of the firm's conduct.

30 United States v. Grinnell Corporation, 384 U.S. 563 (1966).

31 *See, e.g.,* AREEDA & HOVENKAMP, *supra* note 5, ¶501; Werden, *Demand Elasticities, supra* note 3*,* at 374. Many courts and commentators tend to use the terms market power and monopoly power interchangeably. *See, e.g.,* United States v Grinnell Corp., 384 U.S. 563, 577 (monopoly power), 580 (market power) (1966); Hanover Shoe Inc v United Shoe Machinery Corp*.,* 392 U.S. 481, 486 (monopoly power), 486 fn 3 (market power) (1968). *See also* Krattenmaker et al., *supra* note 2, at 246-247 (1987). Some have argued that clarity would be increased if the term monopoly power was used only where market power is substantial. ERNEST GELLHORN ET AL., ANTITRUST 112-113 (5th ed. 2004).

power and monopoly power can be distinguished on the basis of durability, and that substantial market power should be understood as the ability to raise price above the competitive level for a sustained period of time.[32]

To better capture the high degree and durability of market power required under the monopolization offense of Section 2, commentators also suggested that the traditional formula which described "monopoly power" as the ability to "control market prices or competition"[33] would be better interpreted as the firm's ability to control price *and* exclude competition. These two conditions should be required to exist cumulatively to better characterize that a firm with substantial market power must have not only the ability to set output or price for its own products, but must also to some degree be immunized from competitive reactions by other firms.[34]

2.2.4 Substantial Degree of Market Power (Australia)

Australia is an example of a jurisdiction where the statue explicitly incorporates a "substantial market power" requirement: Section 46 of the Trade Practices Act[35] applies to firms that have a "substantial degree of power in a market." Courts have held that Section 46 requires market power in the sense of a firm's "ability of a firm to raise prices above supply cost without rivals taking away customers in due time."[36]

Interestingly, the single firm conduct provision was changed in 1986 from a threshold based on "dominance" which referred to the ability to "substantially control a market" to the current "substantial market power" threshold. The goal apparently was to lower the relevant threshold to ensure that small businesses have greater protection against actions by more powerful competitors, even if those competitors did not reach the degree of market power required under the previously applicable dominance threshold.[37]

There may thus have been an expectation that the changes in the Act had lowered the market threshold, facilitating intervention against firms with relatively low market shares where, for example, it could be said that customers depended on the firm's supplies, even though the firm would not necessarily have the power to raise price substantially above competitive levels. In line with this reasoning, for example, a court agreed with the ACCC that two companies, each of which held a share of less than 20% of the relevant market (wholesale market for recorded music in Australia), could fall under the prohibition in Section 46.[38] However, the High Court in *Boral* clarified that the statutory concept of "substantial degree of power" required a considerable or large degree of market power in a relevant antitrust market over a sustained period. The court stated:

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32 Werden, *Demand Elasticities, supra* note 3, at 378-79.

33 United States v. E.I. du Pont de Nemours & Co., 351 U.S.377, 391 (1956); Eastman Kodak & Co. v. Image Technical Services, 504 U.S. 451, 481 (1992).

34 *See supra*, note 5.

35 In New Zealand, the parallel provision in Section 36 was amended in 2001 to move from a dominance threshold to a threshold that is based on "substantial degree of market power" to ensure that the provision was in line with the equivalent provision in Australian competition law.

36 Boral v. ACCC, [2003] HCA 5, ¶136 (Gleeson CJ and Callinan J).

37 The history of the changes to Section 46 is explained in the Australian Federal Court's decision in ACCC v. Boral, [2001] FCA 30 (emphasizing that the purpose of the 1986 amendments was to lower the threshold, arguably below the thresholds applicable in the United States and Europe), *rev'd*, Boral v. ACCC, [2003] HCA 5.

38 ACCC v. Universal Music, (2001) 115 FCR 442.

> *The concept of "market power" in s 46 shows that the section is not concerned with a one-second snapshot of economic activity. Market power can only be determined by examining what a firm is capable of doing over a reasonable time period. Whether a firm has market power - whether it has the ability to act unconstrained by competition, whether it can raise prices above competitive levels - requires an examination of the existing structure and the likely structure of the market if competitors are removed or prices rise to supra-competitive levels.*[39]

The decision in *Boral* has been interpreted as clarifying that more than isolated incidents of abuse against a single competitor or customer were required, and that the requisite market power must be persistent and not just temporary and readily corrected by the market process. This line of reasoning would appear to raise the evidentiary requirements under Section 46.[40]

3. Evidence of Substantial Market Power

Evidence that can be used to show that a firm has substantial market power is commonly divided into direct evidence and indirect evidence. Direct evidence would, for example, attempt to measure a firm's ability to raise price above competitive level or assess a firm's profitability; evidence that the firm's conduct has anticompetitive effects could also be considered direct evidence of market power. Indirect evidence attempts to draw conclusions from the structure of the market for the question whether a firm can be considered to have substantial market power. Market shares would be part of this analysis, but entry barriers and other factors that could affect a firm's ability to exercise market power should be relevant as well, and perhaps can be even more relevant. Since indirect evidence continues to be prevalent in most cases, the following section will discuss various types of indirect evidence first.

3.1 Indirect Evidence

3.1.1 Market Shares

Competition laws rely in most cases on indirect evidence related to the structure of the market to establish a firm's dominant position/monopoly power. Even though the traditional emphasis on market structure and concentration data has been criticized and its potential weaknesses are well known, there are very few cases in which courts and competition authorities have not used market shares in their analysis of single firm conduct cases.[41] This has prompted one commentator to observe that concentration remains the "high priest" in market power analysis.[42]

The use of market share and other concentration measures to establish dominance/monopoly power in single firm conduct cases ultimately rests on the idea that the structure of a market determines conduct of firms which in turn determines their performance (profitability). The hypothesis is that more concentrated markets lead to less intense rivalry among the market participants. Thus, in more concentrated markets it would be more likely that competition was not effective. This model suggests that market shares can to some extent indicate market power. Many have pointed out, however, that the connection between concentration and market power is far from clear. It is generally recognized that the

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39 Boral v. ACCC, [2003] HCA 5. ¶

40 The Federal Court's subsequent decision in *Universal Music v. ACCC*, [2003] FCAFC 193, acknowledged that the interpretation of "significant market power" had changed as a consequence of the High Court's *Boral* decision.

41 *See also infra*, at page 23.

42 Fingleton, *supra* note 3, at 33.

structure/conduct/performance model (and, therefore, market shares) can have little predictive power for the question whether a firm has substantial market power.[43]

Some have noted, however, that market shares can nevertheless have independent significance in single firm conduct cases for a number of reasons. One observation has been that as it would be a fair starting point to assume that a firm with 100% of the relevant market has substantial market power, the situation for a firm with an only insignificantly lower share would likely not be so fundamentally different. Thus, the situation of a firm with a share of, for example, 80% or 95% would not be so different from that of a true monopolist, thus allowing the inference that a firm with these shares also could have substantial market power.[44] It was also observed that market share could be significant because the greater disparity in shares, the greater anticipated reward for achieving higher price for output: If a firm has a higher market share and its competitors' shares are smaller, it would be less probable that competitors could react to the dominant firm's restriction of output by increasing their supplies sufficiently to make up for the output reduction.[45] Higher market shares also have been regarded as relevant in single firm conduct cases because they would make it more likely that a firm could persuade customers to agree to exclusionary schemes, there would be a greater likelihood that those schemes would impair rival efficiency, and any investment in impairing rival efficiency would be more profitable.[46]

Of course, these arguments rely critically on the ability to establish a relevant antitrust market with some degree of accuracy. Moreover, any presumed correlation between share and market power will depend on several other important factors. In particular, it would be true only if (actual or potential) competitors cannot react when a firm restricts output, customers would not react sufficiently to attempted output reduction, and there are no other conditions that limit the firm's ability to profitably raise price. These factors may ultimately become more relevant than market shares in establishing substantial market power.

The many practical problems in the process of establishing relevant antitrust markets and shares that can affect the reliability of market shares in predicting a firm's market power are well known. Frequently, decision makers have to rely on inexact data. The process can involve difficult and to some extent arbitrary decisions over what to exclude/include in the relevant market. And once a relevant market has been established, shares can be difficult to assign.[47] In addition, putting great emphasis on market shares

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43 *See, e.g.,* Landes & Posner, *supra* note 3, at 947; Fingleton, *supra* note 3, at 18-19.

44 AREEDA & HOVENKAMP, *supra* note 5, ¶532a (noting that other factors such as entry barriers would have to be taken into account if they were clear, but would not be so common that they should impair the starting point of the analysis). *See also* Krattenmaker et al., *supra* note 2, at 259 (noting that theory of contestability shows that under certain, highly restricted circumstances, even a firm with 100% might not have the ability to raise price).

45 AREEDA & HOVENKAMP, *supra* note 5, ¶532a. Areeda and Hovenkamp explain that a competitor with a very small share of the relevant market should for a variety of reasons be less likely than a competitor with a relatively larger share to sufficiently expand output to meet demand of customers who would consider switching in response to a price increase by the near-monopolist. They assume, for example, that excess capacity is somehow proportional to existing output, and that the ability to expand is in some proportion to a firm's existing scale of operation. They do not argue that therefore very high market shares in excess of 80% should be invariably sufficient to establish substantial market power, but may be the reasonable basis for an inference.

46 Krattenmaker et al., *supra* note 2, at 259-60 (1987); Einer Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 253, 335-36 (2002). Elhauge appears to put a curious degree of reliance on the significance of a 50% share in single firm conduct cases.

47 Gregory J. Werden, *Assigning Market Shares*, 70 Antitrust L. J. 67 (2002) (describing difficulties in the assignment of market shares).

creates incentives to define markets narrowly in order to reach higher market shares. A decision maker, when it sees signs of anticompetitive conduct that suggests that a firm has market power, may have to make a choice between finding the requisite market power with a low market share, or defining markets narrowly to arrive at a high market share that makes the finding of market power plausible.[48] For these reasons, the final outcome of the market definition exercise might not adequately reflect the competitive constraints to which a firm is exposed.

A perhaps more fundamental problem with market definition is the absence of a generally accepted model to define the relevant market in single firm conduct cases where a firm already has exercised market power.[49] Relevant markets should be defined with reference to the competitive constraints. The commonly accepted test to assess relevant markets consists of an inquiry whether a small but significant non-transitory increase in price that a hypothetical monopolist could profitably impose over a group of products or services would exceed a certain threshold, typically 5-10%. Once a firm has exercised market power and raised the price to the profit maximizing level, however, it should not be able to further raise prices profitably from the currently observed level. A "test" for what would happen if the firm did increase its price could therefore mislead and produce incorrect results as it would overestimate the effectiveness of competitive constraints to which a firm is exposed.[50]

In many single firm conduct cases, other methods therefore may have to be used to define markets, taking into account competitive constraints on a firm. This adds to the uncertainty about the outcomes of the market definition exercise. Market definition based on a hypothetical monopolist paradigm could be useful primarily in cases where the inquiry is whether conduct which the firm has not yet implemented could create substantial market power,[51] although in many jurisdictions single firm conduct provisions apply only to firms that already have the requisite degree of market power, but not to conduct that could be used to acquire such market power.

Several alternatives have been proposed to get around the problem of substantial market power that has already been exercised. The first option would be to identify the competitive price level that would prevail in the absence of the alleged anticompetitive practices and arrive at a properly defined antitrust

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48 *See, e.g.,* Fingleton, *supra* note 3, at 43.

49 *See, e.g.,* White, *supra* note 4.

50 This phenomenon refers to the well-known Cellophane fallacy. In United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377 (1956), the Court found that Du Pont could not profitably raise price for cellophane because too many customers would switch to other materials, and therefore concluded that the market was wider than cellophane and included all flexible wrapping materials. Commentators agree that the Court committed an error as it overlooked that the high demand elasticity existed because du Pont already had raised the price for cellophane to profit maximizing level; given that du Pont could raise its price to such level, the finding a cellophane only market would have been correct. *See, e.g.,* Stephen C. Salop, *The First Principles Approach to Antitrust,* Kodak, *and Antitrust at the Millenium*, 68 Antitrust L. J. 187, 199 (2000); Werden, *Demand Elasticities*, *supra* note 3, at 377 (commenting that the Court mistook competition created by the exercise of market power for competition that can prevent the exercise of market power).

51 Gregory J. Werden, *Market Delineation under the Merger Guidelines: Monopoly Cases and Alternative Approaches*, 16 Rev. Ind. Org. 211, 212 (2000) (arguing that hypothetical monopolist test could be applied where the inquiry is whether conduct, if left unchecked, could create monopoly power). The Commission's discussion paper mentions one additional use of the hypothetical monopoly test in single firm conduct cases: it points out that if the hypothetical monopolist test suggests that another product is *not* in the same market, this result would be relevant even if the firm under investigation has raised its price to the profit maximizing level. DG Competition, Article 82 Discussion Paper, *supra* note 23, at 8.

market by applying the hypothetical monopolist test at that price level.[52] This approach might not be workable in most cases, however, as it would be not obvious how to determine the "otherwise prevailing" price level. And if some estimate could be made, there is a question whether it would be so reliable that the subsequent market definition and market share allocation could still be considered meaningful. In addition, if competitive price levels can be estimated, market power could be assessed directly, which would make it unnecessary to go through the extra step of trying to define a relevant market and allocate market shares.[53]

Another approach to market definition in a case where single firm conduct is examined ex post would be to ask whether a small price reduction would lead buyers to substitute away from outside products and locations to the products and locations in the candidate market in substantial numbers. If there was not much substitution, the candidate market likely would be an antitrust market.[54] Others have pointed out, however, that using a hypothetical price decrease raises many challenging questions and may not result in a properly delineated market.[55]

A perhaps similar idea can be found in the proposal to apply a two-step inquiry in single firm conduct cases which would first ask what the plaintiff's output would be in the absence of the defendant's alleged anticompetitive practice; and, second, whether the plaintiff's additional "but for" output would have caused a small but significant non-transitory price decrease. As the authors of this proposal point out, their proposed test would not be used to establish a relevant market to assess the defendant's market power, but would directly assess whether the defendant's conduct had anticompetitive effects (where anticompetitive effects would be measured solely in terms of price).[56] The authors also concede that the analysis would require a potentially difficult inquiry into a "but for" situation. It therefore is unclear whether the analysis would produce sufficiently robust data that would permit a reliable estimate either of the relevant market or, more directly, of the defendant's market power.

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52 *See, e.g.,* Canadian Competition Bureau, Abuse of Dominance Guidelines, *supra* note 13, at 13; Salop, *supra* note 50, at 196 (arguing that the proper competitive benchmark for alleged competitive restraints would be the price that would prevail in the absence of the alleged anticompetitive restraints or conduct).

53 *See, e.g.,* DG Competition, Article 82 Discussion Paper, *supra* note 23, at 7-8 (referring to the difficulty of applying a hypothetical monopolist test in abuse of dominance cases, and pointing to difficulty in estimating competitive price levels); Jonathan B. Baker, *Market Definition* 25, fn. 51 (2006); available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=854025; Werden, *Market Delineation, supra* note 51, at 215 (arguing that evidence that actual price exceeds competitive price by 5-10% should be used as direct evidence to establish market power).

54 Baker, *supra* note 53, at 25-26. *See also* Krattenmaker et al., *supra* note 2*,* at 256 fn. 73 (proposing hypothetical price decrease hypothetical to determine whether a firm already has exercised market power).

55 Werden, *Market Delineation, supra* note 51, at 215-16. In addition, if one reaches the conclusion that in response to a hypothetical price decrease buyers would switch to the defendant's product and therefore alternative products are considered in the same market, there would also be a question of how meaningful that wider market definition is as the other products apparently did not prevent the defendant from profitably raising its price.

56 Philip B. Nelson & Lawrence J. White, *Market Definition and the Identification of Market Power in Monopolization Cases: a Critique and a Proposal,* at 22 (NYU Center for Law & Business Working Paper No. CLB-03-022, November 2003). One problem with the proposed test might be that it focuses only on additional output by the plaintiff that would occur in the absence of the allegedly anticompetitive practice. The plaintiff's "but for" output might be too small to produce a price decrease. The conclusion would be that defendant's conduct was not anticompetitive. This might overlook that other firms might have been affected by the anti-competitive strategies as well, and that their "but for" output might have been sufficient to result in a price decrease.

Despite these problems and shortcomings, market definition and market share computation continue to be widely used to provide evidence in single firm conduct cases in almost all jurisdictions. There can be many reasons for this phenomenon. First, legal precedent may require that the plaintiff establish a relevant antitrust market and the defendant's share in the market.[57] They provide a familiar and well-established tool which appears to be relatively easy to use. Frequently, firms might also perceive greater legal certainty if market share thresholds are used.[58] In addition, even those who are sceptical of using market shares as evidence for the existence of substantial market power argue that they can be used as a screen to eliminate cases in which low market shares indicate the absence of market power,[59] although not everyone agrees with this approach.[60]

The question is therefore not whether market definition and market shares will be used as evidence to establish market power in single firm conduct cases in most jurisdictions (as it appears that they will continue to be considered relevant evidence), but how they can be used in such a way that they are likely indicative of market power. As one commentator noted: "Because even the best market shares imperfectly reflect market power, imperfections in market shares certainly should not prevent their use."[61]

The evidentiary weight of market shares varies from jurisdiction to jurisdiction, both concerning the level at which market shares will be considered relevant evidence of substantial market power, and the strength of the inference that can be drawn from a certain market share. These differences in the reliance on market shares have been frequently described by commentators.[62]

Despite these differences, however, there appears to be some common ground regarding the treatment of market shares as evidence. One area of agreement appears to be that while market shares could be a useful item of evidence, they should not be used as the only evidence to establish that a firm has substantial market power. Market definition and finding of high market shares therefore are not the end of the analysis, and a number of other factors, including barriers to entry and expansion, buyer power, and

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57 *See, e.g.,* Walker Process Equipment Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965) ("Without a definition of that market, there is no way to measure [a defendant's] ability to lessen or destroy competition"); Case T30/89, Hilti v. Commission, 1991 ECR II-1439 ("It should be observed at the outset that in order to assess Hilti' s market position it is first necessary to define the relevant market, since the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products").

58 Other reasons have been cited as well, such as institutional laziness and lethargy, and first mover advantages that established these methods before economics developed more appropriate methods. *See* Fingleton, *supra* note 3, at 3, 36-37

59 See, e.g., BISHOP & WALKER, *supra* note 3, at 181; Krattenmaker et al., *supra* note 2, at 260; An Economic Approach to Article 82, Report by the Economic Advisory Group of Competition Policy (EAGCP), at 14 (2005), available at http://www.europa.eu.int/comm/competition/publications/studies/eagcp_july_21_05.pdf.EAGCP; Adrian Majumdar, *Whither Dominance?*, 27 ECLR 161, 163 (2006).

60 *See* Fingleton, *supra* note 3, at 33-36 (criticizing that that focus on market concentration data can lead to type II errors, that is an erroneous determination that market power is absent where it actually exists); Salop, *supra* note 50, at 200 (2000).

61 Werden, *Assigning Market Shares*, *supra* note 47, at 104.

62 *See, e.g.,* Facey & Assaf, *supra* note 14, at 537-38 (stating that in the European Union market shares may in practice carry more weight and create a stronger presumption of dominance than in Canada, and noting that while in Canada technically lower shares might trigger presumptions of substantial market power, all contested abuse cases involved extremely high shares).

customer reaction to anticompetitive conduct, should be considered as well.[63] The Canadian Enforcement Guidelines, for example, express this approach by stating: "the Bureau has adopted the view that high market share is usually a necessary, but not sufficient, condition to establish market power."[64]

The idea that market shares should be the beginning of the analysis, and not the end of it, raises a question about the usefulness of market share-based presumptions. Clearly, as high market shares alone do not reliably identify cases of substantial market power, there is a significant risk that presumptions are "wrong" in the sense that they catch firms that do not have substantial market power. There also could be the risk that market share-based presumptions strongly influence any further analysis and that a decision maker, once satisfied that market share based presumptions have been triggered, analyzes remaining evidence selectively and only to seek confirmation for the initial result. Thus, there is a case against using of market share-based presumptions of substantial market power. In practice, it matters a great deal how presumptions are used and what they mean for the analysis of other evidence. If a competition authority or court continues a full inquiry into all other indications of market power even if it a market share exceeds statutory thresholds, the result of the analysis should correctly identify whether a firm has in fact substantial market power. If such an approach is applied, presumptions based on market shares become more like an alert system. They would indicate that a case requires further analysis, but would not influence the outcome of such inquiry. Such a principle appears to be expressed in the Canadian Enforcement Guidelines: The Guidelines explain that "a share of 35% or more will generally prompt further examination."

Moreover, in assessing the evidentiary value of market shares, account also should be taken of the process in which the relevant market was established and shares were assigned. Commentators have pointed out that the greater the uncertainty in defining the relevant antitrust markets, the less weight should be given to market share numbers as an indicator of market power, relative to other factors such as entry barriers.[65]

Last, the focus on establishing relevant markets and shares should not distract from the more important inquiry into a firm's conduct. Ultimately, the focus of the analysis should be on assessing the anticompetitive effects of a firm's conduct, rather than attempting to define a relevant market.[66]

3.1.2 Entry Barriers[67]

Entry barriers are arguably the single most important factor to assess whether a firm has substantial market power. Without the ability to exclude entrants (and in the absence of other circumstances that

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63 Several of these factors are discussed in the following sections.

64 Competition Bureau, Abuse of Dominance Guidelines, *supra* note 13, at 14; *see also* OFT, Market Power Guidelines, *supra* note 10, at ¶2.11.

65 Baker, *supra* note 53, at 3 (arguing that market definition may contribute little to antitrust analysis when market boundaries are difficult to draw, making the resulting market concentration statistics close to arbitrary). BISHOP & WALKER, *supra* note 3, at 181 (arguing that defining relevant market can be problematic in dominance cases and therefore it may not be possible to put too much weight on market shares).

66 BISHOP & WALKER, *supra* note 3, at 54.

67 While this text focuses on entry barriers, barriers to expansion/mobility affecting existing competitors must also be carefully analysed. The analysis will frequently be similar, although in some cases only one, but not both, will exist. For example, competitors might be able to expand their output even if entry barriers are high. *See, e.g.,* Fingleton, *supra* note 3, at 17; BISHOP & WALKER, *supra* note 3, at 60 (pointing out that barriers to expansion can be low, even if entry barriers are high).

prevent entry), a firm will not be able to maintain market power in the long run, hence its market power will not be durable. This principle is widely accepted by courts and competition authorities. For example, the Australian High Court held:

> *A large market share may well be evidence of market power ... but the ease with which competitors would be able to enter the market must also be considered. It is only when for some reason it is not rational or possible for new entrants to participate in the market that a firm can have market power ... There must be barriers to entry.*[68]

Courts elsewhere have found the same:

> *"If entry barriers to new firms are not significant, it may be difficult for even a monopoly company to control prices through some type of exclusive dealing arrangement because a new firm or firms can easily enter the market to challenge it."*[69]

The Canadian Guidelines state:

> *"...market share is in itself not sufficient to prove market power. Without barriers to entry, any attempt by a firm with high market shares to exercise market power is likely to be met with entry or expansion by existing firms such that the firm with the high market share loses enough customers to its rivals that it is not profitable to attempt to raise prices above competitive levels."*[70]

John Fingleton has taken this approach one step further and argued that as entry barriers are the fundamental source of market power, the procedure to identify market power should start with an assessment of entry barriers (and the existence of price competition), rather than focus on concentration analysis. He suggests that if no entry barriers were identified and price rivalry existed, one could conclude that market power was absent.[71] Fingleton realizes, however, that while most authors would agree that barriers to entry are the fundamental source of market power, the conceptual difficulty of defining a barrier to entry, and the resultant difficulty of measurement are perhaps the main obstacles to a practical approach to market power based primarily on barriers to entry.[72]

The OECD Competition Committee has recently addressed the issue of entry barriers in great detail.[73] Broadly speaking, it characterized entry barriers as market conditions and circumstances that will delay or prevent entry from curing the anticompetitive effects at issue in individual cases.[74] Many of the topics discussed during the roundtable are relevant in the context of the assessment of market power as well. This note will address only a few issues specifically related to the use of entry barriers as evidence.

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68 Boral v. ACCC, [2003] HCA 5, ¶292, quoting Queensland Wire Industries Pty Ltd. v. Broken Hill Pty Co Ltd (1989) 167 CLR 177.

69 Concord Boat v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000).

70 Canadian Competition Bureau, Abuse of Dominance Guidelines, *supra* note 13, at 15.

71 Fingleton, *supra* note 3, at 25. If the first test failed, a second step would require a more detailed analysis of price rivalry, barriers to mobility and demand elasticity.

72 *Id.*, at 15.

73 OECD, Barriers to Entry (2006); available at http://www.oecd.org/dataoecd/43/49/36344429.pdf.

74 OECD, Barriers to Entry, *supra* note 73, at 9; *see also* OFT, Market Power Guidelines, *supra* note 10, ¶5.3 (describing entry barriers are factors that allow a firm to profitably sustain supra-competitive prices in the long run without being more efficient than its potential rivals).

As mentioned above, identifying and quantifying entry barriers can be a challenging task. A meaningful assessment of entry barriers that can provide useful evidence in relation to market power (or the absence thereof) requires a detailed and fact-specific inquiry. The OFT Market Assessment Guidelines explain this point well. The Guidelines suggest that while it may be relatively easy to describe what an entry barrier is, the actual analysis can be rather complex: it may involve inquiries into sunk costs associated with commitment to entry, the relative ease of obtaining the necessary inputs and distribution outlets, the regulatory environment and the cost of operating at the minimum viable scale. This can involve difficult questions of measurement, and require a careful look at qualitative factual evidence as well. Claims that entry would be imminent would have to be assessed in the light of additional credible evidence such as cases of past entry that exerted effective competition. The time within which successful entry would occur also would have to be assessed, which would not necessarily be a straightforward task.[75]

Moreover, entry barriers will constitute meaningful evidence of market power only if the relevant market, or the relevant competitive constraints that can prevent the exercise of market power, have been correctly identified. *Mylan v. IBM* illustrates this point. In *Mylan*, the appeals court reversed the district court's decision that the defendant did not have substantial market power in the market for large scale mainframe computers. The appeals court found that entry that the district court had relied upon in finding that IBM did not have substantial market power would occur in segments and product lines that should not have been included in the relevant market. The district court, for example, had relied on the growth of leasing companies as evidence that entry in the relevant market was easy. The appeals court, however, held that not all activities of leasing companies belonged to the relevant market because not all of them imposed competitive constraints on IBM.[76] A similar issue was relevant in *Dentsply*. There, the lower court had found that despite its high market shares the defendant did not have substantial market power. The court reasoned that while Dentsply's exclusive dealing arrangements had significantly limited access to dealers/wholesalers, Dentsply's competitors were not prevented from selling directly to end customers.[77] The appeals court reversed. While it did not challenge the lower court's finding that competitors may have had access to end customers, it found that access to the dealer network was crucial to compete effectively and that Dentsply's ability to deny its competitors access to key dealers helped it to maintain monopoly power.[78]

There is therefore clearly the risk that without careful analysis, a decision maker might conclude too hastily that entry barriers are low.[79] However, there is also a risk that entry analysis becomes a formalistic exercise once high market shares have been determined, where standard categories of possible entry

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75 OFT Market Power Guidelines, ¶¶5.29-5.31; OECD, Barriers to Entry, *supra* note 73, at 39-43. There can be a link between the level of market share persistently held by a firm and evidentiary requirement concerning entry barriers. The Canadian Enforcement Guidelines make the point that the higher a firm's share, the higher the standard of proof to assess barriers to entry. The Guidelines refer to Canadian jurisprudence which held that where shares were found to be 80% or higher, extenuating circumstances would have to exist, for example concerning ease of entry, to overcome the prima facie determination that a firm had substantial market power. Competition Bureau, Abuse of Dominance Guidelines, *supra* note 13, at 16.

76 Allan-Mylan, Inc. v. International Business Machines Corp., 33 F.3d 194 (1994), *reversing* Allan-Mylan, Inc. v. International Business Machines Corp, 693 F.Supp. 262 (E.D.Pa. 1988).

77 United States v. Dentsply International, Inc., 277 F.Supp.2d 387, 451-52 (D.Del. 2003).

78 United States v. Dentsply International, Inc., 399 F.3d 181, 189-90 (3d Cir. 2005).

79 OECD, Barriers to Entry, *supra* note 73, at 43, quoting Jonathan Baker, *The Problem with* Baker *and* Syufy*: On the Role of Entry in Merger Analysis*, 65 Antitrust L. J. 353, 371 (1997).

barriers are checked off without sufficient factual inquiry.[80] The treatment of vertical integration as an entry barrier provides an example. Vertical integration of the incumbent could be an entry barrier, but it will not necessarily be the case that every time an incumbent firm is vertically integrated competitors face barriers to entry or expansion. Some judgments could be seen as reaching too quickly the conclusion that vertical integration significantly impedes a firm's competitors, without analysis of how vertical integration affects entry.[81]

Evidence that entry has occurred in the past and was viable, and has forced the dominant firm to reduce its price, can substantially facilitate the inquiry into entry barriers and market power, provided that the conditions under which entry occurred in the past continue to exist. Commentators have pointed out that "The only truly reliable evidence of low barriers is repeated past entry in circumstances similar to current conditions. Indeed, repeated entry during a period of competitive prices makes entry even more likely in response to future attempts at monopoly pricing."[82] This would suggest that unless conditions have changed, past entry should be sufficient to defeat the finding of dominance because it indicates a lack of power over price. However, in *Canada Pipe*, the Canadian Competition Tribunal appeared to take a different view, even though it acknowledged the significance of successful entry. The tribunal found that in certain parts of Canada, competitors of the defendant had been able to enter the market. Where entry had occurred, shares of the defendant had dropped by 10%, and entry was shown to have affected price. The Tribunal found that these events were a "powerful counter-argument" to the contention of the plaintiff's expert that entry barriers were substantial. Nevertheless, it ultimately found that the defendant had substantial market power.[83]

While entry barriers are a necessary condition for a firm to maintain substantial market power, evidence of entry barriers does not prove that a firm has substantial market power. There can be vigorous price competition in markets characterized by significant entry barriers. Vigorous competition or, more precisely, the expectation of vigorous competition post entry may deter new entrants.[84] Also, entry barriers might exist with respect to an aftermarket, but the firm's market power may be constrained by vigorous competition in the principal market.

Similarly, maintenance of high market shares over an extended period of time should not in itself be viewed as evidence of entry barriers. The firm could have successfully responded to competitive pressures

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80 *See, e.g.,* Fingleton, *supra* note 3, at 37 (arguing that entry analysis might be coloured by market share statistics).

81 In *United Brands*, for example, United Brands (unlike some of its competitors) controlled plantations, transport facilities, and distribution systems and the Court considered vertical integration as a significant factor in determining that United Brands was a dominant firm. In the Court's view, vertical integration provided the firm with "commercial stability and well being" which its competitors did not possess. Case 27/76, *United Brands v. Commission*, 1978 ECR 207, ¶¶69-96. There was not much inquiry, however, whether non-integrated rivals had sufficient access to inputs on an individual basis in which case United Brands' vertical integration should not have been viewed as an entry barrier. The Court found, for example, that there was production surplus. Presumably this surplus was available to competitors as well. Along the same lines, if there was excess capacity of transport facilities, rivals would have been able to lease the necessary capacity, and even could have had a cost advantage if they were able to lease transport capacity at lower market rates, rather than having to maintain their own fleet at higher costs.

82 AREEDA & HOVENKAMP, *supra* note 3, ¶ 420b.

83 Canada (Commissioner of Competition) v. Canada Pipe, 2005 Comp. Trib. 3 ¶¶141-161. The Tribunal relied on market share, product range and national presence, limited presence of competitors, and limited growth potential were "on balance" sufficient to prove substantial market power.

84 BISHOP & WALKER, *supra* note 3, at 60.

by improving its products and/or lowering its price. For example, in *Hoffmann-La Roche*, the European Court of Justice held that: "stable market shares may just as well result from effective competitive behaviour as from a position which ensures that Roche can behave independently of competitors."[85] Thus, even if high market shares maintained over an extended period of time could be suggestive of substantial market power, evidence that the firm was acting competitively should be considered as well, if it exists.[86]

Where entry barriers are based on the incumbent's conduct (for example, bundled rebates, product differentiation, tying and exclusive dealing), the assessment of market power/entry barriers and of anticompetitive effects can be based on the same facts: the same behaviour that can be used as evidence for the existence of entry barriers can be used as evidence of harm to existing or potential competition.[87] This issue will be discussed in a later section.[88]

3.1.3 Buyer Power

Buyer power is another factor that can affect the assessment whether a firm, even with high market shares, has substantial market power.[89] An economically strong customer could be able to deny a firm the ability to act anticompetitively by exercising substantial market power. As the OFT Guidelines point out, however, it is not necessarily the economic strength of the buyer that counts, but that the buyer has an effective alternative choice. That choice can exist because of the ability to switch to another supplier, to vertically integrate, or to "sponsor" entry of a new supplier.[90]

That the buyer's size alone does not matter, and that evidence of the buyer's choice is the essential part of the inquiry, is illustrated by the Canadian Competition Tribunal's decision in *NutraSweet*. In that case, the Tribunal had already found that NutraSweet's market share was above 90%, and that entry barriers were significant because of intellectual property rights and other factors. NutraSweet attempted to show that it nevertheless did not have substantial market power because its two main customers were Coca-Cola and PepsiCo and it argued that those two companies were powerful enough to overcome any attempt by NutraSweet to exercise market power. The Tribunal rejected these arguments and found that it was unlikely that Coca-Cola or PepsiCo would manufacture aspartame themselves or would be able to switch to an alternative supplier.[91]

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85 Case 85/76, Hoffman-La Roche v. Commission, 1979 ECR 461.

86 Commentators noted an apparently different approach by the Canadian Competition Tribunal in *Canada Pipe*. The Tribunal found that the defendant has held significant market shares in the 80-90% range over a period of time, and held that even though entry occurred and had brought prices down, "entry is limited as shown by [Canada Pipe] maintaining a considerable market share." *See* John Bodrug & Anita Banicevic, *Dominance and Loyalty Programs in Canada, the United States, and the European Union*, 10 Antitrust (Summer 2005) 12, 13-14.

87 OFT, Market Power Guidelines, ¶5.23. Of course, as the previous OECD paper on entry barriers has pointed out, the fact that certain conduct can be considered to create an entry barrier should not automatically mean that it should be condemned as an unlawful practice because it might have a pro-competitive rationale.

88 *See infra*, at 27.

89 Performance and firm conduct focus more directly on whether effects of the exercise of substantial market power can be observed. They will be discussed in the following chapter on direct evidence.

90 OFT, Market Power Guidelines ¶ 6.2. See also DG Competition, Article 82 Discussion Paper, *supra* note 23, at 15 (buyer power relevant factor to counter finding of dominance only if buyers' reaction can stimulate entry or increase output by existing suppliers to defeat price increase).

91 Canada (Director of Investigation and Research) v. NutraSweet Co., [1990] 32 C.P.R. (3d) 1 (Comp. Trib).

The role of buyer power in the assessment of substantial market power may be particularly important where the government or government agencies act as principal purchasers and also regulate more or less extensively the supplier's industry.[92] An example for this situation is the pharmaceuticals sector, in particular in Europe. How much evidence and what type of evidence would be required to establish that the government's buyer power sufficiently limits a pharmaceutical company's market power is not always clear, which may make the outcome of these cases to some extent unpredictable.[93] These cases may be good examples for a point made later in the paper that it may sometimes be preferable to focus in the analysis more directly on the competitive effects of certain conduct, rather than trying first to determine whether the firms have substantial market power.[94]

In a series of decisions involving complaints by wholesalers that pharmaceutical companies withheld supplies of certain products from them, the Spanish Competition Tribunal decided in favour of the defendants on the ground that the pharmaceutical companies were not dominant, even if they held significant market shares. The Tribunal's reasoning focused in particular on the role of the government as purchaser as well as the regulatory framework which limited the pharmaceutical companies' ability to determine their conduct on the market in particular in terms of price. Supply obligations as well as limits on sales channels and advertising were also considered relevant facts for a determination that the companies did not have substantial market power.[95]

But evidence of government buyer power and pricing pressures will not always be sufficient to counter other evidence that indicates that a firm had substantial market power. For example, in *Napp*, the UK Competition Appeal Tribunal (CAT) confirmed a decision by the OFT that Napp held a dominant position even though its pricing freedom was to some degree restricted by the national health care system. The CAT found that the fact that the price for the defendant's product initially had been confirmed by government, and prices has since then been reduced under a government scheme were not sufficient to negate the finding of dominance. It was satisfied that existing pricing regulations did "not have a direct effect on Napp's freedom to conduct itself as it wishes in the market for oral sustained release morphine," and in particular did not prevent Napp from adopting a pricing policy that was designed to exclude competitors.[96] This line of reasoning appears to take a narrower view as to when buyer power can be relevant evidence than the view apparently adopted by the Spanish Competition Tribunal. The CAT seemed to consider buyer power as relevant evidence in the assessment of dominance only if it directly constrained the allegedly anticompetitive conduct of the defendant. This approach appears to be more in line with the argument that the assessment of substantial market power should not be separated from the examination of the allegedly anticompetitive conduct of the defendant.

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92 Regulation can be a separate factor in assessing whether a firm has substantial market power. It will not be addressed in this paper.

93 In fact, the decision maker's assessment of whether it considers a firm to be dominant might well be influenced by its view of the conduct under investigation. The decision on dominance may be the only way to avoid the finding of a competition law violation if the decision maker feels that the conduct would have to be considered anticompetitive once a firm is found to be dominant.

94 *See infra*, at 30.

95 *See, e.g., Cofares/Organon*, Resolution of the TDC File R.547/02 (September 22, 2003); *Laboratoris Farmaceuticos,* Resolution of the TDC (File R.488/01 (December 5, 2001). Reported in EFPIA, Article 82 EC: Can It Be Applied to Control Sales By Pharmaceutical Manufacturers to Wholesalers? (2004).

96 Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading, [2001] CAT 1, ¶¶164-168. *See also* Genzyme v. Office of Fair Trading, [2004] CAT4, ¶¶241-289 (tribunal concluding after detailed examination of regulatory framework and Genzyme's conduct that the health care system's buyer power was not sufficient to negate finding that Genzyme held a dominant position).

ACCC v. Baxter is another illustration that courts might be reluctant to accept power buyer arguments against the finding of substantial market power once they have determined that market shares are high, entry barriers exist, and they are presented with evidence that the defendant's conduct limited entry by competitors. In *Baxter*, however, the defendant appeared to come very close to persuading the court that despite its very high market share of close to 100% and not insignificant entry barriers, it did not have substantial market power as supplier of sterile fluids in Australia because its customers were the state governments. The court went through a number of factors: It found that Baxter had considerable room "to behave as a sole supplier in the market:" it recognized that the governments were something like an "essential outlet" for Baxter and therefore would constrain Baxter's conduct to some extent because it did not want to risk losing their business. But the court also found that Baxter was aware that the governments were under certain constraints because acting against Baxter would come also at a cost to them. Several factors appeared to weigh in Baxter's favour, including that states used tender procedures, and that at least some of the purchasing officials felt that they were experienced enough buyers to counter Baxter's position. Baxter's margins did not appear to be large, although the court hesitated to accept evidence on this topic. Ultimately, the court, although "not without hesitation," agreed with the ACCC that Baxter had considerable market power, although it is not really clear from the judgment which of the factors the court considered to be decisive.[97]

3.1.4 Other Factors

Several other factors could be considered in determining whether or not a firm has substantial market power. One defence related to market characteristics that defendants have raised in the relevant cases is that they are acting in a high tech market where dynamic developments preclude the finding that a firm even with high market shares can exercise market power, or at least different standards should be applied to assess whether a firm has market power. Courts generally have not accepted such broad assertions. As commentators have pointed out, in a market characterized by rapid technological innovation, the pro-competitive effects of technological developments and network effects may offset each other and may be difficult to isolate.[98] Thus, which effects prevail in a specific case, and how they affect the existence of substantial market power, should be analysed in the otherwise applicable categories concerning entry barriers and competitive performance of markets.[99]

3.2 Direct Evidence of Substantial Market Power

Ways of identifying market power more directly have been considered as well. These methods identify to what extent a firm's sales are sensitive to changes in rivals sales and customer reactions, as well determining whether a firm's "performance" is indicative of market power. As discussed at the end of this section, a firm's conduct and the competitive effects of that conduct can also provide evidence on whether a firm has substantial market power or not.

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97 ACCC v. Baxter Healthcare Pty Ltd, [2005] FCA 581, ¶¶571-80.

98 *See, e.g.,* Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture on Network Industries*, U. Chi. L. rev. 1, 6-7 (2001). They point out that high profit margins can represent benign and legitimate returns on investment, but can also indicate substantial market power based on network effects. They conclude that in network industries characterized by rapid technological innovation, both forces may be operating and can be difficult to isolate.

99 *See, e.g.*, United States v. Microsoft, 253 F.3d 34, 49-50, 55-57 (DC Cir. 2001) (court concluding that categorical rules would be difficult to formulate absent a particularized analysis of a given market); Alan-Myland, Inc. v. IBM, 33 F.3d 194, 210 (1994) (finding that rapid technological development and falling prices are not inconsistent with the finding of market power); Commission Decision *Microsoft,* ¶¶ 465-70; OFT Market Power Guidelines, *supra* note 10, ¶¶5.33-5.36 (discussing growth of market and innovation rate in the context of entry barriers).

3.2.1 Estimating Demand Elasticities

A number of approaches using econometric methodologies have been developed to directly measure a firm's market power.[100] One such method is to estimate a firm's demand elasticity. The idea behind this method is to assess the elasticity of demand faced by a firm - and thus the firm's ability to raise price - after accounting for demand responses by customers and supply responses by competitors to an attempted price increase. How much a particular firm's sales will change in response to a change in market price depends, *inter alia*, on the responsiveness of its competitors' sales to that price change. This, in turn, will depend on the costs facing the other firms. A firm will face a higher demand elasticity if competitors can react "effectively" by increasing their output.[101] A lower demand elasticity, on the other hand, would suggest that the firm has greater market power.[102]

Commentators have pointed out that if the data are available, estimating market power based on demand elasticities can provide more precise and reliable evidence to gauge market power than using market definition and market shares.[103] Measuring demand elasticities, however, puts a premium on gathering large amounts of data which may limit its usefulness in many cases. Moreover, even if the method can be applied and a firm's demand elasticities can be estimated, the accurate interpretation of the result might be less than clear-cut. For example, the result of an empirical study may show that the firm's demand elasticity is relatively low and therefore that the firm has some degree of market power, but it would still be necessary to quantify whether this degree of market power is sufficient to be considered "substantial market power" under the applicable competition laws.[104] Experts could disagree not only about the interpretation of the results of empirical studies, but also about the choice of econometric methodology.[105]

Some of the difficulties in using demand elasticities as evidence of market power in courts are illustrated in *U.S. v. Kodak*.[106] The peculiar procedural background in this case meant that Kodak was

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100 *See, e.g.,* Jonathan B. Baker & Timothy F. Bresnahan, *Empirical Methods of Identifying and Measuring Market Power*, 61 Antitrust L. J. 3 (1992); Werden, *Demand Elasticities*, *supra* note 3, at 380-384; AREEDA & HOVENKAMP, *supra* note 3, ¶525.

101 The second factor is the reaction of customers.

102 Firm-specific price shocks can produce relevant information about demand elasticities. Under this approach, it would be necessary to identify instances where only the defendant's cost increased and it therefore had an incentive to raise its price, but the cost of other firms in the market were not affected. If in this situation the particular firm would be able to raise price, its elasticity of residual demand can be measured. Baker & Bresnahan, *supra* note 100, at 6-9; AREEDA & HOVENKAMP, *supra* note 3, ¶525e.

103 AREEDA & HOVENKAMP, *supra* note 3, ¶525a.

104 Moreover, Werden points out that measuring demand elasticities would show that the firm can price in excess of its *short term* marginal costs, but says nothing about pricing in relation to *long-run* marginal costs which would be the more relevant measure to assess whether a firm has substantial market power. Werden, *Demand Elasticities*, *supra* note 3, at 382.

105 A point made by Baker & Bresnahan, *supra* note 100*,* at 15-16.

106 United States v. Eastman Kodak Company, 853 F.Supp. 1454 (D Del. 1994), *aff'd*, 63 F.3d 95 (2d Cir. 1995). It should be noted that the case was supposed to focus on whether Kodak had significant market power as required under Section 1 Sherman Act, and not "substantial market power" as would be required under Section 2 Sherman Act. Nevertheless, the case is a good illustration of the issues that can arise when evidence based on direct measurements of market power is introduced in court.

required to prove that it did not have market power in the market for colour amateur film.[107] A major point of disagreement among the parties was the geographic dimension of the relevant market. Once the court agreed with Kodak's position that the market colour amateur film was worldwide, Kodak's share dropped below 40%, which the court found insufficient for a finding that Kodak had market power in the absence of other factors. But the parties also disagreed about whether direct evidence showed that Kodak had market power in the United States.[108] Kodak's expert had introduced evidence that if Kodak were to raise price by 5%, it would lose 10% of sales, *i.e.*, that Kodak's own price elasticity was 2. The parties interpreted these data very differently. The government contended that this figure showed that Kodak was exercising market power in the United States; it argued that as Kodak was a supplier of a differentiated product, a price elasticity of 2 suggested that Kodak was charging a price twice its marginal cost.[109] The appeals court rejected the government's arguments on two grounds: First, it observed that the government's argument that Kodak's own elasticity of 2 indicated a price twice its marginal costs critically rested on the assumption that Kodak was non-cooperatively pricing a differentiated product.[110] The court found, however, that the facts established by the lower court did not support the assumption that Kodak was a seller of a differentiated product. Moreover, the court concluded that even if the government's argument was accepted, it would not necessarily follow that Kodak was earning monopolistic profits as the data did not take Kodak's substantial fixed costs into account.[111]

The rejection of the government's argument in *Kodak* illustrates that the interpretation of direct evidence based on demand elasticities can critically depend on assumptions over which experts may disagree.[112] Second, the decision suggests that direct evidence that a firm has market power should look to the long-run and compare price levels with long-run marginal cost to show that a firm has the requisite level of "substantial market power."[113] Werden, while criticizing the court's handling of the evidence, suggests that direct evidence related to demand elasticities could in the future be more frequently used in single firm conduct cases. [114] However, the limited familiarity of decision makers in competition cases with the necessary methodology, the large amount of data it requires, and difficulties in accurately

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107 Kodak had initiated the case to terminate consent decrees which had limited certain activities related to film and photo finishing due to alleged antitrust violations. A key question to decide the case was whether Kodak still had market power in the relevant market which the court considered as the market for amateur colour negative film.

108 On appeal, the question whether Kodak had market power in the United States became part of the assessment whether the lower court had correctly decided that the relevant market was worldwide or was limited to the United States.

109 This argument is based on the fact that the Lerner-index (which reflects the price margin earned above the marginal cost) is equal to the reciprocal of a firm's own price elasticity of demand.

$$\frac{P-MC}{P}=-\frac{1}{\varepsilon}$$

The relationship applies only if the firm is maximising its short term profits and sets its price individually, without collusion. *See* Werden, *Demand Elasticities*, *supra* note 3, at 381.

110 *See supra*, note 109.

111 United States v. Eastman Kodak Company, 63 F.3d 95, 109 (2d Cir. 1995).

112 Of course, this is not an argument against the use of this method. Experts can also disagree about indirect evidence to establish substantial market power, such as the definition of the relevant market.

113 *See also* Werden, *Demand Elasticities*, *supra* note 3, at 381-82: Werden makes the point that measuring firm's demand elasticity provides no direct way to gauge the degree of *monopoly power* since it says nothing about long-run marginal cost or the durability of market power.

114 *Id.,* at 384.

interpreting the results, might explain why courts and competition authorities appear to have been rather reluctant to rely on this type of evidence to a greater extent.

3.2.2 Performance - Profitability

Another approach which might be useful in certain circumstances is to determine whether a firm's performance (profitability) is consistent with the finding that the firm has substantial market power. The inquiry is focused on whether a firm's persistent profits can be considered excessive, compared to some measurement of the competitive norm. Looking at economic profits to determine market power would make intuitive sense: in a model of perfect competition, firms would earn zero economic profits, whereas in a model of monopoly, the firm would earn very large profits. Thus, determining that a firm's profits are closer to the upper end in this "competition spectrum" should be a proxy for the firm's market power.[115] It should therefore not come as a surprise that competition authorities and courts have looked to profitability as evidence of market power. For example, the OFT's Market Power Guidelines state: "…it might, for example, be reasonable to infer that an undertaking possesses market power from evidence that it has… persistently earned an excessive rate of profit."[116] The Canadian Competition Tribunal has considered profits as evidence for substantial market power.[117] The Commission's decision in *Microsoft* also included a reference to Microsoft's profitability to support the finding of dominance.[118]

The economic and legal literature, however, while generally supportive of the logic behind the use of profitability estimates, has in general been rather sceptical about the use of profitability data as evidence of substantial market power.[119] Judge Posner, for example, declared:

> *"It is always treacherous to try to infer monopoly power from a high rate of return. ... Not only do measured rates of return reflect accounting conventions more than they do real profits (or losses), but there is not even a good economic theory that associates monopoly power with a high rate of return."*[120]

Judge Posner's statement identifies two frequently expressed concerns about using profitability data as evidence of market power: the difficulty of obtaining valid economic profitability data; and the possibility

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115 BISHOP & WALKER, *supra* note 3, at 74.

116 OFT Market Power Guidelines, ¶6.5. The Guidelines, however acknowledge that there may be reasons other than market power why a firm can earn excessive profits.

117 Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc, (1997), 73 C.P.R. (3d) 1, Section VVI.B.I. (finding that defendant's profits were persuasive evidence of market power and rejecting defendant's arguments that profits reflected only accounting profits and/or reflect a return on intangible assets).

118 Commission Decision Microsoft, ¶464 (finding that Microsoft's 81% profit margin for Windows was "high by any measure."

119 The oft-cited standard contributions criticizing the use of profitability data are George J. Benston, *Accounting Numbers and Economic Values*, 27 Antitrust Bull. 161 (1982); Franklin M. Fisher & John J McGowan, *On the Misuse of Accounting Rates of Return to Infer Monopoly Profits*, 73 Amer. Econ. Rev. 82 (1983). *See also* BISHOP & WALKER, *supra* note 3, at 74-79 (concluding that measuring profitability to infer market power can "become virtually meaningless"); *White, supra* note 4, at 8-9. Some have argued, however, that the ability to obtain monopoly profits (earnings) would be a better way to identify substantial market power than the ability to charge monopoly prices. *See* William J. Baumol & Daniel G. Swanson, *The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power*, 70 Antitrust L. J. 661, 682 (2003).

120 Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406 (7th Cir. 1995).

that supra-competitive profits may be explained by factors other than market power. Given that a firm's profits and rates of return typically are based on accounting data, rather than on profits in an economic sense, even commentators who support the idea of using profitability data to infer market power acknowledge the practical difficulties in methods of economic profit estimation.[121] Others have pointed out that excess economic profits would have to be measured in the long run which is a perspective accounting data do not provide. Another problem frequently acknowledged in the literature is that allocating costs and assessing profitability can be especially difficult for multi-product firms.[122]

In addition, excess profits could be rewards for taking risks and rewards to a competitive advantage such as superior efficiency, and therefore have perfectly legitimate reasons. It has thus been proposed that excess profits should be considered as evidence of market power only if they are not attributable to superior performance;[123] put positively, persistent excess profits could be relevant evidence if they are the result of a firm's ability to reduce output.

It is also not clear whether the lack of excessive profitability should be treated as relevant evidence for the absence of market power. Some have argued that profits persistently below competitive levels should indicate that a firm does not have significant market power.[124] But others have pointed out that the lack of excessive profitability is not necessarily an indication that a firm does not have substantial market power as it may spend profits to insulate itself from competition, or undertake unprofitable expenditures.[125]

Despite these problems, it appears that measuring profitability might in the right circumstances be a useful method to support the finding of dominance or suggest the absence of market power,[126] if relevant and reliable data are available and subject to a careful examination and interpretation. High rates of profitability would not provide decisive proof of substantial market power, but could be relevant if they have been persistent and are consistent with other evidence pointing in the same direction. In particular, as suggested by the OFT Market Power Guidelines, profitability studies could be useful where a meaningful comparison between markets can be made.[127] The usefulness of profitability rates also could depend on the industry under examination. As some have pointed out, it may be more relevant evidence of market power

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121 For example, Baumol and Swanson write: "There can be little doubt about the general absence of defensible data on the economic profit rate; that is, the excess of revenue over cost inclusive of all pertinent opportunity costs and calculated as a percentage return on the total investment (real assets) of the firm, after economic depreciation." Baumol & Swanson, *supra* note 119, at 684. For a more detailed discussion on the use of accounting data in profitability assessment, *see* OFT, Assessing profitability in competition policy analysis, Economic Discussion Paper 6 (2003) 12-13, and chapters 4-6.

122 BISHOP & WALKER, *supra* note 3, at 74-79 (identifying difficulties in measuring economic profitability and emphasizing need to assess excess profitability in the long run); AREEDA & HOVENKAMP, *supra* note 3, ¶515-520c (same).

123 Baumol & Swanson, *supra* note 119, at 683.

124 *Id*.

125 Gloria J. Hurdle & Henry B. McFarland, *Criteria for Identifying Market Power: A Comment on Baumol and Swanson*, 70 Antitrust L. J. 687, 696 (2003); Nelson & White, *supra* note 56, at 12.

126 *See, e.g.,* OFT, Assessing profitability, *supra* note 121, at 6; Werden, *Market Delineation*, *supra* note 51, at 216, fn 5.

127 OFT Market Power Guidelines, ¶6.6: "However, persistent significantly high returns, *relative to those which would prevail in a competitive market of similar risk and innovation*, may suggest that market power does exist. This would be especially so if those high returns did not stimulate new entry or innovation." (emphasis added).

in a mature, capital intensive commodity industry in which brand name and advertising are not important.[128]

3.2.3 Performance - Pricing

Using excessive prices as indicator of market power suffers from some of the same problems as profitability measurements. It will typically be difficult to determine a benchmark competitive price level against which the allegedly competitive prices could be measured. One commentator has noted, however, that in some cases it might be possible to find a reasonable benchmark by way of cross-sectional comparison, i.e., when the same product is sold in separate markets and one of the markets appears to be structurally competitive while the other is not. In this situation it might be possible to compare a competitive price with the price charged by a firm in a market where market characteristics suggest that a firm has substantial market power. Such cross-sectional comparison might produce useful evidence of market power where relevant markets tend to be local, such as, for example, retail markets.[129] Simply comparing prices that two firms charge, or that the same firm charges in separate markets, however, will not produce reliable evidence of substantial market power. It will not always be obvious whether higher prices in one market can be attributed to the exercise of market power by a firm, or whether they might be caused by other factors as well such as higher costs.

3.2.4 Conduct & Anticompetitive Effects

In certain cases, the conduct of a firm and its competitive effects may also be used as evidence that a firm has substantial market power.[130] Such evidence could be used together with other types of evidence to establish substantial market power. But in particular some U.S. courts also have recognized that anticompetitive effects could be sufficient evidence to establish that a firm has substantial market power, and that it was not necessary to produce, in addition, indirect evidence based on relevant markets and market shares. Taking this approach one step further, some have argued that the focus in single firm conduct cases should be only on the analyses of conduct and competitive effects; if substantial anticompetitive effects can be shown, an initial, separate inquiry into whether a firm has substantial market power should not be required.

A good illustration for evidence of substantial market power analysis that was based on the defendant's conduct and the effects of that conduct can be found in *Re/Max v. Realty One*,[131] a case concerning allegedly anticompetitive practices in the real estate agent business. The plaintiff alleged that the defendants had violated Section 2 by engaging in a so-called adverse split policy concerning real estate brokerage fees. While normally real estate brokerage fees were divided equally between the brokers representing the buyer and seller in a real estate transaction, the defendants had implemented a policy whereby its agents would receive between 70 and 75% of the brokerage fee in every deal in which the

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128 BISHOP & WALKER, *supra* note 3, at 79.

129 White, *supra* note 4, at 8.

130 Strictly speaking, conduct and effects of conduct are indirect evidence to establish that a firm has substantial market power. However, the term direct evidence is used because the focus of the inquiry is directly on what antitrust law is most concerned about, i.e., the effects of conduct on consumer welfare.

131 Re/Max International Inc v. Realty One, Inc., 173 F.3d 995 (1999). It is worth noting that *Re/Max*, as other, similar U.S. cases, was decided upon appeal from a dismissal of the case by the trial court before a complete factual record had been made. In those circumstances, courts do not necessarily fully evaluate whether the proffered direct evidence would have been sufficient to establish monopoly power, but only whether there is sufficient evidence to permit that question to be submitted to the fact finder (judge or jury).

plaintiff's agents were involved on the other side. Defendants admitted that the policy was designed to deter defections of their real estate agents to the plaintiff; in addition, there was some evidence in the record that the policy had been successful and had limited competition. The appeal court was satisfied that evidence that tended to show the defendants' ability to exclude competition could be sufficient to establish that the defendant had substantial market power, even where the relevant antitrust market had not been defined. The court considered as relevant evidence that sales commissions were higher in the area in which the defendants had implemented their policy and that the defendants has conceded that they were able to charge higher rates because of their market position. The court also reasoned that the defendants had been able to impose their adverse commission splits policy which would have been impossible without substantial market power.[132]

Several U.S. courts have confirmed in principle that where direct evidence is available to establish monopoly power it would not be necessary to produce indirect evidence to the same effect. But there appear to be relatively few cases where only evidence related to the defendant's conduct was available to establish market power. In most cases one should expect that indirect evidence based on relevant markets and market shares is available as well. In these cases, the relevant question should be whether indirect evidence and evidence related to the defendant's conduct pointed in the same direction. For example, in *Microsoft*, the appeals court reviewed whether indirect evidence suggested that Microsoft had substantial market power, and whether Microsoft's conduct was consistent with the behaviour of a firm that had substantial market power. The court was satisfied that the indirect evidence in the case – which was based on extremely high market shares and high entry barriers – alone would have been sufficient to establish Microsoft's monopoly power.[133] But the court also confirmed that Microsoft's conduct could be sufficient to show the existence of monopoly power. In particular, the court rejected Microsoft's argument that its innovation was inconsistent with the possession of monopoly power.[134]

3.2.5 Inferences of Market Power Should Not be Drawn from Conduct Alone

Where conduct is used as evidence of substantial market power, it is necessary to evaluate this evidence as part of a broader story about competitive harm. As one commentator explained: "In general, any conduct that could be exclusionary has a pro-competitive rationale in that it might also be practiced by a competitive firm. For this reason**,** it is difficult to infer anything from conduct alone."[135] Conduct alone should therefore in principle not be considered evidence for market power, without looking at the circumstances in which the conduct occurs.

To illustrate this point, consider a firm's ability to price discriminate, a conduct that has frequently been considered as evidence of market power.[136] Many commentators have emphasized that while price

132 *Id.,* at 1018.

133 United States v. Microsoft, 253 F.3d 34, 56-58 (D.C. Cir 2001). The court rejected Microsoft's argument that in "uniquely dynamic" industries only direct evidence should be considered to establish monopoly power.

134 United States v. Microsoft Corporation, 253 F.3d 34, 51-58 (DC Cir. 2001).

135 Fingleton, *supra* note 3, at 10 (suggesting that an exception might exist where conduct clearly reveals productive inefficiency).

136 *See, e.g.,* U.S. Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 617 (1977) (Fortner II) (suggesting that price discrimination would imply the existence of power that a free market would not tolerate). For an overview of U.S. jurisprudence concerning the use of price discrimination as evidence of monopoly power *see, e.g.*, James C. Cooper et al., *Does Price Discrimination Intensify Competition? Implications for Antitrust*, 72 Antitrust L. J. 327, 354-356 (2005). For EU competition law, *see, e.g.*, Case 322/81, Michelin v. Commission, 1987 ECR 207 (upholding Commission decision which had relied on price discrimination as indicator of dominance).

discrimination shows that a firm has economic market power, it does not inevitably imply the kind of market power antitrust laws should be concerned about.[137] In other words, "price discrimination is perfectly consistent with competition, just not with perfect competition."[138] Thus, the fact that a firm engages in price discrimination in itself does not support a presumption that it has such degree of market power as is relevant under single firm conduct provisions.[139]

Some authors have even argued that because price discrimination is ubiquitous, it cannot be an indication of substantial market power.[140] Others, however, have opined that persistent and systematic price discrimination could, depending on the circumstances, be part of a broader range of evidence that a firm has exercised market power and was engaged in anticompetitive conduct. They consider, for example, price discrimination in markets characterized by undifferentiated commodity products could imply the existence of market power which antitrust laws should be concerned about.[141] But whether or not these circumstances exist must be determined as part of the fuller inquiry into the facts, and cannot be generally assumed.[142] Thus, price discrimination could not in itself prove substantial market power; but it might be more useful evidence if price discrimination occurs in circumstances in which it could be an indicator of market power, and this finding is consistent with other evidence suggesting the existence of such market power.

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137 Price discrimination is possible when firms face a downward sloping demand curve (and other conditions are met, such as the absence of arbitrage among groups of customers). As discussed earlier, almost all firms face such demand curves and therefore have some market power. *See supra*, at 3. *See also* Hurdle & McFarland, *supra* note 119, at 689-90 (emphasizing that the term "market power" can have different meanings).

138 Cooper et al., *supra* note 136, at 357.

139 *See, e.g.,* Margaret A. Ward (2003), *Symposium on Competitive Price Discrimination: Editor's Note*, 70 *Antitrust L.J.* 593-94 (stating that "price discrimination may, in fact, be competitive in industries with scale economies or significant fixed or sunk costs and where entry is easy. In these industries, firms with downward-sloping demand curves might not charge prices that are always equal to marginal costs, but these firms may nonetheless generate only competitive profits.")

140 Benjamin Klein & John Shepard Wiley Jr., *Competitive Price Discrimination as an Antitrust Justification for Intellectual Property Refusals to Deal*, 70 Antitrust L. J. 599, 621-29 (2003); Cooper et al., *supra* note 136, at 365 (2005).

141 AREEDA & HOVENKAMP, *supra* note 3, ¶522 (stating that "Proving price discrimination in selling or leasing identical (or nearly identical) products can usefully show the existence and degree of market power if cost differences (or their absence) are readily determinable."); Klein & Wiley, *supra* note 140, at 657.

142 What applies to price discrimination should equally apply to other restraints such a tying if they are used to implement price discrimination strategies. This casts doubts on statements that considered, without further qualification, tying arrangements as conduct suggesting dominance:

"According to the Commission, the examples of Hilti' s behaviour in the market which it has taken as evidence of a dominant position *correspond to behaviour which is normally observed only in a dominant undertaking*. The Commission admits that a non-dominant undertaking can behave in that way, but maintains that in practice it is most unlikely to do so because the existence of effective competition will normally ensure that the adverse consequences of such behaviour outweigh any benefits. The "tying" of sales, for example, is usually a practice which brings no gains for a non-dominant supplier. Such behaviour on Hilti's part is therefore supporting evidence of the power it derives from its status as de facto sole supplier of Hilti-compatible cartridge strips." Case T-30/89, Hilti v. Commission, 1991 ECR II-667,¶ [87] (emphasis added). Importantly, the court did not solely rely on conduct, but also – and primarily – relied on a structural analysis to determine whether the Commission had correctly determined that a firm held a dominant position.

3.2.6 Conduct/Effects Can be Inconsistent with Substantial Market Power

Conduct can also constitute evidence in the defendant's favour if it suggests that a firm does *not* have market power. A court might dismiss a case on the ground that the defendants conduct and/or the competitive process in the market are inconsistent with a finding that the defendant had substantial market power. Such evidence could include, for example, bidding wars for customers where smaller competitors were successfully winning new customers or where the alleged monopolist/dominant firm was forced to lower its prices.[143]

The Australian High Court's *Boral* decision is a good illustration for this approach. When examining whether the prohibition in Section 46 TPA applied to Boral, the High Court considered whether Boral's conduct was consistent with that of a firm holding substantial market power. The majority found that it was not:[144]

> *"In the present case, Heerey J, consistently with the requirements of s 46(3), approached the question whether BBM had a substantial degree of power in the CMP market, by examining the actual conduct of BBM, case by case, over the whole of the relevant period (and beyond), in respect of each of the major contracts on which it bid, in the light of the evidence that those major contracts represented the business to which it attached most importance, and on the basis that what went on in relation to those contracts was the best evidence of the state of the market and the best indication of the extent of BBM's power. That was the correct approach. As Heerey J held, a conclusion that BBM had a substantial degree of power in the market would be inconsistent with the detailed evidence as to exactly how BBM, other suppliers, and their customers, behaved.*
>
> *The evidence of the conduct of suppliers and customers showed that the market for CMP was intensely competitive. This was partly due to the existence of the wider market; a factor the Full Court appears to have left out of account after identifying the narrower market. It was also partly due to the related matter of the aggressive behaviour of those on the demand side of the CMP market. BBM's market share was the same at the end of the period of the pricing behaviour complained of as it was at the beginning. Two firms left the market over the period; a successful new firm entered the market. BBM contemplated leaving the market itself; but decided to stay in and compete aggressively. Its decision to upgrade its Deer Park plant was found to be rational, and explicable by reference to a desire to become more efficient. BBM had no expectation that, when the price war ended, it would be faced with anything other than a competitive market."*

3.2.7 Can Evidence of Anticompetitive Effects Eliminate the Need for a Separate Inquiry into Substantial Market Power?

Several commentators have questioned whether the analysis in single firm conduct cases should begin with an initial, separate inquiry whether a firm has substantial market power and have argued that instead the more immediate focus should be on whether certain conduct by a firm had anticompetitive effects. In the approach they propose, an assessment of whether a firm has substantial market power would not disappear, but it would be subsumed in the broader competitive effect analysis.

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143 *See, e.g.,* PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 108 (2d Cir. 2002) (finding that price wars in which PepsiCo won new accounts or forced Coca-Cola to lower prices for customers it was able to maintain was inconsistent with allegation that Coca-Coal had substantial market power).

144 Boral v. ACCC, [2003] HCA 5.

Stephen Salop, for example, has argued that a focus on whether the firm's conduct has anti-competitive effects would be appropriate because competitive effect is the true core of antitrust. He points out that market power analysis can play a role in the evaluation of effects, but it should not be divorced from the assessment of effects. [145] Salop emphasizes that separate market definition and assessment of market power, prior to the assessment of the competitive effects of conduct, can lead to a number of errors which in many cases would let a defendant off the hook even though its conduct was anti-competitive. Salop concludes: "If there is direct evidence of anticompetitive effect, then a separate test of market power, let alone a *threshold* test of market power, is redundant. In essence, the evidence of anticompetitive effect also proves market power in the affected market."[146]

The same idea has more recently been promoted in a paper by the EAGCP on the application of Article 82 EC Treaty:

> *In contrast to a form-based approach, an effects-based approach needs to put less weight on a separate verification of dominance, except possibly for a de minimis consideration. If an effects-based approach yields a consistent and verifiable account of significant competitive harm, that in itself is evidence of dominance. Traditional modes of establishing "dominance" by recourse to information about market structure are merely proxies for a determination of "dominance" in any substantive sense, i.e., the ability to exert power and impose abusive behaviour on other market participants. If an effects-based approach provides evidence of an abuse which is only possible if the firm has a position of dominance, then no further separate demonstration of dominance should be needed - if no separate demonstration of dominance is provided, one may however require the abuse to be clearly established, with a high standard of proof.*
>
> ...
>
> *In terms of procedure, the economic approach implies that there is no need to establish a preliminary and separate assessment of dominance. Rather, the emphasis is on the establishment of a verifiable and consistent account of significant competitive harm, since such an anti-competitive effect is what really matters and is already proof of dominance. In an effects-based approach, the focus is on the use of well-established economic analysis. Such a conceptual framework provides a benchmark for the detailed assessment of the key ingredients that have to be present in a case, whether one tries to check the presence of significant competitive harm, or the achievement of relevant economic efficiencies.* [147]

But even with greater and more immediate focus on competitive effects analysis in single firm conduct cases, market power analysis, which could include the assessment of relevant markets, would not disappear. The EAGCP paper concludes, for example:

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145 Salop, *supra* note 50, at 188.

146 *Id.,* at 200. *See also* Andrew I. Gavil, *On the Utility of "Direct Evidence of Anticompetitive Effects*," 19 Antitrust (Spring 2005) 59 (endorsing cases that found that market power can be established with evidence of competitive effects).

147 EAGCP Report, *supra* note 59, at 14. The report points out that the proposed approach might depart from the tradition of case law concerning Art. 82 of the Treaty, but would *not depart* from the legal norm itself.

> *Traditional considerations about the presence or absence of dominance do not therefore become moot. They merely become part of the procedure for establishing competitive harm by the practice under investigation.*[148]

If the analysis of anticompetitive effects does not refer at some point to the market in which competition takes place, there would be a risk that harm to the competitive process cannot be adequately distinguished from harm to competitors. A plaintiff's claim that it was harmed by the defendant's conduct might be irrelevant if other competitors were not foreclosed. One court therefore concluded that "economic analysis can be virtually meaningless if it is entirely unmoored from at least a rough definition of a product and geographic market."[149]

Moreover, such an approach that focuses more immediately on competitive effects might not always be workable or desirable. First, established case law may require a competition authority to first establish relevant markets and assess market shares before proceeding with an analysis of competitive effects. Second, in cases where competition authorities or courts assess the likely *future* effects of certain conduct, they would not be able to rely on evidence of effects on price or output. In such cases, the inquiry into market power will be necessary to predict the probable competitive effects of certain conduct.[150]

Eliminating a separate, initial inquiry into the defendant's position in the relevant market also could make safe harbour thresholds less available. A threshold analysis of market power at an early stage can be a useful tool, as it can help decision makers to eliminate cases where anticompetitive effects are either highly unlikely or not feasible.[151] Doing away with this separate inquiry could make it more difficult to quickly identify cases in which anticompetitive affects appear unlikely because the firm does not have substantial market power.

Others have expressed the concern that the threshold of intervention could be lowered if a separate step to examine and prove substantial market power was no longer required and the competition authority adopted a "lenient" level of proof to show anticompetitive effects. In other words, maintaining a preliminary inquiry into whether a firm has substantial market power would provide a necessary "filter" where a competition authority is too willing to find anticompetitive effects, and would make it less likely that conduct was condemned that was unlikely to harm consumer welfare.[152] This concern also appears to be acknowledged in the EAGCP paper which proposes that in cases where a separate inquiry into

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148 EAGCP Report, *supra* note 59, at 14. See also Salop, *supra* note 50, at 191; Krattenmaker et al, *supra* note 2, at 259: market share should not be focus on inquiry, but should be one factor in inquiry whether firm can exclude rivals.

149 Republic Tobacco Co. v. North Atlantic Trade Co., 381 F.3d 717, 737 (7th Cir. 2004). In *Republic Tobacco,* the plaintiff's theory of anticompetitive foreclosure depended on a definition of the relevant market that was limited to a nine state, Southeast United States area. The court found that there was to evidence to support such a market and instead found indications that in the industry concerned the market might have been nation-wide.

150 Michael S. McFalls, *The Role and Assessment of Classical Market Power in Joint Venture Analysis*, 66 Antitrust L. J. 651, 657-58 (1998).

151 Frank E. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev 1, 14-16 (1984). See also White, *supra* note 4, at 12 (pointing out that there should be some de jure or de facto lower limit to exclude cases in which firms are unlikely to have the amount of market power antitrust laws should be concerned about). See also Majumdar, *supra* note 59, at 163 (favoring use of market shares as safe harbors).

152 Adrian Majumdar, *supra* note 59, at 163-164 (noting relevance of the strength of evidence required to establish harm to competition and consumers, and arguing that direct evidence of competitive effects is used to infer dominance, substantial adverse effects on consumer welfare should be required).

dominance is not provided, the abuse should have to be clearly established, with a high standard of proof.[153]

Along the same lines, from the perspective of firms there might be the perception that separate market power analysis with market definition and market share assessment can have a certain disciplining effect on competition authorities. Practitioners have expressed the concern that competition authorities focusing solely on anticompetitive effects without initial market definition and market power assessment might increasingly feel "free to roam the industrial landscape without having to establish relevant markets" before enforcing the antitrust laws, opening the door to the "potential of mischief."[154]

In addition, integrating an effects test into the analysis of competition cases is not necessarily an easy task that does not raise issues. As Andrew Gavil has pointed out, greater reliance on competitive effects involves a substantial amount of uncertainty as to what kind and how much of an effect should be deemed sufficient, and what methods would be deemed acceptable to demonstrate such effects. In that context, as Gavil suggests, the quality of evidence matters, whether the evidence is direct or indirect. The more difficult courts find the evaluation of alleged anticompetitive effects, the more evidence they might require with respect to indirect evidence concerning relevant market and substantial market power.[155] Conversely, in cases where indirect evidence is weak and not a reliable indicator whether the defendant has substantial market power, it may be more justified to rely to a greater extent on an analysis of the effects on the defendant's conduct, rather than trying through likely imprecise and possibly inaccurate methods to determine first whether the defendant has substantial market power.[156]

Thus, there could be a number of reasons why competition authorities and courts would want to maintain an explicit inquiry into whether a firm has substantial market power. Proposals to focus more immediately on competitive effects of the defendant's conduct highlight nevertheless that the assessment of whether the defendant has substantial market power should not be separated from the assessment of competitive effects, and that the two parts should as much as possible be integrated.

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153 EAGCP Report, *supra* note 59, at 14.

154 James A. Keyte & Neal R. Stoll, *Markets? We don't need no stinking markets! The FTC and market definition,* 49 Antitrust Bulletin 593, 595 (2004). There might also be a question whether greater reliance on effects to infer substantial market power could deprive firms of necessary legal certainty. In other words, firms would arguably not get much ex-ante guidance if market shares are not used in single firm conduct cases. Given the uncertainties involved in market definition in particular in single firm conduct cases, however, the legal certainty derived from market share thresholds might be more perceived than real.

155 Gavil, *supra* note 146, at 64. *See also* David L. Meyer, Republic Tobacco*, and the Proper Use of "Direct Evidence" of Anticompetitive Effects*, 19 Antitrust (Spring 2005) 67-68; Nelson & White, *supra* note 56 (proposing test to determine in certain cases whether defendant's conduct had anticompetitive effects).

156 Perhaps it is not a coincidence that Salop's proposal to focus more directly on effect analysis refers to a great deal to *Kodak v. Image Technical Services*, 504 U.S. 451 (1992), a case in which market definition was notoriously difficult and in which many commentators have faulted the courts for reaching questionable conclusions. Salop, *supra* note 50, at 187.

This also means that evidence would not always be neatly separated into a stack of evidence for the issue of market power, and another stack for the issue of anticompetitive and effects.[157] The same evidence that supports a finding that a defendant had substantial market power could equally support the finding that its conduct was anticompetitive. In *NutraSweet,* for example, the Canadian Competition Tribunal observed,

> *"The structure of the section does, however, raise a question regarding how far it is necessary to go into the evidence on control since it may include an examination of the alleged anti-competitive acts and their effects. If all of the evidence is taken up here then the three principal elements in paragraphs (a), (b) and (c) of subsection 79(1) may become melded in the evaluation of the first element. This is pervasive in competition law because the relevant factors in the different statutory elements are rarely distinct and it is impossible not to draw on common factors whenever required."*[158]

4. Conclusions

There is not a single method that will in all circumstances produce 100% reliable evidence on whether a firm has substantial market power. All methods described above have some weakness or difficulty. Depending on the case-specific circumstances, such as the allegedly anticompetitive conduct under investigation and/or the data available, some methods will be more useful than others to produce evidence that tends to establish that a firm's market power is substantial and durable.

Almost invariably, a single item of evidence - market shares, for example - will not be sufficient to determine whether substantial market power. Therefore, decision makers should look at all relevant evidence in determining which factors constrain a company's competitive conduct. Evidence should be used in a transparent way and a clear reasoning should be provided as to why certain evidence was considered relevant. Simply referring without much examination to all possible factors that could indicate substantial market power and hoping that some of them will not be wrong, does not contribute to good decisions.

The assessment of whether or not a firm has substantial market power should not divert attention from the ultimate goal of the inquiry, the assessment of competitive effects of a firm's conduct. Thus, the assessment of market power must occur in light of the allegedly anticompetitive conduct. Moreover, evidence that a firm has substantial market power should not preempt a full analysis of the competitive effects of the firm's conduct. In certain cases, it may be feasible and preferable to analyse more directly the competitive effects without an initial, separate determination whether a firm has substantial market power.

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157 Some have argued that if focus in a single firm conduct case is on competitive effects and a separate proof of substantial market power is no longer required, the difference between Section 1 and Section 2 - and equivalent provisions in other competition regimes, such as Articles 81 and 82 - tends to disappear. Once anticompetitive effects are established, it would no longer be necessary to demonstrate that the defendant has a certain measure of (substantial) market power. *See* Andrew I. Gavil, *Copperweld 2000: The Vanishing Gap Between Sections 1 and 2 of the Sherman Act*, 68 Antitrust L. J. 87, 102 (2000); Thomas G. Krattenmaker et al., *supra* note 2, at 247. For similar reasoning related to European competition law *see, e.g.,* Ekaterina Rousseva, *Modernizing by eradicating: How the Commission's new approach to Article 81 EC dispenses with the need to apply Article 82 EC to vertical restraints,* 42 Comm. Mkt. L. Rev. 587, 624-637 (2005) (arguing that only Article 81(1)'s effects based analysis - and not Article 82 - should be applied to assess competitive effects of contractual restrictions, regardless of whether one of the parties has substantial market power and would be considered a dominant firm).

158 Canada (Director of Investigation and Research) v. Nutrasweet Co., [1990] 32 C.P.R. (3d) 1 (Comp. Trib.), at 47.

NOTE DE REFERENCE

Par le Secrétariat

1. Introduction

Les dispositions du droit de la concurrence relatives aux pratiques d'une entreprise isolée *(single firm)* présentent deux dimensions : la désignation des entreprises visées d'une part, et du comportement prohibé, d'autre part. En ce qui concerne le premier point, le champ d'application de ces dispositions est généralement défini de manière plutôt étroite. Les pratiques unilatérales d'une entreprise qui dispose d'un pouvoir de marché faible ou nul ne sont guère susceptibles d'être anticoncurrentielles. À l'inverse, celles d'une entreprise qui détient un fort pouvoir de marché risquent beaucoup plus de fausser la concurrence, une telle entreprise étant en mesure d'imposer ses choix à ses concurrents et de se livrer à des pratiques de nature à les empêcher d'être en réelle position de concurrence sur le marché. Par conséquent, pour cibler l'application de ces dispositions sur les comportements potentiellement les plus anticoncurrentiels, mais aussi pour des raisons de bonne administration du droit, les autorités de la concurrence et les tribunaux doivent distinguer les entreprises qui disposent d'un pouvoir de marché substantiel (ou, selon d'autres normes, d'une puissance économique considérable) [1] de celles qui ne sont pas dans ce cas.

Cette distinction n'est pas facile à faire, car il n'existe pas de méthode unique qui permettrait, dans tous les cas, de déterminer avec certitude si une entreprise détient ou non le pouvoir de marché requis pour que les dispositions s'appliquent. La présente note de référence décrit les méthodes mises au point par les autorités de la concurrence et les tribunaux pour effectuer cette détermination et les éléments sur lesquels ils se fondent le plus fréquemment. Comme dans d'autres domaines du droit de la concurrence, le choix d'une méthode résulte d'un arbitrage entre celles qui présentent l'avantage de la simplicité, celles qui promettent, du moins en apparence, le plus de prévisibilité et la meilleure sécurité juridique, et celles qui offrent les meilleures garanties d'exactitude du fait qu'elles reposent sur une analyse plus approfondie.

La présente note abordera notamment les aspects suivants :

- Toutes les juridictions n'utilisent pas les mêmes concepts ni la même terminologie pour déterminer quelles entreprises sont visées par les dispositions relatives aux pratiques d'une entreprise isolée. Globalement, tous les régimes de concurrence tendent à considérer que ces dispositions ne devraient s'appliquer qu'aux entreprises disposant d'un « pouvoir de marché substantiel ».

- Le concept économique de « pouvoir de marché » ne constitue certes pas une référence précise pour apprécier si une entreprise tombe ou non sous le coup des dispositions sur les pratiques d'une entreprise isolée. Toutefois, il peut offrir une grille d'analyse pertinente si l'on souligne

[1] Dans la présente note, nous utiliserons en principe le terme « pouvoir de marché substantiel » pour désigner, de manière générale, le degré de puissance économique requis aux termes des dispositions relatives au comportement d'une entreprise isolée et les termes « pouvoir de monopole » ou « domination » lorsque nous ferons référence à un cadre réglementaire spécifique.

que ce pouvoir de marché doit à la fois être substantiel et présenter un caractère durable. Dans ce cadre, les éléments permettant d'établir l'existence de barrières à l'entrée et à l'expansion sont jugés extrêmement importants, du fait que l'entrée ou l'expansion réelle ou potentielle peuvent empêcher de manière particulièrement efficace une entreprise d'exercer son pouvoir de marché. Les autres éléments importants sont notamment les conditions de concurrence qui règnent sur le marché et le pouvoir d'achat.

- L'analyse des parts de marché continue d'occuper une place centrale dans l'examen de nombre d'affaires de concurrence mettant en cause une entreprise isolée, bien que les limites de la part de marché en tant qu'indicateur de pouvoir de marché soient largement reconnues. L'étude des parts de marché devrait constituer le point de départ de l'analyse, non une fin en soi. En outre, les seuls éléments relatifs aux parts de marché ne sauraient généralement suffire à établir qu'une entreprise dispose d'un pouvoir de marché substantiel.

- Dans l'examen des affaires de concurrence mettant en cause une entreprise isolée, il est rarement fait appel aux indicateurs directs de pouvoir de marché que sont l'élasticité de la demande résiduelle d'une entreprise et sa rentabilité. Même si ces données sont disponibles, elles ne permettent généralement pas d'établir de manière probante si une entreprise dispose du pouvoir de marché requis. Toutefois, dans certaines circonstances, elles pourraient, associées à d'autres éléments allant dans le même sens, contribuer à démontrer qu'une entreprise dispose d'un pouvoir de marché substantiel.

- Les pratiques d'une entreprise et leurs effets pourraient également servir à démontrer qu'elle détient un pouvoir de marché substantiel, même si les pratiques seules, sans prise en compte de leur contexte, ne sauraient être considérées comme un élément probant. Selon certains commentateurs, les effets des pratiques d'une entreprise sur la concurrence devraient jouer un rôle plus important et plus direct dans l'analyse et avoir la primauté sur l'analyse des parts de marché et autres facteurs structurels. Une plus grande prise en compte des effets restrictifs de concurrence n'autoriserait certes pas à faire l'économie d'une définition des marchés pertinents ou, au moins, d'un repérage des contraintes concurrentielles, mais ferait de cette définition et de ce repérage une composante de l'analyse globale. Toutefois, il n'est pas impossible qu'une telle démarche, qui repose plus directement sur les effets des pratiques d'une entreprise sur la concurrence, se révèle parfois peu souhaitable et difficile à mettre en œuvre.

2. Position dominante/Pouvoir de monopole et concept de « pouvoir de marché substantiel »

Les éléments qu'une juridiction considère comme pertinents, nécessaires ou suffisants pour prouver la position dominante et/ou le pouvoir de monopole ou leurs équivalents dans d'autres législations sur la concurrence varient selon le contenu donné à ces concepts. En général, la réglementation sur la concurrence est peu explicite à cet égard, laissant aux instances chargées de faire respecter le droit et à la jurisprudence le soin de définir ces concepts et de déterminer les éléments qui doivent être réunis pour conclure à leur existence. Cette partie présente d'abord brièvement l'apport de la théorie économique à l'interprétation de ces concepts avant de brosser un tableau succinct des dispositions relatives aux pratiques d'une entreprise isolée dans un certain nombre de juridictions.

2.1 Le concept de « pouvoir de marché substantiel »

La littérature économique réserve une large place au concept de pouvoir de marché et à son utilisation dans les affaires de concurrence mettant en cause une entreprise isolée. Cela n'a d'ailleurs rien de surprenant : comme l'ont fait observer nombre de commentateurs, les régimes de concurrence faisant désormais du bien-être des consommateurs leur principale finalité, le pouvoir de marché revêt une

importance capitale[2]. La théorie économique sur le pouvoir de marché ne fournit certes pas de définition ni de critères précis utilisables par les tribunaux et les autorités de la concurrence lorsqu'ils ont à se prononcer sur des affaires de concurrence mettant en cause une entreprise isolée. Elle offre néanmoins une grille utile pour apprécier les éléments sur la base desquels ils doivent déterminer si une entreprise tombe ou non sous le coup des dispositions relatives aux pratiques d'une entreprise isolée.

Selon la théorie économique, une entreprise détient un pouvoir de marché dès lors qu'elle pratique des prix supérieurs à ses coûts marginaux à court terme. Contrairement à une entreprise en situation de concurrence pure et parfaite, celle qui détient un pouvoir de marché ne se trouve pas face à une courbe de demande horizontale, mais à une courbe décroissante. Le pouvoir de marché d'une entreprise peut donc être déterminé à partir de l'inclinaison et de la forme de sa courbe de demande[3].

Il est presque unanimement reconnu que cette définition du pouvoir de marché est trop large pour constituer une référence en droit de la concurrence. Dans la pratique, la quasi-totalité des entreprises détiennent un certain pouvoir de marché et peuvent augmenter leur prix au-dessus de leur coût marginal à court terme. En outre, une entreprise peut disposer d'un pouvoir de marché pour diverses raisons tout à fait anodines. Par exemple, dans les secteurs propices aux économies d'échelle, aucune entreprise, même efficiente, ne pourrait être rentable si elle n'exerçait pas un pouvoir de marché et ne pratiquait pas un prix supérieur à son coût marginal à court terme. Ainsi, loin d'être une situation exceptionnelle à passer au crible du droit de la concurrence, le constat d'un certain pouvoir de marché correspond à la norme et n'exclut pas l'existence d'une concurrence sur le marché. Par conséquent, tant en termes de politique de la concurrence que d'administration du droit, il faudrait que les instances chargées de faire appliquer la législation se concentrent sur les affaires impliquant des entreprises qui détiennent un fort pouvoir de marché, puisqu'il y a plus de risques que l'exercice de ce pouvoir ait des effets préjudiciables sur le bien-être des consommateurs.

Définir le pouvoir de marché qui excède le niveau considéré comme normal et courant permettrait certes de disposer d'une référence utile pour interpréter le droit de la concurrence et l'appliquer dans des affaires mettant en cause une entreprise isolée, mais n'est pas chose facile dans le cadre du système décrit ci-dessus. C'est pourquoi certains commentateurs ont jugé plus utile de s'intéresser aux sources de ce pouvoir de marché et aux manières dont il peut être exercé. L'examen des circonstances dans lesquelles l'exercice du pouvoir de marché peut avoir les effets négatifs sur le bien-être des consommateurs que le

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2 Thomas G. Krattenmaker et autres, *Monopoly Power and Market Power in Antitrust*, 76 Geo L. J. 241, 245 (1987).

3 *Voir par exemple,* MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE (2003) ; DENNIS W. CARLTON ET JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANISATION, (X éd. 2004) ; SIMON BISHOP ET MIKE WALKER, THE ECONOMICS OF EC COMPETITION LAW*: Concepts, Application and Measurement* (2e éd. 2002) ; William M. Landes et Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937 (1981). L'un des principaux éclairages de la théorie économique est que l'existence et l'importance du pouvoir de marché d'une entreprise dépendent d'abord de contraintes liées à la demande. Aucune entreprise ne peut agir indépendamment de ses clients. Comme l'a fait observer un commentateur, « le pouvoir de marché dépend du bon vouloir des consommateurs ». Ainsi, l'examen de la situation de la demande face à laquelle se trouve une entreprise peut être utile pour apprécier son pouvoir de marché. *Voir,* Gregory J. Werden, *Demand Elasticities in Antitrust Analysis*, 66 Antitrust L. J. 363, 371, 380-84 (1998) (qui présente des méthodes d'appréciation du pouvoir de marché d'une entreprise reposant sur l'évaluation de l'élasticité de la demande de l'entreprise elle-même).

Pour une approche légèrement différente, *voir* John Fingleton, *Undefining Market Power*, Trinity Economic Paper Series, n° 2000/4, pp. 21-23 (qui avance que, dans certaines circonstances, on peut être en présence d'un pouvoir de marché ayant des effets négatifs sur le bien-être des consommateurs même si l'entreprise est face à une courbe de demande horizontale et que, dans de tels cas, il peut ne pas être suffisant d'examiner l'élasticité de la demande de l'entreprise pour apprécier son pouvoir de marché).

droit de la concurrence cherche à prévenir, les a amenés à conclure que le pouvoir de marché n'est préjudiciable que s'il perdure pendant très longtemps[4]. Pour renforcer ce critère de durée, certains ont proposé de considérer qu'une entreprise peut exercer son pouvoir de marché soit en réduisant sa propre production, soit en excluant ses concurrents (en d'autres termes en réduisant leur production), mais qu'il n'y a pouvoir de marché au sens du droit de la concurrence que si l'entreprise peut augmenter son prix au-dessus du niveau concurrentiel *et* exclure ses concurrents (ou s'il existe d'autres barrières à l'entrée ou à l'expansion)[5]. Comme nombre de commentateurs l'ont souligné, l'existence d'un pouvoir de marché substantiel aux termes de cette approche dépend pour beaucoup de la présence de barrières à l'entrée et à la mobilité susceptibles d'empêcher les concurrents de réagir à une baisse de production d'une entreprise[6].

D'autres économistes ont fait valoir une conception différente, proposant, au lieu de définir le pouvoir de marché justifiant l'application des dispositions sur les pratiques d'une entreprise isolée en termes d'élasticité de la demande et concepts de même nature, de ne considérer qu'il existe que si l'on peut démontrer qu'une entreprise est en mesure, en réduisant sa propre production, d'influer sur l'état du marché. Selon cette approche, le pouvoir de marché d'une entreprise ne dépend pas de sa capacité ou non à augmenter ses propres prix, mais de son aptitude ou non à entraîner, en décidant de réduire sa production, une baisse de la production et une hausse des prix sur l'ensemble du marché[7]. Rien ne prouve toutefois que cette approche aboutirait, dans la pratique, à des résultats très différents. En effet, d'une part les méthodes utilisées pour déterminer si une entreprise capable d'influer sur les prix du marché sont en grande partie les mêmes que celles que l'on applique dans l'approche plus « traditionnelle » : elles reposent en premier lieu sur l'analyse de la part de marché et des barrières à l'entrée et à l'expansion[8]. D'autre part, si l'on définit le

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4 Pour distinguer le « pouvoir de marché ordinaire » du degré de pouvoir de marché potentiellement répréhensible aux termes du droit de la concurrence, Werden propose de définir le pouvoir de monopole (en d'autres termes le pouvoir de marché substantiel) comme la capacité d'une entreprise cherchant à maximiser ses bénéfices à pratiquer un prix supérieur à son *coût marginal à long terme*, et non à son coût marginal à court terme. Werden, *Demand Elasticities, supra* note 3, 371-73. Selon un autre commentateur, l'examen des affaires de concurrence mettant en cause une entreprise isolée devrait porter en priorité sur la capacité de l'entreprise à « maintenir » et non à « augmenter » son prix au-delà du niveau concurrentiel, ce qui met l'accent sur le fait que le pouvoir de marché doit présenter un caractère durable et que les entreprises en position dominante ont, selon toute attente, déjà augmenté leur prix pour le fixer au-delà du niveau concurrentiel. *Voir* Lawrence J. White, *Market Definition in Monopolization Cases: A Paradigm is Missing* 4 (Document de travail de la New York University 2005). *Voir également infra*, para. 23.

5 PHILLIP AREEDA ET HERBERT HOVENKAMP, IIA ANTITRUST LAW, 501 (2004) expliquent que la deuxième partie de la formule se rapporte non seulement à la capacité à exclure des concurrents mais aussi à l'existence de barrières à l'entrée et à l'expansion, quelles qu'elles soient ; Werden, *Demand Elasticities, supra* note 3, 377-78, affirme que le pouvoir de contrôler les prix pourrait permettre d'établir l'existence d'un « pouvoir de marché », tandis que le « pouvoir d'exclure les concurrents » pourrait être un critère, qui, ajouté au premier, permettrait de distinguer le pouvoir de marché du pouvoir de marché substantiel/pouvoir de monopole.

6 Cela a conduit certains économistes à affirmer que l'examen des affaires de concurrence mettant en cause une entreprise isolée doit commencer par une étude des barrières à l'entrée. Fingleton, supra *note* 3*,* pp. 20-21.

7 Benjamin Klein, *Market Power in Antitrust: Economic Analysis After Kodak*, 3 Sup. Ct. Econ. Rev. 43, 76-85 (1993) avance que le pouvoir de marché (au sens du droit de la concurrence) devrait dépendre de la capacité d'une entreprise à influer sur la situation du marché. *Voir aussi* Joao Pearce de Azevedo et Mike Walker, *Dominance: Meaning and Measurement*, 23 ECLR 363, 366 (2002) (qui proposent de définir la position dominante comme la capacité d'une entreprise à réduire la production totale du marché pour la ramener à un niveau nettement inférieur à celui *où elle se trouve)*.

8 Pearce de Azevedo et Walker, *supra* note 7, citent également la variabilité de la part de marché, l'existence de produits de substitution, l'existence de capacités limitées, la nature de l'interaction concurrentielle sur le marché.

pouvoir de marché substantiel comme la capacité d'une entreprise à fixer son prix au-dessus du niveau concurrentiel *et* à exclure les concurrents, on cherchera, là aussi, à déterminer si les concurrents sont dans l'incapacité de réagir à une tentative de réduction de la production/d'augmentation des prix de la part d'une entreprise donnée. Si tel est le cas, il faudra en déduire que la réduction de production de cette entreprise a eu une incidence sur la production et le prix sur l'ensemble du marché.

2.2 Position dominante et pouvoir de monopole : critères et définitions dans un un certain nombre de juridictions

La partie suivante décrit brièvement la manière dont les termes « pouvoir de monopole », « position dominante » et termes équivalents utilisés dans les dispositions sur les pratiques d'une entreprise isolée sont interprétés dans un certain nombre de régimes de concurrence. Il en ressort que la terminologie utilisée importe peu. Certains régimes, tout en ayant adopté une formulation juridique différente dans leur législation, utilisent dans une large mesure le même concept de « pouvoir de marché substantiel ». D'autres au contraire, utilisent parfois des concepts qui présentent certaines différences, tout en ayant adopté la même terminologie juridique. C'est particulièrement vrai en ce qui concerne le concept de « position dominante », que l'on retrouve dans les dispositions sur les pratiques d'une entreprise isolée de nombreuses juridictions.

2.2.1 Position dominante[9]

La partie qui suit montre, à titre d'exemple, comment le concept de position dominante a été interprété au Canada et dans l'Union européenne.[10]

Canada

Les dispositions canadiennes reposent sur le concept « d'abus de position dominante ». La « position dominante » est définie comme la capacité d'une entreprise à « contrôler » un marché. Aux termes de l'article 79 de la Loi sur la concurrence, il faut, pour qu'il y ait position dominante, « qu'une ou plusieurs

9 La présente note porte exclusivement sur les éléments requis pour établir l'existence de position dominante isolée, sans examiner si les éléments requis pour établir l'existence d'une position dominante conjointe seraient différents.

10 A l'évidence, de nombreuses autres juridictions utilisent ce concept dans leurs dispositions sur les pratiques d'une entreprise isolée et le terme « position dominante » est diversement interprété. Le Royaume-Uni est un exemple extrême, ce pays ayant apparemment totalement intégré le concept économique de « pouvoir de marché substantiel » dans l'analyse de la position dominante. Ainsi, selon les Lignes directrices sur le pouvoir de marché publiées par le Bureau britannique de la concurrence (Office of Fair Trading, OFT), « une entreprise n'est pas en position dominante dès lors qu'elle ne détient pas un pouvoir de marché substantiel. » Office of Fair Trading, Assessment of Market Power (2004) 2.9. Au contraire, certains pays précisent expressément que le concept de position dominante ne repose pas sur celui de « pouvoir de marché substantiel ». En Afrique du Sud, par exemple, les entreprises qui possèdent une part de marché comprise entre 35 % à 45 % peuvent réfuter la présomption de position dominante en prouvant qu'elles ne disposent pas d'un pouvoir de marché substantiel, mais celles qui détiennent plus de 45 % du marché ne peuvent pas invoquer un tel moyen de défense. En d'autres termes, elles ne peuvent pas réfuter la présomption légale de position dominante, qu'elles détiennent ou non un pouvoir de marché substantiel.

personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions »[11].

Le critère selon lequel une personne doit *contrôler* sensiblement ou complètement une catégorie ou espèce d'entreprises a été interprété dans le sens où la personne est en mesure de pratiquer, de manière rentable, des prix supérieurs aux niveaux concurrentiels pendant une période prolongée. Ainsi, dans l'affaire *NutraSweet,* le tribunal de la concurrence a considéré que :

> *Pour sa part, la défenderesse estime que le « contrôle » est plutôt synonyme de « puissance commerciale », que 1'on interprète généralement comme signifiant la capacité de fixer des prix plus élevés que les niveaux concurrentiels pendant une longue période. Cette approche théorique est valable, mais elle n'est pas facilement applicable ; il faut habituellement tenir compte des indicateurs de la puissance commerciale, comme la part du marché et les obstacles posés à l'accès au marché. Les facteurs particuliers qui devront être pris en compte pour évaluer le contrôle ou la puissance commerciale varieront dans chaque cas*[12].

On retrouve cette approche dans les Lignes directrices pour l'application des dispositions sur l'abus de position dominante du Bureau de la concurrence, qui précisent que le terme « contrôle » est synonyme d'exercice d'une « puissance commerciale », elle-même définie comme la « capacité de fixer de façon rentable les prix au-delà des niveaux concurrentiels pendant une période prolongée ». Les Lignes directrices précisent également qu'une « période prolongée » est en principe une période d'au moins un an[13]. Selon les commentateurs, le concept canadien de « position dominante » est très proche de la notion américaine de « pouvoir de monopole » et équivaut, peu ou prou, au concept de « pouvoir de marché substantiel ». Ils estiment également qu'en termes de mise en application, il est possible que le concept de « position dominante » ne soit pas appliqué exactement de la même manière en droit canadien et en droit communautaire de la concurrence[14].

Droit communautaire de la concurrence

L'article 82 du Traité instituant la Communauté européenne (Traité CE) fait référence « au fait, pour une ou plusieurs entreprises, d'exploiter une position dominante sur le marché commun ou dans une partie substantielle de celui-ci. » La Cour de justice des Communautés européennes (CJCE) définit

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11 Loi sur la concurrence, article 79(1)a. Selon l'interprétation donnée à l'article 79, l'entreprise doit (1) être en « position dominante » sur un marché de produits et un marché géographique (en d'autres termes, détenir un pouvoir de marché) (2) s'être livrée à la « pratique d'agissements anticoncurrentiels » (3) qui a eu ou aura vraisemblablement pour effet « d'empêcher ou de diminuer sensiblement la concurrence ». *Voir par exemple,* MICHAEL TREBILCOCK et autres, THE LAW AND ECONOMICS OF CANADIAN COMPETITION POLICY 507 (2002) ; D. Jeffrey Brown et autres, *The Aspen Skiing Case From a Canadian Perspective*, 73 Antitrust L. J. 235, 254 (2005).

12 Canada (Directeur des enquêtes et recherches) contre NutraSweet Co., [1990] 32 C.P.R. (3d) 1 (Trib. conc.) ; Canada (Commissaire de la concurrence) contre Tuyauteries Canada, 2005 Trib. conc. 3, para. 122.

13 Bureau de la concurrence, Lignes directrices pour l'application des dispositions sur l'abus de position dominante (2001), p. 16.

14 Brian A. Facey et Dany H. Assaf, *Monopolization and Abuse of Dominance in Canada, The United States and the European Union: A Survey*, 70 Antitrust L. J. 513, 537-38 (2002) estiment que dans la pratique, l'Union européenne accorde peut-être plus de poids à la part de marché, qui peut créer une plus forte présomption de position dominante que le Canada. Voir également Bureau de la concurrence, Lignes directrices pour l'application des dispositions sur l'abus de position dominante (2001), *supra* note 13, pp. 16-17.

traditionnellement la « position dominante » comme la possibilité, pour une entreprise, de se comporter de manière indépendante par rapport aux forces du marché.

> *La position dominante visée par cet article concerne une position de puissance économique détenue par une entreprise qui lui donne le pouvoir de faire obstacle au maintien d'une concurrence effective sur le marché en cause en lui donnant la possibilité de comportements indépendants dans une mesure appréciable vis-à-vis de ses concurrents, de ses clients et, finalement, des consommateurs*.[15]

Cette définition, qui continue de faire jurisprudence concernant la notion de « position dominante »[16] laisse depuis longtemps les commentateurs sceptiques[17]. Ils ont notamment fait observer que le concept « d'indépendance » n'a pas de sens économique précis[18]. Ils ont également souligné que même une entreprise en position dominante ne pouvait pas agir indépendamment de ses clients et que l'indépendance par rapport aux clients/consommateurs n'était par conséquent pas un critère pertinent pour distinguer les entreprises en position dominante de celles qui ne le sont pas[19]. Néanmoins, certains d'entre eux ont également concédé que la notion « d'indépendance par rapport aux concurrents » pouvait renvoyer à une situation dans laquelle une entreprise a pu augmenter son prix de manière rentable au-delà du niveau concurrentiel. Dans un tel cas, on pourrait considérer que l'entreprise a été en mesure de se comporter de manière indépendante vis-à-vis de ses concurrents au niveau du prix concurrentiel et qu'elle a par conséquent pu s'affranchir des contraintes concurrentielles qui l'auraient empêchée d'augmenter ses prix de manière rentable si elle n'avait pas été en position dominante. Selon cette interprétation, le concept de position dominante est étroitement lié à celui de pouvoir de marché substantiel[20].

Dans sa récente décision sur l'affaire *Microsoft*, la Commission européenne développe plus précisément le concept « d'indépendance » d'une entreprise en position dominante. Elle aborde les trois dimensions de l'indépendance et décrit les critères d'appréciation utilisés pour chacune d'entre elles. En l'espèce, la Commission a estimé que Microsoft s'était comportée de manière indépendante vis-à-vis de ses concurrents, soulignant que l'apparition sur le marché des applications concurrentes Open Source n'a pas

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15 Affaire 27/76, United Brands Company et United Brands Continental BV contre Commission des Communautés européennes, Rec. 1978 p. 207, para. 65 ; Affaire 85/76, Hoffmann-La Roche et Co. AG contre Commission des Communautés européennes, Rec. 1979 p. 461.

16 OCDE, Droit et politique de la concurrence dans l'Union européenne, p. 31 (2005).

17 RICHARD WHISH, COMPETITION LAW 179 (5e éd. 2003) note que la Cour de justice des Communautés européennes n'a jamais expliqué comment les deux éléments – la capacité à empêcher une concurrence effective et la capacité à se comporter de manière indépendante par rapport à ses concurrents, à ses clients et aux consommateurs – étaient liés, ni précisé leur importance respective).

18 *Voir, par exemple*, Fingleton, *supra* note 3, p. 27 qui estime difficile d'établir un lien entre le critère de position dominante retenu par la CJCE et un quelconque concept économique. *Voir également* Pearce de Azevedo et Walker, *Dominance, supra* note 7, 363 qui font observer que l'on ne dispose d'aucune définition précise et d'aucun critère d'appréciation de la « position dominante » ; *voir aussi* Joao Pearce Azevedo et Mike Walker*, Market Dominance, Measurement Problems and Mistakes*, 24 ECLR 640 (2003) qui estiment que le fait qu'aucun concept économique ne sous-tend la définition de la position dominante n'aide pas à la bonne application du droit de la concurrence.

19 *Voir par exemple,* Pearce de Azevedo et Walker, *Market Dominance, Measurement Problems and Mistakes, supra* note 7, 364 (qui avancent qu'il n'est pas cohérent, d'un point de vue économique, de penser qu'une entreprise puisse agir indépendamment de ses clients dans une mesure appréciable, toutes les entreprises étant soumises à la discipline de la courbe de demande, qui veut qu'un changement de prix se répercute sur la production de l'entreprise).

20 BISHOP ET WALKER, *supra* note 3, 184; WHISH, *supra* note 17, 179.

eu d'incidence sur ses résultats financiers, ne l'a pas contrainte à modifier sa politique tarifaire et son modèle économique et qu'elle est restée une entreprise florissante. La Commission a également considéré que Microsoft se comportait de manière indépendante vis-à-vis de ses clients, MS Windows étant un produit incontournable pour les fabricants d'ordinateurs PC. Elle a aussi estimé qu'elle se comportait de manière indépendante vis-à-vis des consommateurs finals, citant plusieurs déclarations qui démontrent que le coût élevé du changement dissuade les consommateurs d'opter pour un système d'exploitation concurrent[21]. Reste maintenant à savoir dans quelle mesure cette analyse détaillée du concept d'indépendance aura une influence sur l'issue des affaires à venir[22].

Bien qu'il subsiste peut-être un certain flou sur la notion « d'indépendance », le concept de position dominante du droit communautaire de la concurrence se rapproche désormais plus ouvertement de celui de pouvoir de marché substantiel. Cette évolution transparaît dans le document de réflexion sur l'article 82 dans lequel la Commission européenne interprète la jurisprudence relative à la notion « d'indépendance » utilisée comme moyen de déterminer si une entreprise détient un pouvoir de marché substantiel[23]. Un commentateur a fait observer qu'il existe déjà une forte convergence entre les concepts de position dominante et de pouvoir de monopole et qu'ils reposent sur une même conception du pouvoir de marché substantiel[24].

2.2.2 Position superdominante

La question se pose également de savoir si une distinction pertinente entre différents degrés de « pouvoir substantiel de marché » pourrait être effectuée et offrirait une référence utile pour l'examen des affaires de concurrence mettant en cause une entreprise isolée. L'introduction du concept d'entreprise « superdominante » dans plusieurs affaires récentes examinées dans le cadre du droit communautaire de la concurrence mérite particulièrement l'attention. Selon ce concept, des entreprises qui détiennent une part extrêmement élevée, quasi monopolistique, du marché pertinent pourraient être considérées comme « superdominantes » ; des critères spécifiques seraient alors appliqués pour déterminer si elles se sont livrées à des pratiques qui enfreignent la législation sur la concurrence. Par exemple, dans l'affaire *Cewal*, l'avocat général a estimé que :

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21 Décision de la Commission du 24 mars 2004 relative à une procédure d'application du l'article 82 du Traité CE, affaire COMP/C-3/37.792 Microsoft, para. 460-63.

22 À noter que la Commission s'est également fondée sur d'autres critères pour établir l'existence de position dominante. Elle a non seulement procédé à une analyse de la part de marché et des barrières à l'entrée, mais a aussi considéré la rentabilité de Microsoft comme une preuve de sa position dominante. En outre, l'existence de position dominante n'a pas été contestée lorsque la décision a été rendue, Microsoft ayant admis détenir une position dominante pour la fourniture de systèmes d'exploitation pour PC. Décision de la Commission du 24 mars 2004 relative à une procédure d'application du l'article 82 du Traité CE, affaire COMP/C-3/37.792 Microsoft, para. 429-64. L'utilisation de la rentabilité comme indicateur de position dominante est examinée *infra*, p. 30.

23 DG Concurrence, Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses (décembre 2005), Document de réflexion, para. 24-28.

24 Fingleton, *supra* note 3, p. 28 considère que les concepts de position dominante et de pouvoir de monopole se sont rapprochés de la notion de pouvoir de marché au sens de l'économie du bien-être. *Voir également* Ronald W. Davis et Jennifer M Driscoll, *The Urge to Converge – The New Discussion Paper on Abuse of a Dominant Position*, 20 Antitrust (printemps 2006) 82, 83 qui relèvent une ambiguïté concernant la notion de position dominante dans le document de réflexion sur l'article 82 publié par la Commission, mais forment le vœu de voir le « degré élevé de pouvoir de marché » devenir le facteur décisif pour conclure ou non à l'existence de position dominante.

> *A notre avis, on ne peut interpréter l'article 86 comme permettant aux monopoleurs ou quasi-monopoleurs d'exploiter la très importante puissance sur le marché que leur confère leur position très nettement dominante pour empêcher l'émergence d'un concurrent nouveau ou supplémentaire. Lorsqu'une entreprise ou un groupe d'entreprises dont le comportement doit s'apprécier globalement dispose d'une position éminemment dominante proche du monopole, comparable à celle qui existait en l'espèce à l'époque où G & C a pénétré sur le marché pertinent, l'obligation spéciale particulièrement lourde qu'a une telle entreprise dominante de ne pas porter atteinte à la structure de la faible concurrence existante fait obstacle à ce que cette entreprise réagisse, même à la concurrence sur les prix agressive d'une entreprise entrant sur le marché, en adoptant une politique de réductions de prix ciblées et sélectives, visant à éliminer ce concurrent*[25].

Selon la même logique, la Commission a, dans sa décision sur l'affaire *Microsoft*, qualifié Microsoft d'entreprise détenant une position *« très largement dominante »*[26]. Comme l'avocat général dans l'affaire *Cewal*, elle a utilisé ce concept pour qualifier une entreprise considérée comme détenant un quasi-monopole sur le marché pertinent.

Selon certains auteurs, le concept de « position superdominante » pourrait être utile pour repérer les entreprises qui risquent plus d'être jugées en infraction avec l'article 82 du Traité CE que celles qui se trouvent en « position dominante ». Des obligations plus lourdes pourraient leur être imposées et leur « responsabilité spéciale » pourrait être plus importante. Ce concept pourrait ainsi permettre de mieux comprendre pourquoi certains types de pratiques, comme les réductions de prix sélectives ou le refus de vente, sont jugés plus sévèrement dans certains cas que dans d'autres[27].

En principe, le concept de « position superdominante » pourrait tout simplement exprimer l'idée que certaines entreprises détiennent un plus grand pouvoir de marché substantiel que d'autres, en d'autres termes, que les adjectifs « substantiel » ou « significatif » peuvent se décliner selon plusieurs degrés[28]. Il n'est toutefois pas prouvé que ce concept constitue un outil utile pour l'analyse des affaires mettant en cause les pratiques d'une entreprise isolée. En effet, en se fondant exclusivement sur l'existence d'une part de marché très élevée pour établir qu'il y a position « superdominante », on risque d'accorder la priorité au calcul de la part de marché, au détriment de l'analyse d'autres facteurs, comme les barrières à l'entrée, la dynamique concurrentielle et le pouvoir d'achat[29]. En outre, même si certaines pratiques risquent plus – toutes choses égales par ailleurs – d'avoir des effets anticoncurrentiels dès lors que l'entreprise concernée

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25 Affaire 395/96 P, Compagnie maritime belge transports SA (C-395/96 P), Compagnie maritime belge SA (C-395/96 P) et Dafra-Lines A/S (C-396/96 P) contre Commission des Communautés européennes. Conclusions du 29 octobre 1998, para. 137 (italique ajouté).

26 Décision de la Commission du 24 mars 2004 relative à une procédure d'application du l'article 82 du Traité CE, affaire COMP/C-3/37.792 Microsoft, para. 435. *Voir également* l'affaire 1001/1/1/01, Napp Pharmaceuticals Holdings Ltd. v Director General of Fair Trading, [2002] CAT 1, para. 219, où il a été estimé que la « responsabilité spéciale d'une entreprise en position dominante est particulièrement lourde si elle est en situation de quasi-monopole et bénéficie d'une 'position dominante proche du monopole', d'une position 'superdominante' ou 'très largement dominante se rapprochant du monopole' ».

27 WHISH, *supra* note 17, 190.

28 *Voir également* BISHOP ET WALKER, *supra* note 3, 186 qui estiment qu'une « graduation » de la notion de position dominante serait acceptable d'un point de vue économique.

29 À noter toutefois que, dans les quelques affaires où le concept de « position superdominante » a été utilisé, (*Cewal, Microsoft, Napp),* l'analyse n'a pas exclusivement porté sur la part de marché : d'autres facteurs, comme les barrières à l'entrée, le pouvoir des acheteurs et les effets sur la concurrence des pratiques de l'entreprise, ont également été évalués.

a un pouvoir de marché substantiel plus élevé, il est nécessaire d'apprécier ce risque à la lumière d'une analyse approfondie des effets anticoncurrentiels des pratiques de l'entreprise.

2.2.3 Pouvoir de monopole (États-Unis)

Aux États-Unis, l'infraction de monopolisation au sens de l'article 2, comporte deux dimensions : (1) la détention d'un pouvoir de monopole sur le marché pertinent et (2) le caractère volontaire de l'obtention et de la préservation de ce pouvoir, par opposition à son apparition et à son développement grâce à la mise sur le marché d'un produit de qualité supérieure, à un sens aigu des affaires, ou à un accident historique[30].

Bien que la législation ne fournisse pas d'autres précisions pour l'interprétation du concept de « pouvoir de monopole », les tribunaux, les organismes compétents en matière de droit de la concurrence et la plupart des commentateurs s'accordent apparemment à reconnaître que le « pouvoir de monopole » est lié au concept économique de « pouvoir du marché » et qu'il ne peut y avoir infraction de monopolisation au sens de l'article 2 que si l'entreprise détient un pouvoir de marché important, en d'autres termes un « pouvoir de marché substantiel »[31]. Selon les commentateurs, les concepts de pouvoir de marché et pouvoir de monopole peuvent être distingués l'un de l'autre en fonction de leur durée, le « pouvoir de marché substantiel » devant alors se comprendre comme la capacité d'une entreprise à augmenter son prix au-delà du niveau concurrentiel pendant une période prolongée[32].

Certains commentateurs ont également allégué qu'il serait plus pertinent de définir le « pouvoir de monopole » en termes de capacité de l'entreprise à contrôler les prix *et* à exclure la concurrence et non, comme le veut la formule traditionnelle, de capacité à « contrôler les prix du marché ou la concurrence » [33], estimant que cela permettrait de mieux apprécier l'importance et la durée que doit avoir le pouvoir de marché pour qu'il y ait infraction de monopolisation au sens de l'article 2. Selon eux, il faudrait que ces deux conditions soient exigées pour qu'il soit plus clair qu'une entreprise disposant d'un pouvoir de marché substantiel n'est visée par l'article 2 que si, en plus d'avoir la capacité de fixer les niveaux de production ou de prix pour ses propres produits, elle est, jusqu'à un certain point, à l'abri des réactions concurrentielles d'autres entreprises[34].

2.2.4 Degré substantiel de pouvoir de marché (Australie)

L'Australie est un exemple de juridiction dont la législation mentionne expressément le critère de « pouvoir de marché substantiel », l'article 46 de la loi sur les pratiques commerciales (Trade Practices

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30 United States v Grinell Corporation, 384 U.S. 563 (1966).

31 *Voir, par exemple* AREEDA ET HOVENKAMP, *supra* note 5, 501 ; Werden, *Demand Elasticities, supra* note 3*,* 374. De nombreux tribunaux et commentateurs ont tendance à utiliser indifféremment « pouvoir de marché » ou « pouvoir de monopole ». *Voir par exemple*, United States v Grinnell Corp., 384 U.S. 563, 577 (pouvoir de monopole), 580 (pouvoir de marché) (1966) ; Hanover Shoe Inc v United Shoe Machinery Corp.*,* 392 U.S. 481, 486 (pouvoir de monopole), 486 nbp 3 (pouvoir de marché) (1968). *Voir également* Krattenmaker et autres, *supra* note 2, 246-247 (1987). Certains commentateurs ont fait valoir qu'il serait plus clair de réserver l'usage du terme « pouvoir de monopole » aux situations dans lesquelles le pouvoir de marché est substantiel. ERNEST GELLHORN et autres, ANTITRUST 112-113 (5e éd. 2004).

32 Werden, *Demand Elasticities, supra* note 3*,* 378-79.

33 United States v E.I. du Pont de Nemours & Co., 351 U.S.377, 391 (1956) ; Eastman Kodak & Co. v Image Technical Services, 504 U.S. 451, 481 (1992).

34 *Voir supra*, note 5.

Act, TPA)[35] s'appliquant aux entreprises qui détiennent un « degré substantiel de pouvoir de marché ». Les tribunaux ont estimé que le pouvoir de marché exigé aux fins d'application de l'article 46, s'entendait comme la « capacité d'une entreprise à augmenter ses prix pour les fixer au-delà du coût d'approvisionnement sans que les consommateurs se détournent au profit de ses concurrents[36].

On notera que les dispositions relatives aux pratiques d'une entreprise isolée ont été amendées en 1986, la notion de capacité à « contrôler un marché de manière substantielle » qui définissait jusqu'alors le seuil retenu pour conclure à l'existence d'une « position dominante » ayant été remplacée par celle de « pouvoir de marché substantiel », appliquée actuellement. L'objectif était apparemment d'abaisser ce seuil pour offrir une meilleure protection aux petites entreprises contre les concurrents plus puissants qu'elles, y compris contre ceux ne détenant pas le niveau de pouvoir de marché correspondant à l'ancien seuil[37].

Par conséquent, on s'est peut-être attendu à ce que les amendements introduits abaissent le seuil de pouvoir de marché, ce qui aurait permis d'intervenir plus facilement contre des entreprises détenant une part de marché relativement faible, dès lors qu'il y avait lieu, par exemple, de considérer que l'approvisionnement des consommateurs dépendaient de l'entreprise en cause et ce même si elle n'était pas nécessairement en capacité d'augmenter son prix de manière substantielle au-delà du niveau concurrentiel. C'est en suivant la même logique qu'un tribunal, donnant raison à la Commission australienne de la concurrence (ACCC), a estimé que deux entreprises, qui détenaient chacune moins de 20 % du marché pertinent (en l'occurrence le marché de gros de la musique enregistrée) pouvaient tomber sous le coup de l'interdiction prescrite par l'article 46[38]. Toutefois, dans la décision *Boral*, la Haute Cour (High Court of Australia) a précisé que le concept juridique de « degré substantiel de pouvoir de marché » sous-entendait l'existence d'un pouvoir de marché important ou considérable sur un marché pertinent pendant une période prolongée. La Cour a en effet déclaré :

> *Il ressort du concept de « pouvoir de marché » au sens de l'article 46 que cet article n'envisage pas une appréciation ponctuelle de l'activité économique. Le pouvoir de marché ne peut s'apprécier qu'en examinant ce dont une entreprise est capable sur une certaine durée. Pour déterminer si une entreprise détient ou non un pouvoir de marché – si elle a ou non la capacité d'agir sans entraves liées à la concurrence et d'augmenter ses prix au-delà du niveau concurrentiel – il faut étudier la structure du marché telle qu'elle se présente et telle qu'elle se présentera si des concurrents sont exclus ou si les prix augmentent et dépassent le niveau concurrentiel*[39].

La décision rendue dans l'affaire *Boral* a été interprétée comme dissipant toute ambiguïté quant au fait, d'une part, qu'il ne suffit pas d'alléguer des actes abusifs isolés contre un seul concurrent ou consommateur, et, d'autre part, que le pouvoir de marché requis ne doit pas être temporaire et facilement

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35 La disposition correspondante en droit néo-zélandais (article 36), a été modifiée en 2001 par souci de parallélisme avec la législation australienne ; le seuil retenu pour conclure à l'existence d'une position dominante repose désormais sur la notion de « degré substantiel de pouvoir de marché ».

36 Boral v ACCC, [2003] HCA 5, 136 (Gleeson CJ et Callinan J).

37 L'histoire de la modification de l'article 46 est exposée dans la décision rendue par la Cour fédérale australienne (Australian Federal Court) dans l'affaire ACCC contre Boral, [2001] FCA 30 (la Cour souligne que les modifications adoptées en 1986 visaient à abaisser le seuil, probablement jusqu'à un niveau inférieur à ceux appliqués aux États-Unis et en Europe), *infirmé par*, Boral v ACCC, [2003] HCA 5.

38 ACCC v Universal Music, (2001) 115 FCR 442.

39 Boral v ACCC, [2003] HCA 5. ¶

corrigeable par les mécanismes du marché, mais durable. Cette argumentation semble impliquer un renforcement du niveau de preuve exigé aux fins d'application de l'article 46[40].

3. Preuves de l'existence d'un pouvoir de marché substantiel

On répartit en général les preuves pouvant servir à établir qu'une entreprise détient un pouvoir de marché substantiel en deux catégories : les preuves directes et les preuves indirectes. On classe parmi les preuves directes les tentatives de mesure de la capacité d'une entreprise à augmenter son prix au-dessus du niveau concurrentiel, l'appréciation de sa rentabilité et les éléments prouvant que ses pratiques ont eu des effets anticoncurrentiels. Les preuves indirectes résultent d'une analyse de la structure du marché qui vise à déterminer si une entreprise détient un pouvoir de marché. Il peut s'agir par exemple de la part de marché, des indices de concentration ou d'autres éléments, peut-être encore plus pertinents, comme les barrières à l'entrée et autres facteurs susceptibles d'avoir une incidence sur la capacité d'une entreprise à exercer un pouvoir de marché. La partie suivante commence par décrire divers types de preuves indirectes, ces dernières continuant d'occuper une place prépondérante dans les affaires liées aux pratiques d'une entreprise isolée.

3.1 Preuves indirectes

3.1.1 Parts de marché

La législation sur la concurrence se fonde le plus souvent sur des preuves indirectes en rapport avec la structure du marché pour établir l'existence d'une position dominante ou d'un pouvoir de monopole. Bien que l'importance traditionnellement accordée à la structure du marché et aux indices de concentration ait été critiquée et que les insuffisances de l'analyse de la part de marché soient bien connues, il est rare que les tribunaux et les autorités de la concurrence ne se reposent pas sur la part de marché pour examiner les affaires de concurrence[41]. Cela a d'ailleurs amené un commentateur à déclarer que la concentration restait le « grand manitou » de l'analyse du pouvoir de marché[42].

L'utilisation de la part de marché et d'autres indices de la concentration du marché pour établir l'existence d'une position dominante ou d'un pouvoir de monopole repose sur l'idée que la structure d'un marché conditionne les pratiques de l'entreprise, qui déterminent elles-mêmes ses résultats (rentabilité). Cette idée repose sur l'hypothèse que la concurrence est moins âpre sur un marché plus concentré. Il s'ensuit qu'elle risque davantage de ne pas être effective sur un marché concentré. Dans ce modèle d'analyse, on considère que la part de marché peut, dans une certaine mesure, permettre d'apprécier le pouvoir de marché. Nombre de commentateurs ont toutefois fait observer que la corrélation entre concentration et pouvoir de marché est loin d'être univoque. Il est largement reconnu que le modèle reposant sur le lien entre structure du marché, pratiques et résultats (et par conséquent part de marché) n'a qu'un faible pouvoir prédictif quant à la question de savoir si une entreprise détient un pouvoir de marché substantiel[43].

Certains commentateurs ont néanmoins souligné que la part de marché pouvait tout de même, pour diverses raisons, avoir une signification indépendante dans les affaires de concurrence mettant en cause

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40 Dans la décision qu'elle a rendue par la suite dans l'affaire *Universal Music v ACCC*, [2003] FCAFC 193, la Cour fédérale australienne a reconnu que l'interprétation de la notion de « degré substantiel de pouvoir de marché » avait évolué à la suite de la décision rendue par la Haute Cour dans l'affaire *Boral.*

41 *Voir également infra*, p. 27.

42 Fingleton, *supra* note 3, p. 33.

43 *Voir par exemple,* Landes et Posner, *supra* note 3*,* 947 ; Fingleton, *supra* note 3, pp. 18-19.

une entreprise isolée. Il a d'une part été observé que, s'il est logique de partir du principe qu'une entreprise détenant 100 % du marché pertinent dispose d'un pouvoir de marché substantiel, la situation d'une entreprise ayant une part de marché très légèrement inférieure à 100 % n'est a priori pas fondamentalement différente. Ainsi, la situation d'une entreprise détenant une part de marché de 80 ou 95 % par exemple n'est pas très éloignée de celle d'un vrai monopole, ce qui permet de déduire qu'une entreprise détenant d'une telle part de marché dispose également d'un pouvoir de marché substantiel[44]. Autre raison avancée pour démontrer que la part de marché peut être un indicateur significatif, plus la disparité des parts de marché est grande, meilleur est le profit que l'entreprise peut espérer retirer de l'augmentation du prix de ses produits. Par exemple, si une entreprise détient une part de marché supérieure à celles de ses concurrents, il est moins probable que ces derniers soient en mesure de réagir à la baisse de production de l'entreprise dominante en augmentant leur offre dans une proportion suffisante pour compenser la baisse[45]. Enfin, la part de marché a été également considérée comme un indicateur potentiellement significatif parce qu'une entreprise détenant une part de marché élevée a plus de chances de convaincre les consommateurs de la suivre dans ses stratégies d'exclusion, que ces stratégies ont plus de chances de nuire à l'efficience des concurrents et que tout investissement réalisé pour nuire à l'efficience des concurrents est plus rentable[46].

La validité de ces arguments dépend évidemment beaucoup de la capacité à définir avec un minimum de précision le marché pertinent au sens du droit de la concurrence. En outre, pour que la corrélation présumée entre la part de marché et le pouvoir de marché se confirme, plusieurs autres facteurs importants doivent être présents. En particulier, cette corrélation n'existe que si les concurrents (réels ou potentiels) ne sont pas en mesure de réagir à la baisse de production d'une entreprise, si les consommateurs ne réagissent pas suffisamment à la tentative de baisse de production et si aucun autre élément ne limite la capacité de l'entreprise à augmenter ses prix de manière rentable. Au final, il est possible que ces facteurs deviennent plus significatifs que l'importance de la part de marché pour déterminer si l'entreprise détient un pouvoir de marché substantiel.

On sait que la définition des marchés pertinents au sens du droit de la concurrence et le calcul des parts de marché posent de nombreux problèmes pratiques de nature à remettre en cause la fiabilité de la méthode qui consiste à calculer les parts de marché pour déterminer si une entreprise détient un pouvoir de marché. Bien souvent, les instances de décision doivent se fonder sur des données inexactes. Les décisions

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44 AREEDA ET HOVENKAMP, *supra* note 5, 532a, font observer que d'autres facteurs, comme les barrières à l'entrée, devraient être pris en compte s'ils étaient clairs, mais qu'ils ne devraient pas être communs au point de faire reposer l'analyse sur un mauvais point de départ. *Voir également* Krattenmaker et autres, *supra* note 2, 259 qui soulignent que la théorie de la contestabilité démontre que, dans certaines circonstances très précises, même une entreprise détenant 100 % du marché peut ne pas être en mesure d'augmenter ses prix.

45 AREEDA ET HOVENKAMP, *supra* note 5, 532a. Areeda et Hovenkamp expliquent qu'un concurrent détenant une très petite part du marché pertinent a sans doute, pour diverses raisons, moins de chances qu'un concurrent qui possède une part de marché relativement importante d'augmenter suffisamment sa production pour répondre à la demande des consommateurs qui envisageraient de changer de fournisseur à la suite de l'augmentation de prix de l'entreprise en situation de quasi-monopole. Ils partent notamment de l'hypothèse que la capacité excédentaire est proportionnelle à la production existante et que la capacité d'augmenter la production dépend de la taille de l'entreprise. Ils n'en déduisent toutefois pas qu'une part de marché supérieure à 80 % suffise nécessairement à prouver que l'entreprise détient pouvoir de marché substantiel, mais estiment que cela pourrait constituer un bon point de départ pour en faire l'hypothèse.

46 Krattenmaker et al., *supra* note 2, 259-60 (1987) ; Einer Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 253, 335-36 (2002). Elhauge semble accorder une importance étonnante à la signification d'une part de marché de 50 % dans les affaires de concurrence mettant en cause une entreprise isolée.

sur ce qu'il faut inclure ou non dans le marché peuvent se révéler difficiles à prendre, voire présenter un certain arbitraire. Puis, une fois le marché pertinent délimité, l'attribution des parts de marché peut également être problématique[47]. En outre, accorder beaucoup d'importance aux parts de marché incite à opter pour une définition étroite des marchés pour parvenir à des parts de marché plus élevées. En présence de pratiques anticoncurrentielles laissant présager qu'une entreprise détient un pouvoir de marché, les instances de décision peuvent avoir à choisir entre constater qu'une entreprise détient le pouvoir de marché exigé alors qu'elle a une faible part de marché ou définir plus étroitement le marché pour trouver une part de marché élevée, qui rend la détention de pouvoir de marché plus plausible[48]. C'est pourquoi le résultat auquel aboutit cet exercice de définition peut parfois ne pas rendre fidèlement compte des contraintes concurrentielles auxquelles une entreprise est exposée.

La définition du marché se heurte à un autre problème, peut-être plus fondamental : l'absence de modèle unanimement reconnu pour définir le marché pertinent dans les affaires où une entreprise a déjà exercé son pouvoir de marché[49]. Il faut, pour définir le marché, tenir compte des contraintes concurrentielles. Pour délimiter les marchés, on utilise souvent une méthode qui consiste à examiner si l'augmentation de prix faible, mais néanmoins significative et non transitoire qu'un monopole hypothétique pourrait appliquer de manière rentable à une catégorie de produits ou services excède ou non un certain seuil, généralement compris entre 5 et 10 %. Cependant, une fois que l'entreprise a exercé son pouvoir de marché et augmenté son prix jusqu'au niveau de maximisation des bénéfices, elle ne doit pas être en mesure de procéder à une autre augmentation rentable par rapport au prix atteint. Un test qui porterait sur ce qui arriverait si l'entreprise augmentait son prix pourrait donc induire en erreur et donner de faux résultats, en raison d'une surestimation de la réalité des contraintes concurrentielles auxquelles est exposée l'entreprise[50].

Dans nombre d'affaires, il peut être nécessaire, pour définir le marché, de recourir à d'autres méthodes, qui tiennent compte des contraintes concurrentielles de l'entreprise. Cela ajoute au caractère incertain des résultats de l'exercice de définition du marché. La délimitation du marché basée sur le test du monopole hypothétique peut surtout être utile dans les affaires où l'on cherche à savoir si des pratiques auxquelles l'entreprise ne s'est pas encore livrée pourraient l'amener à détenir un pouvoir de marché

47 Gregory J. Werden, *Assigning Market Shares*, 70 Antitrust L. J. 67 (2002), décrit les difficultés que pose l'attribution des parts de marchés.

48 *Voir par exemple,* Fingleton, *supra* note 3, p. 43.

49 *Voir par exemple,* White, *supra* note 4.

50 Ce phénomène renvoie à la célèbre affaire Cellophane. Dans son arrêt United States v E.I. Du Pont de Nemours & Co., 351 U.S. 377 (1956), la Cour a estimé que Du Pont n'était pas en mesure d'augmenter le prix de la cellophane de manière rentable du fait que les consommateurs seraient trop nombreux à se tourner vers d'autres produits, et a donc conclu que le marché pertinent était plus large que le marché de la cellophane et incluait tous les matériaux d'emballage souples. Les commentateurs s'accordent à reconnaître que la Cour a commis une erreur, car elle n'a pas tenu compte de ce que la forte élasticité de la demande s'expliquait par le fait que Du Pont avait déjà augmenté le prix de la cellophane jusqu'au niveau de maximisation des bénéfices ; comme Du Pont avait été en mesure d'augmenter son prix jusqu'à ce niveau, il aurait fallu limiter le marché pertinent au marché de la cellophane. *Voir par exemple,* Stephen C. Salop, *The First Principles Approach to Antitrust,* Kodak, *and Antitrust at the Millenium*, 68 Antitrust L. J. 187, 199 (2000) ; Werden, *Demand Elasticities*, *supra* note 3, 377, estime que la Cour a confondu concurrence créée par l'exercice d'un pouvoir de marché et concurrence pouvant empêcher l'exercice d'un pouvoir de marché.

substantiel[51], même si, dans de nombreuses juridictions, les dispositions relatives aux pratiques d'une entreprise isolée visent exclusivement celles qui possèdent déjà le pouvoir de marché requis et non les pratiques qui pourraient être mises en œuvre pour acquérir ce pouvoir.

Plusieurs autres méthodes ont été proposées pour examiner les situations dans lesquelles le pouvoir de marché substantiel a déjà été exercé. La première consisterait à déterminer le niveau du prix concurrentiel qui prévaudrait en l'absence des pratiques anticoncurrentielles alléguées et à retenir ce prix pour appliquer le test du monopole hypothétique et parvenir ainsi à une délimitation satisfaisante du marché pertinent[52]. Toutefois, dans la majorité des affaires, cette solution risque d'être impossible à mettre en œuvre, car il peut être difficile de déterminer le prix qui « prévaudrait en l'absence de pratiques anticoncurrentielles ». En outre, même à supposer qu'une estimation soit possible, il est permis de se demander si elle serait suffisamment fiable pour que la définition du marché pertinent et l'attribution des parts de marché restent significatives. Par ailleurs, si les niveaux de prix concurrentiels peuvent être estimés, le pouvoir de marché peut être apprécié directement, ce qui rend inutile l'étape supplémentaire consistant à délimiter un marché pertinent et à attribuer les parts de marché[53].

L'autre approche envisageable pour délimiter le marché pertinent lorsque les pratiques d'une entreprise sont examinées *a posteriori* consisterait à se demander si, en cas de légère réduction du prix, un nombre significatif d'acheteurs se détournerait d'autres marchés de produits ou d'autres marchés géographiques au profit des produits ou zones géographiques du marché candidat. S'il y a peu de substitution, le marché candidat est probablement un marché pertinent au sens du droit de la concurrence[54].

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51 Gregory J. Werden, *Market Delineation under the Merger Guidelines: Monopoly Cases and Alternative Approaches*, 16 Rev. Ind. Org. 211, 212 (2000) estime que le test du monopole hypothétique pourrait être appliqué lorsque l'enjeu est de déterminer si des pratiques risquent, en l'absence d'intervention, de créer un pouvoir de monopole). Dans son document de réflexion sur l'article 82 du Traité CE, la Commission européenne cite une autre utilisation possible du test du monopole hypothétique dans les affaires de concurrence mettant en cause une entreprise isolée, estimant que s'il ressort du test qu'un autre produit ne fait pas partie du marché pertinent, ce résultat serait pertinent même si l'entreprise qui fait l'objet de l'enquête a augmenté son prix jusqu'au niveau de maximisation des bénéfices. DG Concurrence, Document de réflexion sur l'article 82, *supra* note 23, p. 8.

52 *Voir par exemple,* Bureau de la concurrence, Lignes directrices pour l'application des dispositions sur l'abus de position dominante (2001), *supra* note 13, p. 15 ; Salop, *supra* note 50, 196 estime que le prix de référence à retenir pour apprécier les restrictions à la concurrence alléguées devrait être le prix qui prévaudrait si les contraintes et les pratiques anticoncurrentielles alléguées n'existaient pas.

53 *Voir par exemple,* DG Concurrence, Document de réflexion sur l'article 82, *supra* note 23, pp. 7-8. (concernant les problèmes que pose l'application du test du monopoleur hypothétique dans les affaires d'abus de position dominante et la difficulté de l'estimation des niveaux de prix concurrentiels) ; Jonathan B. Baker, *Market Definition* 25, nbp 51 (2006) ; disponible sur le site Internet http://papers.ssrn.com/sol3/papers.cfm?abstract_id=854025 ; Werden, *Market Delineation, supra* note 51, 215, propose d'utiliser les éléments prouvant que le prix réel est supérieur de 5 à 10 % au prix concurrentiel comme preuve directe pour apprécier le pouvoir de marché.

54 Baker, *supra* note 53, 25-26. *Voir également* Krattenmaker et autres., *supra* note 2*,* 256 nbp 73 qui proposent d'utiliser la baisse de prix hypothétique pour déterminer si une entreprise a déjà exercé son pouvoir de marché.

D'autres commentateurs ont toutefois souligné que l'utilisation d'une baisse de prix hypothétique soulevait de nombreuses questions et pouvait ne pas permettre de délimiter correctement le marché[55].

C'est peut-être une idée similaire qui sous-tend la proposition d'appliquer un test en deux étapes consistant d'abord à s'interroger sur ce que serait la production du plaignant en l'absence des pratiques anticoncurrentielles auxquelles le défendeur est censé s'être livré, puis à se demander si le volume supplémentaire qu'aurait produit le plaignant en l'absence de ces pratiques aurait entraîné une baisse de prix faible mais néanmoins significative et non transitoire. Comme le soulignent les auteurs de cette proposition, ce test ne serait pas utilisé pour délimiter un marché pertinent afin d'évaluer le pouvoir de marché du défendeur, mais permettrait d'apprécier directement si les pratiques de ce dernier ont eu des effets anticoncurrentiels (lesquels seraient alors mesurés exclusivement en termes de prix)[56]. Les auteurs concèdent également qu'une telle analyse suppose d'examiner une situation hypothétique, ce qui peut se révéler complexe. Par conséquent, rien ne prouve que cette méthode permettrait d'obtenir des données suffisamment solides pour garantir une délimitation fiable du marché pertinent ou, plus directement, une appréciation du pouvoir de marché du défendeur.

Malgré ces problèmes et insuffisances, dans la quasi-totalité des juridictions, on continue de faire une grande utilisation de la délimitation du marché et du calcul des parts de marché pour trouver des éléments probants dans les affaires de concurrence mettant en cause une entreprise isolée. De nombreuses raisons peuvent expliquer ce phénomène. D'une part, la jurisprudence peut exiger que le plaignant délimite un marché pertinent au sens du droit de la concurrence et définisse la part de marché du défendeur[57]. Ces outils sont en effet bien connus et semblent relativement faciles à utiliser. D'autre part, l'utilisation de seuils de parts de marché est souvent perçue par les entreprises comme un gage de plus grande sécurité juridique[58]. Enfin, même ceux que l'utilisation des parts de marché pour établir l'existence d'un pouvoir de marché substantiel laisse sceptiques, estiment qu'elles peuvent servir de filtre pour éliminer les cas dans

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55 Werden, *Market Delineation, supra* note 51, 215-16. En outre, si l'on parvenait à la conclusion que les acheteurs réagiraient à une réduction de prix hypothétique en se tournant vers des produits du défendeur, et par conséquent que les produits de substitution appartiennent au même marché, il conviendrait de se demander dans quelle mesure cette définition plus large du marché pertinent est significative puisque les autres produits n'ont apparemment pas empêché le défendeur d'augmenter son prix de manière rentable.

56 Philip B. Nelson et Lawrence J. White, *Market Definition and the Identification of Market Power in Monopolization Cases: a Critique and a Proposal,* p. 22 (Document de travail du NYU Center for Law & Business n° CLB-03-022, novembre 2003). L'un des problèmes du test proposé pourrait être qu'il ne porte que sur le volume supplémentaire que le plaignant produirait en l'absence des pratiques anticoncurrentielles alléguées. Cette production hypothétique aurait peut-être été trop faible pour entraîner une baisse de prix. Cela amènerait à conclure que les pratiques du défendeur n'étaient pas anticoncurrentielles. Toutefois, cette conclusion occulte peut-être le fait que d'autres entreprises ont pu être également touchées par les pratiques anticoncurrentielles et que leur production supplémentaire hypothétique aurait pu être suffisante pour entraîner une baisse de prix.

57 *Voir par exemple,* Walker Process Equipment Inc. contre Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965) (« Sans définition de ce marché, il n'existe aucun moyen de mesurer la capacité [du défendeur] à entraver ou éliminer la concurrence ») ; Affaire T30/89, Hilti AG contre Commission des Communautés européennes, Rec. 1991 p. II-1439 (« Liminairement, il convient de remarquer que, pour apprécier la position de Hilti sur le marché, il y a lieu, tout d'abord, de définir le marché en cause, les possibilités de concurrence ne pouvant être appréciées qu'en fonction des caractéristiques des produits en cause, en vertu desquelles ces produits seraient particulièrement aptes à satisfaire des besoins constants et seraient peu interchangeables avec d'autres produits. »)

58 D'autres raisons ont été avancées : par exemple, le manque de volonté et l'immobilisme des institutions et le fait que cette méthode a été le premier outil utilisé, jusqu'à ce que la science économique mette au point des méthodes plus appropriées. *Voir* Fingleton, *supra* note 3, pp. 3, 36-37

lesquels la faiblesse de la part de marché permet de conclure à l'absence de pouvoir de marché[59]. Cette position ne fait toutefois pas l'unanimité[60].

Par conséquent, la question n'est pas tant de savoir si la définition du marché et des parts de marché est utilisée dans toutes les juridictions pour établir l'existence d'un pouvoir de marché (elle va en effet apparemment continuer de constituer une preuve pertinente), mais plutôt de déterminer quel usage faire de cette définition pour qu'elle soit un indicateur potentiel de pouvoir de marché. Comme l'a observé un commentateur : « Puisque même les meilleurs calculs de parts de marché ne donnent qu'une image imparfaite du pouvoir de marché, leurs imperfections ne doivent pas empêcher de les utiliser[61]. »

L'importance accordée aux parts de marché en tant qu'éléments de preuve varie d'une juridiction à l'autre, tant en termes de niveau à partir duquel elles permettent de conclure à l'existence d'un pouvoir de marché substantiel, qu'en termes de valeur de la conclusion qui peut être tirée d'une part de marché donnée. Ces différences dans l'importance accordée aux parts de marché ont été fréquemment décrites par les commentateurs[62].

Malgré ces différences concernant l'importance accordée aux parts de marché, des points communs semblent se dégager. D'une part, il y a apparemment un consensus sur le fait que les parts de marché peuvent certes constituer une preuve utile, mais ne sauraient en aucun cas être le seul élément pris en compte pour établir qu'une entreprise détient un pouvoir de marché substantiel. Par conséquent, la délimitation du marché et l'existence d'une part de marché élevée ne constituent pas la finalité de l'analyse ; d'autres facteurs, par exemple les barrières à l'entrée et à l'expansion, le pouvoir d'achat et la réaction des consommateurs aux pratiques anticoncurrentielles, doivent également être pris en compte[63]. Cette approche transparaît dans les Lignes directrices canadiennes pour l'application des dispositions sur l'abus de position dominante, selon lesquelles : « Le Bureau estime qu'une part élevée de marché est habituellement une condition nécessaire, mais non suffisante, pour établir l'existence d'une puissance commerciale[64]. »

L'idée selon laquelle l'appréciation des parts de marché doit constituer le point de départ et non la finalité de l'analyse, soulève la question de la valeur des présomptions reposant sur cette appréciation. De

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59 *Voir par exemple*, BISHOP ET WALKER, *supra* note 3, 181 ; Krattenmaker et autres., *supra* note 2, 260 ; An Economic Approach to article 82, Rapport du Groupe consultatif économique pour la politique de concurrence (Economic Advisory Group of Competition Policy, EAGCP), p. 14 (2005), disponible sur le site Internet http://ec.europa.eu/comm/competition/publications/studies/eagcp_july_21_05.pdf ; Adrian Majumdar, *Whither Dominance?*, 27 ECLR 161, 163 (2006).

60 *Voir* Fingleton, *supra* note 3, pp. 33-36, qui souligne que l'importance accordée aux indicateurs de concentration des marchés risque de conduire à des erreurs de type II, en d'autres termes d'amener à conclure à tort à l'absence de pouvoir de marché ; Salop, *supra* note 50*,* 200 (2000).

61 Werden, *Assigning Market Shares*, *supra* note 47, 104.

62 *Voir par exemple,* Facey et Assaf, *supra* note 14, pp. 537-38, qui affirment que, dans la pratique, les parts de marché ont peut-être plus de poids et créent une plus forte présomption de position dominante dans l'Union européenne qu'au Canada ; au Canada, même si, techniquement, des parts de marché relativement faibles peuvent constituer une présomption de pouvoir de marché substantiel, toutes les actions en justice introduites pour abus de position dominante concernaient des entreprises possédant une part de marché très élevée.

63 Plusieurs de ces facteurs sont présentés dans les parties suivantes.

64 Bureau de la concurrence, Lignes directrices pour l'application des dispositions sur l'abus de position dominante (2001), *supra* note 13, p. 17 ; voir également OFT, Market Power Guidelines, *supra* note 10, 2.11.

toute évidence, une part de marché élevée n'étant pas un critère suffisant pour détecter avec certitude les entreprises qui détiennent un pouvoir de marché substantiel, il y a un risque non négligeable que les présomptions soient « fausses », en d'autres termes concernent des entreprises qui ne disposent pas d'un pouvoir de marché substantiel. L'autre risque est que les présomptions reposant sur le calcul des parts de marché influent fortement sur la suite de l'analyse : une fois convaincus que l'analyse de la part de marché aboutit à des présomptions, les instances de décision risquent de procéder à un examen sélectif des autres preuves et de se cantonner à rechercher la confirmation des présomptions initiales. Par conséquent, certains éléments militent contre une utilisation des présomptions de pouvoir de marché substantiel reposant sur le calcul des parts de marché. Dans la pratique, la manière dont les présomptions sont utilisées et leur implication pour l'analyse des autres éléments de preuve sont des facteurs déterminants. Si une autorité de la concurrence ou un tribunal procède à un examen complet des autres éléments de preuve, même dans les cas où le seuil de parts de marché légal est franchi, l'analyse devrait permettre de déterminer sans erreur si l'entreprise détient effectivement un pouvoir de marché substantiel. Les présomptions fondées sur le calcul des parts de marché deviennent alors une forme de système d'alerte, signalant qu'une situation requiert une analyse plus approfondie, sans influencer l'issue de ladite analyse. Les Lignes directrices canadiennes font d'ailleurs référence à ce principe, disposant que : « une part de marché de 35 % ou plus entraînera généralement plus ample examen. »

Par ailleurs, pour apprécier la valeur probante des parts de marché, il faut également tenir compte de la méthode utilisée pour délimiter le marché pertinent et attribuer les parts. Selon les commentateurs, plus la délimitation des marchés pertinents est sujette à caution, moins il faut accorder d'importance au niveau des parts de marché par rapport à d'autres facteurs, comme les barrières à l'entrée, pour déterminer si une entreprise détient un pouvoir de marché[65].

Enfin, l'importance accordée à la définition des marchés pertinents et des parts de marché ne doit pas empêcher de procéder à l'examen, plus important, des pratiques de l'entreprise. Le but ultime de l'analyse doit être d'apprécier les effets anticoncurrentiels de ces pratiques, pas de définir un marché pertinent[66].

3.1.2 Barrières à l'entrée[67]

Les barrières à l'entrée sont probablement le principal facteur à prendre en compte pour déterminer si une entreprise détient un pouvoir de marché substantiel. En effet, aucune entreprise ne peut conserver son pouvoir de marché à long terme, et par conséquent détenir un pouvoir de marché durable, si elle ne peut pas empêcher de nouveaux concurrents de pénétrer sur le marché (et si aucun autre facteur n'empêche cette entrée). Ce principe est largement reconnu par les autorités de la concurrence et les tribunaux. Ainsi, la Haute Cour australienne a estimé que :

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65 Baker, *supra* note 53, 3, qui estime possible que la définition du marché soit peu utile à l'analyse de la situation de la concurrence lorsque les contours du marché sont difficiles à tracer, les indicateurs de concentration de ce marché étant alors presque arbitraires. BISHOP ET WALKER, *supra* note 3, 181, estiment que le marché pertinent peut être difficile à définir dans les affaires de position dominante et qu'il n'est donc pas possible d'accorder trop d'importance à la part de marché.

66 BISHOP ET WALKER, *supra* note 3, 54.

67 Bien que la présente note s'intéresse surtout aux barrières à l'entrée, les barrières à l'expansion ou la mobilité auxquelles se heurtent les concurrents déjà présents sur le marché doivent également faire l'objet d'une analyse approfondie. Généralement, cette analyse est la même, bien que dans certains cas, un seul type de barrières – pas les deux – existe. Par exemple, il peut arriver que les concurrents soient en mesure d'augmenter leur production même si les barrières à l'entrée sont élevées. *Voir par exemple,* Fingleton, *supra* note 3, p. 17 ; BISHOP ET WALKER, *supra* note 3, 60, soulignent que les barrières à l'entrée peuvent être élevées et les barrières à l'expansion faibles.

« Une part de marché élevée peut fort bien constituer une preuve de l'existence d'un pouvoir de marché … mais il faut tenir également compte de la facilité avec laquelle les concurrents peuvent pénétrer sur le marché. Une entreprise ne peut détenir un pouvoir de marché que si, pour une raison quelconque, il n'est pas rationnel ou pas possible que de nouveaux arrivants pénètrent sur le marché. Il faut qu'il y ait des barrières à l'entrée[68]. »

Des tribunaux d'autres pays sont parvenus à la même conclusion :

« En l'absence de barrières à l'entrée élevées, une entreprise, fût-elle en situation de monopole, risque d'avoir des difficultés à contrôler les prix par un quelconque accord d'exclusivité, si une ou des nouvelles entreprises peuvent facilement entrer sur le marché pour le mettre en échec[69]. »

Les Lignes directrices canadiennes disposent que :

« … une forte part de marché ne suffit pas en soi à prouver la puissance commerciale. En l'absence d'obstacles à l'entrée, toute tentative d'une entreprise jouissant d'une forte part de marché d'exercer une puissance commerciale est susceptible de susciter l'arrivée de nouvelles entreprises ou l'expansion d'entreprises existantes. L'entreprise ayant une forte part de marché perd alors des clients à ses rivaux, à tel point qu'elle ne jugera pas rentable de tenter d'augmenter ses prix au-delà des niveaux concurrentiels[70]. »

John Fingleton a poussé ce raisonnement plus loin ; selon lui, puisque les barrières à l'entrée constituent la source principale de pouvoir de marché, la procédure visant à établir l'existence d'un pouvoir de marché doit commencer par une évaluation de ces barrières (et de l'existence d'une concurrence par les prix), plutôt que par une analyse de la concentration. D'après lui, en l'absence de barrières à l'entrée et de concurrence par les prix, il y a lieu de conclure à l'absence de pouvoir de marché[71]. Fingleton est toutefois conscient que, même si la plupart des auteurs s'accordent à reconnaître que les barrières à l'entrée constituent la principale source de pouvoir de marché, la difficulté conceptuelle à laquelle on se heurte pour les définir et les problèmes de mesure qui en découlent constituent peut-être le principal obstacle au choix de l'évaluation des barrières à l'entrée comme principal outil d'appréciation du pouvoir de marché[72].

Le Comité de la concurrence de l'OCDE a récemment mené une étude très approfondie sur les barrières à l'entrée[73]. Schématiquement, l'étude définit ces barrières comme des conditions et circonstances de marché retardant les entrées ou les empêchant d'éliminer les effets anticoncurrentiels en cause dans une

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68 Boral contre ACCC, [2003] HCA 5, 292, citant Queensland Wire Industries Pty Ltd. v Broken Hill Pty Co Ltd (1989) 167 CLR 177.

69 Concord Boat contre Brunswick Corp., 207 F.3d 1039 (8e Cir. 2000).

70 Bureau de la concurrence, Lignes directrices pour l'application des dispositions sur l'abus de position dominante (2001), *supra* note 13, p. 18.

71 Fingleton, *supra* note 3, p. 25. En cas d'échec du premier test, il faudrait, dans une deuxième étape, procéder à une analyse plus approfondie de la concurrence par les prix, des barrières à la mobilité et de l'élasticité de la demande.

72 *Id.*, p. 15

73 OCDE, Barrières à l'entrée (2006) ; disponible en anglais sur le site Internet http://www.oecd.org/dataoecd/43/49/36344429.pdf.

affaire donnée[74]. L'appréciation du pouvoir de marché a également un lien avec nombre des thèmes abordés pendant la table ronde. La présente note ne traitera que certains aspects, qui concernent spécifiquement l'utilisation des barrières à l'entrée en tant qu'éléments de preuve.

Comme indiqué précédemment, définir et mesurer les barrières à l'entrée peut être une tâche difficile. Pour que l'évaluation des barrières fournisse des éléments de preuve utiles à l'appréciation du pouvoir de marché (ou à l'établissement de son absence), il est indispensable d'effectuer une analyse détaillée et factuelle. Les Lignes directrices pour l'appréciation du pouvoir de marché publiées par le Bureau britannique de la concurrence (Office of Fair Trading, OFT) sont très explicites sur ce point. Il y est en effet expliqué que, si la définition d'une barrière à l'entrée peut être relativement facile, son analyse effective peut se révéler plus complexe : il peut être nécessaire d'examiner les coûts irrécupérables liés à l'entrée sur le marché, la facilité relative avec laquelle les approvisionnements et points de vente nécessaires peuvent être obtenus, l'environnement réglementaire et le coût de fonctionnement de l'entreprise à une échelle minimum viable. Cela peut poser d'épineux problèmes de mesure et requérir une analyse minutieuse des éléments factuels qualitatifs. Les allégations selon lesquelles une entrée est imminente doivent être appréciées à la lumière d'autres éléments de preuve crédibles, par exemple d'entrées passées qui ont débouché sur une concurrence effective. Il convient également d'évaluer le temps nécessaire pour parvenir à entrer sur le marché, ce qui n'est pas toujours aisé[75].

Par ailleurs, les barrières à l'entrée ne constituent une preuve significative de pouvoir de marché que si le marché pertinent, ou les contraintes concurrentielles de nature à empêcher l'exercice du pouvoir de marché, ont été définis correctement. La décision *Mylan v. IBM* illustre cet aspect. Dans cette affaire, la cour d'appel a infirmé la décision rendue en première instance, selon laquelle défendeur ne disposait pas d'un pouvoir de marché substantiel sur le marché des ordinateurs centraux. La cour a estimé que les entrées sur lesquelles le tribunal de première instance s'était fondé pour déterminer qu'IBM ne détenait pas un pouvoir de marché substantiel concernaient des segments ou des gammes de produits qui n'auraient pas dû être inclus dans le marché pertinent. Le tribunal de première instance avait par exemple estimé que l'expansion des entreprises de location prouvait que l'entrée sur le marché était facile. La cour d'appel a au contraire jugé que les activités de ces entreprises ne faisaient pas toutes partie du marché pertinent, certaines d'entre elles n'entraînant pas de contraintes concurrentielles pour IBM[76]. On retrouve le même cas de figure dans l'affaire *Dentsply*. En l'espèce, le tribunal de première instance avait estimé que, malgré sa part de marché élevée, le défendeur ne détenait pas un pouvoir de marché substantiel. Selon le tribunal, à travers ses accords d'exclusivité, Dentsply avait certes sensiblement limité l'accès aux distributeurs/ grossistes, mais n'empêchait pas ses concurrents de vendre directement aux consommateurs finals et les concurrents pouvaient donc être réellement en situation de concurrence s'ils optaient pour ce mode de

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74 OCDE, Barrières à l'entrée, *supra* note 73, p. 13 ; *voir également* OFT, Market Power Guidelines, *supra* note 10, 5.3 qui décrivent les barrières à l'entrée comme permettant à une entreprise de maintenir durablement et de manière rentable des prix supérieurs au niveau concurrentiel, sans être plus efficiente que ses rivales potentielles.

75 OFT Market Power Guidelines, 5.29-5.31 ; OCDE, Barrières à l'entrée, *supra* note 73, pp. 81-86. Il peut y avoir un lien entre la part de marché détenue durablement par une entreprise et le niveau de preuve exigé en matière de barrières à l'entrée. Les Lignes directrices canadiennes considèrent que plus la part de marché de l'entreprise est élevée, plus le niveau de preuve requis pour apprécier les barrières à l'entrée doit être élevé. Elles font référence à la jurisprudence canadienne, selon laquelle lorsqu'une entreprise détient au moins 80 % du marché, il faut présenter une preuve de facteurs atténuants, en rapport avec les barrières à l'entrée par exemple, de nature à infirmer l'existence d'un pouvoir de marché constatée en première analyse. Bureau de la concurrence, Lignes directrices pour l'application des dispositions sur l'abus de position dominante, *supra* note 13, p. 22.

76 Allan-Mylan, Inc. v International Business Machines Corp., 33 F.3d 194 (1994), *infirmant* Allan-Mylan, Inc. contre International Business Machines Corp, 693 F.Supp. 262 (E.D.Pa. 1988).

distribution[77]. Ce jugement a été infirmé en appel. Sans remettre en cause l'argument selon lequel les concurrents pouvaient avoir accès aux consommateurs finals, la cour d'appel a estimé que l'accès au réseau de distributeurs était crucial et que la capacité de Dentsply d'empêcher ses concurrents d'accéder aux distributeurs contribuait au maintien de son pouvoir de monopole[78].

Par conséquent, à défaut d'examen approfondi, les instances de décision risquent à l'évidence de conclure trop hâtivement à la faiblesse des barrières à l'entrée[79]. Toutefois, il faut également veiller à ce que l'examen de ces barrières ne se transforme pas en un exercice formaliste, conduit une fois les parts de marché appréciées, et consistant à passer en revue des catégories de barrières possibles sans examen factuel suffisant[80]. À cet égard, le traitement de l'intégration verticale en tant que barrière potentielle est édifiant. L'intégration verticale d'une entreprise déjà implantée peut certes constituer une barrière à l'entrée, mais ne fait pas systématiquement obstacle à l'entrée ou à l'expansion de concurrents. Il est permis d'estimer que certains tribunaux ont peut-être conclu trop vite que l'intégration verticale d'une entreprise constituait une entrave significative pour ses concurrents, sans avoir analysé la manière dont cette intégration affecte l'accès au marché[81].

Les éléments démontrant que des entrées sur le marché ont déjà eu lieu dans le passé, se sont révélées viables et ont obligé l'entreprise en position dominante à réduire ses prix, peuvent considérablement faciliter l'examen des barrières à l'entrée et du pouvoir de marché, sous réserve que les conditions de marché n'aient pas changé. Ainsi, selon certains commentateurs « le fait que des entrées aient eu lieu de manière répétée dans le passé dans les mêmes conditions qu'actuellement constitue la seule preuve réellement fiable de la faiblesse des barrières à l'entrée. En effet, des antécédents répétés d'entrées au cours d'une période où les prix étaient au niveau concurrentiel rendent encore plus probables les entrées en réaction aux futures tentatives d'augmentation des prix au-delà du niveau concurrentiel[82]. » Selon ce raisonnement, sauf si les conditions de marché ont changé, l'existence d'antécédents d'entrées devrait suffire à infirmer l'existence d'une position dominante puisqu'il y a absence de pouvoir sur les prix. Toutefois, dans l'affaire *Tuyauteries Canada*, le Tribunal de la concurrence semble avoir raisonné différemment, tout en reconnaissant le caractère significatif de l'entrée sur le marché. Il a en effet estimé

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77 United States v Dentsply International, Inc., 277 F.Supp.2d 387, 451-52 (2003).

78 United States v Dentsply International, Inc., 399 F.3d 181, 189-90 (3e Cir. 2005).

79 OCDE, Barrières à l'entrée, *supra* note 73, p. 85 ; citation de Jonathan Baker, *The Problem with* Baker *and* Syufy*: On the Role of Entry in Merger Analysis*, 65 Antitrust L. J. 353, 371 (1997).

80 *Voir par exemple,* Fingleton, *supra* note 3, p. 37, qui avance que l'analyse des barrières à l'entrée pourrait être nuancée par les indicateurs de part de marché.

81 Dans l'affaire *United Brands*, par exemple, United Brands (à la différence de certains de ses concurrents) contrôlait les plantations, les moyens de transport et les systèmes de distribution ; la Cour a considéré cette intégration verticale comme un facteur déterminant pour conclure à la position dominante de l'entreprise. Elle a estimé que l'intégration verticale donnait à United Brands « une garantie de stabilité et de confort commerciaux », dont ses concurrents ne bénéficiaient pas. Affaire 27/76 United Brands Company et United Brands Continental BV contre Commission des Communautés européennes, Rec. 1978 p. 207, para. 69-96. Toutefois, la Cour ne s'est guère interrogée sur le point de savoir si les concurrents non intégrés verticalement avaient individuellement suffisamment accès aux approvisionnements, auquel cas l'intégration verticale de United Brands n'aurait pas dû constituer une barrière à l'entrée. La Cour a par exemple constaté un excédent de production. A priori, cet excédent était également disponible pour les concurrents. Dans le même ordre d'idées, si les capacités de transport étaient excédentaires, les entreprises rivales pouvaient louer les capacités nécessaires et même retirer des avantages de cette location en termes de coûts en les louant au prix du marché, relativement faible, au lieu d'avoir à entretenir leur propre flotte, moyennant des coûts plus élevés.

82 AREEDA ET HOVENKAMP, *supra* note 3, 420b.

que les concurrents du défendeur n'avaient pas pu accéder au marché dans certaines parties du Canada. Lorsque des entrées avaient eu lieu, la part de marché du défendeur avait baissé de 10 %, et il a été établi que l'arrivée de nouvelles entreprises avait entraîné une baisse des prix. Le Tribunal a considéré que cette arrivée « contredisait de manière très convaincante » la thèse de l'expert du plaignant, selon laquelle les barrières à l'entrée étaient élevées. Toutefois, en dernière analyse, il a estimé que le défendeur détenait un pouvoir de marché important[83].

Bien que les barrières à l'entrée soient indispensables pour qu'une entreprise conserve un pouvoir de marché substantiel, leur présence ne suffit pas à établir son existence. Ainsi, il peut y avoir une âpre concurrence par les prix sur des marchés caractérisés par d'importantes barrières à l'entrée. Une telle concurrence ou, ou plus exactement, l'idée qu'il faudra l'affronter après avoir accédé au marché peut dissuader les candidats à l'entrée[84]. Par ailleurs, il est possible que des barrières empêchent l'accès à un marché de renouvellement, mais que le pouvoir de marché de l'entreprise soit entravé par une concurrence par les prix très dure sur le marché principal.

De même, le fait qu'une entreprise conserve une part de marché élevée pendant une période prolongée ne saurait constituer en soi une preuve de la présence de barrières à l'entrée. L'entreprise a fort bien pu réagir à des pressions concurrentielles en améliorant ses produits ou en baissant ses prix. Ainsi, dans l'affaire *Hoffmann-La Roche*, la Cour de justice des Communautés européennes a estimé que « [le] maintien [des part de marché pouvait] tout aussi bien être la conséquence d'une attitude concurrentielle efficace que d'une position assurant à l'entreprise en cause une possibilité de comportement indépendant de la concurrence »[85]. Bien que le maintien de parts de marché élevées pendant une période prolongée puisse être révélateur d'un pouvoir de marché substantiel, il faut donc également tenir compte des éléments prouvant que l'entreprise a agi dans le respect des règles de la concurrence, le cas échéant[86].

Lorsque les barrières à l'entrée sont dues aux pratiques de l'entreprise en place (ristournes groupées, différenciation des produits, ventes liées, accords d'exclusivité par exemple), les mêmes faits peuvent servir à apprécier le pouvoir de marché ou les barrières à l'entrée et les effets anticoncurrentiels : les pratiques qui permettent d'établir la présence de barrières à l'entrée peuvent également servir à prouver les

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83 Canada (Commissaire de la concurrence) contre Tuyauteries Canada, 2005 Trib. conc. 3, 141-161. Le Tribunal s'est fondé sur le fait que la part de marché, la gamme de produits, la présence nationale, le nombre limité de concurrents, et le caractère limité du potentiel de croissance étaient « en moyenne » des éléments suffisants pour prouver l'existence d'un pouvoir de marché substantiel.

84 BISHOP ET WALKER, *supra* note 3, 60.

85 Affaire 85/76, Hoffmann-La Roche & Co. AG contre Commission des Communautés européennes, Rec. 1979 p. 461.

86 Selon les commentateurs, le Tribunal de la concurrence a apparemment adopté une approche différente dans l'affaire *Tuyauteries Canada*. Le Tribunal a, en dépit du fait que des entreprises avaient accédé au marché et que ces entrées avaient entraîné une baisse des prix, estimé que le défendeur détenait une part de marché élevée, de l'ordre de 80 à 90 % : « l'entrée est limitée, comme le montre la part considérable du marché que conserve [Tuyauteries Canada] ». *Voir* John Bodrug et Anita Banicevic, *Dominance and Loyalty Programs in Canada, the United States, and the European Union*, 10 Antitrust (été 2005) 12, 13-14.

préjudices portés à la concurrence existante ou potentielle[87]. Cet aspect sera abordé dans la suite de cette note[88].

3.1.3 Pouvoir d'achat

Le pouvoir d'achat est un autre facteur qui peut être pris en compte pour déterminer si une entreprise a un pouvoir de marché substantiel, y compris lorsqu'elle a une part de marché élevée[89]. Un consommateur puissant sur le plan économique peut être en mesure d'empêcher une entreprise d'exercer son pouvoir de marché à des fins anticoncurrentielles. Comme le soulignent les Lignes directrices de l'OFT, l'élément déterminant n'est pas toujours la puissance économique de l'acheteur, mais le fait qu'il ait réellement un autre choix possible. Ce choix résulte de la capacité à opter pour un autre fournisseur, à s'intégrer verticalement ou encore à « soutenir » l'arrivée sur le marché d'un nouveau fournisseur[90].

La décision rendue par le Tribunal canadien de la concurrence dans l'affaire *NutraSweet* montre que la taille de l'acheteur n'a, en soi, guère d'importance, la question du choix de l'acheteur étant l'élément essentiel de l'analyse. Dans cette affaire, le Tribunal avait déjà constaté que NutraSweet détenait plus de 90 % du marché et avait conclu à l'existence de barrières à l'entrée créées, entre autres, par des droits de propriété intellectuelle. NutraSweet a essayé de démontrer que malgré cela, elle ne disposait pas d'un pouvoir de marché substantiel du fait que ses deux principaux clients, en l'occurrence Coca Cola et PepsiCo, étaient suffisamment puissants pour contrecarrer toute tentative d'exercice d'un pouvoir de marché de sa part. Le Tribunal a rejeté ces arguments et estimé peu probable que Coca-Cola et Pepsi-Co fabriquent de l'aspartame ou soient en mesure de se tourner vers un autre fournisseur[91].

Le pouvoir d'achat peut jouer un rôle particulièrement important dans l'appréciation du pouvoir de marché substantiel si l'État ou les organismes publics sont les principaux acheteurs et régulent le secteur du fournisseur de manière plus ou moins importante[92]. C'est par exemple le cas dans le secteur pharmaceutique, en particulier en Europe. Le nombre et la nature des preuves à fournir pour établir que le pouvoir d'achat de l'État limite le pouvoir de marché substantiel d'un laboratoire pharmaceutique ne sont

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87 OFT, Market Power Guidelines, 5.23. Comme le souligne la précédente étude de l'OCDE sur les barrières à l'entrée, le fait que certaines pratiques puissent être considérées comme créant une barrière à l'entrée ne signifie évidemment pas automatiquement qu'elles doivent être jugées illicites ; elles peuvent en effet reposer sur une logique proconcurrentielle.

88 *Voir infra*, pp. 33.

89 L'examen des résultats et du comportement d'une entreprise porte plus directement sur le point de savoir si l'exercice d'un pouvoir de marché substantiel a des effets. Ces deux éléments seront abordés dans le chapitre consacré aux preuves directes.

90 OFT, Market Power Guidelines 6.2. Voir également DG Concurrence, Document de réflexion sur l'article 82, *supra* note 23, p. 15 (le pouvoir de l'acheteur n'est un élément pertinent pour infirmer un constat de position dominante que si la réaction des acheteurs peut empêcher une augmentation des prix en favorisant l'entrée sur le marché de nouveaux fournisseurs ou en augmentant la production des fournisseurs existants).

91 Canada (Directeur des enquêtes et recherches) contre NutraSweet Co., [1990] 32 C.P.R. (3d.) 1 (Trib. conc.).

92 La régulation peut faire l'objet d'une analyse distincte lors de l'examen visant à déterminer si une entreprise détient un pouvoir de marché substantiel. Elle n'est pas abordée dans la présente note.

pas toujours clairement définis, ce qui peut rendre l'issue de ce type d'affaires relativement imprévisible[93]. Ces affaires illustrent également le fait, évoqué dans la suite de cette note, qu'il est parfois préférable d'axer l'analyse plus directement sur les effets de certaines pratiques sur la concurrence, plutôt que de commencer par examiner si l'entreprise à un pouvoir de marché substantiel[94].

Dans une série de décisions rendues à la suite de plaintes dans lesquelles des grossistes alléguaient que les laboratoires pharmaceutiques ne mettaient pas certains produits à leur disposition, le Tribunal espagnol de la concurrence a tranché en faveur des défendeurs, estimant qu'ils n'étaient pas en position dominante malgré des parts de marché relativement importantes. Le Tribunal a notamment axé son raisonnement sur le rôle de l'État en tant qu'acheteur et sur l'existence d'un cadre réglementaire limitant la capacité des laboratoires à décider de leur comportement sur le marché, en particulier en termes de prix. Les obligations d'approvisionnement, les règles limitant les circuits de distribution et la publicité ont également été considérées comme des éléments pertinents pour conclure à l'absence de pouvoir de marché substantiel[95].

Toutefois, les éléments prouvant que l'État exerce un pouvoir d'achat et des pressions sur les prix ne l'emportent pas toujours sur ceux qui démontrent qu'une entreprise détient un pouvoir de marché substantiel. Ainsi, dans l'affaire *Napp*, la Cour d'appel de la concurrence (Competition Appeal Tribunal, CAT) a confirmé la décision dans laquelle l'OFT estimait que Napp était en position dominante même si le système national de santé entravait un peu sa liberté de fixer ses prix. Selon la CAT, le fait que le prix du produit du défendeur ait été initialement approuvé par le gouvernement puis réduit dans le cadre d'un système public ne suffisait à infirmer l'existence d'une position dominante. Elle a estimé que les règlements en vigueur en matière de fixation des prix « n'avaient pas d'incidence directe sur la capacité de Napp à agir librement sur le marché de la morphine orale à libération prolongée » et, en particulier, ne l'empêchait pas d'adopter une politique de prix destinée à exclure les concurrents[96]. Comparativement à l'approche du Tribunal de la concurrence espagnol, ce raisonnement semble traduire une conception plus étroite de la question de savoir quand le pouvoir d'achat peut être une preuve pertinente. Apparemment, la CAT a considéré qu'il n'était un élément pertinent pour l'appréciation de l'existence d'une position dominante que s'il entravait directement les pratiques anticoncurrentielles reprochées au défendeur. Cette approche semble plus en phase avec la thèse selon laquelle il ne faut pas séparer l'appréciation du pouvoir de marché substantiel de l'examen des pratiques anticoncurrentielles dont est soupçonné le défendeur.

L'affaire *ACCC v. Baxter* est une autre illustration de la réticence que peuvent avoir les tribunaux à reconnaître que les arguments relatifs au pouvoir d'acheteur infirment l'existence d'un pouvoir de marché

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93 En réalité, l'instance de décision pourrait fort bien, au cours de l'examen visant à déterminer si une entreprise occupe une position dominante, être influencé par son point de vue sur les pratiques examinées. La décision sur la position dominante peut en effet être le seul moyen d'éviter de conclure à une infraction au droit de la concurrence lorsque que l'instance de décision pressent que les pratiques en cause devraient être jugées anticoncurrentielles une fois que l'entreprise a été considérée comme occupant une position dominante.

94 *Voir infra*, p. 37.

95 *Voir par exemple, Cofares/Organon*, décision du Tribunal de la concurrence, dossier R.547/02 (22 septembre 2003) ; *Laboratoris Farmaceuticos,* décision du Tribunal de la concurrence, dossier R.488/01 (5 décembre 2001). Affaires citées dans « Article 82 EC: Can It Be Applied to Control Sales By Pharmaceutical Manufacturers to Wholesalers? », EFPIA (2004).

96 Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading, [2001] CAT 1, 164-168. *Voir également* Genzyme v Office of Fair Trading, [2004] CAT4, 241-289 (après avoir procédé à un examen précis du cadre réglementaire et du comportement de Genzyme, la CAT a conclu que le pouvoir d'achat du système de santé n'était pas suffisant pour infirmer l'existence d'une position dominante).

substantiel, alors qu'ils ont déjà constaté le niveau élevé des parts de marché, la présence de barrières à l'entrée et qu'ils ont examiné des éléments prouvant que les pratiques du défendeur ont empêché des concurrents d'accéder au marché. Toutefois, dans cette affaire, le défendeur a apparemment presque réussi à convaincre la Cour fédérale que, ses clients étant les autorités des États, il ne détenait pas un pouvoir de marché substantiel en tant que fournisseur de solutés stériles en Australie, malgré une part de marché proche de 100 % et l'existence de barrières non négligeables à l'entrée. La Cour a examiné une série de facteurs et estimé que Baxter disposait d'une marge de manœuvre considérable pour « se comporter comme un fournisseur unique sur le marché ». Elle a concédé que les autorités des États représentaient en quelque sorte un « débouché essentiel » pour Baxter et pouvaient, dans une certaine mesure, entraver sa liberté d'action, l'entreprise ne voulant pas perdre ce marché. Toutefois, la Cour a aussi estimé que Baxter savait que les États étaient également soumis à certaines contraintes, parce qu'ils devraient supporter les coûts de toute action menée contre elle. Plusieurs facteurs ont semblé jouer en faveur de Baxter, notamment le fait que les États utilisaient des procédures d'appel d'offres, que certains des fonctionnaires chargés des achats avaient l'impression d'avoir suffisamment d'expérience en tant qu'acheteurs pour contrer la position de l'entreprise. En outre, les marges dégagées par Baxter ne semblaient pas élevées, même si la Cour a hésité à accepter les preuves qui lui ont été soumises sur ce point. Toutefois, en dernière analyse, les juges ont, certes « non sans hésitation », donné raison à l'ACCC et estimé que Baxter détenait un pouvoir de marché considérable ; le jugement ne permet toutefois pas d'identifier avec certitude les facteurs considérés comme déterminants[97].

3.1.4 Autres facteurs

Plusieurs autres facteurs pourraient être pris en compte pour déterminer si une entreprise détient ou non un pouvoir de marché substantiel. Dans certaines affaires, les défendeurs ont fait valoir un moyen de défense lié aux caractéristiques du marché, à savoir que l'évolution rapide du marché technologique sur lequel ils opèrent empêche de conclure à la capacité d'une entreprise à exercer un pouvoir de marché, même si elle détient une part de marché élevée, ou du moins plaide en faveur du recours à des critères spécifiques pour statuer sur l'existence d'un pouvoir de marché. En règle générale, les tribunaux n'ont pas accepté des arguments aussi vagues. Comme l'ont souligné les commentateurs, sur un marché caractérisé par la rapidité de l'innovation technologique, les effets proconcurrentiels des avancées technologiques et les effets de réseau peuvent se compenser et il est parfois difficile de distinguer les uns des autres[98]. Par conséquent, la détermination des effets qui l'emportent dans une situation donnée et de leur signification en termes de pouvoir de marché substantiel doit être effectuée dans le cadre de l'examen des autres catégories de preuves relatives aux barrières à l'entrée et aux performances concurrentielles des marchés[99].

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97 ACCC contre Baxter Healthcare Pty Ltd, [2005] FCA 581, 571-80.

98 *Voir également,* Howard A. Shelanski et J. Gregory Sidak, *Antitrust Divestiture on Network Industries*, U. Chi. L. rev. 1, 6-7 (2001). Ils font observer que des marges bénéficiaires élevées peuvent représenter des retours sur investissement modestes et légitimes, mais aussi indiquer que l'entreprise détient un pouvoir de marché substantiel induit par des effets de réseau. Ils concluent que dans les industries de réseau caractérisées par la rapidité des avancées technologiques, ces deux aspects peuvent être à l'œuvre et qu'il peut être difficile de les distinguer l'un de l'autre.

99 *Voir par exemple*, United States v Microsoft, 253 F.3d 34, 49-50, 55-57 (DC Cir. 2001) (la Cour a estimé qu'il serait difficile de définir des règles catégorielles en l'absence d'une analyse individualisée d'un marché donné) ; Alan-Myland, Inc. contre IBM, 33 F.3d 194, 210 (1994) (il a été conclu que la rapidité des mutations technologiques et la baisse des prix n'étaient pas incompatibles avec l'existence d'un pouvoir de marché) ; Décision de la Commission du 24 mars 2004 relative à une procédure d'application du l'article 82 du Traité CE, affaire COMP/C-3/37.792 Microsoft*,* 465-70 ; OFT Market Power Guidelines, *supra* note 10, 5.33-5.36 (concernant l'expansion du marché et le taux d'innovation dans le contexte des barrières à l'entrée).

3.2 Preuves directes de l'existence d'un pouvoir de marché substantiel

Des méthodes permettant d'apprécier plus directement le pouvoir de marché ont également été envisagées. Elles visent à établir jusqu'à quel point les ventes d'une entreprise sont sensibles aux variations des ventes de leurs concurrents et aux réactions des consommateurs et à déterminer si les « résultats » d'une entreprise sont révélateurs d'un pouvoir de marché. Comme cela sera précisé à la fin de cette partie, les pratiques d'une entreprise et leurs effets sur la concurrence peuvent également constituer des preuves pour déterminer s'il y a ou non pouvoir de marché substantiel.

3.2.1 Estimation de l'élasticité de la demande

Diverses méthodologies faisant appel à des techniques économétriques ont été élaborées pour mesurer directement le pouvoir de marché d'une entreprise[100]. L'une d'entre elles consiste à évaluer l'élasticité de la demande résiduelle de l'entreprise. Elle repose sur l'appréciation de l'élasticité de la demande adressée à une entreprise – et par conséquent de la faculté de cette dernière d'augmenter son prix – après prise en compte de la manière dont les consommateurs, du côté de la demande, et les concurrents, du côté de l'offre, ont réagi à une augmentation de prix. L'ampleur de la variation des ventes d'une entreprise en réaction à un changement du prix du marché dépend, entre autres, de la réactivité des ventes de ses concurrents, qui dépend elle-même des coûts que doivent assumer les autres entreprises et de la manière dont elles réagissent aux initiatives prises par leurs concurrents. L'élasticité de la demande résiduelle d'une entreprise est plus élevée si ses concurrents sont en mesure de réagir « réellement » en augmentant leur production ou en repositionnant leurs produits[101]. Au contraire, une élasticité plus faible indique que l'entreprise dispose d'un pouvoir de marché plus important[102].

Certains commentateurs ont souligné que, si l'on dispose des données nécessaires, les méthodes reposant sur les courbes de demande résiduelle permettent de se fonder sur des éléments plus précis et plus fiables pour apprécier le pouvoir de marché que celles qui font appel à la définition du marché et au calcul des parts de marché[103]. Toutefois, la mesure de l'élasticité de la demande nécessite une grande quantité de données, ce qui, dans de nombreux cas, peut limiter son utilité. En outre, même s'il est possible d'appliquer la méthode et d'évaluer la demande résiduelle de l'entreprise, il peut être plus difficile d'interpréter correctement le résultat. Ainsi, même si une étude empirique de la demande résiduelle montre que l'élasticité de la demande de l'entreprise est relativement faible et, par conséquent, que l'entreprise dispose d'un certain pouvoir de marché, il reste nécessaire de mesurer l'importance de ce pouvoir de marché afin de déterminer s'il peut être qualifié de « substantiel » en vertu du droit de la concurrence

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100 *Voir par exemple,* Jonathan B. Baker et Timothy F. Bresnahan, *Empirical Methods of Identifying and Measuring Market Power*, 61 Antitrust L. J. 3 (1992) ; Werden, *Demand Elasticities*, *supra* note 3, 380-384 ; AREEDA ET HOVENKAMP, *supra* note 3, 525.

101 Le deuxième facteur est la réaction des consommateurs.

102 Les chocs sur les prix spécifiques à l'entreprise peuvent fournir les informations nécessaires concernant l'élasticité de la demande. Selon cette approche, il faut repérer les cas dans lesquels seul le défendeur a vu ses coûts augmenter, de sorte qu'il avait une incitation à relever son prix, tandis que les coûts des autres entreprises présentes sur le marché n'ont pas été touchés. Dans une telle situation, si l'entreprise peut augmenter son prix, il est possible de mesurer l'élasticité de la demande résiduelle. Baker et Bresnahan, *supra* note 100, 6-9; AREEDA ET HOVENKAMP, *supra* note 3, 525e.

103 AREEDA ET HOVENKAMP, *supra* note 3, 525a.

applicable[104]. Les experts peuvent être en désaccord non seulement sur l'interprétation des résultats des études empiriques, mais aussi sur le choix de la technique économétrique retenue[105].

L'affaire *U.S. v. Kodak*[106] illustre certaines des difficultés que pose l'utilisation par les tribunaux de l'élasticité de la demande comme preuve du pouvoir de marché d'une entreprise. Dans cette affaire au contexte procédural peu commun, Kodak a été invitée à prouver qu'elle ne détenait pas de pouvoir de marché sur le marché du film couleur amateurs[107]. L'une des principales pommes de discorde entre les parties concernait la dimension géographique du marché pertinent. Une fois que le tribunal a eu donné raison à Kodak quant à la dimension mondiale du marché du film couleur amateurs, la part de marché de l'entreprise a chuté et est devenue inférieure à 40 %, chiffre que le tribunal a estimé insuffisant pour conclure, en l'absence d'autres facteurs, que Kodak détenait un pouvoir de marché. Cependant, les deux parties étaient également en désaccord sur le point de savoir si les preuves directes démontraient que Kodak disposait d'un pouvoir de marché aux États-Unis[108]. L'expert de Kodak avait produit des preuves démontrant que si elle augmentait ses prix de 5 %, l'entreprise verrait ses ventes reculer de 10 %, en d'autres termes que sa propre élasticité-prix était de 2. Les parties ont interprété ces données de manière très différente. Pour l'État, ce chiffre démontrait que Kodak exerçait un pouvoir de marché significatif aux États-Unis et, Kodak fournissant un produit différencié, une élasticité-prix de 2 signifiait que l'entreprise pratiquait un prix égal au double de son coût marginal[109]. La cour d'appel a rejeté cet argument pour deux motifs. D'une part, elle a fait observer que la théorie voulant qu'une élasticité-prix de 2 signifiait que Kodak pratiquait un prix deux fois plus élevé que le coût marginal dépendait beaucoup de l'hypothèse selon laquelle l'entreprise fixait de manière indépendante le prix d'un produit différencié[110]. Or, la cour a estimé que les faits établis par le tribunal de première instance ne corroboraient pas la thèse selon laquelle Kodak vendait un produit différencié. En outre, la cour a conclu que même à supposer que l'argument de

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104 De plus, Werden souligne que la mesure de l'élasticité de la demande montrerait que l'entreprise peut pratiquer un prix supérieur à ses coûts marginaux à *court terme*, sans donner aucune indication sur sa capacité à fixer son prix au-delà de ses coûts marginaux à *long terme*, alors que cette information serait la plus pertinente pour évaluer s'il y a pouvoir de marché substantiel. Werden, *Demand Elasticities*, *supra* note 3, 382.

105 Observation faite par Baker et Bresnahan, *supra* note 100*,* 15-16.

106 United States v Eastman Kodak Company, 853 F.Supp. 1454 (D Del. 1994), *confirmé par* 63 F.3d 95 (2e Cir. 1995).

107 Kodak avait saisi la justice pour faire annuler des arrêts qui avaient limité certaines de ses activités dans le domaine du développement photographique et du film en raison d'allégations de violation du droit de la concurrence. La question de savoir si Kodak disposait encore d'un pouvoir de marché sur le marché pertinent, défini par le tribunal comme le marché du film couleur négatif pour amateurs, a joué un rôle déterminant dans la décision.

108 En appel, la question de savoir si Kodak disposait d'un pouvoir de marché aux États-Unis est devenue partie intégrante de l'appréciation visant à déterminer si le marché pertinent était mondial, comme l'avaient estimé les juges en première instance, ou limité aux États-Unis.

109 Cet argument repose sur le fait que l'indice de Lerner (qui mesure la fraction du prix excédant le coût marginal) est la réciproque de l'élasticité au prix de la demande de l'entreprise.

$$\frac{P - MC}{P} = -\frac{1}{\varepsilon}$$

Cette équation ne s'applique que si l'entreprise maximise ses bénéfices à court terme et fixe ses prix individuellement, sans collusion. *Voir* Werden, *Demand Elasticities*, *supra* note 3, 381.

110 *Voir supra*, note 109.

l'État soit acceptable, il ne s'ensuivrait pas nécessairement que Kodak faisait des bénéfices monopolistiques, les données ne tenant pas compte de ses coûts fixes substantiels[111].

Le rejet de l'argument de l'État dans l'affaire *Kodak* montre que l'interprétation des preuves directes reposant sur l'élasticité de la demande dépend parfois beaucoup d'hypothèses sur lesquelles les experts peuvent être en désaccord[112]. D'autre part, la décision de la cour d'appel porte à croire que les preuves directes examinées pour déterminer si une entreprise détient le pouvoir de marché substantiel requis doivent s'apprécier sur le long terme et reposer sur une comparaison des prix avec le coût marginal à long terme[113]. Tout en critiquant la manière dont la cour a utilisé les preuves, Werden propose d'utiliser plus fréquemment, à l'avenir, les preuves directes liées à l'élasticité de la demande dans les affaires de concurrence mettant en cause une entreprise isolée[114]. Toutefois, les tribunaux et autorités de la concurrence semblent plutôt réticents à utiliser davantage ce type de preuves, ce qui peut s'expliquer par le fait que les instances de décision ont une expérience limitée des méthodologies à utiliser, que ces preuves nécessitent la collecte d'un grand nombre de données et que l'interprétation des résultats est problématique.

3.2.2 Résultats- Rentabilité

Dans certaines circonstances, il pourrait également être utile de déterminer si les résultats (la rentabilité) de l'entreprise indiquent qu'elle détient un pouvoir de marché substantiel. Cette approche consiste à examiner si ses bénéfices réguliers sont excessifs comparativement à une norme concurrentielle. Il paraît logique d'apprécier le pouvoir de marché d'une entreprise d'après ses résultats économiques ; en effet, dans un système de concurrence pure et parfaite, ses bénéfices économiques seraient nuls, tandis qu'ils seraient considérables dans un système monopolistique. Par conséquent, le fait qu'ils se rapprochent de l'extrémité supérieure de cette « fourchette concurrentielle » peut indiquer qu'elle dispose d'un pouvoir de marché[115]. Il n'est donc pas surprenant que les autorités de la concurrence et les tribunaux considèrent la rentabilité comme une preuve de pouvoir de marché. Ainsi, les Lignes directrices de l'OFT disposent que « si des preuves démontrent que l'entreprise réalise continuellement des bénéfices excessifs, il est raisonnable d'en déduire qu'elle détient un pouvoir de marché[116]. » Le Tribunal canadien de la concurrence a considéré les bénéfices comme une preuve de pouvoir de marché substantiel[117]. Quant à la Commission

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111 United States v Eastman Kodak Company, 63 F.3d 95, 109 (2e Cir. 1995).

112 Cela n'est évidemment pas une raison pour ne pas utiliser cette méthode. Les experts peuvent également être en désaccord sur les preuves indirectes, telle que la définition d'un marché pertinent, utilisées pour établir l'existence d'un pouvoir de marché.

113 *Voir également* Werden, *Demand Elasticities*, s*upra* note 3, 381-82. Werden avance que la mesure de l'élasticité de la demande de l'entreprise ne permet pas d'évaluer directement son pouvoir de monopole, cette mesure ne donnant aucune indication sur le coût marginal à long terme ou le caractère durable ou non du pouvoir de marché.

114 *Id.,* 384.

115 BISHOP ET WALKER, *supra* note 3, 74.

116 OFT Market Power Guidelines, 6.5. L'OFT reconnaît toutefois dans ses Lignes directrices que d'autres raisons que le pouvoir de marché peuvent expliquer la réalisation de bénéfices excessifs.

117 Canada (Directeur des enquêtes et recherches) contre Télé-Direct (Publications) Inc. (1997), 73 C.P.R. (3d) 1, Section VVI.B.I (les bénéfices réalisés par le défendeur ont été considérés comme une preuve convaincante de pouvoir de marché et ses arguments, selon lesquels ses bénéfices n'étaient que des bénéfices comptables ou le résultat d'un retour sur des actifs immatériels, ont été récusés).

européenne, elle a également, dans sa décision sur l'affaire Microsoft, invoqué la rentabilité de l'entreprise pour étayer l'existence de position dominante[118].

Pourtant, la littérature économique et juridique traduit un certain scepticisme vis-à-vis de l'utilisation de la rentabilité comme preuve de pouvoir de marché substantiel, même si elle reconnaît le bien fondé de la logique qui sous-tend cette approche[119]. Le juge Posner, par exemple a fait la déclaration suivante :

> *« Il est toujours dangereux d'essayer de conclure à l'existence d'un pouvoir de monopole en se fondant sur un taux de rendement élevé. Non seulement les taux de rendement mesurés reflètent davantage des conventions comptables que les bénéfices (ou les pertes) réels, mais en plus, il n'existe pas une seule théorie économique sérieuse qui associe pouvoir de monopole et taux de rendement élevé.[120]. »*

À travers cette déclaration, le juge Posner exprime deux problèmes fréquemment cités en ce qui concerne l'utilisation de la rentabilité comme preuve de pouvoir de marché : la difficulté à obtenir des chiffres fiables sur la rentabilité économique et la possibilité d'expliquer les bénéfices supraconcurrentiels par d'autres facteurs que le pouvoir de marché. Les bénéfices et les taux de rendement d'une entreprise étant en principe des données comptables plutôt que le reflet des bénéfices au sens économique, même les commentateurs favorables à l'utilisation de la rentabilité pour déterminer le pouvoir de marché reconnaissent les difficultés pratiques que posent les méthodes d'estimation des bénéfices économiques[121]. D'autres ont souligné que les bénéfices économiques excessifs devaient être mesurés sur le long terme, ce que les données comptables ne permettent pas. Enfin, de nombreux auteurs signalent que l'allocation des coûts et l'évaluation des bénéfices peuvent se révéler particulièrement difficiles dans le cas d'entreprises multiproduits[122].

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118 Décision de la Commission du 24 mars 2004 relative à une procédure d'application du l'article 82 du Traité CE, affaire COMP/C-3/37.792 Microsoft, 464 (la Commission a estimé que la marge bénéficiaire de 81 % dégagée par Microsoft était « un résultat élevé quel que soit le critère de mesure »).

119 Parmi les auteurs qui critiquent l'utilisation de la rentabilité comme preuve de pouvoir de marché, les plus souvent cités sont : George J. Benston, *Accounting Numbers and Economic Values*, 27 Antitrust Bull. 161 (1982) ; Franklin M. Fisher et John J McGowan, *On the Misuse of Accounting Rates of Return to Infer Monopoly Profits*, 73 Amer. Econ. Rev. 82 (1983). *Voir également* BISHOP ET WALKER, *supra* note 3, 74-79 qui estiment que la mesure de la rentabilité pour apprécier le pouvoir de marché peut « perdre quasiment toute signification » ; *White, supra* note 4, pp. 8-9. Toutefois, selon certains commentateurs, la capacité à dégager des bénéfices monopolistiques est un meilleur critère que la capacité à pratiquer des prix monopolistiques pour déterminer si une entreprise détient un pouvoir de marché substantiel. *Voir* William J. Baumol et Daniel G. Swanson, *The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power*, 70 Antitrust L. J. 661, 682 (2003).

120 Blue Cross & Blue Shield United of Wisconsin v Marshfield Clinic, 65 F.3d 1406 (7e Cir. 1995).

121 Ainsi, selon Baumol et Swanson : « Il ne peut guère y avoir de doute quant à l'absence générale de données satisfaisantes sur le taux de profit économique, qui est égal à la différence entre les recettes et les charges, compte tenu de tous les coûts d'opportunité pertinents, et correspond au taux de retour sur l'investissement total (actifs réels) de l'entreprise, après dépréciation économique. » Baumol et Swanson, *supra* note 119, 684. Pour un développement plus complet sur l'utilisation de données comptables pour apprécier la rentabilité, *voir* OFT, Assessing profitability in competition policy analysis, Economic Discussion Paper 6 (2003) 12-13, et chapitres 4-6.

122 BISHOP ET WALKER, *supra* note 3, pages 74-79 recensent les difficultés que pose la mesure de la rentabilité économique et soulignent la nécessité d'apprécier l'excès de bénéfices sur le long terme ; AREEDA ET HOVENKAMP, *supra* note 3, 515-520c expriment la même opinion.

De surcroît, la réalisation de bénéfices excessifs peut également être le résultat d'une prise de risque ou d'un avantage concurrentiel, par exemple d'une meilleure efficience, et, par conséquent, avoir une origine tout à fait légitime. C'est pourquoi il a été proposé de ne se fonder sur la réalisation de bénéfices excessifs pour conclure à l'existence d'un pouvoir de marché que s'ils ne sont pas imputables au fait que l'entreprise est particulièrement performante[123] ; il n'en reste pas moins que, lorsqu'elle résulte de la capacité de l'entreprise à réduire la production, la réalisation continuelle de bénéfices excessifs peut constituer une preuve pertinente.

D'autre part, aucune réponse claire n'est apportée à la question de savoir si l'absence de bénéfices excessifs doit permettre de conclure à l'absence de pouvoir de marché. Selon certains commentateurs, des bénéfices constamment inférieurs aux niveaux concurrentiels indiquent qu'une entreprise ne détient pas de pouvoir de marché significatif[124]. Pour d'autres en revanche, une telle situation ne signifie pas nécessairement qu'une entreprise ne dispose pas d'un pouvoir de marché substantiel, dans la mesure où elle a pu choisir de dépenser ses bénéfices pour se mettre à l'abri de la concurrence ou réaliser des dépenses non rentables[125].

En dépit de ces problèmes, la mesure de la rentabilité peut, dans certaines circonstances, être utile pour confirmer qu'il y a position dominante ou faire présumer une absence de pouvoir de marché[126], à condition de disposer de données pertinentes et fiables, de les examiner et de les interpréter avec soin. Des taux de rentabilité élevés ne constituent pas une preuve décisive de pouvoir de marché substantiel, mais peuvent être intéressants à prendre en compte s'ils sont continuels et vont dans le même sens que d'autres preuves. Comme le souligne l'OFT dans ses Lignes directrices, l'étude de la rentabilité peut notamment être utile lorsqu'une comparaison significative entre marchés est possible[127]. L'utilité des taux de rentabilité peut également dépendre du secteur concerné. Comme l'ont relevé certains commentateurs, ils peuvent constituer une preuve de pouvoir de marché plus pertinente dans un secteur de produits de base, mature et à forte intensité capitalistique, dans lequel les marques et la publicité n'ont guère d'importance[128].

3.2.3 Résultats – Détermination des prix

L'utilisation du caractère excessif des prix comme indicateur de pouvoir de marché présente certaines des insuffisances observées à propos de l'utilisation de la rentabilité. Il est généralement difficile de déterminer un niveau de prix concurrentiel de référence auquel comparer des prix réputés excessifs. Un commentateur a toutefois fait observer qu'il était, dans certain cas, possible de trouver une référence relativement satisfaisante en procédant à une comparaison transversale, ce qui est possible quand les mêmes produits sont vendus sur deux marchés distincts, dont l'un semble avoir une structure

123 Baumol et Swanson, *supra* note 119, 683.

124 *Id*.

125 Gloria J. Hurdle et Henry B. McFarland*, Criteria for Identifying Market Power: A Comment on Baumol and Swanson*, 70 Antitrust L. J. 687, 696 (2003) ; Nelson et White, *supra* note 56, p. 12.

126 *Voir par exemple,* OFT, Assessing profitability, *supra* note 121, page 6 ; Werden, *Market Delineation*, *supra* note 51, 216, nbp 5.

127 OFT Market Power Guidelines, 6.6 : « Toutefois, des rendements continuellement très élevés *par rapport à ceux qui seraient observés sur un marché concurrentiel présentant les mêmes niveaux de risques et d'innovation*, peuvent indiquer qu'il y a effectivement pouvoir de marché. Ceci peut notamment être le cas lorsque ces rendements élevés n'ont favorisé ni l'arrivée de nouvelles entreprises sur le marché, ni l'innovation » (italique ajouté).

128 BISHOP ET WALKER, *supra* note 3, 79.

concurrentielle et l'autre non. Dans un tel cas, il est envisageable de comparer le prix concurrentiel à celui pratiqué par une entreprise sur un marché dont les caractéristiques structurelles semblent indiquer que l'entreprise y détient un pouvoir de marché substantiel. Ce type de comparaison peut apporter des preuves de pouvoir de marché lorsque le marché pertinent est plutôt local, comme celui de la distribution par exemple[129]. Toutefois, la simple comparaison des prix pratiqués par deux entreprises ou de ceux pratiqués par une même entreprise sur deux marchés distincts, ne permet pas d'obtenir des preuves fiables. Il n'est en effet pas toujours facile de distinguer les situations où le niveau plus élevé des prix sur un marché s'explique par l'exercice d'un pouvoir de marché de celles où il peut être dû à d'autres facteurs, par exemple à des coûts plus élevés.

3.2.4 Pratiques et effets anticoncurrentiels

Dans certains cas, les pratiques d'une entreprise et les effets anticoncurrentiels de ces pratiques peuvent également servir à établir qu'elle possède un pouvoir de marché substantiel[130]. Ces éléments peuvent être utilisés en complément d'autres types de preuves pour statuer sur l'existence d'un pouvoir de marché substantiel. Cependant, il a parfois été reconnu, en particulier par des tribunaux américains, que les effets anticoncurrentiels pouvaient suffire à établir l'existence d'un pouvoir de marché substantiel, sans qu'il soit besoin de fournir en plus des preuves indirectes fondées sur la définition du marché pertinent et des parts de marché. Certains sont allés plus loin, préconisant de ne s'intéresser, dans les affaires de concurrence mettant en cause une entreprise isolée, qu'aux effets anticoncurrentiels et estimant que s'il est possible de prouver leur existence, il n'est pas nécessaire de procéder à une enquête initiale spécifique destinée à déterminer l'existence d'un pouvoir de marché substantiel.

L'affaire *Re/Max v. Realty One*[131], relative à des pratiques anticoncurrentielles alléguées dans le secteur des agents immobiliers, offre une bonne illustration de l'utilisation de preuves de pouvoir de marché fondées sur les pratiques du défendeur et leurs effets. Dans cette affaire, le plaignant alléguait que les défendeurs avaient enfreint l'article 2 en instaurant un mode de répartition des commissions immobilières préjudiciable. Alors que ces commissions étaient en principe réparties à parité entre le courtier représentant l'acheteur et celui mandaté par le vendeur dans une transaction immobilière, les défendeurs avaient mis en place un règlement aux termes duquel leurs agents devaient percevoir 70 à 75 % de la commission dans toutes les transactions auxquelles les agents du plaignant étaient partie. Les défendeurs ont reconnu que ce règlement visait à dissuader leurs agents immobiliers de se détourner d'eux au profit du plaignant ; en outre, certains faits prouvaient que ce règlement avait atteint son objectif et limité la concurrence. La cour d'appel a considéré que les éléments semblant prouver la capacité des défendeurs à empêcher la concurrence suffisaient à établir qu'ils disposaient d'un pouvoir de marché substantiel, bien que le marché pertinent n'ait pas été défini. La cour a reconnu comme une preuve pertinente le fait que les commissions sur les ventes étaient plus élevées dans la région où les défendeurs avaient appliqué leur règlement et que ces derniers avaient admis avoir pu facturer des commissions plus élevées en raison de leur position sur le marché. La cour a également tenu compte de ce que les défendeurs

129 White, *supra* note 4*,* p. 8.

130 *Stricto sensu*, les pratiques et leurs effets sont des preuves indirectes permettant d'établir si une entreprise a un pouvoir de marché substantiel. Toutefois, le terme « preuve directe » est utilisé parce que l'examen cible directement ce qui est au cœur des préoccupations du droit de la concurrence, en l'occurrence les effets du comportement de l'entreprise sur le bien-être des consommateurs.

131 Re/Max International Inc. v Realty One, Inc., 173 F.3d 995 (1999). À noter que l'affaire *Re/Max*, comme d'autres affaires instruites aux États-Unis, a été jugée en appel après avoir été renvoyée par le tribunal de première instance avant que tous les faits aient été réunis. Dans ces circonstances, les tribunaux n'évaluent pas toujours complètement si les preuves directes présentées auraient été suffisantes pour établir l'existence d'un pouvoir de monopole ; ils se contentent d'examiner si les preuves sont suffisantes pour que cette question soit soumise à un juge ou à un jury.

étaient parvenus à imposer leur règlement, ce qui aurait été impossible en l'absence de pouvoir substantiel de marché.[132]

Plusieurs tribunaux américains ont confirmé que lorsqu'il existe des preuves directes pour établir le pouvoir de monopole, il n'est en principe pas nécessaire de fournir des preuves indirectes. Toutefois, il semble n'y avoir que peu d'affaires dans lesquelles on a uniquement fourni des preuves relatives aux pratiques du défendeur pour établir l'existence d'un pouvoir de marché sont relativement rares. Dans la plupart des cas, on s'attend à ce que des preuves indirectes fondées sur la définition de marchés pertinents et des parts de marché soient également produites. En pareille situation, il faut chercher à savoir si les preuves indirectes et celles relatives aux pratiques du défendeur vont dans le même sens. Ainsi, dans l'affaire Microsoft, la cour d'appel a examiné si les preuves indirectes indiquaient que l'entreprise détenait un pouvoir de marché substantiel et si son comportement était celui d'une entreprise disposant d'un tel pouvoir de marché. Elle a estimé qu'en l'espèce, les preuves indirectes – une part de marché extrêmement élevée et l'existence de barrières à l'entrée – auraient, à elles seules, suffi à établir l'existence d'un pouvoir de marché substantiel[133]. Mais elle a aussi considéré que le tribunal de première instance avait eu raison d'interpréter les pratiques de Microsoft comme une preuve de pouvoir de marché. La cour d'appel a souligné que l'entreprise avait été en mesure de fixer de manière indépendante le prix de Windows sans tenir compte des prix pratiqués par ses concurrents, et que d'autres aspects de ses pratiques d'exclusion n'avaient une explication rationnelle que si elle détenait un pouvoir de monopole[134]

3.2.5 Les pratiques ne permettent pas, à elles seules, de conclure à l'existence d'un pouvoir de marché substantiel

Lorsque les pratiques de l'entreprise sont utilisées pour prouver l'existence d'un pouvoir de marché substantiel, il faut analyser cette preuve en la replaçant dans le cadre plus vaste d'un préjudice à la concurrence. Comme l'a expliqué un commentateur, « en principe, toute pratique susceptible d'exclure repose sur une logique proconcurrentielle, dans le sens où elle pourrait également être le fait d'une entreprise concurrentielle. C'est pourquoi il est difficile de tirer quelque conclusion que ce soit des seules pratiques de l'entreprise[135]. » Par conséquent, les pratiques ne doivent en principe pas, à elles seules, avoir valeur probante si elles ne sont pas replacées dans leur contexte.

Cet aspect peut être illustré par un comportement souvent considéré comme une preuve de pouvoir de marché : la capacité d'une entreprise à pratiquer une discrimination par les prix[136]. Nombre de

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132 *Id.,* 1018.

133 United States contre Microsoft, 253 F.3d 34, 56-58 (D.C. Cir 2001). La cour a rejeté l'argument de Microsoft, selon lequel dans des secteurs « au dynamisme exceptionnel », seules des preuves directes devraient être examinées pour statuer sur l'existence d'un pouvoir de monopole.

134 United States contre Microsoft Corporation, 253 F.3d 34, 51-58 (DC Cir. 2001)

135 Fingleton, *supra* note 3, p. 10 (pense qu'il peut y avoir une exception à cette règle, en l'occurrence lorsque les pratiques révèlent indéniablement une inefficience productive).

136 *Voir par exemple,* U.S. Steel Corp. V Fortner Enters., Inc., 429 U.S. 610, 617 (1977) (Fortner II) (dont il ressort que la discrimination par les prix implique l'existence d'un pouvoir qui ne serait pas toléré sur un marché libre). Pour un tour d'horizon de la jurisprudence américaine concernant l'utilisation de la discrimination par les prix en tant que preuve de pouvoir de monopole, *voir par exemple* James C. Cooper et autres, *Does Price Discrimination Intensify Competition? Implications for Antitrust*, 72 Antitrust L. J. 327, 354-356 (2005). En ce qui concerne le droit communautaire de la concurrence, *voir par exemple* Affaire 322/81, NV Nederlandsche Banden Industrie Michelin contre Commission des Communautés européennes, Rec. 1987, p. 207 (l'arrêt annule la décision de la Commission, qui avait considéré la discrimination par les prix comme un indicateur de position dominante).

commentateurs ont souligné que, même s'il est vrai que la discrimination par les prix révèle qu'une entreprise détient un pouvoir de marché économique, cela ne signifie par inévitablement qu'il s'agisse d'un type de pouvoir de marché que le droit de la concurrence réprouve[137]. En d'autres termes, « la discrimination par les prix est parfaitement compatible avec la concurrence, mais pas avec un modèle de concurrence parfaite[138]. » Par conséquent, le simple fait qu'une entreprise pratique la discrimination par les prix ne doit pas, en soi, conduire à présumer qu'elle détient un pouvoir de marché d'une importance telle qu'il tombe sous le coup des dispositions relatives aux pratiques d'une entreprise isolée[139].

Certains auteurs ont même avancé que du fait de son omniprésence, la discrimination par les prix ne peut pas être un indicateur de pouvoir de marché substantiel[140]. D'autres, toutefois, estiment qu'une discrimination par les prix durable et systématique, peut, selon les circonstances, faire partie d'un ensemble plus large de preuves permettant d'établir qu'une entreprise a exercé son pouvoir de marché et s'est livrée à des pratiques anticoncurrentielles. Ils considèrent, par exemple, que la discrimination par les prix sur des marchés de produits de base non différenciés pourrait indiquer l'existence d'un pouvoir de marché potentiellement contraire au droit de la concurrence[141]. Il convient toutefois de déterminer, dans le cadre de l'examen des faits, si ces circonstances sont présentes ou non et de ne pas partir de l'hypothèse qu'elles le

137 La discrimination par les prix est possible lorsque des entreprises font face à une courbe de demande décroissante (et que d'autres conditions, comme l'absence d'arbitrage entre des groupes de consommateurs sont remplies). Comme on l'a vu, la majorité des entreprises font face à une courbe de demande décroissante et, par conséquent, ont un certain pouvoir de marché. *Voir supra*, p. 5. *Voir également,* Hurdle et McFarland, *supra* note 119, 689-90 qui soulignent que le terme « pouvoir de marché » peut avoir différentes significations.

138 Cooper et autres, *supra* note 136, 357.

139 *Voir par exemple,* Margaret A. Ward (2003), *Symposium on Competitive Price Discrimination: Editor's Note*, 70 *Antitrust L.J.* 593-94 qui affirme que « la discrimination par les prix peut, en réalité, être concurrentielle dans des secteurs où les entreprises réalisent des économies d'échelle ou ont des coûts fixes ou irrécupérables élevés et où l'entrée sur le marché est facile. Dans ces secteurs, les entreprises qui ont une courbe de demande décroissante peuvent pratiquer des prix qui ne sont pas toujours égaux aux coûts marginaux ; mais elles peuvent néanmoins ne dégager que des bénéfices concurrentiels. »)

140 Benjamin Klein et John Shepard Wiley Jr., *Competitive Price Discrimination as an Antitrust Justification for Intellectual Property Refusals to Deal*, 70 Antitrust L. J. 599, 621-29 (2003) ; Cooper *et al.*, *supra* note 136, 365 (2005).

141 AREEDA ET HOVENKAMP, *supra* note 5, 522 affirment que « Prouver qu'une entreprise pratique une discrimination par les prix lorsqu'elle vend ou loue des produits identiques (ou quasi identiques) peut permettre d'établir et d'apprécier le pouvoir de marché si les différences de coûts (ou l'absence de différences) sont faciles à déterminer » ; Klein et Wiley, *supra* note 140, 657.

sont[142]. Ainsi, la discrimination par les prix ne permet pas, en elle-même, d'établir qu'il y a pouvoir de marché substantiel, mais peut constituer un élément de preuve utile si elle est pratiquée dans un contexte qui en fait un indicateur de pouvoir de marché et si d'autres éléments vont dans le même sens.

3.2.6 Les pratiques/les effets anticoncurrentiels peuvent être incompatibles avec l'existence d'un pouvoir de marché substantiel

Les pratiques d'une entreprise peuvent également jouer en sa faveur si elles portent à croire qu'elle ne détient *pas* de pouvoir de marché. Un tribunal peut rejeter une plainte au motif que les pratiques du défendeur ou la dynamique concurrentielle du marché sont incompatibles avec la thèse selon laquelle il détenait un pouvoir de marché substantiel. À cet égard, les preuves peuvent être, par exemple, le fait qu'une entreprise a mené une guerre des prix pour conquérir les consommateurs, alors que des concurrents plus petits n'avaient aucune peine à trouver de nouveaux clients ou le fait qu'une entreprise présumée en situation de monopole ou dominante a été contrainte de baisser ses prix[143].

La décision rendue par la Haute Cour australienne dans l'affaire *Boral* offre une bonne illustration de cette approche. Lorsqu'elle a examiné si l'interdiction prescrite par l'article 46 de la Loi sur les pratiques commerciales s'appliquait à Boral, elle a cherché à déterminer si son comportement pouvait être celui d'une entreprise détenant un pouvoir de marché substantiel. Les juges ont, dans leur majorité, répondu par la négative[144] :

> *« En l'espèce, Justice Heerey, a, comme l'exige l'article 46(3), cherché à déterminer si BBM détenait un degré substantiel de pouvoir sur le marché des produits de maçonnerie en béton, en examinant les pratiques réelles de BBM, au cas par cas, tout au long de la période en cause (et au-delà) vis-à-vis de chacun des contrats majeurs qu'elle a cherché à remporter ; il a conduit cet examen à la lumière de preuves démontrant que ces contrats correspondaient à l'activité à laquelle BBM attachait le plus d'importance et s'est fondé sur le fait que ce qui se passait par rapport à ces contrats constituait la meilleure preuve de l'état du marché et la meilleure*

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142 Ce qui vaut pour la discrimination par les prix vaut aussi pour d'autres entraves à la concurrence, comme la vente liée, si elles sont utilisées pour mettre en œuvre des stratégies de discrimination par les prix. Ceci jette un doute sur les déclarations dans lesquelles les ventes liées ont été considérées, sans autre qualification, comme des comportements évoquant l'existence de position dominante :

« Selon la Commission, les exemples qu'elle a retenus du comportement de Hilti sur le marché en tant que preuves d'une position dominante *constituent tous des types de comportement que l'on n'observe normalement que chez une entreprise dominante*. Certes, une entreprise non dominante pourrait se comporter de cette manière mais, dans la pratique, il serait très peu probable qu'elle agisse ainsi, car l'existence d'une concurrence effective assurerait normalement que les inconvénients d'un tel comportement l'emportent sur les éventuels avantages. Ainsi, le jumelage des ventes serait normalement un procédé qui ne présenterait pas d'avantage pour un fournisseur non dominant. L'adoption de ce comportement par Hilti constituerait donc une preuve supplémentaire de la puissance que lui confère sa situation d'unique fournisseur de facto de chargeurs compatibles avec ses pistolets. » Affaire T-30/89, Hilti AG contre Commission des Communautés européennes, Rec. 1991 II-667, [87] (italique ajouté). À noter que le Tribunal ne s'est pas exclusivement fondé sur les pratiques mais s'est aussi – et surtout –basé sur une analyse structurelle pour déterminer si la Commission avait eu raison de considérer que l'entreprise était en position dominante.

143 *Voir par exemple,* PepsiCo, Inc. v Coca-Cola Co., 315 F.3d 101, 108 (2e Cir. 2002) (dont il ressort que les guerres des prix qui ont permis à PepsiCo de conquérir de nouveaux clients ou qui ont contraint Coca-Cola à baisser ses prix pour les clients qu'elle était parvenue à conserver étaient incompatibles avec l'allégation selon laquelle Coca-Cola détenait un pouvoir de marché substantiel).

144 Boral contre ACCC, [2003] HCA 5.

indication du degré de pouvoir de marché de BBM. C'était l'approche qu'il fallait adopter. Comme l'a déclaré Justice Heerey, conclure que BBM détenait un degré substantiel de pouvoir de marché serait incompatible avec les éléments précis dont on dispose sur la manière dont BBM, les autres fournisseurs et leurs clients se sont comportés.

Les preuves relatives aux pratiques des fournisseurs et des consommateurs ont démontré que le marché des produits de maçonnerie en béton était extrêmement concurrentiel. Ceci s'expliquait en partie par l'existence d'un marché plus large, facteur dont la Cour fédérale réunie en séance plénière semble ne pas avoir tenu compte après avoir défini le marché plus étroit. L'autre élément d'explication tient aux pratiques agressives des acteurs qui se trouvaient du côté de la demande sur le marché des produits de maçonnerie en béton. La part de marché de BBM n'a pas varié entre le début et la fin de la période au cours de laquelle elle s'est livrée à la discrimination par les prix qui lui est reprochée. Durant cette période, deux entreprises ont quitté le marché, et une entreprise, florissante, y a accédé. BBM elle-même a envisagé de quitter le marché mais y a finalement renoncé. Sa décision de moderniser son usine de Deer Park a été jugée rationnelle, et justifiée par un désir de réaliser des gains d'efficience. BBM ne s'attendait pas à devoir affronter autre chose qu'un marché concurrentiel une fois la guerre des prix terminée. »

3.2.7 Les preuves de l'existence d'effets anticoncurrentiels peuvent-ils permettre de faire l'économie d'une enquête spécifique destinée à déterminer s'il y a pouvoir de marché substantiel ?

Plusieurs commentateurs ont émis des doutes sur l'approche consistant, dans les affaires de concurrence mettant en cause une entreprise isolée, à commencer par mener une enquête spécifique pour déterminer si une entreprise détient un pouvoir de marché substantiel et ont préconisé d'examiner en priorité si certaines de ses pratiques ont des effets anticoncurrentiels. Ils ne proposent pas de renoncer à l'appréciation du pouvoir de marché, mais suggèrent de l'intégrer à l'analyse plus large des effets des pratiques de l'entreprise sur la concurrence.

Ainsi, Stephen Salop estime qu'il faudrait en priorité examiner si les pratiques de l'entreprise ont des effets anticoncurrentiels, parce que ces effets sont au cœur du droit de la concurrence. Il souligne que l'analyse du pouvoir de marché peut avoir sa place dans cet examen, mais qu'elle ne doit pas être effectuée séparément[145]. Selon lui, définir le marché pertinent et la part de marché dans le cadre d'une analyse spécifique, avant d'évaluer les effets des pratiques de l'entreprise sur la concurrence, peut entraîner des erreurs qui, souvent, risquent de permettre à un défendeur d'obtenir gain de cause même si son comportement était anticoncurrentiel. Salop conclut : « S'il existe des preuves directes d'effets anticoncurrentiels, il devient superflu de conduire une analyse spécifique pour établir l'existence d'un pouvoir de marché, *a fortiori* une analyse reposant sur un critère de *seuil*. Par essence, les preuves de pratiques anticoncurrentielles démontrent également l'existence d'un pouvoir de marché sur le marché concerné[146]. »

Plus récemment, le Groupe consultatif économique pour la politique de concurrence (Economic Advisory Group for Competition Policy, EAGCP) a défendu la même position dans un rapport relatif à l'application de l'article 82 du Traité CE :

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145 Salop, *supra* note 50, 188.

146 *Id.,* 200. *Voir également* Andrew I. Gavil, *On the Utility of « Direct Evidence of Anticompetitive Effects*, » 19 Antitrust (printemps 2005) 59 (qui souscrit à la décision rendue dans des affaires où il a été considéré que l'existence d'un pouvoir de marché pouvait être établie sur la base d'éléments prouvant l'existence d'effets anticoncurrentiels).

> *À la différence de l'approche formaliste, l'approche basée sur les effets n'a pas à être axée sur un examen spécifique visant à établir l'existence de position dominante, sauf, éventuellement, aux fins d'application de la procédure de minimis. Si cette approche permet d'obtenir des preuves cohérentes et vérifiables de l'existence d'un préjudice significatif pour la concurrence, ce résultat suffit en lui-même à démontrer la position dominante. Les méthodes traditionnellement utilisées pour établir la « position dominante », qui font appel à des données sur la structure du marché, ne peuvent donner qu'une indication sur la « position dominante », définie comme la capacité à exercer un pouvoir et à imposer des pratiques abusives à d'autres acteurs d'un marché. Si une telle approche permet de prouver un abus qui est possible uniquement si l'entreprise est en position dominante, il ne devrait pas être nécessaire de procéder à un examen spécifique pour démontrer qu'il y a position dominante – en l'absence d'un tel examen, on peut toutefois exiger que l'abus soit clairement établi, et que le niveau de preuve soit élevé.*
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> ...
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> *En termes de procédure, l'approche économique rend superflue la conduite d'un examen préalable et spécifique pour établir la position dominante. L'accent est plutôt mis sur le recueil de preuves cohérentes et vérifiables de préjudice concurrentiel significatif, puisque ce sont précisément ces effets anticoncurrentiels qui ont de l'importance et qui constituent en eux-mêmes une preuve de position dominante. L'approche reposant sur l'examen des effets anticoncurrentiels privilégie l'utilisation de méthodes d'analyse économique éprouvées. Un cadre conceptuel de ce type permet de disposer d'une référence pour procéder à une analyse détaillée des principaux ingrédients qui doivent être présents dans une affaire, que l'on cherche à vérifier l'existence d'un préjudice concurrentiel significatif ou à s'assurer que les gains d'efficience recherchés ont été réalisés*[147].

Toutefois, accorder la priorité à l'analyse des effets anticoncurrentiels dans les affaires de concurrence mettant en cause une entreprise isolée ne signe pas la disparition de l'analyse du pouvoir de marché, comportant éventuellement la délimitation des marchés pertinents. Ainsi, l'EAGCP conclut, par exemple :

> *Par conséquent, les critères traditionnels d'existence ou d'absence de pouvoir de marché ne perdent pas leur intérêt. Ils deviennent tout simplement partie intégrante de la procédure visant à établir que les pratiques faisant l'objet d'une enquête nuisent à la concurrence*[148].

Si l'analyse des effets anticoncurrentiels ne renvoie pas, à un moment ou à un autre, au marché sur lequel se déroule la concurrence, il risque d'être difficile de distinguer le préjudice causé à la dynamique concurrentielle de celui causé aux concurrents. Les allégations d'un plaignant qui affirme avoir été lésé par les pratiques du défendeur peuvent être infondées si les autres concurrents n'ont pas été exclus du marché. Cela explique qu'un tribunal ait conclu qu'« il ne faut accorder quasiment aucune signification à l'analyse

147 Rapport de l'EAGCP, *supra* note 59, p. 14. Le rapport souligne que l'approche proposée s'écarte peut-être de la tradition jurisprudentielle relative à l'article 82 du Traité, mais qu'elle *ne s'écarte pas* du Traité lui-même.

148 Rapport de l'EAGCP, *supra* note 59, p. 14. Voir également Salop, *supra* note 50, 191 ; Krattenmaker et autres, *supra* note 2, 259 : l'appréciation de la part de marché ne doit pas constituer l'élément principal, mais simplement un élément de l'enquête qui vise à déterminer si l'entreprise est en mesure d'exclure les concurrents.

économique si elle est totalement déconnectée de la définition, fût-elle imprécise, d'un marché de produits et d'un marché géographique[149]. »

Toutefois, il n'est pas impossible qu'une telle démarche, axée plus directement sur les effets des pratiques d'une entreprise sur la concurrence, se révèle parfois peu souhaitable et difficile à mettre en œuvre. D'une part, la jurisprudence peut exiger que les autorités de la concurrence délimitent des marchés pertinents et définissent la part de marché préalablement à l'analyse des effets des pratiques sur la concurrence. D'autre part, lorsque les tribunaux ou les autorités de la concurrence doivent apprécier les effets que certaines pratiques sont susceptibles d'avoir *dans l'avenir*, ils ne peuvent pas se fonder sur des preuves des effets de ces pratiques sur le prix ou la production. Dans ce type d'affaires, l'analyse du pouvoir de marché est indispensable pour prévoir les effets que certains pratiques risquent d'avoir sur la concurrence[150].

La suppression de l'examen initial spécifiquement destiné à apprécier la position de l'entreprise sur le marché pertinent risque également de faire disparaître certains seuils de sécurité. La réalisation, au début de l'enquête, d'une analyse du pouvoir de marché reposant sur des critères de seuil peut également constituer un outil utile, dans la mesure où elle peut aider les instances de décision à éliminer les affaires dans lesquelles l'existence d'effets anticoncurrentiels est soit très improbable, soit impossible[151]. Faire l'économie de cet examen spécifique risque de compliquer la détection rapide des affaires dans lesquelles l'existence d'effets anticoncurrentiels est peu vraisemblable parce que l'entreprise ne détient pas un pouvoir de marché substantiel.

D'autres ont exprimé leur crainte de voir le seuil d'intervention diminuer s'il n'est plus obligatoire d'établir et de prouver l'existence d'un pouvoir de marché substantiel dans le cadre d'une démarche spécifique et si les autorités de la concurrence se montrent « indulgentes » quant au niveau de preuve exigé pour établir l'existence d'effets anticoncurrentiels. En d'autres termes, le maintien de l'enquête préliminaire visant à déterminer si une entreprise dispose d'un pouvoir de marché substantiel permettrait de disposer d'un « filtre » utile lorsqu'une autorité est trop encline à trouver des effets anticoncurrentiels et rendrait moins probable la condamnation de pratiques peu susceptibles de nuire au bien-être des consommateurs[152]. L'EAGCP semble également conscient de ce problème, puisqu'il précise dans son rapport qu'en l'absence d'enquête spécifique pour établir la position dominante, l'abus doit être clairement établi et le niveau de preuve élevé[153].

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149 Republic Tobacco Co. v North Atlantic Trade Co., 381 F.3d 717, 737 (7e Cir. 2004). Dans l'affaire *Republic Tobacco,* le plaignant avait fondé son argument de fermeture anticoncurrentielle du marché sur un marché pertinent limité à un territoire comprenant neuf États du sud-est des États-Unis. Le tribunal a estimé que rien ne justifiait une telle définition du marché et a, au contraire, trouvé des éléments indiquant que dans le secteur concerné, le marché englobait sans doute l'ensemble des États-Unis.

150 Michael S. McFalls, *The Role and Assessment of Classical Market Power in Joint Venture Analysis*, 66 Antitrust L. J. 651, 657-58 (1998).

151 Frank E. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev 1, 14-16 (1984). *Voir également*, White, *supra* note 4, 12 (qui l'utilité d'une limite *de jure* ou *de facto* pour exclure les cas dans lesquels il est peu probable que les entreprises disposent du pouvoir de marché suffisant pour qu'un problème de concurrence se pose). Voir également Majumdar, *supra* note 59, 163 (qui plaide en faveur de l'utilisation des parts de marché à titre de sécurité).

152 Adrian Majumdar, *supra* note 59, 163-164, relève qu'il est pertinent d'exiger un niveau élevé de preuve pour établir qu'un préjudice est causé à la concurrence et aux consommateurs ; selon lui, si l'on utilise la preuve directe des effets sur la concurrence pour conclure à l'existence de position dominante, il faut exiger que les préjudices causés aux consommateurs soient importants.

153 Rapport de l'EAGCP, *supra* note 59, p. 14.

Dans le même ordre d'idées, il est possible que les entreprises perçoivent l'enquête spécifique destinée à analyser le pouvoir de marché sur la base de la définition du marché pertinent et de la part de marché comme un moyen d'encadrer les autorités de la concurrence. Les praticiens du droit ont alerté sur le fait que les autorités de la concurrence, si elle se focalisent directement sur les effets anticoncurrentiels sans définir au préalable le marché pertinent, risquent de se sentir de plus en plus « libres de parcourir le paysage industriel au gré du hasard sans avoir à définir des marchés pertinents » avant d'appliquer la législation sur la concurrence, ce qui ouvrirait la porte à « tous les abus »[154].

De plus, intégrer un examen des effets anticoncurrentiels à l'analyse des affaires de concurrence n'est pas nécessairement facile et peut poser des problèmes. Comme l'a relevé Andrew Gavil, se fier davantage aux effets des pratiques sur la concurrence entraîne une grande incertitude quant au type et à la quantité d'effets à exiger et aux méthodes acceptables pour les mettre en évidence. Dans ce contexte, comme le souligne Gavil, la qualité de la preuve, qu'elle soit directe ou indirecte, a de l'importance. Si les tribunaux jugent les effets anticoncurrentiels allégués difficiles à apprécier, ils exigeront peut-être davantage de preuves indirectes relatives au marché pertinent et au pouvoir substantiel de marché[155]. À l'inverse, dans les affaires où les preuves indirectes sont faibles et ne permettent pas de déterminer de manière fiable si le défendeur détient un pouvoir de marché substantiel, il sera peut-être justifié d'accorder plus d'importance à l'analyse des effets des pratiques de défendeur, plutôt que d'essayer de commencer par déterminer, au moyen de méthodes potentiellement peu fiables, s'il possède un pouvoir de marché substantiel[156].

Ainsi, les autorités de la concurrence et les tribunaux auraient un certain nombre de raisons de vouloir qu'une enquête expressément destinée à déterminer si une entreprise détient un pouvoir de marché substantiel continue d'être conduite. Toutefois, les propositions en faveur d'un examen plus directement axé sur les effets anticoncurrentiels des pratiques du défendeur insistent sur la nécessité de ne pas séparer l'appréciation du pouvoir de marché de celle des effets des pratiques de l'entreprise sur la concurrence, et précisent que ces deux aspects doivent être regroupés autant que possible.

Il s'ensuit également que les preuves ne se répartissent pas toujours en deux catégories clairement délimitées, l'une correspondant aux preuves relatives au pouvoir de marché, l'autres à celle concernant les

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154 James A. Keyte et Neal R. Stoll, *Markets? We don't need no stinking markets! The FTC and market definition,* 49 Antitrust Bulletin 593, 595 (2004). Peut-être faudrait-il aussi se demander si, en se reposant davantage sur l'existence d'effets anticoncurrentiels pour établir qu'il y a pouvoir de marché substantiel, on ne risque pas de priver les entreprises de la sécurité juridique dont elles ont besoin. En d'autres termes, si l'on n'utilise plus les parts de marché dans les affaires de concurrence mettant en cause une entreprise isolée, les entreprises n'auront probablement plus beaucoup de repères *a priori*. Toutefois, la définition du marché pertinent comportant une marge d'incertitude, notamment dans ce type d'affaires, la sécurité juridique liée aux seuils de part de marché est plus apparente que réelle.

155 Gavil, *supra* note 146, at 64. *Voir également* David L. Meyer, Republic Tobacco*, and the Proper Use of "Direct Evidence" of Anticompetitive Effects*, 19 Antitrust (printemps 2005) 67-68 ; Nelson et White, *supra* note 56, proposent un test pour déterminer, dans certaines affaires, si les pratiques du défendeur ont eu des effets anticoncurrentiels.

156 Peut-être n'est-ce pas par hasard que Salop, dans sa proposition d'axer plus directement l'enquête sur l'analyse des effets, renvoie souvent à l'affaire *Kodak v Image Technical Services*, 504 U.S. 451 (1992), dans laquelle le marché a été notoirement difficile à définir et qui a valu aux tribunaux de voir leurs conclusions remises en cause par de nombreux commentateurs. Salop, *supra* note 50, 187.

pratiques anticoncurrentielles et leurs effets[157]. Les éléments qui plaident en faveur de l'existence d'un pouvoir de marché substantiel peuvent également démontrer qu'il a eu un comportement anticoncurrentiel. Ainsi, dans l'affaire *NutraSweet,* le Tribunal canadien de la concurrence a relevé que :

> *« Toutefois, 1'économie de l'article soulève la question de savoir s'il faut étudier à fond la preuve relative au contrôle puisque cela entraînerait probablement une étude des agissements anticoncurrentiels reprochés et de leurs effets. Si tous les éléments de preuve sont pris en compte, les trois principaux facteurs des alinéas a), b) et c) du paragraphe 79(1) pourraient être regroupés dans 1'évaluation du premier. Cet aspect est courant dans le droit de la concurrence parce que les facteurs pertinents des différentes dispositions 1égislatives sont rarement distincts et l'on doit nécessairement se fonder sur des facteurs communs au besoin.[158]. »*

4. Conclusions

Il n'existe pas de méthode unique qui permettrait de disposer de preuves parfaitement fiables pour déterminer si une entreprise possède un pouvoir de marché substantiel. Toutes les méthodes décrites dans cette note présentent une insuffisance quelconque ou posent un problème. Selon les caractéristiques de chaque affaire, par exemple selon les pratiques anticoncurrentielles qui font l'objet de l'examen ou les données disponibles, certaines méthodes permettront, mieux que d'autres, de disposer de preuves tendant à démontrer que le pouvoir de marché d'une entreprise est substantiel et durable.

Un seul type de preuve – les parts de marché par exemple – ne permet jamais, ou presque, à lui seul de déterminer si une entreprise détient un pouvoir de marché substantiel. Il faudrait donc que les instances de décision examinent toutes les preuves pertinentes pour identifier les facteurs qui déterminent le comportement d'une entreprise vis-à-vis de la concurrence. Il faut faire une utilisation transparente des preuves et expliquer clairement pourquoi telle ou telle preuve a été jugée pertinente. Se contenter de considérer, sans les examiner précisément, tous les facteurs susceptibles d'indiquer qu'une entreprise détient un pouvoir de marché substantiel en espérant que certains d'entre eux sont exacts n'aide pas à prendre de bonnes décisions.

L'examen visant à déterminer si une entreprise détient un pouvoir de marché ne doit pas faire oublier le but ultime de l'enquête, en l'occurrence l'appréciation des effets des pratiques de l'entreprise sur la concurrence. L'appréciation du pouvoir de marché doit donc se faire à la lumière de ces effets. En outre, les preuves démontrant qu'une entreprise détient un pouvoir de marché substantiel ne doivent pas avoir la primauté sur une analyse exhaustive des effets des pratiques de l'entreprise sur la concurrence. Dans

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157 Si l'on accorde la priorité à l'analyse des effets anticoncurrentiels, et si un examen spécifique de l'existence d'un pouvoir de marché substantiel n'est plus obligatoire, la différence entre l'article 1 et l'article 2 – ou les dispositions équivalentes dans d'autres régimes de concurrence, par exemple entre l'article 81 et l'article 82 – s'estompe. Une fois les effets anticoncurrentiels établis, il ne serait en effet plus nécessaire de démontrer que le défendeur détient un certain degré (degré substantiel) de pouvoir de marché. *Voir* Andrew I. Gavil, *Copperweld 2000: The Vanishing Gap Between Sections 1 and 2 of the Sherman Act*, 68 Antitrust L. J. 87, 102 (2000) ; Thomas G. Krattenmaker *et al.*, *supra* note 2, 247. Pour un raisonnement similaire en droit communautaire de la concurrence, voir *par exemple* Ekaterina Rousseva, *Modernizing by eradicating: How the Commission's new approach to Article 81 EC dispenses with the need to apply Article 82 EC to vertical restraints,* 42 Comm. Mkt. L. Rev. 587, 624-637 (2005). Selon elle, pour évaluer les effets des restrictions contractuelles, il faut limiter l'analyse à l'application de l'article 81(1) – sans tenir compte de l'article 82 – indépendamment du fait que l'une ou l'autre des parties dispose d'un pouvoir de marché substantiel et puisse être en position dominante.

158 Canada (Directeur des enquêtes et recherches) contre NutraSweet Co., [1990] 32 C.P.R. (3d.) 1 (Trib. conc.), p. 54.

certains cas, il peut être possible et préférable d'analyser plus directement ces effets sans passer au préalable par un examen spécifique destiné à l'établir l'existence d'un pouvoir de marché substantiel.

CANADA

1. Introduction

In Canada, competition is governed by a federal law, the *Competition Act* (Act). This law and the *Competition Tribunal Act* provide a clear separation between the functions of the Commissioner of Competition (Commissioner) and the Competition Tribunal (Tribunal).

The Commissioner is responsible for carrying out inquiries under the Act, while the Tribunal is responsible for adjudicating the civil provisions of the Act, including the abuse of dominance provisions (Sections 78 and 79). The standard of proof required under the civil reviewable matters is "on a balance of probabilities".

The Competition Bureau (Bureau) conducts inquiries on an impartial basis after complaints have been lodged. The Bureau pursues complaints alleging abuse of dominance if they meet the elements of section 79 of the Act.

Only the Commissioner can make an application to the Tribunal for a remedial order under the abuse provisions of the Act.[1] Upon filing an application with the Tribunal for a remedial order, the Commissioner must prove to the Tribunal that the case satisfies all of the elements of section 79 and that 2.

2. Outline of Submission

The purpose of this submission is to offer the Bureau's experience in proving dominance, particularly, a discussion on how the Bureau defines dominance, evidence necessary to show dominance, and description of how dominance was proven in past cases.

3. Section 78 and 79 of the Act - Abuse of a Dominant Position

Sections 78 and 79 deal with situations where a dominant firm in a market, or a dominant group of firms, engages in conduct that is intended to eliminate or discipline a competitor or to deter future entry by new competitors, with the result that competition is prevented or lessened.

Subsection 79(1) sets out three essential elements, which must all be found to exist by the Tribunal for it to grant an order. The Tribunal must find that:

- one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

[1] Private access to the Tribunal is only available for conduct reviewable under sections 75 (refusal to deal) and 77 (exclusive dealing, tied selling and market restriction) of the Act. For more information, see http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1392&lg=e.

- that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

- the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.[2]

4. Definition of Dominance

Paragraph 79(1)(a) clearly focuses the provisions on dominance and market power. The phrase "substantially or completely control" implies that a firm must have market power.

The Bureau considers control to be synonymous with market power, where market power is the ability to profitably set prices above competitive levels for a considerable period of time.[3] This approach was adopted by the Tribunal in *NutraSweet,*[4] *Laidlaw*,[5] and *Nielsen*.[6]

Market power may also be defined with respect to a material, non-transitory reduction in other factors of competition such as service, quality, variety, advertising and innovation. For ease of reference, market power is referred to here with respect to price increases but should be understood to include non-price factors of competition.[7]

The Bureau normally regards a "considerable" period of time for the purposes of establishing market power to be one year. This does not mean that the Bureau will not pursue an abuse of dominance case where the exercise of market power has been in place for less than one year. In such instances, there is an analysis of the likelihood that this exercise of market power would continue if the Bureau did not intervene.[8]

5. Evidence Required to Prove Market Power

Paragraph 79(1)(a) contains a number of elements that need to be fleshed out. The meaning of control must be defined ("one or more persons substantially or completely control"). The relevant product market and geographic market must also be defined ("class or species of business" and "throughout Canada or any area thereof").

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2 Competition Bureau, *Enforcement Guidelines on Abuse of Dominance Provisions* (Section 78 and 79 of the *Competition Act*), 2001. Available http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1251&lg=e.

3 Ibid.

4 *Canada (Director of Investigation and Research)* v. *NutraSweet Co.* (1990) 32 C.P.R. (3d); [1990] C.C.T.D. No 17.

5 *Canada (Director of Investigation and Research)* v. *Laidlaw Waste Systems Ltd.* (1991) 40 C.P.R. (3d) 289, [1992] C.C.T.D. No. 1 (Comp. Trib.).

6 *Canada (Director of Investigation and Research)* v. *The D&B Companies of Canada Ltd.* [1995] C.C.T.D. No. 20 (Comp. Trib.) (AC. *Nielsen*).

7 Supra note 2.

8 Supra note 2.

5.1 Product Market

In defining markets, a determination must be made whether competition from other products limit the ability of the firm in question to exercise market power.

The analysis focuses on whether there are close substitutes for the relevant product in question, such that buyers would turn to these substitutes in the event that the product price was raised above competitive levels by a significant amount for a non-transitory period of time. In general, a 5% increase above competitive levels lasting one year is considered a significant and non-transitory amount.[9] This approach was accepted by the Tribunal in *Laidlaw* and *Nielsen*.[10] As the Tribunal said in *Tele-Direct*[11] and *Nielsen*[12], "Substitutability is the *fundamental test* or *touchstone* for determining the boundaries of the relevant product market."

Both direct and indirect evidence of substitutability are studied to determine the product market. Direct evidence includes data about the reaction of the buyers in response to small changes in the price of the product. If the data demonstrates that buyers do not tend to switch product in response to small price changes, then the two products are probably not in the same market.

Indirect or qualitative factors are far more numerous. Indirect evidence consists of information about the characteristics of the product and its buyers. Depending on the case studied, different factors are considered. The factors used by the Bureau are: the end use and physical and technical characteristics, the views, strategies, behaviour and identity of the buyers, the inter-industry competition, the price relationships and relative price levels and finally, the switching costs.

5.2 Geographic Market

When determining geographic market definition under the abuse of dominance provisions, the Bureau will draw on some of the quantitative techniques used to define the relevant product market and will consider certain qualitative factors. The qualitative factors include the views, strategies, behaviour, and identity of buyers, switching costs, transportation costs, price relationships and relative price levels, shipment patterns, and foreign competition.

As the Tribunal explained in *Laidlaw*[13]: "The general test for determining the geographic dimensions of a market is the same as that used to determine the product dimensions: identification of the universe of effective competition. That is, insofar as the relevant geographic dimensions are concerned, for the purposes of this case one asks what are the boundaries of the geographic area within which competitors must be based if they are to provide effective competition to Laidlaw. Effective competition means that the competitor provides a significant restraint on Laidlaw's ability to raise prices above the competitive level."

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9 Supra note 2.

10 Supra note 5 and 6.

11 *Canada (Director of Investigation and Research)* v. *Tele-Direct (Publications) Inc.* [1997] C.C.T.D. No. 8.

12 Supra note 6.

13 Supra note 5.

5.3 Market Power

The Bureau recognizes that it is difficult to measure market power directly. As such, a number of indicators are normally relied upon.

Performance results, profitability, conduct and pricing practices are all considered direct indicators. When a firm generates high profits or imposes high prices it usually indicates that first, prices are above competitive levels and second, that the firm has market power. A good indicator of market power is the practice of price discrimination. This practice occurs when a firm charges different prices to different customers, based for example on their need for the product, their location and other characteristics.

The Bureau also uses indirect indicators of market power such as market shares, barriers to entry and countervailing power.

5.3.1 Market Shares

There is not a definitive threshold to market share that implies that a firm has market power but the Bureau has adopted the view (which is supported by jurisprudence) that high market share is usually a necessary, but not sufficient, condition to establish market power. As stated in *Tele-Direct*[14], a market share over 80% is a prima facie indicator of market power, while in *Laidlaw*[15], the Tribunal mentioned that a market share below 50% would not give rise to a prima facie finding of dominance.

To measure market shares, the Tribunal often compares revenues earned by firms in the designated market. In addition to comparing revenues, output or capacity, information specific to the industry are commonly used to complete the measurement of the market share. In *Laidlaw*[16], the number of competitors in the market and their market shares, excess capacity and ease of entry was also considered.

5.3.2 Barriers to Entry

High market share is not in itself sufficient to prove market power, demonstration of the existence of barriers to entry for new firms on the market must also be made. For barriers to entry to exist, there must be absolute cost differences between the incumbent and the entrant or the need to make investments that are not likely to be recovered if entry is unsuccessful.

To evaluate the existence of the barriers to entry, the viability of the new entrant on the designated market must be taken into consideration. The Bureau has to evaluate if a new entrant is able to start a business in the market and if it can operate that business as a viable competitor. In *Laidlaw*[17], the Tribunal referred to their requirement as one of sustainability. It also observed that the most significant barrier to entry was the acquisition of a sufficient customer base within a reasonable period of time to allow the business to become profitable.

From previous cases, the Tribunal has taken into consideration particular factors in determining barriers to entry. Those factors include observed entry and exit, sunk costs, cost of entry, economies of

14 Supra note 9.

15 Supra note 5.

16 Ibid.

17 Ibid.

scale, patents, other intellectual property needed and any other legal framework barriers which may exist, incumbent advantages, conduct of the incumbent, industry-specific barriers, reputation and the state of the relevant market.

In cases[18] where firms had an 80% or higher market share, the Tribunal has required evidence of *extenuating circumstances, in general, ease of entry* to overcome a prima facie determination of control.

5.3.3 Countervailing Power

Countervailing power means the ability, for large market participants, to protect their own interest and to counteract any market power a firm may have. In his 2005 article, M. Osborne[19] writes "Evidence that buyers have countervailing power tends to rebut evidence of market power." But as M. Osborne points out, when there is no competition in the relevant market, even the biggest player will not have countervailing power.

6. Case Examples

6.1 NutraSweet

In 1989, with 95% of the Canadian market, NutraSweet was the main supplier for artificial sweetener aspartame in the country.

NutraSweet's contracts contained clauses requiring or inducing exclusivity.[20]

The contracts substantially lessened competition by the fact that NutraSweet enjoyed a high market share, that its contracts covered 90 percent of the market and that contract exclusivity prevented the entry of competitors.

The existence of barriers to entry, including high customer switching costs, sunk costs, a two-year entry period and economies of scale also lessened competition.

To remedy the situation, the Tribunal prohibited NutraSweet from enforcing the contractual.

6.2 Laidlaw

Laidlaw offered commercial waste services, collection and disposal in four local communities on Vancouver Island. The company held 87% of the market in 1991.

The anti-competitive acts committed by Laidlaw included acquisitions of competitors, lengthy non-compete clauses in purchase agreements of competitors and contracting practices which included long-term customer contracts with automatic renewal, excessive liquidated damages, rights of first refusal and intimidation through litigation or its threat to inhibit customers from switching suppliers.

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18 *Supra* note 6 and 9.

19 OSBORNE, Michael, *Essentials of Reviewable Matters*, Ontario Bar Association, Toronto, May 9 2005, p.14.

20 The contracts obligated customers to purchase all their aspartame from NutraSweet and the company granted discounts and price allowances to customers for use of the NutraSweet logo and name. The promotional allowances were only awarded when NutraSweet product was used. In addition, the contracts had meet-or-release and most-favoured-nation clauses.

The Tribunal concluded that those acts substantially lessened competition. It found that the existence of high prices and increases of these prices indicated that Laidlaw possessed market power. In addition, the presence of high barriers to entry, including Laidlaw's contracting practices, erected barriers to the development of the necessary client base for new entrants. The Tribunal found that the contracts between Laidlaw and its customers restricted competition and that the acquisition of competitors created a local monopoly.

The Tribunal ordered that Laidlaw be barred from further acquisitions in three affected markets for three years. It also required that Laidlaw amend and delete parts of its contracts with respect to rights of first refusal, non-compete clauses, exclusivity requirements and liquidated damages for early termination. Furthermore, as a result of the order, customers were no longer obligated to disclose bids by competitors. Initial and renewal terms of contracts were reduced to one year and contract termination was possible on 30-days notice.

Notification and information requirements were also imposed on Laidlaw. Those requirements included that the customers had to be advised that contract clauses subject to the order were no longer to be applied. Laidlaw was required to explain any amendments to contracts to its customers. The existence of the order was made known to its customers and managers. Laidlaw's employees were to be notified in writing that compliance with the Act was company policy and copies of existing and future contracts had to be provided to the Bureau.

6.3 Nielsen

Nielsen provides scanner-based market tracking services in Canada. For this market, the company's market share was 100% in 1994.

The anti-competitive act was the use of exclusive contracts denying competitors access to scanner data.[21]

The Tribunal concluded that competition was substantially lessened since Nielsen had 100% of the market and used practices designed to bar entry. The Tribunal also found that Nielsen's practices raised barriers where they did not formerly exist.

To remedy the situation, amendments were imposed on the Nielsen contracts. Provisions preventing or limiting the supply of data to any party were declared null and void. Clauses promoting exclusivity of scanner data were rendered unenforceable. In addition, inducements to limit the supply of data were banned and the use of the most-favoured-nation clause was prohibited for 24 months after the issuance of the order. The same term was imposed on all future contracts signed within 18 months of the date of the order. Long-term contracts for Nielsen's services were reduced and Nielsen was also ordered to provide 15 months of data, calculated from the date requested by a new entrant competitor, Information Resources, Inc.

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[21] Those contracts were long-term contracts of three years or more. They included most-favoured-nation clauses to ensure that no competitor was paid less for data than Nielsen. They also contained strict conditions for termination, including lengthy notification requirements and monetary penalties for early termination. Their renewals were structured to occur at different times so as to limit the available sources. Finally, if a retailer supplied data to a competitor, it had to pay for exclusive access to data or pay financial penalties.

CZECH REPUBLIC

In the Czech Republic, the existing applicable Competition Act No. 143/2001 Coll., on competition protection (hereinafter „the Act"), used by the Office for the Protection of Competition (hereinafter referred to as "the Office") includes the definition of dominance in the provision of Clause 10.

According to the above mentioned provision, a competitor or more competitors together have a dominant position in the market, to which their market power allows, to a considerable extent, to behave independently of other competitors or consumers. The market power is then characterized by the volume of supplies or purchase of goods (market share) achieved by the competitor or competitors within the studied period, the economic and financial power of the competitors, legal or other obstacles of the entrance in the market for other competitors, stage of a vertical integration, structure of the market, and the quantity of the market shares of the closest competitors. This provision of the Act also contains a refutable assumption, according to which, if the contrary is not proven according to the stated indexes, it is supposed that the competitor or competitors, which achieved the market share less than 40% within the examined period, does/do not have a dominant position.

Resulting from the wording of the cited provision of the Act, the definition of the dominant position is based on the concept of the market power, when the amount of the market share of a particular competitor is only one of a few criteria which define the market power. This is the change compared to the original definition of the dominant position contained in the previous Act on the economic competition protection, which resulted from the amount of the competitor´ s market share only, and defined that it is the competitor the market share of which amounts to 30% which takes the dominant position.

When assessing the market power it is necessary to take into consideration other circumstances. This especially means, which market is considered from the point of view of its stability in the course of time. If it is a new market, where frequent changes of the market shares of the individual competitors occur, then the surpass of the above mentioned threshold value of 40% market share need not necessarily mean a potential existence of the dominance. On the contrary, in the market with a long-term stability and where a competitor with the market share higher as 40% is active, it is possible to suppose in a more real way that this can be a significant circumstantial evidence about the possible dominant position of such a competitor in the market.

At the assessment of the dominance, an important role is played by the fact whether the action of the competitor is assessed, which is e. g. part of multinational company with a wide portfolio of activities. In that case it must be regarded that such a competitor has quite surely not only a significant economic, but also a financial potential at its disposal. Also the ownership of the rights to an industrial and other intellectual property, a well-known trade mark, back the conclusion that the competitors have an important economic power. Also a vertical link, e. g. consisting of the development, production, distribution, and sale will play a significant role and will witness the real significant potential of such a competitor.

> *Analysis of whether there are obstacles for the entry into the market for other competitors, it is necessary to take into consideration both possible legal obstacles and other obstacles too. The usual legal obstacles are, according to the Office, the existence of duties, prohibition of import, and sanitary restrictions. Other obstacles are, according to the Office, e. g. those related to the*

distribution (a narrow circle of clients bound by a contract to take goods from the existing suppliers), the obstacles related to the existing preference of well-established trade marks, availability of the clients from the side of the newly entering competitor, etc.

As far as the examination of the quantities of the market shares of the closest competitors is concerned, it is necessary to state that not only the absolute amount of the market share of the specific assessed competitor is decisive to determine the dominant position, but the fact is not less important how large the distance between such a competitor and the closest competitors is. The length of this distance has its significance especially in the cases when the shares of the assessed competitor in the market are close to the above mentioned limit of 40%.

At the evaluation of the market share, the Office uses many documents and a great deal of information. First of all, this information is acquired by the Office currently without regard to the fact whether the administrative proceeding is just conducted. This sort of information is mainly statistical, both from the central source, i. e. from the Czech Statistical Office, and the information published by the mass media, information issued by different professional associations, etc. In this way the Office will obtain an overall view of the specific market, and, in case that the administrative proceeding is conducted, this general information is specified in detail. The detailed specification comes out of the documents, which are required by the Office both from the examined competitor and from the other competitors with activities in the same market, and of the same importance is also the information from the consumers. Ascertained is e. g. the quantity of production, the competitor´ s economic result, way of distribution of its products or services, its suppliers and clients´ circle, and the like.

As dominant such competitors are evaluated by the Office that have a very high share in the market. These are prevailingly the competitors active in the so-called network branches, such as electricity, gas, heating, national telephone steady line operator, water mains operators; these competitors are not really exposed to any competition and take a monopolistic position in the market. In these cases, the Office mostly comes out, at the dominance ascertainment, from the competitor´ s market share (this share makes 100% in fact) and does not examine further criteria necessary to prove the market power anymore. This conclusion of the Office was also confirmed by the Regional Court in Brno in the judgment 31Ca 142/2005-58 where it was stated that in the case of the proving of the market share in the amount of 100%, the assessment of the other criteria included in Clause 10, Article 2 of the Act cannot lead to the conclusion about the non-existence of the market power. According to the judgment, it is not necessary to insist on the formal assessment of those further criteria only.

In the cases when there is a competitor not having the stated exclusive position in the market, the Office must examine the following above mentioned criteria by which the market power is proven.

An obvious pre-requisite of the correct evaluation of the competitor´ s position in the market is the correct and exact delimitation of the relevant market. The Office comes out of the presupposition that the relevant market is a place where generally the offer and demand penetrate. The relevant market is the market of the goods then, which, from the point of view of their characteristics, price, and intended use is identical, comparable, or mutually substitutable on the territory, where the competition conditions are sufficiently homogenous and markedly distinguishable from the neighboring territories. If there is not the correct delimitation of the market, then the competitor´ s position in the market cannot be assessed correctly, with the consequence of the incorrect application of the law on the specific case. If, in such a case, the Office came to the conclusion that the competitor misused the market position evaluated in the incorrect way, then such a ruling would have to be cancelled in a review proceeding.

At the evaluation of the competitors´ market power by means of the criteria named as an example in Clause 10 of the Act, the Office comes out from the information given by the individual competitors active

in the market, and they ascertain which services and products in the market are offered by them, what the volume of the supplies of these products or services is in the given market, from these data they calculate the share is expressed as percentage, and thus obtain the survey of the market shares of the proper competitors. At the same time, the Office ascertains the distance between the individual competitors with regard to the quantity of their market shares. At the ascertainment of the market shares the Office also make use of a 5% or 10% test by questioning of a selected sample of consumers about whether they would prefer a different product (service) provided by a different competitor at the 5% or 10% price increase of the product or service provided by the particular competitor, or, despite of the price increase, they are not willing to transfer to the different competitor.

One of the cases when the relevant market delimitation showed to be very significant for proving the potentially dominant position, was the following merger of two competitors in the pharmaceutical sector.

1. Case study - Merger case of two important pharmaceutical producers

The basis of this concentration was acquisition of indirect control by the company Zentiva over the companies of the Slovakofarma group, which is the most important Slovak producer of generic pharmaceuticals. As Zentiva already controls the companies of the Léčiva group, representing the most important Czech producer of generic pharmaceuticals, there is in fact a concentration of companies Léčiva and Slovakofarma representing the leading pharmaceutical companies in Czech Republic and Slovak Republic respectively.

The results of the investigation carried out by the Office had shown that this concentration would have lead to significant strengthening of the market power of the merged entity leading to substantial distortion of competition in several relevant markets. It has been also taken into account that these markets are characteristic by existence of relatively high entry barriers due to necessity to register the pharmaceutical and due to the functioning of the public health insurance system preferring cheaper pharmaceuticals (which are in many cases supplied the merging companies). In addition, the merging undertakings own a number of well-established trademarks with a long tradition of consumption in the Czech Republic. The competition concerns of the Office related in particular to the following areas:

- In five relevant pharmaceutical markets delineated according to the appropriate expert classification of drugs, the concentration would have lead to significant increases of market shares of the merging undertakings. Taking into account the above-mentioned characteristics of the competition in these relevant markets, these horizontal overlaps would have lead to the creation of dominant positions of the merged undertaking in these markets leading to significant distortion of competition. The competitive pressure between these two important direct competitors would have been eliminated resulting in possible negative impact on the price competition, reduction of choice of products offered and foreclosure of certain markets.

- The concentration would have lead to a significant strengthening of negotiating power of the merged entity that would have had available a large product portfolio with a whole group of pharmaceuticals which are unique due to their quality, price and trademark. It would have thus become an unavoidable trading partner for distribution companies active in the selling of human pharmaceuticals. A danger of distortion of competition would then have existed in the market for distribution of pharmaceuticals in case the merged entity would have created an exclusive relationship with only one pharmaceutical distributor, threatening thus the existence of the other distributing companies.

In order to eliminate these competition concerns, the party to the proceeding entered into the following commitments, upon the fulfilment of which the Office made conditional its decision approving the concentration:

- In relation to the above-mentioned markets with significant horizontal overlaps, the merging undertakings have committed to divest all assets connected with production and selling of three important pharmaceuticals offered in these markets. The divested assets must form an indivisible complex containing all elements (i.e. both tangible and intangible assets) necessary for the divested assets to be able to be further active in the market as a real competitor. This complex of assets thus also has to be divested to a single purchaser. At the same time, the merging undertakings have committed vis-à-vis both the Office and the purchaser of these assets not to compete for a certain sufficiently long period by producing pharmaceuticals of the same chemical composition as that of the divested pharmaceuticals. This set of commitments has reduced the increase in market shares of the merging undertakings in these markets and prevented thus the creation of dominant positions distorting competition. Furthermore, taking into account the fact that the merging undertakings yield in this way several well-established trademarks of pharmaceuticals that would be available to independent undertakings, the implementation of these commitments leads also to reduction of entry barriers in these markets and to enhanced potential for third parties to enter these relevant markets and establish themselves there.

- Another set of commitments consisted in transfer of two well-established trademarks to third parties, without transferring any production or other connected assets. These are quasi-structural conditions where a sufficiently strong competitive impulse in the relevant markets is to be created by the fact that well-known trademarks for generic pharmaceuticals are gained by a new entity or a current competitor.

- With regard to the above-described danger of anticompetitive effects of the concentration in the vertically connected pharmaceutical distribution market, the merging undertakings made a behavioural commitment not to conclude exclusive distribution agreements with some pharmaceutical distributors and to ensure non-discriminatory treatment for all distributors of pharmaceuticals produced by the companies Léčiva and Slovakofarma.

These commitments entered into by the merging parties have been assessed by the Office as sufficient to remove the identified dangers of substantial distortion of competition resulting from this concentration. Once these commitments are properly implemented, the effects of the assessed merger will no longer hinder maintenance and development of competition in these relevant markets and the danger of creation of a substantial distortion of competition caused by creation or strengthening of dominant positions of the merged entity in the defined relevant pharmaceutical markets will be eliminated.

DENMARK

The Danish Competition Council (DCC) recently came to a rather unique decision in a competition case put forward by the Danish Competition Authority (DCA) dealing with excessive pricing in the wholesale market for electricity.

The decision was unique in the sense that the DCC introduced a limit on the mark-up that a dominant producer and wholesaler can charge in the Danish market – even though there is a Nordic exchange for electricity.

A model developed by the DCA estimating the optimal pricing behaviour of a dominant player on the Danish market confirms the optimal behaviour conducted by the Danish dominant firm. This supports the argument that this company holds a dominant position on the Danish market.

1. Background

In 2003 the DCA was contacted by a Danish electricity company and by Nord Pool – the Nordic Power Exchange[1] – who both raised concerns in relation to the behaviour of the electricity producer Elsam. The claim was based on the fact that Elsam abused its dominant position in the Danish market to charge excessive prices to the detriment of Danish companies and consumers.

Based on these notifications, the DCA decided to launch an investigation of the pricing behaviour conducted by Elsam.

2. The market for wholesale electricity

The main relevant product market in the case was the wholesale market for electricity.

The wholesale market for electricity is unique compared to most other product markets. The lack of ability to store the product is one important characteristic. Electricity must be consumed directly after being produced.

Moreover, electricity has no close substitutes. The demand for electricity is very inelastic both in the short run and in the long run. As a consequence, electricity is not a price sensitive product.

Finally, the electricity market is characterized by factors implying that the competitive situation in the wholesale market for electricity can change rapidly. The main factors are:

- Congestion on transmission cables may imply that the market is open for competition from abroad in one hour but closed in the next hour.

- The demand for electricity varies from hour to hour. E.g. the consumption of electricity during the morning normally exceeds the consumption at night.

[1] For more information about Nordpool, see www.nordpool.com

- A substantial part of the capacity comes from windmills and the production of electricity from windmills varies by the hours.

The main actors in the wholesale market for electricity are electricity producers, grid companies, electricity trade companies and large firms demanding electricity.

The DCA's market delineation proved the presence of two separate relevant geographical markets. Each of the two Danish price areas - East Denmark and West Denmark - constitutes a separate geographical market.[2]

In the Nordic countries the electricity markets are physically connected by cables making import and export possible. The trade of electricity in the Nordic region takes place either bilaterally or through Nord Pool.

Nord Pool is owned by the transmission system operators (TSO's) in Norway, Sweden, Finland, and Denmark. Nord Pool operates a spot market for physical contracts (Elspot) and a market for financial derivatives in Norway, Sweden, Finland, and Denmark. Nord Pool also operates clearing services for contracts traded OTC ("Over The Counter") and on spot markets.

Physical trade between the Nordic countries is based on Nord Pool's Elspot market solely (not bilateral contracts). The Elspot market is a market for physical delivery the following day. Hence, the market is referred to as a day-ahead market.

In this market, each participant submits a price-quantity curve for each individual hour of the day. The price-quantity curve provides information on how much the individual participant wants to produce or consume at any given price level. Prices for sale and purchases are determined hourly throughout the day.

During periods of no congestion (no bottlenecks) in the inter-Nordic transmission cables, the Nordic countries constitute one price area. In this single price area there is one common Nordic spot equilibrium price (or system price), for each hour determined by the intersection of the demand and supply curves. This system price makes up the spot price for physical delivery of electricity in a given hour.

During periods of bottlenecks, Nord Pool splits up the market by up to six separate Elspot price areas with differing system prices[3]. The Nordic Region constitutes a single price area in about 30 percent of all hours during the year.[4] The rest of the time, the Nordic Region is subdivided into different constellations of smaller price areas.

Two out of the six price areas in Nord Pool are Danish. These two areas are interestingly not connected to each other, whereas both are connected to price areas abroad. East Denmark is connected to Sweden and Germany. West Denmark is connected to Norway, Sweden, and Germany (cf. figure 1).

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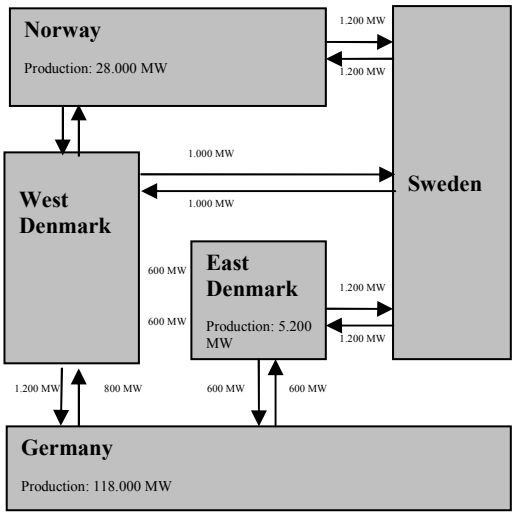
2 Technically it could be argued that the relevant geographic market is East and West Denmark in "congestion hours" and larger in "non-congestion" hours. The decisive factor, however, is that Elsam to a large extend can control whether the cables will be congested or not, regarding an Elsam supply.

3 The six areas are Sweden, Finland, East Denmark, West Denmark, South Norway and Middle/North Norway. In some hours there can, however, be up to ten different price areas.

4 Furthermore these hours are typically off-peak hours such as nighttimes i.e. measured as a percentage of the volume sold the Nordic market constitutes one single price area for a much smaller percentage.

Figure 1: Connections between the electricity markets in the Nordic countries and Germany



Source: "Topics in Merger Control – Experiences from a Recent Merger in the Danish Electricity Sector", by Pedersen, Smidt and Kongsted Christiansen in World Competition Law and Economics Review, Vol. 27, No. 4, Dec. 2004.

In each price area, the system price is determined by three factors: 1) supply and demand in the price area, 2) demand and supply curves in adjacent price areas, and 3) the capacity of the cables between the price areas. The spot market price is also used as a reference price for trade in the electricity derivatives market.

Nord Pool determines the volume of flow in the cables from West Denmark to Norway/Sweden and from the two Danish price areas to Germany. Nord Pool directs the electricity to the price areas with the highest prices. In this way, Nord Pool tries to eliminate price differences between price areas. In almost 100 pct. of the time, however, there are price differences between the German and the Nordic markets i.e. the Danish markets are situated as a transfer market facilitating flows of electricity from Germany to Norway/Sweden or vice versa.

3. Optimal conduct by a dominant player in the Danish market

To analyze the theoretical optimal behaviour by a dominant player in the Danish market for wholesale electricity, the DCA has developed a model that describes this market well.

Since actors in this market submit individual supply and demand functions for electricity at Nord Pool, the model, equivalently, uses supply and demand functions as strategic variables in optimizing e.g. firm profits. The model also takes account of the capacity of the cables connecting the different price areas i.e. it allows for price differences in case of bottlenecks.[5]

Given the low demand elasticity in this market, aggregate profits are roughly maximized at the highest possible price. To a dominant player, the highest possible prices will often maximize firm profits equivalently.

[5] For more information about the DCA model, see "Modelling European Mergers – Theory, Competition Policy and Case Studies" edited by Peter A. G. van Bergeijk and Erik Kloosterhuis.

In order to obtain the highest possible prices a dominant firm must take account of the market characteristics at a given time i.e. congestion in transmission cables, demand for electricity, supply from windmills etc.

Demand for electricity is relatively easy to estimate in a day-to-day market as the Nordic market for wholesale electricity. The supply side is, however, more complex to estimate. However, given e.g. water reserves in Norway and Sweden, and wind forecasts, the supply of electricity from other actors can be estimated within a fairly narrow interval of quantities at given prices.

Given supply and demand for different price regions in the Nordic market, actors can, with a relatively high certainty, predict whether congestion in the transmission cables is likely to occur.

In periods of congestion in the transmission cables there will be price differences within the different price areas. The DCA model confirms that these price differences can be exploited by a dominant player, e.g. by setting a price close to the highest price in neighbouring markets.[6] In the extreme, in case of congestions in all import cables, prices can be set irregardless of prices in the neighbouring markets. In these scenarios mark-ups in the Danish markets can be as much as several times higher than those in the neighbouring markets.[7]

In summary, the DCA model confirms a dominant strategy by a potential dominant firm consisting of pricing equal to the highest price in neighbouring countries except for periods of congestions in all import cables as a result of which the pricing will be significantly higher.

Comparing the results from the DCA model and the actual behaviour undertaken by Elsam – the presumed dominant firm – an overlap is obtained. This supports the argument that Elsam holds a dominant position on the Danish market for wholesale electricity.

4. Comparing the DCA model with a SSNIP test approach

The SSNIP test is often used to delineate geographic markets. Applying the SSNIP test in the wholesale market for electricity must, however, be conducted cautiously: There is a risk of creating a "new" cellophane fallacy i.e. to conclude that e.g. the Danish market is part of the Nordic market due to idle capacity in transmission cables and equal prices in the two markets.[8] This is after all not necessarily so.

It might be that e.g. low water reserves in Sweden and Norway have raised the price in these markets due to high opportunity costs.[9] Denmark has no water turbines, so in a Danish competitive market the price could easily be significantly lower than those in the Norwegian and Swedish markets. A dominant actor in the Danish market can, however, exploit this situation by submitting prices equal to the high Norwegian and Swedish prices and thus earning a higher profit.

In practice, this is conducted by the dominant actor in the Danish market charging a very high price on the marginal capacity exported to Sweden/Norway, as depicted in figure 2 below.

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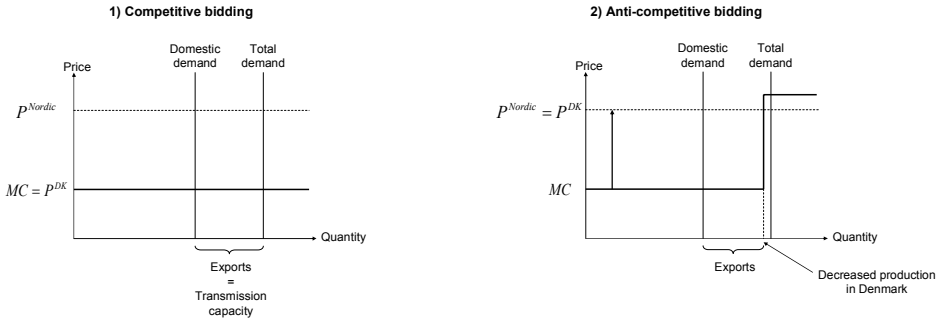
6 In practise firms submit supply functions, but submitting a lower supply at given prices is equivalent to submitting higher prices at given supplies.

7 Furthermore the dominant firm can influence whether bottlenecks will occur.

8 The argument is similar to the ones in "The Power Fallacy – Energizing the Collophane Fallacy" by Olesen and Sundahl; *fouthcoming in European Competition Law Review*.

9 Additional electricity is produced using coal, which has relatively large marginal costs compared to the "free" water.

Figure 2: Submitting a high price on the marginal export capacity



Source: DCA based on Olesen & Sundahl (2006)

Figure 2 depicts two scenarios labelled "competitive bidding" and "anti-competitive bidding" respectively. By setting a high marginal price, the dominant actor in the Danish market obtains a significantly higher price on all units sold. In the competitive bidding scenario, price differences would have been obtained.

Using the SSNIP test with a competitive price as a starting point would have lead to the conclusion that the Danish market constituted a single market. However, using the empirical Danish price as a starting point for the SSNIP test would (falsely) have lead to the conclusion that the Danish market was part of the Nordic market.

The approach taken by the DCA is in line with announcements by the EU Commission saying that the SSNIP test should take the prevailing market price into account *unless* the prevailing price has been determined in the absence of sufficient competition, which is argued to be the case in the Danish market for wholesale electricity.[10]

[10] EU Commission, "Notice on the Definition of the Relevant Market for the Purpose of Community Competition Law", December 1997.

HUNGARY

1. What is monopoly power/dominance?

According to Article 22 of the Competition Act a dominant position shall be deemed to be held on the relevant market by persons who are able to pursue their business activities to a large extent independently of other market participants substantially without the need to take into account the market reactions of their suppliers, competitors, customers and other trading parties when deciding their market conduct.

In determining whether or not an undertaking is dominant the authorities should, therefore, seek to identify whether there are any competitors capable of constraining the undertaking's behaviour and preventing it from behaving independently of effective competitive pressure. A dominant position does not mean that an undertaking deemed to be in a dominant position has no competitors; it simply means that an undertaking is in a position to have an appreciable influence on the conditions under which conduct in the relevant market will develop. In assessing whether a dominant position exists, the following factors, shall be considered, in particular:

- the costs and risks of entry to and exit from the relevant market, and the technical, economic and legal conditions that have to be met;
- the property status, financial strength and profitability of the undertaking or the group of undertakings, and the trends in their development;
- the structure of the relevant market, the comparative market shares, the conduct of market participants and the economic influence of the undertaking or the group of undertakings on the development of the market.

Dominant positions may be held by individual undertakings or group of undertakings or jointly by more than one undertaking or more than one group of undertakings.

The jurisdiction of the competition authority of Hungary (GVH) has not made a distinction between dominance and super dominance, though extremely high market shares facilitated the establishment of dominance in cases. However in certain cases market power deriving from even such high shares was considered to be eroded by the lack of exit barriers of its customers.[1]

The dynamics of the market was also taken into account. Constant decrease of market shares was a factor in the justification of the non-existence of a dominant position.[2] Circumstances favorable for the allegedly dominant firm should be present for a significant period and short term advantages can not lead to the establishment of dominance.[3] On the other hand short term power on the market could also form the

1 Case Vj-45/2004 para. 20

2 Case Vj-155/2004 para. 14

3 In case Vj-124/1998. para. 56 it was established that the temporary oversupply of agricultural products in itself does not justify the establishment of the buyer's dominance.

basis of the establishment of dominance in a situation where contracts were long term and market entry of competitors was uncertain and unforeseeable. This situation arose relating to cable TV and ADSL services in small localities where one provider was already present and the small number of potential consumers made market entry less likely.[4]

2. Evidence used to prove market power in monopolization/abuse of dominance cases

Dominance or market power exists only in relation to a particular market and not in the abstract. The possibility of dominance on the market is generally determined with a view on the market share of the undertaking concerned. Though no legal presumptions are established in the Competition Act, the GVH has analysed the level of market share as an indicator. In a case[5] the undertaking had 10% market share on the chemical market that the GVH did not consider enough to form the basis of dominance. Similarly market shares of 20 and 30% were not eligible.[6] Even a share ranging from 30% to 50% was not enough to establish a dominant position.[7] However a similar share and the relative size of the firm, together with other conditions justified the establishment of dominance. The market leader shipping company at lake Balaton had a share of 50% and competitors were not even close to that share. Furthermore high entry barriers restricted the effects of potential competition as well. Upon such circumstances dominance was established by the GVH.[8] The 79% share of Magyar Telekom was enough in itself to establish its dominant position on the relevant market of interconnections.[9]

On the other hand even high market shares are rarely considered independently as an indicator of dominance. As it was mentioned above due to extremely low exit costs a newspaper wholesaler was not considered dominant despite its monopoly position as retailers were free to exit the market in case of the application of abusive practices.

Concentration measures were also taken into account at the evaluation of post-merger dominance. In a merger concerning the already oligopolistic sugar market the pre-merger HHI index was 3414. The GVH considered that the merger would strengthen the existing close relationship of the three sugar producers and would create structural links as well further reducing the already weakened competition on the market. The merger was therefore cleared only subject to structural conditions.

As mentioned above the lack or existence of barriers to entry can be crucial when determining whether or not a firm has a significant market power. Even an undertaking with a high market share would not be able to hold a dominant position, if the barriers to entry are so low that the undertaking, who engages into anti-competitive activity, has to face the competition of new competitors. The undertaking will be protected from the other potential competitors, if the barriers to entry are high. As it was presented in Hungary's submission for the roundtable of the Competition Commission (DAF/COMP/WD(2005)65) there is no strict definition for entry barriers and practically any impediment that has the effect of reducing competition constitutes an entry barrier.

A provision of the internal rules on price setting of an electricity company was considered as an evidence of dominance. The said provision established the calculation of final prices but indicated that in

4 Case Vj-37/2005 para 54

5 Case Vj-141/2004 para. 41

6 Cases Vj- 26/2005 para 12 and Vj-155/2004 at para. 14, respectively

7 Case Vj-60/2004 para. 132

8 Case Vj- 69/2002 paras 20-22.

9 Case Vj-66/2004 para. 116

case of need deriving from the pressure of competition a lower profit rate can be applied in order to reach the level of market price.

Concerning dominance the GVH also analyses the principles of the establishment of price, especially cost calculation methods and the applied cost allocations.

As regards misdiagnosing monopoly power it should be noted that the GVH rarely follows the effects of its decisions. It mainly happens when conditions were imposed or undertakings were submitted. In general however it can be said, that the GVH is cautious in establishing abuse of dominance. In case of doubt the established policy prefers not to intervene. On the other hand decisions can be appealed providing a second supervision of the effects of the decision and securing feedback to the authority on improper conclusions.

3. Case examples

3.1 The acquisition of control by the Ringier Group over the political daily, Népszabadság

In the present case summary the merger of two undertakings active on the newspapers market would be presented. A strong market actor, the Ringier Group intended to buy the market leader national political daily, Népszabadság. The merger was prohibited by the GVH on the basis of portfolio effects, but the court overruled the decision on the basis of a different market definition. In its second procedure the GVH repeated its conclusions drawn in its previous decision and submitted further evidence supporting it. On the other hand it also incorporated some views of the court. The merger was finally cleared subject to conditions intending to remedy the negative effects deriving from the merger's portfolio effects.

3.1.1 The parties

Tabora a property managing company seated in the Netherlands is in the property of the Swiss Ringier AG which itself is owned by Ringier Holding AG. Undertakings owned by the group are directly and indirectly involved in the newspaper market in many countries of Europe and in the Far-East.

Népszabadság is a market leader political daily.

3.1.2 Particularities of the media market

Due to the privatisation process of the early nineties beside several national, regional and local radios and television channels more than 10 national, 22 regional dailies and around 300 monthly and more than 400 other type of newspapers and magazines are present on the market.

Printed media is a particular product as it shall meet the needs of the readers and the advertisers at the same time. The market is therefore consisted of two segments.

The readers' segment of the printed media market

On the market of printed media there are different kind of products

- daily and periodical,
- regional and national,
- general, and specialised papers

National dailies and their market shares are as follows (Papers belonging to the Ringier Group are in **bold**):

- political papers (**Magyar Hírlap**, Magyar Nemzet, *Népszabadság,* Népszava)

	2000	**2001**	**2002**
Népszabadság	59%	59%	55%
Magyar Hírlap	10%	10%	10%
Népszava	12%	11%	9%
Magyar Nemzet	19%	20%	26%

- economic dailies (Világgazdaság, Napi Gazdaság)
- free dailies (Metro, Esti Hírlap (the latter ceased to exist in September 2003))
- tabloids (**Blikk -** 69%**,** Színes Mai Lap, Mai Nap)
- sports dailies (**Nemzeti Sport** - 100%)

The advertisers' segment of the printed media market

The turnover of the overall advertisement market is growing year by year. In 2002 it was around 1.200.000 euros. Around 85% of this amount was spent for advertisements on TV and printed media. Counted on actually paid prices which differs from list-prices the shares of the different media in the amount spent on advertisements is as follows:

Media	**2000**	**2001**
Television	39.5	38.8
Printed media	39.5	41.6
Radio	7.9	5.9
Posters est. on public domain	9.7	9.8
Cable TV	1.9	2.2
Internet	0.8	1
Cinemas	0.7	0.7

The share of the Ringier group and the Népszabadság on the different levels of the market of advertisements in per cent is approximately as follows:

Market level	**Ringier group**	**Népszabadság**	**Together**
All media	1.5	1.9	3.4
Printed media	6.1	7.8	13.9
Dailies	12.5	15.9	28.4
National dailies	26.6	34.1.	60.7
National political dailies	60.4	12.8	73.2

Incomes deriving from advertisements are essential for newspapers. In the case of Magyar Hírlap, Népszabadság and Magyar Nemzet around 40, 50 and 25% of the overall revenues derived from advertisements, respectively.

3.1.3 The notification

The parties submitted in their notification that the merger did not create or strengthen a dominant position even on the narrowest possible market, on the market of political dailies (national and regional papers).

They also submitted that that advantages of the merger were:

- more efficient printing and supply resulting in lower prices,
- more efficient administration, finances, logistical co-ordination,
- co-ordination of the marketing and market research activities of the four dailies of the Ringier group,
- efficient use of experts' knowledge and its share among editorial boards,
- possibility for faster development of connected media activity (Internet, magazines),
- enlargement of brand names of existing papers

Alleged advantages for the consumers:

- continuous development of quality,
- increase of the number of editorial pages,
- investments for better quality of photos,
- new products (Népszabadság books, sport and fitness events, special magazines, online services etc.)
- adaptation of developments of the European market

Alleged advantages for the parties:

- more competitive prices for advertisements,
- creation of a viable alternative for TV advertisements,
- greater financial stability

The acquirer also submitted undertakings to

- make investments to the new design and marketing of Népszabadság,
- exploit the possibilities for co-operation within the Ringier group,
- optimise the activity of the administration.

3.1.4 The opinion of third parties

The common position of all the national and regional political dailies was that the merger would have negative effects, namely:

- the exclusion of competition on the market of national political dailies,
- further strengthening in the positions of Ringier in relation with distribution, access to paper and printing facilities,
- the merger could cause the liquidation of certain papers,
- the merger would result in a significant increase of the concentration on the market of national dailies,
- through its portfolio Ringier could acquire a much larger share on the market of advertisements.

The national political daily, Magyar Nemzet submitted that the free daily, Metro competes with the other dailies for the advertisements but not for the readers. It also indicated that regional papers, due to the emphasis they add to news of local nature can not be considered as competitors of the national dailies.

An other national political paper, Népszava upheld the opinion of Magyar Nemzet relating to the role of Metro. It further underlined that due to the political affiliation of the readers the market of national political dailies is further segmented into two sub-markets, namely that of right wing-conservative and left wing-liberal papers. On this latter market after the merger Népszava, with its share of 12 per cent, would remain the only competitor of the Ringier papers.

Metro, in relation to its own position on the market, supported the market definition of Magyar Nemzet and Népszava.

The opinion of the publishing houses of the regional papers was not uniform. One submitted that it considers the national political papers as competitors, while an other cares them only in the competition for advertisers.

3.1.5 The decision

Relating to the relevant product market of readers the GVH established that printed media is not substitutable with other forms of media. It also made a distinction between political and non-political papers and between dailies and periodic papers. The GVH considered furthermore that national dailies can not be substituted with regional ones nor with the free daily, Metro.

The Council also identified some peculiarities on the market of national political dailies but its further subdivision was not necessary for the analysis. The relevant product market was therefore the three (or four) national political dailies. The geographical market was Hungary.

The GVH established that the share of the parties on this market would have risen from 13 to 87 (or from 10 to 55 per cent).

Relating to the market of advertisements the GVH established that although undertakings had great discretion to select the appropriate media for their advertisements, the majority of advertisement campaigns are organised through the so called ‘media mix’ which includes the use of all kinds of media,

including printed media as well. Through the merger Ringier would have created a large portfolio of national dailies, on the market of advertisements in the printed media.

The GVH established that the Ringier group was in a dominant position on the markets of national sports dailies and tabloids and that it would have become a dominant undertaking on the market of national political dailies. Such a strong portfolio covering the printed media market would have reinforced its position on the market of advertisements and this latter position would have reinforced the former.

The GVH did not question the benefits deriving from the increasing competitiveness as it characterises all mergers. However these benefits remain available if competition is not restricted unduly. In this case a restriction of this kind was likely. The GVH also established that the undertakings of the parties were not sufficient to remedy the negative effect of the increasing concentration. Even the divestment of Magyar Hírlap would have been less than desirable.

The GVH prohibited the planned concentration on these grounds.

3.1.6 Appeal

On appeal the Metropolitan Court accepted that a strong portfolio in the printed media market for advertisers has a reinforcing effect on market power on the readers' side of the same market.

It considered however that such an effect could result only slowly, in several steps the starting point of which should be a dominant position in face of advertisers of the printed media market. The court considered however, that such a dominance would not be established by the merger. On the other hand portfolio effects resulting on the long term were to be significantly influenced by the possibility of supply side substitutability and the level of entry barriers. The question to be decided according to the court was whether portfolio effects could in fact appear after the merger or would be extinguished by the entry competitors.

The court established that the GVH did not take into account the plaintiff's argument that portfolio effects are highly restricted by the segmentation of the market of national political dailies. Consumers loyal to a given political wing would not easily change from one paper to an other simply because of lower prices. What's more, the readers' market is narrowing in time, which further reduces the likeliness of portfolio effects. In the case of political segmentation the market exit of certain papers, due to the low level of incomes from advertising, would not increase but reduce entry barriers as consumers were unwilling to buy papers of differing political disposition and instead they would be willing to buy the product of a new competitor having the same political views.

According to the court, in such a market situation where changes happen in several steps and stretched out in time, participants of the printed media market for advertisers are competitors on the readers' market too. This is because any publisher would be able to react in time and appear on the market of national political dailies. Entry barriers relating to the time of entry identified by the GVH are important in the case of quickly realised horizontal effects but considered low in the case of slowly appearing portfolio effects, based on strategic behaviour.

Upon the available data the court considered that dominance would not be created by the merger and therefore the GVH was wrong considering that portfolio effects would result in such an increase of market power. Relating to alleged portfolio effects it noted that if supply side substitutability was correctly taken into account than the relevant market would comprise of all the undertakings and publishers active on the market of printed media. In such a situation, having in mind that the market is not further segmented no dominance could have been established on the basis of the therefore non-existing portfolio effects. The court therefore annulled the decision of the GVH and ordered the re-investigation of the merger.

3.1.7 The second decision of the GVH

In its second decision the GVH established that concerning the market of national political dailies no supply substitutability can be identified. The GVH did not argue against the allegation of the parties that the publishers of Metro and the regional papers are well-capitalised undertakings, owing the technical and professional background to issue a political daily. However, first, such a change would cause significant costs and second, the issuing of a political daily is not simply a matter of technical capabilities. A successful and viable market entry requires the attainment of a size of circulation comparable to those of the competitors within a short period of time. Taking into account the characteristics of the market, the lack of such a possibility excludes the existence of supply side substitutability as timely entry is unlikely. Publishers of papers other than the national dailies can therefore only taken into account as potential competitors and not as supply side substitutes. So the relevant product market can not be extended to a market wider than that of national political dailies and so dominance can be established. From the point of view of readers Ringier would therefore acquire a dominant position on the market of national political dailies while it is already dominant on the market of daily tabloids and daily sport papers. In its conclusion the GVH established again that the merger would have significant portfolio effects in face of advertisers.

The GVH finally cleared the merger subject to conditions. The parties were obliged to separate their advertisement management activities and not to provide bundled offers for advertisers for two years. Népszabadság was allowed to increase its prices for advertisements only according to the average increase of such prices on the market. It was also obliged to provide regular information to the GVH on its pricing and on the average market price changes for three years.

IRELAND

1. What is dominance?

The Irish courts define dominance in abuse cases using the "classic definition of dominance"[1] contained in the United Brands –v- Commission (Case 27/76) [1978] E.C.R. 207 at p. 277 ("*United Brands*") wherein dominance refers to 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, customers, and ultimately of its consumers.

The Irish Competition Authority employs the same approach to the definition of dominance in its analysis of alleged abuse of dominance. In assessing dominance, the Irish Competition Authority takes into account if and to what extent an undertaking encounters constraints on its ability to behave independently of its competitors by raising price and reducing quantity on a sustained basis.

There is no rule of thumb used in the Irish system for establishing how much market power is enough. The Irish Competition Authority and Irish Courts have had regard in this task to the degree to which an undertaking can exercise its market power by raising its prices above the competitive price for a sustained period of time without encouraging new entry into the market and/or thereby rendering its actions unprofitable.[2] The approach adopted is consistent with that described in Faull & Nikpay[3] that:

- Dominance is the position of considerable economic power held for a period of time by firms over customers and/or suppliers in a market. More specifically, it is the ability of firms to restrict output and thus raise prices above the level that would prevail in a competitive market, without existing rivals or new entrants in due time taking away its customers.

- Thus, the durability of the undertaking's market power and the profitability of an undertaking's actions are relevant in establishing a threshold for how much market power enables an undertaking act "to an appreciable extent" independently of competitive reactions in the market.

The Irish Competition Authority has set out its approach to the assessment of dominance in a number of reasoned decision notes published by it in relation to specific investigations. The Irish Competition Authority's goal in publishing these notes is to provide guidance to practitioners in the field of competition law and policy, business, and the public generally on the approach and methodology used by the Irish Competition Authority in assessing alleged breaches of competition law. The decision note series includes

1 See for example Irish High Court case Meridian Communications Limited v. Eircell Limited [2001] IEHC 195 (5th April 2001) ("*Meridian v. Eircell*") at paragraph 20, and Competition Authority –v- O'Regan et al [2004] IRLHC 330 ("*Competition Authority v. ILCU*").

2 Supra note 1.

3 *EC Competition Law;* Faull & Nikpay, chapter 3, page 122.

details of investigations into a variety of allegations from alleged resale price maintenance[4] to abuse of dominance. The series also includes examples of instances where the Irish Competition Authority has concluded that the undertakings concerned were dominant and others where it concludes they are not. However, it is important to remember that these decision notes represent the views of the Irish Competition Authority in an individual investigation. While they give detail on the approach followed by the Irish Competition Authority in investigating the relevant category of alleged breach of the Act, they do not create legal precedent. Ultimately, only the Irish courts can make a finding of a breach of competition law.

The Irish Competition Authority's decision note series is available on the Irish Competition Authority's website at www.tca.ie/enforcement_decisions.html. The most relevant for the purposes of this discussion include:[5]

- Decision Note No. E/06/001, Alleged excessive booking fees by TicketMaster Ireland and its exclusive contractual relationships with MCD Promotions Limited and Aiken Promotions Limited, March 2006 ("TicketMaster Note");

- Decision Note No. E/05/002, Alleged excessive pricing by Greenstar Recycling Holdings Limited in the provision of household waste collection services in northeast Wicklow, October 2005 ("Greenstar Note"); and

- Decision Note No. E/05/001, The alleged predation by the Drogheda Independent Company Limited in the market for advertising in local newspapers in the greater Drogheda area, February 2005 ("Drogheda Newspapers Note").

2. Evidence used to prove market power in abuse of dominance cases

The Irish Competition Authority favours an effects-based approach to the analysis of competition issues, including establishing dominance, on the basis that there is a danger that a form-based/presumptions approach could discourage pro-competitive and pro-consumer conduct by firms. Thus, while relative market share is often used by the Irish Competition Authority as an initial indicator of market power the Irish Competition Authority does not employ any assumption of dominance. The Irish Competition Authority will not rely on evidence relating to market shares alone but is equally concerned in assessing dominance with examining factors such as barriers to entry and actual or potential competition to determine the degree to which potential competition constrains the allegedly dominant undertaking's activities.[6] While not required such an approach is certainly supported by Irish and EU jurisprudence.[7]

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4 See for example: Decision Notes No. E/03/004, "*Agreements between The Irish Times Limited and newspaper retailers allegedly fixing the retail price of The Irish Times newspaper*", December 2004; E/03/003, "*Agreements between Independent Newspapers (Ireland) Limited and newspaper retailers allegedly fixing the retail price of Independent newspaper titles*", December 2004; or E/03/002, "*Agreements between Statoil Ireland Limited and motor fuels retailers allegedly fixing the retail price of motor fuels in Letterkenny*" December 2003.

5 There are two additional reasoned decision notes dealing with alleged abuse of dominance. These are Decision Notes No. E/02/002 "*The Increase in the Wholesale Price of Electronic Top-Up by Vodafone Ireland Limited*"; and E/02/001 "*The Reduction in Travel Agents' Commissions by Aer Lingus plc.*" both of which were published in June 2003.

6 The Irish Competition Authority's approach to establishing dominance is set out in detail in reasoned decision notes published by the Irish Competition Authority in relation to selected investigations. Of particular relevance are the Irish Competition Authority's notes in relation to Drogheda Newspapers, Greenstar Recycling Ltd., and Ticketmaster Ireland.

In *Hoffman La Roche v Commission*, the ECJ indicated that high market share may be related to market power, especially when a high market share is held for some time. The ECJ states that:

- *The existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative* but among these factors a highly important one is the existence of very large market shares. A substantial market share as evidence of the existence of a dominant position is not a constant factor and *its importance varies* from market to market *according to the structure of these markets*, especially as far as production, supply and demand are concerned … …

- Furthermore although the importance of the market shares may vary from one market to another the view may legitimately be taken that very large market shares are in themselves and save *in exceptional circumstances,* evidence of the existence of a dominant position. An undertaking which has a very large market share and holds it for some time … … is by virtue of that share in a position of strength.

- (Emphasis added)

This approach was employed by the Irish High Court in its decision in *Meridian v. Eircell* in which the court determined that to better assess the weight to be attached to the market share of the [allegedly dominant undertaking] it is helpful to give a brief outline of the background to that market share. The reason for this is that a given market share will have different significance depending on how it came about.

It is clear from both Irish and EU case law that the burden of demonstrating that high market shares should not be taken as proof of dominance rests with the allegedly dominant undertaking. In the decision of the High Court in *Competition Authority v. ILCU* for example the court states

> *No evidence has been led by or on behalf of the ILCU to suggest that its huge market share is not indicative of equivalent market power or that any other exceptional circumstances exist which would lead the court to seriously question ILCU's dominance in both markets.*

Nevertheless, the Irish Competition Authority does not rely on market share alone in assessing dominance. Rather, the Irish Competition Authority will examine all aspects of the dynamic characteristics and structure of the relevant markets to determine the nature and extent of the competitive constraints facing the allegedly dominant firm should it attempt to raise its prices on a sustained basis above the competitive level before the Irish Competition Authority will conclude on the issue of dominance.

In the assessment of dominance the Irish Competition Authority and courts have considered a whole range of factors in establishing the degree of market power that an undertaking possesses to determine whether or not it possesses a dominant position. The range of factors considered include:[8]

- The relative market share of the allegedly dominant undertaking;

- The level of concentration in the relevant market;

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7 See Richard Whish, 2003, *Competition* Law, 5th edition, pp. 178-190 for further discussion on EU cases.

8 The way in which these factors have been applied in practice is described here by reference to Irish Competition Authority reasoned decision notes only. However, the reader should also have regard to the discussion in Section 3 below concerning two High Court decisions in Meridian v. Eircell and Competition Authority v. ILCU.

- Pattern of evolution of the prevailing market structure;
- Degree of countervailing buyer power by customers and/or end consumers;
- Potential competition;
- Economies of scale/scope;
- Control of infrastructure not easily duplicated;
- Barriers to entry or expansion; or
- Switching costs.

These factors are not used as a checklist but rather as a means of understanding and characterising the dynamics of a market and thus coming to a view about dominance.[9]

In its Drogheda Newspapers Note the Irish Competition Authority concluded that a publisher – the Drogheda Independent Company – with a 65-75% market share was not dominant. In reaching its conclusion the Irish Competition Authority took the following factors into account:

- The Drogheda Independent's market share had fallen considerably over a five year period from a previous monopoly level;
- The Drogheda Independent faced a single, large, well-resourced, and innovative rival – the Drogheda Leader;
- The evidence showed that the Drogheda Independent was unable to increase advertising rates due to the presence of the Drogheda Leader;
- The barriers to setting up a local newspaper were considered to be low and falling;
- Similarly, barriers to expansion were considered low due to growing demand in the relevant market;
- The evidence showed that customer switching costs are low and a customer survey carried out by the Competition Authority provided evidence of switching by advertisers between the rival newspaper publishers.

The Irish Competition Authority went on to conclude in its examination that even if the Drogheda Independent Company were dominant its behaviour was not predatory as alleged. The Irish Competition Authority concluded that the alleged conduct was in fact arguably pro-consumer and more indicative of intense competition in the market than predatory conduct by a dominant undertaking.

[9] The "European Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services" OJ 2002/C165/03 provide a good description of the nature of the approach followed by the Irish Competition Authority.

In its Greenstar Note the Irish Competition Authority concluded that Greenstar was dominant in the relevant market for household waste collection in northeast Wicklow on the basis of a number of factors. These factors include:

- Greenstar was the only operator in the market concerned, and there had been no new entry into the market since 2000,

- There was no evidence of competition from firms operating in adjacent geographic areas. This appeared to be the case due to issues associated with access to landfill and disposal facilities and logistical considerations associated with the topography of the region,

- While sunk costs and permitting procedures were not found to be problematic, the need for new entrants to achieve a combination of economies of scale and density acted as a significant barrier to entry and expansion into the market by potential competitors,[10]

- Regulatory delays in processing applications for permission to develop new waste infrastructure[11] were considered to constitute a barrier to expansion by new entrants.

The Irish Competition Authority went on to conclude in its analysis that although Greenstar was dominant in the relevant market the evidence did not substantiate the allegation of excessive pricing. The evidence showed that that Greenstar's prices are not unrelated to the social value of the service provided or to the cost involved in providing the service in question. Nor was it considered to be the case that Greenstar's prices are significantly higher than the prices charged by other private operators; they are in some cases cheaper than those charged by other private operators in the State.

Finally, in its TicketMaster Note the Irish Competition Authority concluded that TicketMaster Ireland had enjoyed a 100% share of the market for outsourced ticketing services for events of national or international appeal on the Island of Ireland since 1998. Nevertheless, the Irish Competition Authority noted that there were "exceptional circumstances" in the market that meant that TicketMaster Ireland could not be assumed to be dominant. These factors countering a finding of dominance included:

- The considerable countervailing buyer power of TicketMaster Ireland's largest customers – two event promoters accounting for in excess of 50% of the volume of tickets sold each year – associated with their ability to switch suppliers or commence self supply in a relatively short period,

- The presence of alternative ticketing service providers in an adjacent product market that act as a constraint on TicketMaster Ireland's behaviour,

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10 In reaching this conclusion the Irish Competition Authority had regard to a study commissioned by the Italian Competition Authority that estimated that firms supplying waste collection services reach a minimum efficient scale when serving around 16,000 inhabitants. Stevens, Barbara J., 1978, "Scale, Market Structure, and the Cost of Refuse Collection", Review of Economics and Statistics, 60(3) August, p. 447. Dubin, Jeffrey A. and Peter Navarro 1988, "How markets for impure public goods organize: the case of household refuse collection", Journal of Law, Economics and Organization, 4(2), pp. 217-241.

11 This term covers was disposal facilities such as landfill as well as sorting/recycling facilities including, but not limited to, transfer stations, material recovery facilities or baling stations, i.e., any waste management facility which sorts, compacts or recycles waste such that the collection firm reduces the amount of waste ultimately going to landfill.

- Evidence that the promoters could dictate the terms of their contractual arrangements with TicketMaster Ireland such that these contracts would not act as a barrier to entry into the market,

- Evidence that the promoters exert downward pressure on TicketMaster Ireland's charges to consumers.

The Irish Competition Authority concluded in this investigation that TicketMaster Ireland's conduct did not constitute an abuse of dominance on the basis that the promoters constrained the behaviour of TicketMaster Ireland in such a way that benefits consumers – maintaining downward pressure on TicketMaster Ireland's ticketing service charges and through risk sharing with TicketMaster Ireland that benefits consumers by attracting a greater variety of artists to the island of Ireland.

3. Costs of misdiagnosis of dominance

Competition law in Ireland does not prohibit possession of a dominant position but rather *abuse* thereof. Clearly there are certain costs associated with a misdiagnosis of dominance regardless of any conclusions regarding the firm's conduct. An incorrect finding of dominance will impose costs on the individual firm involved and more generally throughout the economy. In contrast an incorrect finding of no dominance will result in abusive behaviour that adversely affects competition and consumers continuing unfettered. However, there are a number of checks in the Irish Competition Authority's approach that minimise the likelihood of such situations arising.

There are a number of circumstances in which a finding of dominance might be reached, in each instance there are measures in place that will help to test and prove the robustness of the Irish Competition Authority's finding. *First*, the Irish Competition Authority may conclude that an undertaking is dominant in a market which is narrowly defined. In such circumstances the Irish Competition Authority checks that the narrowness of the market has not biased its analysis in favour of an incorrect finding of dominance by incorporating an assessment of the degree to which actual or potential competition from adjacent market constrains the ability of the allegedly dominant firm to raise price and/or reduce output for a sustained period of time into its analysis of market power.[12] *Second*, where the Irish Competition Authority concludes that an undertaking is dominant, assessment of the alleged abuse offers a secondary check on that finding of dominance.[13] For instance, in the case of alleged predatory pricing the Irish Competition Authority incorporates a recoupment test into its analysis.[14] Clearly, if the undertaking were incorrectly found to be dominant in the first stage of the analysis this recoupment test is unlikely to be satisfied. *Third*, were the Irish Competition Authority to conclude that an undertaking was dominant but that it had not abused that dominance; the Irish Competition Authority might publish a reasoned decision note outlining the details of that case and the bases for its conclusion. The Irish Competition Authority's rationale, approach, and conclusions in that investigation are then open to comment by practitioners. *Finally* and in contrast, the Irish Competition Authority might conclude that the allegedly dominant undertaking's behaviour was abusive and decide to bring legal proceedings. In such circumstances the

12 See for example the Irish Competition Authority's Greenstar and TicketMaster enforcement decision notes.

13 It is important to note that there are also internal checks and balances incorporated within this process. The Irish Competition Authority is a collegiate body with five members from various professional backgrounds – law, economics, and public administration. The conclusions of the Monopolies Division – the division within the Irish Competition Authority that responsible for investigating alleged abuse of dominance – must be reviewed and approved by the five members of the Irish Competition Authority who make the final decision on whether or not they support the Division's conclusions.

14 The Irish Competition Authority's approach to the assessment of predation complaints is outlined in the Irish Competition Authority's Drogheda Newspapers Note.

Courts will assess the Irish Competition Authority's conclusions in order to determine whether on the balance of probabilities the Irish Competition Authority's finding of dominance (and abuse) is supported by the evidence.[15] In this way the risk of an incorrect finding of dominance (or lack thereof) is limited.

For the undertaking incorrectly identified as dominant there are likely to be significant costs in terms of additional competition compliance measures and the heightened probability of legal action being taken against their conduct in the market, whether by a competition authority or private party. The Irish Competition Authority would also be concerned that a misdiagnosis of dominance, even if in the absence of a finding of abuse, would have a chilling effect on the behaviour of firms more generally with adverse consequences for the development of competition in a market. This could arise in a number of circumstances. The competitive activities of the incorrectly labelled dominant firm might be curbed due to concern that its conduct would be labelled abusive. Thus, behaviour that would otherwise benefit consumers would be curtailed. The competitive behaviour of rival firms could also be curtailed if they believe that lowering their prices or expanding their output in the market could not be rewarded by increased revenues at a dominant firm's expense. Further, potential entrants could be deterred from entering a market which they believe to be dominated by an incumbent operator. For example, evidence from undertakings exploring the possibility of entering the Irish energy market show that many have decided against entry due to the presence of a dominant incumbent, the ESB.

Finally, in the event that a dominant undertaking is incorrectly found not to have sufficient market power to permit it to act independently of competitors and consumers its behaviour will not be prohibited. Any harm to competition and consumers resulting from the dominant firm's behaviour on the market will continue uncensored. This is likely to reduce and/or eliminate existing competition in the market. However, it would also have the effect of retarding the development of competition by directly preventing or deterring entry and expansion into the market. Such a situation would clearly be to the detriment of consumers.

The Irish Competition Authority's approach to assessing dominance is to explore all aspects of the market in determining the nature and extent of competitive constraint on the allegedly dominant firm before reaching any conclusions on dominance. Such an approach significantly limits the probability of a misdiagnosis of dominance.

4. Case Examples

4.1 Meridian Communications Ltd. v. Eircell Ltd [2001] IEHC 195

In this case the court employed a thorough and comprehensive analysis in concluding that Eircell was not dominant. The action concerned an alleged abuse by the incumbent mobile telecommunications operator, Eircell Ltd ("Eircell"), in relation to an agreement for the resale of airtime supplied by Eircell by the plaintiff Meridian Communications Limited ("Meridian"). Meridian asserted that the terms of the agreement placed undue restrictions on its actions and constituted an abuse of dominance by Eircell.

The court used the "classic definition of dominance" provided in *United Brands*.[16] The assessment of whether or not an undertaking would be considered dominant was considered to involve an analysis of both structural and behavioural aspects of the market and a consideration of whether or not such analysis supports the allegation of dominance.

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15 Rights and procedures for appeal of decisions of the courts are of course provided for in Irish law.

16 *Meridian v. Eircell*, supra note 0, para 21.

The court considered a significant number of factors in concluding that Meridian had not presented evidence to prove that Eircell was dominant. The factors considered were:

- Eircell's market share;
- The number of competitors in the market;
- Market share of Eircell's competitors;
- Eircell's designation as having Significant Market Power[17] by the Irish telecommunications regulator;
- Barriers to entry and expansion;
- The availability of competing products and the ease of customer switching;
- The vertical integration of Eircell and its ready access to a route to market;
- Behavioural aspects of the market and evidence of competition.

In determining that Eircell's 60% market share was not a reliable basis for concluding Eircell was dominant the court considered a number of factors that it felt limited the weight to be assigned to Eircell's high market share. *First*, the court noted that Eircell had experienced a 'quite dramatic' fall in its market share from 100% between 1997 and 1999.[18] *Second*, the court noted that a third GSM mobile operator had recently launched on the market and the telecommunications regulator was also planning to issue 3G mobile licences in the near future. *Finally*, the court noted the rapid rate of growth in mobile telecommunications in the State which gave significant scope for the development of a highly competitive market. The court concluded that Eircell's ability to act independently in the market must be considered in the light of this combination of factors.

While the court acknowledged that the number of competitors is a factor to be taken into account in assessing dominance it went on to state that the significance of this factor would vary from market to market. The court determined that in a recently deregulated market where the number of licences is fixed by the regulator the number of competitors was "not of any great assistance in assessing whether the [Eircell] is dominant".[19] The court did consider it significant that Eircell's closest rival, Digifone, had amassed a market share of around 40%. The court ruled that while it was widely recognised that barriers to entry into the market were high, the evidence of low barriers to expansion in the market the court determined that Digifone could exercise 'powerful constraints' on Eircell's behaviour in the market. The court concluded that the ability of the competitors in the market place to expand easily, and thus take advantage of price raising or restriction of output by a rival, is of central importance in the present case.[20]

In doing so the court had regard to evidence presented in relation to behavioural aspects and instances of price competition in the market. The court concluded that the fact that mobile phone usage charges were high in Ireland relative to other countries – based on international comparisons supplied by the

17 At the time of the High Court's assessment this term was defined to apply to telecommunications operators with market share in excess of 30% of the market.

18 Ibid, para 33.

19 Ibid, para 36.

20 Ibid, para 41.

parties – could not be relied upon as evidence of dominance; primarily on the basis that neither party could speak to the assumptions that had been made in those international comparisons in calculating the relevant rates. Further, evidence presented for and on behalf of Eircell showed a pattern of price competition between Eircell and Digifone whereby Eircell would lower its price and/or adjust its product offerings in response to actions by Digifone and vice versa.

The court also dismissed Meridian's assertion that Eircell's designation by the regulator as having significant market power was relevant to a finding of dominance in the case at hand. In doing so the court stated.

Such a designation exists in the regulatory context only and it is irrelevant to the determination in competition cases.[21]

Ultimately the court concluded in *Meridian v. Eircell* that the significance of the structural characteristics of the market was outweighed by evidence of competitive conduct and on the behavioural characteristics in the market. The Court states

> *Taking into account all the evidence in the case the Court is not convinced that Eircell can act to an appreciable extent independently of its competitors and ultimately of consumers. The plaintiffs have failed to prove on the balance of probabilities that Eircell are dominant.*[22]

4.2 Competition Authority v. O'Regan et al

In this case proceedings were brought by the Irish Competition Authority in relation to a refusal by the ILCU to grant access to a 'vital' resource controlled by it to a new rival in the market, the Credit Union Development Association ("CUDA"). The Irish Competition Authority argued *inter alia* that the ILCU had abused its dominance by effectively refusing to grant CUDA or its members access to its Savings Protection Scheme ("the SPS")[23] – the only such scheme available to credit unions in the country established by the ILCU and its members in 1989. The court found in favour of the Irish Competition Authority's assertion that the ILCU had abused a dominant position in the relevant markets identified by the Irish Competition Authority; the markets for credit union representation services and savings protection services on the island of Ireland.[24] In reaching this conclusion the court relied on evidence presented to it in relation to, *inter alia*

- Relative market shares and market structure;

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21 Ibid, para 37.

22 Ibid, para 127.

23 The SPS is a stabilisation fund which does not offer guarantees or insurance to savers, or to individual credit unions, but rather enables discretionary assistance to be given in appropriate cases by way of emergency finance for an individual credit union which may be in difficulty or a sum of up to €12,700 for any individual saver on the failure of a credit union.

The requirement for a savings protection scheme for credit unions was voluntary until August, 2001, when, by virtue of s. 6 of the Credit Union Act, 1997, it was made compulsory for any new credit union to take part in an SPS. Section 46 of the Credit Union Act, 1997, defines a savings protection scheme as:

a scheme established to protect, in whole or in part, the savings of members of a credit union in the event of insolvency or other financial default on the part of the credit union and, for this purpose, 'savings' includes shares, deposits and all other funds held by a credit union on behalf of its members.

24 This decision is currently under appeal to the Irish Supreme Court. The matter is to be heard in July 2006.

- The pattern of development of the prevailing market structure;
- Significant barriers to entry;
- Control of a 'vital' input by the dominant incumbent;
- High switching costs for customers – i.e., for individual credit unions looking to switch from one representative organisation to another; and
- Evidence presented by the Irish Competition Authority that the ILCU could and did act to an appreciable extent independently of its customers and ultimately of consumers.

In relation to the market structure the Court considered the very high market share that had been enjoyed by the ILCU in both markets (80% and 100% respectively) "not just 'for some time' but until the emergence of CUDA in 2001". The Court considered that there was no evidence of any "exceptional circumstances" that could lead it to conclude that the ILCU's market share should not be considered as an indicator of dominance. The evidence on dominance was not focussed solely on market shares. It was acknowledged that the ILCU's market share of the market for credit union representation services in the State had declined from 100% to 85% since the entry of CUDA in 2001. Nevertheless the ILCU retained an "enormous market share" and had not lost so many of its members as to significantly adversely affect its profitability.

The court relied in particular upon evidence of barriers to entry and expansion which prevent or would prevent anyone else entering the market, namely the SPS. The court found that access to an SPS was vital for the success of any rival credit union representative organisation. Nor could such scheme be re-created in the State; primarily due to the relatively small size of the available market and the lack of sufficient risk diversity across credit unions in the State that would be required to support such an SPS. The lack of availability of an SPS presented an unacceptable switching cost for customers, i.e., member credit unions, switching to move from one representative organisation to another.

The court concluded that the combination of these factors was sufficient – in the absence of evidence to the contrary by the defendant – to ground a finding of dominance in respect of both relevant markets.

JAPAN

1. Introduction

Illegal activity by a firm holding dominance/monopoly power can be regulated by two regulatory means, that is, Private Monopolization and Unfair Trade Practices under the Antimonopoly Act (AMA).

As there are no particular criteria for determining dominance/monopoly power, a comprehensive judgment is made based on the situation and on various factors of the market in which the illegal activity is carried out.

The following describes the regulations governing firms with dominance/monopoly power under the AMA and some cases in which the issue of dominance/monopoly power in a market was dealt with.

2. Regulations Governing Firms with Dominance/Monopoly Power under the AMA

2.1 Private Monopolization (Section 3 of the AMA)

Private Monopolization is prohibited as stated in Section 3 of the AMA. It is defined in Section 2 (5) as: "such business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or in any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade."

"Exclusion" in this definition is interpreted as making it difficult for other firms to continue their business activities or preventing other firms from entering the market. "Control" in this definition is interpreted as depriving other firms of their freedom of decision-making concerning their business activities and forcing them to obey the controller's desire.

2.2 Unfair Trade Practices

Unfair Trade Practices are prohibited in Section 19 of the AMA. Unfair Trade Practices refer to conduct which tends to impede fair competition, designated by the Japan Fair Trade Commission (JFTC).

When a firm with a high market share in a particular market engages in conduct regulated by Unfair Trade Practices, such as Dealing on Exclusive Terms (Section 11 of General Designation of Unfair Trade Practices), Unjust Low Price Sales (Section 6), and Discriminatory Pricing (Section 3), it also can be considered such a conduct may fall under Private Monopolization, depending on how that conduct affects competition.

Regulations against the aforementioned Unfair Trade Practices target those typical behaviors which are used to create monopolies by controlling and eliminating competitors and are aimed at prohibiting monopolies at an incipient level. An illegal activity falls under the Unfair Trade Practices if such an illegal activity "tends to impede fair competition," which fails to reach the criterion of "substantial restraint of competition," which should be shown to prove Private Monopolization. Therefore, a firm that is not

subject to the regulations of Private Monopolization because it does not have enough power to obtain a dominant position in a market may be subject to the regulations of Unfair Trade Practices if it engages in conduct that falls under the provisions of Unfair Trade Practices.

Concerning some of the illegal activities designated as Unfair Trade Practices, whether a firm is influential in a market or not is considered one of the determining factors in recognizing the existence of a violation (Guidelines Concerning Distribution Systems and Business Practices[1]).

Conduct by an influential firm is considered to be illegal as a form of Unfair Trade Practices if 1) the firm engages in transactions with its trading partners on the condition that the trading partners shall not deal with the firm's competitors, or if 2) it causes the trading partners to refuse to deal with competitors, and if such conduct may result in reducing the competitors' business opportunities and making it difficult for them to easily find alternative trading partners (Section 11 (Dealing on Exclusive Terms), or 13 (Dealing on Restrictive Terms) of the General Designation).

This approach is based on the viewpoint that, in the case of a firm ranked low in the market share or newly entered on the market, the conduct usually would not result in reducing the competitors' business opportunities or making it difficult for them to find alternative trading partners. Whether a firm is "influential in a market" is judged by, among others, the firm's market share, that is, whether it holds no less than 10% of the market, or its position is among the top three in the market (meaning a product market which consists of a group of products with the same or similar function and utility as the product covered by the conduct, and which competes with other firms based on geographical conditions, transactional relations, etc.).

3. Judgment of Dominance/Monopoly Power under Private Monopolization

"Substantial restraint of competition" in Section 2, Subsection 5 of the AMA, which defines Private Monopolization means to form, maintain, and reinforce dominance by making it difficult for others to compete in the market (in a particular field of trade).

The Toho and Shin-Toho Co., Ltd. Case (decision by Tokyo High Court on December 9, 1953) states that "to restrain competition substantially means to bring about a state in which competition itself has significantly decreased and a situation has been created in which a specific firm or a group of firms can control the market by determining price, quality, volume, and various other conditions with some latitude of its or their own volition."

A comprehensive judgment on when the market is dominated can generally be made by looking at economic conditions such as the details of the conduct, the situation of the industry in which the firm is operating, the share of market dominance in each market, the respective circumstances of the supplier and customer, whether there are imported goods or substitutes involved or not, and the difficulty of entering the market.

[1] The Guidelines were made public on July 11th, 1991. Available at http://www2.jftc.go.jp/e-page/legislation/ama/distribution.pdf

4. Case Studies relating to a firm's Dominance/Monopoly Power

4.1 Private Monopolization

4.1.1 Case against Paramount Bed Co., Ltd. (Recommendation decision issued on March 31, 1998)

Paramount Bed Co., Ltd (Paramount Bed) and two other companies manufactured hospital beds at the time of this case in Japan, where Paramount Bed manufactured and sold the majority of hospital beds ordered by the government or by local municipalities. In the hospital bed market for orders placed by Tokyo Metropolitan Government's Finance Department in this case, Paramount Bed held high shares (approximately 90%).

Paramount Bed committed the following violations under the market conditions above:

- Paramount Bed approached the procurement officials to create specifications that would only apply to products manufactured by Paramount Bed

  Paramount Bed approached the procurement officials to create specifications that would only apply to hospital beds manufactured by Paramount Bed. By means of this conduct, Paramount Bed could exclude the business activities of other hospital bed manufacturers by realizing tenders of specifications for hospital beds manufactured only by Paramount Bed.

- Decision of a successful bidder and contract price

  Paramount Bed dominated the business activities of the suppliers by choosing a successful bidder among the suppliers (bid participants) who sell its beds, and presenting respective bidding prices to successful bidders as well as other bidding participants. Moreover, Paramount Bed provided funds to its suppliers in order to ensure that the bidders would carry out the above actions.

The JFTC found that the conduct by Paramount Bed fell under the criteria for a form of Private Monopolization, as it excluded the business activities of other hospital bed manufacturers and controlled the business activities of its supplier and therefore substantially restricted competition in the market of specific hospital beds ordered by Tokyo Metropolitan Government's Finance Department by reinforcing their monopoly power (dominance). Therefore, the JFTC ordered elimination measures to Paramount Bed.

4.1.2 Case against Intel Kabushiki Kaisha, Ltd. (Recommendation decision issued on April 13, 2005)

Intel Kabushiki Kaisha, Ltd. (Intel) was found to be acting within the following market environment regarding the CPU market in Japan:

- Intel had a high market share in the CPU market (approximately 90%);

- Intel's CPUs had a strong brand power;

- Intel had technical strength to sell high-end and new CPUs which can be incorporated into almost all types of personal computers (PCs); and

- Considering the changing situation of the market, the Japanese PC manufacturers had to cut their costs. Therefore, it was important for Japanese PC manufactures to purchase Intel's CPUs under the best business terms possible by receiving rebates and/or the MDF[2].

Intel engaged in the following illegal activities under the aforementioned market circumstances:

- Intel had made five major Japanese PC manufacturers refrain from adopting competitors' CPUs for all or most of the PCs manufactured and sold by them, or all of the PCs that belonged to specific groups of PCs, by making commitments to provide the Japanese PC manufacturers with rebates and/or certain funds, respectively, under the conditions listed below:

  - To make 100% of the share of CPUs manufactured by Intel out of all the CPUs adopted in the PCs manufactured and sold by each domestic PC-maker (Market Segment Share (MSS)) and to refrain from adopting competitors' CPUs;

  - To make 90% MSS, and to require that the share of competitors' CPUs in the volume of CPUs be incorporated into the PCs manufactured and sold by them within 10%; or

  - To refrain from adopting competitors' CPUs to be incorporated into groups of PCs with a comparatively large amount of production volume.

The JFTC found that Intel strengthened its monopoly power (dominance) and substantially restrained competition in the market of CPUs for the Japanese PC manufacturers by carrying out such activities, and therefore this form of conduct fell under the criteria for Private Monopolization. Accordingly, the JFTC ordered elimination measures to Intel.

4.2 Unfair Trade Practices

4.2.1 Case against Sony Computer Entertainment Inc. (Formal decision issued on August 1, 2001)

Sony Computer Entertainment Inc. (SCE) fell within the following market environment conditions regarding the home video game market as a whole:

- Their shipment values in 1996 for sales of game consoles and game software attained first place in the market.

- As a game software seller, SCE was the dominant supplier of software for PlayStation (PS Software), a home video game console sold by SCE.

- Consumers had high expectations of PS as Sony held a 50% share of SCE, and also had its own brand power, and predominant game software manufacturers developed and manufactured PS Software.

- As game software is relatively expensive, and consumers tend to sell the used game software after becoming bored with the game or after finishing the game and retailers can receive high profit ratios or profit margins by dealing used games, it was widely found that consumers would sell the used game software to retailers and then software dealers would buy the used software from the retailers and sell it once again.

[2] Funds labeled under the "Market Development Fund," provided by Intel to the Japanese PC manufacturers.

In this market environment, SCE signed exclusive dealer agreements with dealers who agreed to the following conditions: no discounts of PS Software on the recommended retail price, no selling of used PS Software, and no selling of PS products to other dealers. SCE took corrective measures with dealers who violated this agreement.

The JFTC found that SCE's conduct, namely providing PS Software to retailers under the condition that the recommended retail price be maintained or making wholesalers provide PS Software to retailers under the condition that the recommended retail price be maintained, fell under the criteria for Resale Price Restriction (subsection 12) of Unfair Trade Practices. Furthermore, because SCE provided PS Software to retailers and wholesalers with the restriction of target of their sales, SCE's conduct also fell under the criteria for Dealing on Restrictive Terms (subsection 13) as SCE's business practice unjustly restricted the business activity of retailers and wholesalers. Therefore, the JFTC ordered elimination measures to SCE.

5. Conclusion

Although having dominance/monopoly power is not a statutory requirement for proving Private Monopolization and Unfair Trade Practices, in many cases, having a high share in the market can lead to illegal activities that can be perceived to be a form of Private Monopolization or Unfair Trade Practices, as can be seen from the above case studies.

A comprehensive judgment on whether market dominance was formed, maintained, and reinforced can be made by looking at the existing economic conditions, such as the details of the conduct, the situation of the industry in which the entrepreneur is operating, the percentage of market dominance in each market, the respective supplier's and customer's circumstances, whether imported goods or substitutes are involved or not, and the difficulty of entering the market.

KOREA

1. Introduction

The Monopoly Regulation and Fair Trade Act ("MRFTA") grants the Korea Fair Trade Commission ("KFTC") the authority to regulate abuse of market dominance.

This report will introduce the definition and judgment criteria of abuse of market dominance and also the Korean competition authority's competition law enforcement cases in this area.

2. What is monopoly power/dominance?

Under the MRFTA, the term "market-dominant business" is defined as "companies with market dominance that can determine, maintain or change prices, quantity or quality of commodities or services or other terms and conditions of business as a supplier or customer in a particular business area individually or jointly with other enterprisers." In assessing whether a company is a market-dominant company, the company's market share, existence and degree of entry barriers, competing businesses' relative sizes and other matters are examined comprehensively. However, businesses whose annual turnover or purchase in specific business areas is less than one billion Won(approximately one million US dollars) are excluded in the assessment of market dominance[1].

There is no difference between the court and the Korea Fair Trade Commission in definition of market dominant companies.

3. Evidence used to Prove Market Power in Monopolization /Abuse of Dominance Cases

Criteria used to assess whether a company is a market-dominant one are defined in the MRFTA and "Criteria for Assessing Abuse of Market Dominance." Market share in relevant markets is the most fundamental factors in determining market dominance. Pursuant to the MRFTA, companies that meet any of the following requirements in market share are presumed to have market dominance:

- The No. 1 company in a specific trade area has a market share of 50% or more.
- In a specific trade area, the top three companies have a combined market share of 75% or more.

However, companies with a market share of less than 10% are excluded in this assessment for market dominance[2].

Even though market share is the most important criteria to determine market dominance, other factors[3] are also looked upon: existence and degree of entry barriers, competitors' relative sizes, possibility

1 Item 7 of Article 2 of the MRFTA

2 Article 4 of the MRFTA

3 Chapter 3 of Criteria for Assessing Abuse of Market Dominance

of collusive behaviors among competitors, existence of similar goods/services and neighboring markets, market foreclosure, financial capacity and so on.

In the past, when companies satisfied one of the requirements mentioned above, the KFTC designated them as market dominant companies and made their names public. However, in 1999, with the adoption of a new system called *Presumption of Market Dominance,* businesses' market dominance was reviewed only when they got involved in dominance abuse cases. Though not much has been achieved so far in correcting abuse of market dominance, the KFTC will make up for the weaknesses of current relevant laws and regulations and also strengthen law enforcement against abuse of dominance by easing the market share requirements to presume market dominance and toughening punishment against offenders.

3.1 Market Share

A company's market share refers to what percentage the goods/services it supplied or purchased in the domestic market takes out of the total goods/services supplied or purchased in the same market in monetary term during the year immediately preceding the business year in which the suspected abuse of market dominance was terminated. However, when it is difficult to calculate market share in this monetary term, output or production capacity can be used as well.

3.2 Existence and Degree of Entry Barrier

When a company can newly enter the market in question in the near future with relative ease, chances are low for the company to be a market dominance company. In assessing possibility for entering a market, various factors are considered such as existence of legal/institutional entry barriers, the size of the minimum capital required, technological requirements for production such as patents and intellectual property rights and other factors involved in production, changes in the proportion of imports and so on.

3.3 Relative Size of Competitors

When competitors are relatively larger in size than the company in question, chances for the company to be a market dominant one in the market are low. Even when the company's market share doesn't satisfy any of the requirements to presume market dominance, if its competitors are smaller than the company, the company is highly likely to have dominance. When it comes to evaluating the relative size of competitors, their market shares, production capacity and the proportion of their natural resource purchases are analyzed.

3.4 Possibility of Collusive Behaviors among Competitors

When it is easy for companies to implement overt or tacit collusive behaviors regarding price, output or other transaction conditions, chances for them to be market dominant ones are high.

3.5 Existence of Similar Goods/Services and Neighboring Markets

Chances for companies to have market dominance decrease when similar goods/services and neighboring markets affect the market in question.

3.6 Market Foreclosure

When the proportion of a company's purchase or supply of natural resources against the total domestic supply satisfies the requirements for market share as stated in Article 4 (Presumption of market dominant companies), chances for the company to have market dominance could increase.

3.7 Financial Capacity

When a company's financial capacity is significantly larger than other companies, chances for the company to be a market dominant one increase. When it comes to measuring a company's financial capacity, various factors are examined such as turnover, profit, net earnings rate, cash flow, access to the financial market, financial capacity of affiliates or sister companies and so on.

3.8 Other Factors to be considered

Can the company change their business partners? Does the company have new technologies it developed on its own or have intellectual property rights that can affect competition in the market?

4. Case examples

4.1 Abuse of market dominance by BC Card (Co., Ltd) and its twelve member banks, LG Capital (Co., Ltd) and Samsung Card (Co., Ltd).

In this case, the KFTC comprehensively examined these companies' market shares in the relevant market, existence of entry barriers, market entry by latecomers for the recent three years, existence of collusive behaviors in the past and alternative products to determine whether these companies were market dominant companies.

The top three companies' market share stood at 70% falling short of 75 % required to presume market dominance. However, the KFTC determined that their market share and other factors made them market dominance companies in effect.

4.1.1 Case Summary and KFTC's Decision

The respondents increased interest rates for cash advance and installment payment services and delinquency rates in 1997 and 1998 citing increasing interest rates and risks. Since 2000, there had been dramatic changes in financing cost, delinquency rates, loan loss rates and other major factors that affect the overall costs of the credit card business. So, the respondents could have cut delinquency rates and interest rates for their services significantly. However, they increased or maintained/modestly decreased interest rates until March 2003.

The KFTC determined in April 2001 that this behavior constituted unfairly changing/maintaining price or transaction conditions despite big changes in costs such as financing interest and the Commission imposed corrective measures and surcharges on the respondents.

4.1.2 Proving of Market Dominance

The KFTC found BC Card (Co., Ltd) and its twelve member banks, LG Capital (Co., Ltd) and Samsung Card (Co., Ltd) to be market dominant companies in the market that could decide/maintain/change price or transaction conditions such as interest rates for cash advance services and delinquency rate considering the following reasons:

- As of 2000, market shares of BC Card (Co., Ltd) and its twelve member banks, LG Capital (Co., Ltd) and Samsung Card (Co., Ltd) were 35%, 18.8% and 17.0% respectively. Their combined market share was 70.8% demonstrating intensive market concentration. Especially, in cash advance services market, their respective share was 35.7%, 18.9% and 17.7% with the combined market share standing at 72.3%.

- Pursuant to Article 3 of Specialized Credit Financial Business Act, approval from the relevant government agency is essential in starting a credit card company and this constitutes an institutional entry barrier. Since 1995, no new entry into the market had been made for six years and this helped maintaining stable market structure for existing credit card companies.

- Considering that credit card users usually have high demand for fast loans with low interest rates, alternatives are hard to find. Therefore, consumers had no choice but to use the respondents' cash advance services with high interest rates and this decreased demand elasticity of users against changing interest rates. In early 1998, the respondents increased interest rates for cash advance services and others, and at the end of 2000, set them at similar or higher levels. However, the amount of cash advance and installment payment increased by four times from those of early 1998.

- Collusive behaviors in this stable market structure persisted as we can see from the fact that the respondents once received corrective measures from the KFTC for its collusion regarding merchant fees.

However, in the appeal filed by the respondents, the court ruled in December 2005 that the twelve banks and BC Card created by them could not be considered as a single business. The KFTC was defeated in the appeal as it considered them a single business. However, difference between the court and the KFTC in opinions lied on the definition of "a single business," not on the definition and criteria of market dominant companies.

4.2 Abuse of Market Dominance by POSCO (Co., Ltd)

In this case, to presume market dominance, market share and entry barrier were examined to a large extent.

4.2.1 Case Summary and KFTC's Decision

Around the completion of cold rolled steel sheet factories in Feb 1999, Hyundai Hysco (Co., Ltd) asked the respondent on many occasions to supply it with hot coils for cold rolled steel sheet for test operation and production. However, the respondent refused to supply the product to the competitor, Hyundai Hysco.

The KFTC determined that this refusal constituted "unfairly refusing to transact with specific companies" and that the respondent should refrain from the unfair practice and publicly announce its violation and pay a surcharge of $1,640,200.

4.2.2 Proving of Market Dominance

The KFTC found the respondent to have market dominance in the hot coil market for the following reasons:

- The respondent had a market share of 79.8 % in the hot coil market as of 2000 being the only integrated steel mill and also the No. one company in the world in terms of crude steel production. As this was the case, the company had huge influence on both the domestic and foreign markets.

- Given that construction of an integrated steel mill requires trillions of investment, in effect entry barrier in the market is very high. As of 2000, the respondent had huge financial capacity with its

turnover at 11.6920 trillion Won(approximately 11.7 billion US dollars) and net income at 1.6369 trillion Won(approximately 1.6 billion US dollars).

- The company filed an appeal against the KFTC's decision. However, the Seoul high Court's decision was in line with that of the KFTC, so it dismissed the appeal in August 2002.

4.3 Abuse of Market Dominance by Microsoft

In assessing market dominance, market share was the most fundamental factor, but other factors such as technological and economic entry barriers were examined as well. For more detailed information on the case, please refer to Appendix I.

The KFTC issued corrective measures and surcharges to Microsoft for its tie-in sales of Server Operating System and Media Server, PC Operating System and Media Player and PC Operating System and messenger program.

4.3.1 Proving of Market Dominance

Based on the following market share requirements, the respondent was presumed to have market dominance. Moreover, given the high technological and economic entry barriers, it was hard to deny the company's market dominance:

- The respondent's Windows Server Operating System had a market share of 77 % in the PC Server Operating System market, while its Windows Operating Systems, 99% of the PC Operating System. With these market shares, the company was presumed to be a market dominant company pursuant to Article 4 of the MRFTA.

- Developing PC Server Operating System and PC Operating System requires cutting-edge technologies and massive capital investment, human resources and time. Furthermore, various application programs are necessary as well. All these work together to erect economic and technological entry barriers.

As for the respondent, it spent four to five years for R&D and enormous expenses to successfully enter the Server Operating System market.

To enter the market, companies need to develop various kinds of application programs, and this burden is so enormous that this sets up another entry barrier. The value of PC Server Operating System and PC Operating System goes up as the number of application programs increases. For example, for consumers to be able to use the PC Server Operating Systems for multiple purposes such as web server, exchange server and business server, there should be application programs that can satisfy such specific needs. No matter how excellent a PC Server Operating System might be, if the program doesn't have application programs tailored to it, the program becomes no use. Therefore, companies that want to enter the PC Server Operating System market can't help but suffer the burden of developing diverse application programs.

At the same time, compatibility among application programs is also an issue here. That is, as most PC application programs were designed to work for the respondent's PC Operating System, they often didn't work for other companies' PC Operating Systems or had a lot of errors. This was one of the factors that raised entry barriers.

- Consumers' switching cost also raised entry barriers in the PC Operating System market. For consumers to switch from the current operating system to a new one, aside from purchase expenses, other costs are incurred in exploring and studying new systems. Such costs often generate the lock-in effect where consumers stick to the respondent's operating system.

5. Conclusion

The KFTC has not had much achievement regarding abuse of market dominance cases so far. This is mostly because the Commission's human resources were concentrated on cases triggered by complaints by outsiders. However, since the Commission's organizational restructuring in Dec 2005, law enforcement in abuse of market dominance cases has been strengthened and relevant systems in this area are going to have improvement to be in line with global standards.

APPENDIX I: ABUSE OF MARKET DOMINANCE BY MICROSOFT

On Wednesday, December 7, 2005, the KFTC has reached upon a decision to order Microsoft Corporation and Microsoft Korea, inter alia, to unbundle the tied product, including Windows Media Player, and to impose surcharge of approximately 33 billion won (approximately 31 million US dollars) for violation of the MRFTA, including abuse of market dominant position.

1. The KFTC found the following practices by the Microsoft to be violation of the MRFTA.

First, tying Windows Media service to the Windows Server Operating System, where Microsoft has market dominance.

Second, tying Windows Media Player to the Windows PC Operating System, where Microsoft has monopoly power.

Third, tying instant messaging programme to the Windows PC Operating system, where Microsoft has monopoly power.

The KFTC found such tying practices liable because they constitute abuse of market dominant position and unfair trade practices unfair the MRFTA. The KFTC found that the tying practices by the Microsoft proved to have eliminated competition and exacerbate monopolization of tied product market including messenger. Such practices raised entry barrier of the tying product market, namely the PC Server Operating System and PC Operating System, which led to restriction of market competition and obstruction of consumer welfare.

2. The ground of the KFTC's decision that found Microsoft's tying in violation is as follows:

First, by tying Windows Media Service to the Windows Server Operating System, a product which Microsoft has 78% market share, Microsoft was able to leverage its dominant power of the PC server operating system market to the streaming media server market, as a result monopolizing it. Dominant streaming media server market that had been almost fully preoccupied by RealNetworks and domestic venture companies, tipped over to Microsoft that had more than 90% market share.

Second, by tying Windows Media Player and Microsoft's messenger to the Windows PC Operating System, a product in which the Microsoft had 99% market share, Microsoft was able to shift its monopoly to the streaming media player and instant messenger market. As a result, Microsoft restricted competition in the tied product market, which previously had been held by Microsoft's competitions.

Up until December 2000, right after Microsoft's tying of the Windows Media Player, Microsoft and RealNetworks had 39% and 37% of streaming media player market in Korea, respectively. Recently, however, the market share of the Microsoft has increased to over 60%, whereas that of the RealNetworks has shrunk to 5%.

In the instant messenger market, local instant messaging service companies, which had occupied the market, began to lose market share right after Microsoft tied messaging programme to Windows PC Operating System. As a consequence, in April 2004, Microsoft was able to take 65.2% of the instant messenger market, leaving Daum Messenger had 65.5% of market share, but Microsoft's messenger still retained 50.9% of the market, with the market share of other messaging services continuing to fall.

Third, those tying practices by Microsoft led to increased supply of Windows Media Service, Windows Media Player and other applications that complimented Windows Media Technology. This, in turn, led to raising entry barrier for the PC Server Operating System and PC Operating System market, resulting in enforcing monopoly power of the Microsoft in each operating system market.

For the reasons given above, the KFTC found the three respective tying practices by Microsoft to be liable, as violating Article 3-2 of the MRFTA, which prohibited market-dominant firm from engaging in "act unreasonable interfering with the business activities of other businesses" and "act unfair excluding competitions or substantially harm consumer benefit".

3. For the above violations by the Microsoft, the KFTC decided to impose following remedies.

For tying of Windows Media Service, Microsoft was obliged to unbundle Windows Media Service from Windows Server Operating System, within 180 day after the decision.

For tying of Windows Media Player and instant messenger, following remedies have been imposed:

First, Microsoft is required to offer two versions of windows PC Operating System, within 180 days after the decision. One version will be stripped of Windows Media Player and instant messenger. Another version will be newly installed with "Media Player Centre" and "Messenger" that will contain links to web pages that allow consumers to download competing media players and instant messengers, so that competing softwares can be equally installed into Window PC Operating System.

Second, for Windows PC Operating Systems already sold and currently in use by consumers at the time of decision, Microsoft is required to provide users with "Media Player Centre" through CDs or Internet updates.

In this case, the specifics such as competitive products to be included in the "Media Player Centre" will be determined by the KFTC after consulting with the Advisory Board.

The remedy will remain effective for 10 years and after 5 years, Microsoft will have an opportunity each year to request KFTC to review the remedy, accounting for changing market environment.

4. Imposing surcharge

In addition to the above mentioned remedies, a total of 27.92 billion won (approximately 27 million US dollars) of surcharge has been imposed on Microsoft Corporation and Microsoft Korea Ltd., 22.92 billion won (approximately 22 million US dollars) on the former and 5 billion won (approximately 5 million US dollars) on the latter. Surcharge corresponding to 2005 revenue will be imposed later, as the revenue of 2005 was not available as of the date of the decision. Once Microsoft repots revenue data for 2005, the KFTC will determine and impose surcharge corresponding to year 2005. It is estimated that the total surcharge including the amount for 2005 will be approximately 33 billion won (approximately 33 million US dollars).

5. As the Microsoft case was a very complicated one with huge ripple effects on the market, how the case was handled itself had significance in several respects.

First of all, this case succeeded in drawing a conclusion through extensive, in-depth fact-findings, economic analysis and a heated legal debate. Microsoft submitted reports on economic analysis and market analysis generated by lawyers from the largest law firms in Korea and the U.S., renowned Korean & American economists and computer experts.

To refute Microsoft's reports and prove illegality of the company's tie-in sales, examiners and complainants reviewed economic & technology analysis reports and studies provided by Korea's most prominent jurists, economists and computer experts that prove anti-competitiveness of the company's act.

Secondly, during the deliberations on the case, Microsoft, complainants and all other stakeholders were given the chance to state their opinions. In this way, this case enjoyed the maximum procedural fairness. From 13th Jul 2005 to 26th Oct 2005, the full committee was held on seven occasions for a total of 40 hours to give the company sufficient time to defend its position and also to hear from examiners, witnesses and expert witnesses. After the deliberations, commissioners on the full committee had discussions on six occasions to reach a final agreement.

Thirdly, competition in the domestic IT industry was thoroughly, objectively analyzed on multiple fronts through opinions from various market participants. Opinions were collected from contents providers, PC manufacturers, software developers & experts, media service providers, messenger service providers, SI (System Integration) companies and so on. Their opinions were utilized to make a judgment on illegality of the company's practice and to determine what corrective measures should be imposed.

MEXICO

1. Introduction

This note provides a summary of the techniques and evidentiary issues used by the Federal Competition Commission (FCC) in assessing market power to enforce competition and sectoral legislation against monopolistic conducts. Since there are no relevant judicial decisions on substantive issues associated with market power determinations, the note only addresses analyses related to FCC enforcement actions.

The following section describes the concepts related to the determination of substantial market power (SMP or dominance)[1] and the types of proceedings in which the FCC applies them. The third section provides a description of the elements considered on a case-by-case basis and section four outlines the FCC's practice. Finally, section five presents some concluding remarks.

2. Definitions

2.1 Substantial market power

The Federal Law of Economic Competition (FLEC) does not provide a definition of SMP, but article 13 outlines the criteria to be used when evaluating whether a specific agent has this power.

The use of economic concepts and the lack of specific definitions of these concepts in the law have been challenged in judicial proceedings on the grounds of unconstitutionality. However, the Supreme Court resolved that the FLEC has constitutional grounds to use these concepts, because it establishes criteria that shed light on their meaning. The Supreme Court has also declared that there is no constitutional obligation for the FLEC to provide definitions of economic concepts because *"...the law is not a dictionary"*. Further, it considered that the law needs to be interpreted in its economic context and in accordance with national and international criteria.

Nevertheless, it may be argued that article 13, section I, of the FLEC implicitly defines SMP when specifying that the FCC must evaluate "*…whether it can unilaterally fix prices or restrict supply in the relevant market, without competitor agents being able to actually or potentially offset such power"*.

Since there is no explicit definition of SMP, there is no distinction between degrees of market power or stipulations on its duration. However, any determination of market power is related to a defined relevant market which includes both geographical as well as temporal dimensions, as depicted in the case of the determination of market power in five telephony markets below. In this case, the whole evaluation refers to the specific market conditions prevailing during the years following the privatisation of the telephony state-monopoly.

[1] Throughout the note, the concept of substantial market power will be used interchangeably with the concept of dominance.

2.2 Proceedings

The competition legislation addresses two types of proceedings before the FCC that are based on the concept of dominance: (i) relative monopolistic practices, which include unilateral conduct considered illegal; and (ii) declarations on competition conditions that are required to trigger specific sector regulations.

2.2.1 Relative monopolistic practices

Under the law, relative monopolistic practices are anti-competitive unilateral behaviours, and include abuse of dominance or monopolisation as well as vertical practices. These cases are reviewed under a rule of reason analysis, which takes into account whether the economic agent allegedly responsible for anticompetitive conduct possesses substantial market power in the relevant market.

Article 10 of the FLEC defines relative monopolistic practices as those that "… improperly displace other agents from the market, substantially limit their access, or establish exclusive advantages in favour of certain persons". The law typifies six specific conducts: (i) vertical market division, (ii) resale price maintenance, (iii) tied-in sales, (iv) exclusive dealing, (v) refusals to deal, and (vi) boycott. It also includes a catch-all provision: *"In general, all the actions that unduly damage or impair the process of competition and free access to production, processing, distribution and marketing of goods and services"*. Based on this provision, Article 7 of the Regulations to the FLEC (Regulations) identifies five additional conducts: (i) predatory pricing, (ii) exclusive dealing in exchange for special discounts, (iii) cross-subsidisation, (iv) price discrimination, and (v) raising rivals' costs.[2]

2.2.2 Declarations on market power

Most sectoral regulation requires that the FCC determine the absence of effective competition before regulators impose additional regulations (price, access, and other) on all market participants. In telecommunications, the sectoral legislation requires that the FCC finds an economic agent with SMP to impose additional regulations on that specific agent.

In practice, the concept of effective competition has a broader meaning than SMP. In practice, the FCC determines the absence of effective competition when it finds that an economic agent has SMP in the relevant market.[3] However, the absence of effective competition may also be due to other structural or behavioural characteristics of the market, even if none of the participants has SMP.

3. Evidence used to prove substantial market power

Market power determinations are based on a case-by–case analysis, and there are no specific thresholds that may be used in these assessments. However, article 13 of the FLEC and article 12 of the Regulations provide a comprehensive list of evidence to be considered when evaluating whether an agent possesses SMP.

Article 13 of the FLEC includes the following elements:

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2 The catch all provision was declared unconstitutional by the Supreme Court. However, recent reforms approved by the Mexican Congress resolved this problem by eliminating this provision and incorporating into the FLEC the list of conducts previously included in the Regulations.

3 See, for example, the declaration of the absence of effective competition in airport groups, such as GAP (file AD-24-99)

- Agent's market share. The Commission frequently uses the monetary value of sales for this calculation.[4] Sales provide observable and unambiguous data, which are a consequence of all the factors that determine the real competitiveness of each agent in the market. However, depending on the available information or the type of market that is being analysed, the FCC may choose another indicator. In such cases, the Commission must explain its reasons for using the chosen indicator. Market share thresholds, on the other hand, have only been defined with respect to merger analysis.[5]

- Agent's ability to unilaterally set prices or restrict supply.

- The existence of barriers to entry and any elements that may foreseeably alter those barriers.

- The existence and market power of other competitors.

- Access to inputs by the agent and its competitors.

- Agent's recent behaviour.

Article12 of the Regulations complements this list with additional criteria:

- Market positioning of the agent's goods or services.

- The lack of access to imports or high costs of moving them within the border.

- Costs faced by users to change providers.

As regards concentration measures, following article 13 of the Regulations, the FCC issued the methodology for calculating concentration indices and the criteria for their implementation. It comprises two indices, namely the renowned Herfindahl index and the Dominance index[6]. The latter index takes into account that an agent's ability to displace competitors depends not only on its own absolute size but also on its relative size as compared to other competitors. The established thresholds indicate that a merger is unlikely to adversely affect competition if any one of four conditions are met: the calculated Herfindahl index lies below 2000 points, or its variation is lower than 75 points; the Dominance index is below 2500, or its variation is negative (this may result from a merger between relatively small firms). Nevertheless, high market concentration is not a sufficient condition to conclude that an agent possesses SMP.

Article 11 of the Regulations elaborates on the types of elements that can be construed as barriers to entry when undertaking this analysis. Section I of this article considers capital requirements, that is, "financial costs or the costs of developing alternative channels". It also considers whether financial markets are efficient: that is, if conditions of "limited access to financing" exist. Section II takes into

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4 This preference is expressed in the Economic analysis notes for merger review, issued as guidelines by the FCC.

5 The criteria used is a market share of at least 35%; in addition, the firm's contribution to the merged entity must be at least of 50% (h_i of the Herfindahl Index). The longer this condition has been sustained, the more accurate this threshold is.

6 The Dominance index, developed by Pascual Garcìa Alba former FCC Commissioner, takes directly into account the relative size of every firm against the size of the other firms. The value of this index is calculated through the Herfindahl formula, but taking the contribution of each agent to the value of the Herfindal index.

account adjustment costs, "[the] term for recouping the required investment", and whether costs are effectively sunk, "[the] return for alternative uses of infrastructure and equipment". Section IV takes into account fixed costs such as advertising and investments in brands or trademarks. Marketing and business practices lie within the definition of barriers provided in section VI. Finally, sections III, V, and VII consider normative barriers: regulation and regulatory actions, including the use of intellectual and industrial property as barriers to entry, and regulation relating to international trade as a special case of barriers to entry.[7]

3.1 Efficiency defence

Article 6 of the Regulations allows agents to present an efficiency defence for their allegedly anticompetitive conduct. According to this article, the Commission will consider the following factors non-exclusively as efficiency gains:

- Attaining resource savings which enable the agent to produce the same quantity of the good at a lower cost, or to produce a greater quantity of the good at the same cost, on a permanent basis (economies of scale).
- Achieving lower costs if two or more goods or services are produced jointly as opposed to separately (economies of scope).
- Lowering administrative costs significantly.
- Transferring production technology or market know-how.
- Reducing production or trade costs as a result of an expansion of an infrastructure or distribution network.

The approach followed by the FCC to determine whether an agent possesses SMP precludes misdiagnosis that may result from using thresholds to presume illegality. The FCC is required to make an assessment after considering a wide range of structural and behavioural elements that provide a sound basis for assessing particular conditions on a case-by-case basis. On the other hand, the lack of objective parameters to set acceptable levels may be deemed to introduce discretion to the FCC and uncertainty for agents under investigation.

4. Case examples

4.1 Determination of Telmex's market power in five relevant markets[8]

Telecommunications was the first infrastructure sector to be liberalised in Mexico. This process preceded the FLEC and, therefore, its design missed important competition considerations. The concession title granted the privatised telephony firm, Teléfonos de México, SA de CV (Telmex), a six-year exclusivity (monopoly) period for long distance telephony in order to maximise government revenues, to rebalance tariffs, and to increase network deployment. Moreover, the exclusivity period granted to Telmex conferred to it a first-mover advantage in telephony and increased barriers for new entrants, who subsequently have been unable to gain critical mass to recover their investments. These measures have resulted in Mexico consistently being ranked among the most expensive OECD countries with the lowest penetration rates in telephony markets.

7 The reforms to the FLEC approved by the Mexican congress include a more extensive list of entry barriers.

8 Files AD-41-97 and RA-36-2001.

In 1997, the Commission determined that Telmex possessed substantial market power in five telephony markets. We briefly describe each of these markets and the elements analysed to reach this determination[9].

- *Local service*. Telmex's market share was almost 100%, being the sole holder of a concession to operate a public switched telecommunications network that provided local telephony in Mexico (i.e. PSTN). It was found to have the capacity to unilaterally set prices because it significantly increased local service fees in 1997 in order to eliminate cross-subsidies, and was the only provider of dedicated lines. The main barrier to entry consisted of the investments required to establish a local public network. The large advertising investments required to establish a trademark were considered another important barrier. Although the Commission did not find explicit regulatory barriers, the lack of a specific regulatory framework for these services was considered to significantly discourage entry into the market. The need to obtain a concession to provide local services and availability of the spectrum to provide local wireless services were also considered normative barriers. Finally, there were no competitors offering local services.

- *Access to local networks*. Telmex's market share was almost 100%, being the sole provider of both switched and leased services. It was found to have the capacity to unilaterally set prices. On the one hand, Telmex actually charged unauthorized tariffs for switched interconnection services, openly disregarding the regulated tariff. On the other, during 1996, it increased the fees for certain leased lines not subject to regulation by more than 900%. Telmex was also found to have the capacity to restrict supply by means of delaying the provision of leased lines to its competitors. An almost insurmountable barrier were the huge amounts of money required to duplicate Telmex's local wire network, which provides access to final users (i.e. local loop). In addition, the concessions required to provide access services and to use the spectrum for microwave links (granted through auctions) were deemed to constitute normative barriers.

- *National long distance*. Telmex's market share was over 70%, comprising 60 cities opened to competition. Herfindahl and Dominance indices calculated (0.58 and 0.89 respectively) showed a high market concentration. Telmex's announcement to increase the fee for leased lines by 900% was taken as an indication of its capacity to set prices over relevant inputs. Barriers to entry included the very high economic and financial cost of building a network in addition to the time required to build it and to generate marketable products; this investment represents a sunk cost. Advertising expenses for new entrants were also identified as a barrier. Although Telmex had competitors in this relevant market, their total market share was deemed low and they were considered not to have any power because they relied on Telmex for interconnection to local networks. In addition, given the fact that Telmex is vertically integrated, it was found to control access to an essential facility, the local loop, for the provision of long distance services.

- *Inter-urban transport*. Telmex had a market share of 83%, measured in terms of installed capacity. Telmex's vertical integration was interpreted to endow it with a significant advantage because it was the only agent able to sell a package including both inter-urban transport and interconnection. Vertical integration was also deemed to produce incentives to use its market power to harm competitors in downstream markets open to competition, for example, by charging the same price in retail and wholesale markets. The main barrier to entry was the high economic and financial cost of building an optic fibre network as well as the time required for building this network. The Commission considered, nevertheless, that this barrier to entry was likely surmountable over the medium term, because long distance operators were anticipated to

[9] This determination was delivered before the Regulations were issued, thus the analysis does not include the elements contained in this legal text.

install microwave lines and to expand their wire networks, and because of other expected technological developments. Although several providers were identified in the market for inter-urban transport, this fact was considered insufficient to dilute the incumbent's power.

- *International long distance*. This market was open to competition shortly after the investigation took place and thus information on international traffic volumes was not available. The FCC therefore estimated Telmex's market share based on the number of registered subscribers, which amounted to 74%. Its market share was also measured in terms of its capacity to offer international port services, which added up to 85% but was expected to fall down to 65%. The incumbent was found to have the capacity to set prices because the tariff rules in place appointed Telmex as the operator in charge of negotiating liquidation tariffs in international agreements, thus providing it with privileged information with respect to other domestic operators. Telmex was also deemed to hold the ability to restrict the capacity of other providers to offer the service by delaying the provision of leased lines.

In its assessment of barriers to entry the FCC considered that, to provide this service, concession holders required local and international interconnection services and the availability of a network (either owned or leased) that was connected with the local loop. In addition, regulatory barriers were found to restrict entry to international ports, since only long distance service providers may request authorisation of the telecom regulator to operate international ports. These rules further limited entry by requiring, among other things, that long distance concession holders prove that they have connected cities located in at least three states using their own infrastructure and that they have undertaken at least one interconnection agreement with a foreign operator, authorised by the regulator. The existence of ten operators which were able to serve any route was not deemed sufficient given their low market share and the fact that they depend on Telmex to provide interconnection and to determine liquidation tariffs. Finally, access to inputs was deemed to be restricted as a consequence of Telmex's vertical integration, because it was able to control the supply and price of cross-border leased lines and to provide integrated packages including local and long distance services.

In 2001, in an appeal for review filed by Telmex[10], the FCC confirmed its arguments regarding the advantages derived from Telmex's role in the negotiation of international liquidation tariffs. The arguments were grounded on the fact that the information it has access to is confidential during the process of negotiation and that its competitors are unable to offer lower tariffs with a view to capture more long distance calls. Moreover, Telmex had incentives not to reduce liquidation tariffs because the rules for international long distance establish that long distance tariffs may not be lower than the average liquidation tariff. The FCC also reinforced its arguments regarding access to inputs in the national long distance market by explaining that the negative effects of the existence of market power are the inefficient operation of markets and reduced social welfare, as well as the creation of unequal conditions for firms in the market. The regulation of an agent with substantial market power thus seeks to limit or eliminate these negative effects. It further explains the competition problem arising from vertical market integration in terms of the incumbent's position as the sole provider of a service that is essential for the provision of other services, such as long distance. Thus, vertical integration and the control of local service is one of the factors that give rise to the incumbent's market power.

By different legal means, Telmex has been successful in delaying the enforcement of the FCC's declaration on its market power that would trigger the issuance of specific regulations to control its

10 RA-36-2001.

dominant position in five relevant markets.[11] In August 2004, the FCC issued a new resolution satisfying the Circuit Court's rulings, but it was also challenged before the judiciary and resolution is still pending. In all subsequent decisions, the FCC has been able to support the initial conclusions[12] without Telmex being able to reverse them in the Courts.

4.1 Alleged relative monopolistic practices by Walmart Mexico (Walmex)

In May 2002, the FCC initiated an *ex officio* investigation into large self-service chain stores. The relevant market was defined as the acquisition, distribution, and commercialisation of goods by self-service stores with a national geographic dimension. One of the principal motivations was a concern that some multiproduct self-service retailers were forcing their suppliers to charge higher resale prices to other competing stores under the threat of suspending their purchases. The FCC also sought to investigate other potentially unlawful behaviour, such as discrimination in the terms these stores offered for distribution services to upstream suppliers, or conduct arising from increased reliance on private branding that resulted in self-service chain stores competing with their suppliers.

The investigation was closed in early 2003 without a discovery of violation, notwithstanding the finding that Walmex possessed substantial market power. In particular, there was no evidence to sustain that Walmex had stopped purchasing products because they were being offered at a lower price to its competitors. Further, Walmex agreed to inform its purchasing agents that price negotiations with suppliers should focus exclusively on prices charged to Walmex without any reference to prices charged to competitors.

The first step to determine whether Walmex, or any other large self-service chain store, was responsible for unilateral conduct was to define the relevant market as the acquisition, distribution, and marketing of goods by self-service stores. Following the definition and elements set out in Article 13 of the FLEC, the Commission's analysis considered as one of the key factors Walmex's market share and its power to set prices or restrict supply in the relevant market. The data on the value of sales presented by the different agents in the market showed consistently that Walmex was the leader of the multiproduct self-service retailers with a market share of 35.9%, which doubled each of its main competitors' market share. The relevance of this leadership was reinforced by a global trend that shows a growing importance and use of self-service chain stores.

Furthermore, the FCC found that, for half of its16 main product suppliers, Walmex was the most important distribution channel, representing at least 40% of their sales. In contrast, none of Walmex's suppliers represented more than 10% of Walmex's sales. These facts showed an asymmetry in the importance that suppliers attribute to Walmex as a distribution channel and the importance that any individual supplier's sales represents for Walmex's total sales. This asymmetry together with the "one-stop shopping" phenomenon, which has become an intrinsic characteristic of self-service retailers, was used to assess that Walmex had the capacity to unilaterally set prices or restrict supply.

Entry barriers identified included the existence of economies of scope in the distribution and marketing of goods, advertising expenses, and brand recognition. In evaluating the existence of

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11 In April 1998 Telmex appealed the FCC's decision which was later reaffirmed by the Plenum (RA-15-98). Telmex also filed an amparo action with the judiciary branch, and in May 2001, the First Collegiate Tribunal granted it, leading to a new FCC determination that arrived to the same conclusions. Two months later, Telmex appealed the Commission's decision and the Commission decided not to address this appeal. In April 2004, Telmex obtained another amparo and in July the Plenum reconfirmed its May 2001 decision.

12 Those adopted in the 1998 and 2001 under files AD-41-97 and RA-36-2001, respectively.

competitors, the Commission reckoned that, since Walmex doubled the market share of its closer competitors, no agent could offset its ability to undertake a monopolistic practice. When assessing access to input sources the Commission also took into account that one of its main competitors stated that Walmex used its power to get exclusive products and special conditions.

After analysing all the factors described above, the FCC concluded that Walmex was an agent with substantial power in the relevant market.

In its defence, Walmex argued that it had developed important efficiencies and economies of scope due to improvements in its distribution system. These efficiencies were transferred to the customers as low prices, and to the suppliers as shorter payment periods. The FCC also noted that Walmex had exhibited accelerated growth following its 2000 strategy of "low prices everyday", and that this growth had continued amid a slowdown in private spending. The analysis showed that efficiencies and investments contributed to this growth as well.

5. Final remarks

In evaluating the existence of SMP, the FCC adopts criteria outlined in the competition legislation. This criteria allows the assessment of market power on a case-by-case basis and a consistent application across sectors. Until now, the Supreme Court has supported the constitutionality of all the provisions related to the definition of the relevant market and substantial market power.

The two case presented above exemplify the FCC's approach in applying the detailed criteria set out in the competition legislation to assess SMP. The telecommunications case illustrates the importance of the FCC's role in determining market power, following an ill-designed opening of this sector, in terms of competition. The efficiency-based approach followed by the FCC takes into account both structural features and evidence provided by the incumbent's conduct. Thus, while Telmex's market share in each of the five relevant markets exceeded thresholds that may be considered elsewhere sufficient to presume market power, the FCC analysis considers regulatory gaps, the implications of market integration of the incumbent, and related access problems, among other factors. In addition, the criteria provide not only for an evaluation of static efficiency, but also certain dynamic aspects, by considering the effects of potential technological developments.

In the Walmex case the FCC put this store's dependency on suppliers in perspective to its suppliers' dependence on them to show how Walmex was in a position to obtain advantageous bargaining conditions. Additionally, the existence of entry barriers, particularly those emerging from its distribution channels and economies of scope, were determinant to a finding of its possession of substantial market power. The two-step approach prevented a false positive determination of illegal conduct because the exercise of this market power was not demonstrated. However, the market power determination was useful in preventing any such abuses because of the role it played in the FCC obtaining a commitment from Walmex not to incur in exclusionary conduct.

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NETHERLANDS

1. Introduction

In this paper some comments are offered on the issue of techniques and evidentiary issues in proving dominance. What follows is not an all-encompassing analysis, but a discussion of a few essential aspects of this subject and of how the Netherlands Competition Authority (hereafter: NMa) applies the concept in practice.

Basically, the definitions of dominance used by Dutch courts and the NMa are the same as those used by the European Commission and the European Courts. But, at least from an economic point of view, some remarks for discussion and clarifications can be made with respect to these definitions.

Our comments are structured as follows. In the first section we discuss some theoretical and conceptual issues related to the definition of dominance. In the second section we focus on evidence used to prove dominance. Finally we illustrate the NMa's practice of establishing dominance by briefly reviewing three significant cases.

The message we want to convey is that dominance and abuse are related concepts, with barriers to entry as a central element. From the point of view of competition policy, barriers to entry must be regarded as essential if they might sustain a dominant position and if they enable the dominant firm to 'recoup' its losses in case of 'exclusionary abuse'. In this sense the three concepts are related.[1]

2 The concept of dominance

2.1 Market power and dominance

The NMa takes it as given that the target of competition policy is the (long-term) protection of consumer welfare by protecting competition. Competition may be hampered or thwarted by market power,[2] which, while it may frustrate consumer interests, may benefit a specific firm or specific firms. This, protecting competition, is not meant to imply that competitors should be protected: generally speaking the NMa will not protect an 'inefficient competitor' even though such a competitor might exert competitive pressure.

There are various degrees of market power. From both a competition policy and an economic point of view, market power may become a problem only if it is 'significant', i.e. if there is a high degree of market power. Market power in the general economic sense, i.e. defined as a positive Lerner-index, is not enough

1 We are not saying that 'possible abusive behaviour' defines 'dominance'. See on this subject, for instance, A. Majumdar, *Whither Dominance*, CCP Newsletter, nr. 9, November 2005.

2 The usual economic definition of market power is the ability to raise price above marginal cost, or, to put it differently, a positive Lerner index. The Lerner index is the price-marginal cost difference divided by the price. This is equal to the inverse of the firm's own price-elasticity.

to define 'dominance' in a meaningful way. Market power in an economic sense only means that prices are above marginal cost. In general, theoretically, this will or may be true, for instance:

- for any firm in a market for non-homogeneous products.
- for any firm in Cournot-equilibrium.
- for any firm with (substantial) fixed cost.
- for any firm in a Bertrand-equilibrium with unequal marginal costs.[3]

None of these situations in itself constitutes necessary or sufficient conditions to conclude that 'dominance' in the sense of art. 82 exists. Any of the situations described can be perfectly compatible with a situation of (effective) competition. Hence, more than market power is required to define dominance. Loosely speaking, a firm with (some) market power that cannot harm the competitive process,[4] is not dominant, while market power is significant when it implies the ability to harm the competitive process significantly. Or, to put it differently: market power is significant when a firm's behaviour will have a significant impact on the whole (relevant) market. Competition policy then has to be concerned about dominant positions.

Dominance may be created by the competitive process itself.[5] By superior competition, for instance, a firm may be, for the time being, the sole winner in the market, and be able to exploit this monopoly power.[6] Generally the competitive process will erode this position again, unless of course the dominant firm is able to extend its dominant position by hampering the competitive process. Behaviour that allows the dominant firm to extend its dominant position in this way, such that ultimately consumers are harmed

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3 In this case the firm with lowest marginal costs will set a price at a level slightly lower than the next highest level of marginal costs. This firm will be a monopolist, but is clearly constrained by potential competitors.

4 This poses the question what 'the competitive process' is and in what sense it can be hampered, or, alternatively, what 'competition on the merits' is. These are important questions, but cannot be answered fully. They are important because any firm may have some impact on the market and this impact may be 'negative' (increase prices for a while, for instance). But this does not warrant intervention against all sorts of behaviour of all sorts of firms. Hence, a convincing account of dominance and a convincing account of (significant) harm to consumers are essential for antitrust intervention, in our view. See also OECD background note on *Competition on the merits*, DAF/COMP(2005)17, 9 May 2005.

5 Dominance may also be created by mergers, hence the existence of merger control. In the case of cartels there is a useful distinction between 'hard-core' cartels and less invidious agreements. 'Hard-core' cartels in general have as an object the restriction of competition, which basically implies the exploitation of dominance (in line with our description of dominance); hence they are forbidden 'per se'. More general agreements between undertakings may restrict competition but may also have benefits that are shared with consumers. Consumers will share in the benefits, for instance if the agreement does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned, which we may take to imply (for purposes of this paper): the absence of dominance (as outlined above).

6 By 'exploit' and 'exploitation' we mean the benefits a dominant firm may realize for itself, without 'abusing' this position. This poses the question whether 'exploitation' by a dominant firm can be non-abusive. We think so. A firm that has become dominant by risky investments and superior efficiency may reap the benefits by charging higher prices than would have been possible without this position. The term 'exploitation' is therefore not meant to imply abusive behaviour.

more or longer than otherwise would have been the case, amounts conceptually, in our view, to an abuse of dominance.

Conceptually, dominance is the amount of market power that enables the firm to influence the market outcome by unilaterally being able to determine the market price. Basically it means that output and (hence) price decisions are taken with little or no respect for direct competitors, potential competitors or consumers, in the sense that market demand is a given for the firm and can be exploited as such. Consumers may leave the market, but up to a point, the dominant firm is not restricted in its choice of price and output by these consumers; in a case of non-dominance a firm could not have permitted this loss of consumers. We would like to note that also in a case where a firm has competitors it can still be dominant: it may still have (residual) demand, such that a profit-maximizing price has an impact on the whole market. So, a dominant firm is able to raise (market) prices and restrict (market) output,[7] or, for that matter, reduce the quality, the range of products, or innovation.

Since dominance may create problems in the sense described on the one hand, but since dominance is also intrinsic to the competitive process on the other, competition policy should be careful in establishing dominance in order to prohibit mergers, certain behaviour or agreements. Mergers, agreements among firms and all sorts of behaviour may in fact be welfare-enhancing.

2.2 Barriers to entry

This brings us to one of the main issues. Dominance must be related to barriers to entry, because abusive behaviour, wrongful mergers and welfare-reducing cartels are only worthwhile and possible if they will have as a result a position that enables the firm(s) to get more profits and/or profits for a longer time than otherwise would have been the case. This implies that where there are no entry-barriers, entrants would erode the dominant position, and hence anything that impedes this process of entry may constitute a barrier to entry.[8] Related to this point is the question of timing: in practice there will almost always be some period in which a dominant firm may exploit its position before attracting entry. In our definition, and in practice, we will have to take account of this fact, and not automatically conclude that such behaviour constitutes an abuse, even if this 'exploitation period' may create social agitation.[9]

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7 We agree with Elhauge on this: E. Elhauge, *Defining better monopolization standards*, Stanford Law Review, vol. 253, November 2003, pp. 253-344. On page 343: "….. it would be unfair to say that current monopoly power doctrine is like the emperor who has no clothes. … current doctrine leaves large and unnecessary uncertainties about the degree of market power required and whether pricing discretion or market share is the key variable. We can clothe it better by recognizing that the requirement of proving a causal link between the exclusionary conduct and the relevant monopoly power means that power should be not just over the defendant's own output or prices, but a power to affect *marketwide* output or prices."

In the same vein, see Azevedo J. and M. Walker, *Dominance: meaning and measurement*, European Competition Law Review, issue 7, 2002. On p. 366: "Secondly, what matters is that the firm is able to restrict total output in the market, not just its own output. Any firm can restrict its own output, but in most markets any unilateral output restriction would be replaced by an output expansion by other players in the market. This is not true of a dominant firm's output restriction."

8 To date, economic definitions (by focussing on 'long run profits') do not take into account the dynamic aspects of entry-barriers ('how long will it take to 'erode' high prices'). This implies that economic definitions are in a sense 'static'. Hence, antitrust barriers to entry may be a larger category than economic ones. See on this: P. McAfee, H. Mialon and M. Williams, *What is a barrier to entry?*, American Economic Review Papers and Proceedings, vol. 94, no. 2, 2004, May 2004, pp. 461-465. See also, in the same issue of the AEA P&P the articles by Carlton (p. 466) and Schmalensee (p. 471) on this.

9 An example is the debate in parliament with regard to the question of how to regulate the Dutch cable-TV tariffs after the NMa made it clear it did not consider them to be excessive.

Relevant for competition policy is the question of how long it will take for prices (for instance) to go down after they have been raised by a dominant firm (for instance after a merger).[10] We agree with Schmalensee's focus on dynamics: 'Antitrust barriers to entry could then be defined as factors that elevate the post-merger price trajectory over time, either temporarily (by slowing entry) or permanently …'[11]

2.3 Durability

A second, related and essential, issue we would like to discuss briefly is whether the requisite market power must be durable. As was stated before, a dominant position may be the outcome of the competitive process hence it can be inherent to this process. Only if this position is sustainable and can only be 'undermined' at great cost, may it be called dominant. The problem is that in markets with volatile demand (for instance electricity markets), a firm may have market power because it can serve peak-demand where others cannot. In that case it may have an incentive to reduce peak-capacity if it will profit from that behaviour when demand is high and others cannot increase capacity in the short-run.[12] Durability in such a case should not be defined with respect to the period over which 'peak-demand' prevails. The time-dimension is to be measured relative to the possibilities of increasing capacity. These possibilities depend on the existence and nature of entry-barriers.

With regard to investment (capacity-expansion): in a truly 'competitive' or 'contestable' market, there should be entry or capacity-expansion if profits are made by incumbent firms. If this process is unhindered (taking account of exogenous entry-barriers), there seems to be no reason for a competition authority to intervene.

Crucial for this point of view is that entry and investment should be unhindered; if an incumbent firm (or firms) does hinder this process (by enlarging entry-barriers for instance), this might count as abuse.

Note also that from this point of view it might constitute unwarranted intervention to punish a dominant firm for charging monopoly-prices: no prices higher than these would theoretically be charged and in a free competitive process the profits involved constitute an incentive for entry, investment and innovation.[13]

With regard to the process of investment and entry, it should also be clear that a dynamic and long-term perspective is needed (as defined by the duration of investing and overcoming exogenous entry-barriers) to establish an abuse. In this sense establishing dominance and establishing abuse are interrelated: is the dynamic competitive process being hindered by a dominant firm? This also puts the emphasis on entry-barriers and exclusionary behaviour rather than on exploitative behaviour.[14]

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10 McAfee e.a define antitrust barriers to entry as 'a cost that delays entry and thereby reduces social welfare relative to immediate but equally costly entry'. Carlton focuses on the dynamic aspects involved in the competitive process.

11 Schmalensee only discusses barriers to entry in merger cases. But we think that his point of view is also relevant for abuse-cases. For further information on the NMa's views on 'barriers to entry', see its submission to the OECD- Roundtable of October 19, 2005.

12 The analysis of such a situation is more complicated than suggested in the text. In practice the NMa undertook such an analysis in the merger case of Nuon and Reliant: see below.

13 Theoretically, this statement implies that longer run benefits of the competitive process are considered to be higher than the short(er) run 'deadweight loss'. Put differently: interference by the competition authority in order to avoid a deadweight loss may welll stifle the competitive process itself.

14 This does not mean that we are of the opinion that 'exploitative abuse' cannot exist.

2.4 Profits

The NMa would like to state first that it does not even consider embarking on a profit analysis if there is evidence that the market/industry/sector is characterised by innovation/high entry etc. The NMa is of the opinion that competition authorities should not investigate prices or otherwise undertake an abuse-investigation in dynamic sectors with low entry barriers.

Two additional remarks are in order. The first one is related to the usefulness of profits-analysis in establishing dominance or abuse. Theoretically, the longer run dynamic process should imply investment, entry, innovation, lower prices, higher quality etc. and, possibly, also lower profits. So, at the theoretical level, high profit levels appear to be a test for establishing dominance. In practice, this is unworkable. For one; high profits are neither a necessary nor a sufficient condition, even in the longer run, for establishing dominance and/or abuse, unless circumstances are very specific. On the other hand if profits are low (or are being lowered) for a long period of time, no abuse or dominance should be found.[15]

The second remark, related to the first one, is the concept of profits itself. Probably most competition authorities would be inclined to use accounting profits. As is well known, accounting profits have to be used in dominance-cases with great care.[16]

Economically, a dynamic concept of profitability should be used, like for example, the internal rate of return. Also this concept is not as straightforward in practice as it seems to be in simple theory. For instance, uncertainty at the start of an investment should be discounted. Typically an investigation about abuse will be looking back in time with regard to profits, which then may not take initial uncertainty into account. Also, these facts will be very hard to establish which implies that both 'excessive prices' and 'dominance' will, in general, not be found by looking at profits.

2.5 The cellophane fallacy

Another element of dominance we would like to emphasize is the 'cellophane fallacy'. In merger-cases the use of the SSNIP-test does not pose any conceptual and theoretical problems.[17] In abuse-cases, the dominant (profit-maximizing) firm will already have exercised market power with respect to prices, hence any further price increase must imply lower profits.[18] A consequence of this is that different plausible markets can be defined (which will mainly be a problem if dominance crucially depends on market definition) and hence, that the facts and circumstances of the case, including those with respect to abuse, will determine the case only in terms of plausibility.

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15 If profits are low or negative, an undertaking could be engaged in a 'predatory strategy', but this should not be sustainable for years.

16 See, for example, 'Assessing profitability in competition policy analysis' (July 2003), report nr. 657 commissioned by the OFT from OXERA, or Americal Bar Association, Section of Antitrust Law, *Market Power Handbook*, 2005, chapter VIII, "Assessing market power using evidence on pricing and profitability".

17 Conceptually: if the merged firms will be able to raise prices profitably with a small but significant, non transitory, percentage, then it is established that the merged firms constitute a relevant market (and the merged entity has a dominant position).

18 Of course this will always be true for any profit maximizing firm. For any such firm the SSNIP-test must establish that it has substitutes that make price-increases unprofitable.

2.6 False positives and false negatives

A final point with respect to dominance concerns 'false positives' and 'false negatives'. False positives may stifle competition and, hence, erode the competitive process. It may turn out that dominant firms (or even non-dominant firms [19] will no longer compete vigorously and, hence, de facto establish a cartel with other incumbents or entrants. Also, they may lose the incentives to innovate (which may also lead to less incentives to innovate or enter the market more generally). Welfare enhancing mergers may not take place if the competition authority 'over-enforces'.

False negatives (or a lenient view on abuse cases or mergers) may also pose problems: it may erode the competitive process. If, for instance, 'predatory behaviour' goes unpunished this will have a deterrent effect on entry. False negatives may well be the lesser problem though, if the competition authority monitors markets carefully (part of which is taking complaints seriously).

In the case of mergers, incorrectly concluding that dominance is the result of the merger, will in general have two effects:

- a possibly efficient merger is prohibited, which then may be welfare-reducing, but may be so only temporarily (in appeal the merger may go through, or the firms at hand will merge with still other undertakings, however, such mergers will possibly be less efficient)

- firms might be deterred from merging even if this would be efficient. Clearly such reaction is critically dependent on the reputation of the competition authority.

An investigation by Twijnstra/Gudde into this last effect showed that the NMa is perceived to be quite accurate and predictable in her merger findings.

According to the Dutch merger system the NMa has to establish that the merger will lead to dominance in two subsequent phases. In both phases the firms have the opportunity to provide evidence that can challenge the alleged dominance. The two-phase structure is probably an adequate safe-guard in merger cases against incorrectly finding dominance. In any case the possibility of an incorrect finding of dominance seems to be limited to the cases that are far from clear-cut.

On the other hand, incorrectly concluding that a merger will not lead to a dominant firm, will result in the establishment of a dominant firm that might abuse its position. Although this can be a problem, either the market or the competition authority might correct the mistake. But obviously, this might be a costly mistake.

In abuse-cases establishing dominance or even monopoly power is never sufficient for finding 'abuse'. So, there may be costs involved in falsely concluding that behaviour was abusive, either because a non-dominant firm was involved (but incorrectly classified as a dominant one) or because a dominant firm did in fact not behave abusively. Abusive behaviour has to be defined by the (ultimate) harm this behaviour imposes on consumers.

If a non-dominant firm was involved, but its behaviour was classified as abusive, the NMa would obviously not have properly investigated the effect of this behaviour on the market. As said before, behaviour that has not (or cannot have) an appreciable effect on the market, must imply that the firm at

[19] This might be the case for firms with high market-shares that are otherwise non-dominant, because of, for instance, low entry-barriers.

hand is not dominant. So, careful scrutiny of the likely effects of behaviour by a firm on the market (and hence on consumers) will reduce this mistake.

This would also be true in the case of a dominant firm that was in effect not behaving abusively. This would be a case of perceiving behaviour incorrectly as harming consumers. Careful scrutiny of this likely effect, could reduce this mistake.

Effectively, both mistakes will stifle competition.

If, on the other hand, in hypothetical cases where the NMa incorrectly would not find abuse, either because the NMa would conclude incorrectly that a firm is not behaving abusively, or because the NMa would conclude incorrectly that a non-dominant firm is involved, the abuse would also stifle competition. There might be self-correction in the sense that at a later date the negative effect of behaviour could become manifest and, hence, the competition authority could intervene as yet. That would come at a cost however as harm would already have been done.[20]

What are the best measures against over- or under-enforcement? This is quite a difficult question to address in full here. Careful scrutiny and sound economic analysis might reduce both types of mistakes, but that is costly in itself. So, we share the point of view as expressed by Leary:[21] "The conventional wisdom is that under-enforcement is a less serious problem because the market place is likely to eventually discipline anticompetitive effects, whereas efficiencies lost through over-enforcement are lost forever. I am not sure that either statement is universally true. In close cases, it might be a lot more helpful to have uncertainties acknowledged and the decisional factors identified and addressed in these terms rather than to provide glib conclusions that a particular transaction is or is not anticompetitive. … I would encourage more of it."

3. Conclusion

The NMa is of the opinion that the concept of 'dominance' should be based on sound economic theory and the concept should be used consistently in merger and abuse-cases, taking account of the cellophane fallacy. The concept will in practice be applied in a dynamic context and hence, durability must be an essential element before intervention should be considered. The goal of establishing dominance is to investigate behaviour, both in merger[22] and in abuse cases with a view to answering the question whether or not consumers will be worse off (in the end) by behaviour of the (merged) dominant firm.

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20 More generally: a competition authority should determine whether or not enforcement will have a positive effect on the market and whether the costs involved are outweighed by the benefits. For instance: determining that a dominant firm abuses its position by charging discriminatory prices may in effect imply that the competition authority has to determine the (unique) non-abusive price and monitor this. The costs involved are not only that the welfare effect of discrimination may be less than the welfare effect of a unique price (both in a static and a dynamic sense), but also that the competition authority effectively has to use resources for inefficient and possibly ineffective market monitoring. These considerations must be taken into account by the competition authority in determining whether or not to intervene and how to do so.

21 Commissioner of the Federal Trade Commission T. Leary, *Antitrust Economics: Three Cheers and Two Challenges*, http://www.ftc.gov/speeches/leary/learythreecheers.htm

22 Strictly speaking one investigates in merger cases the likely consequences of the change in market structure on behaviour.

3.1 Evidence used to prove market power

The NMa will, in principle, seek to use all types of evidence. In our view it is necessary to do so, because of all the difficulties involved in establishing dominance: the cellophane fallacy, market-incentives, the intrinsic dynamic nature of the competitive process, (hence) the fact that dominance in itself should not be considered a problem.

Evidently, keeping European case law in mind, market shares and the development in market shares play an important role, especially in providing a safe haven: if market shares are low, this may in itself be a reason not to object to a merger or not to investigate a complaint about abuse. If market shares are higher, more characteristics will be investigated. It is not the case that market share thresholds will establish dominance and consequently shift the burden of refuting this to the defendant.

As to the extent that there must be proof of entry barriers, all types of evidence must be used to satisfy this requirement. Entry barriers are important because they define the time horizon and extent of a dominant position and they are crucial in identifying an abuse, e.g. with respect to 'recoupment'-opportunities.

The measuring of concentration and changes in concentration (e.g. in merger investigations) are also important. More generally, as stated before, as many characteristics as possible play a role: most notably of course what the entry-barriers are, but also what kind of structural links exist between firms, and the existence of buyer power.[23]

The following case examples may give some more information on the techniques used by the NMa.

3.2 Case examples

We would like to discuss briefly three cases: one merger case and two 'abuse'-case.

3.2.1 Nuon-Reliant

Nuon and Reliant were independent energy producers and (wholesale) energy traders. With respect to electricity Nuon was a relatively small producer, while Reliant had ample production capacity. After the second-phase investigation, the NMa cleared the merger on the condition that 90 tranches of 10 MW of Nuon's *firm* capacity should be auctioned between July 1, 2004 and December 31, 2004. Total capacity in the Netherlands is about 20.000 MW (2001-figure). Some market parties (Nuon, Essent and Electrabel) were excluded from these auctions. Nuon and Reliant objected to the obligations and appealed before a Dutch court.

The NMa had based its decision on two econometric simulation models of the Dutch electricity market. These models predicted that the merger would lead to significant price-increases (ca. 10%), depending on the time of day, i.e. the moments which allowed the parties to exercise (significant) market power. Hence, these studies tried to measure market power directly.

The court ruled that the NMa had failed to prove that a dominant position would be established by the merger. One important reason for this conclusion was that the court did not accept the outcome of the

[23] Compare Azevedo and Walker (2002), op.cit., p. 366: "The standard list includes at least: (i) market share of the leading firms; (ii) variability of market shares; (iii) existence of substitute products; (iv) barriers to entry; (v) barriers to expansion; (vi) existence of spare capacity; and (vii) the nature of competitive interaction in the market." See also OFT, Competition Law Guideline, *Assessment of market power,* December 2004.

econometric analysis as prove of dominance but merely as an indication that prices could rise as a result of the merger.[24]

3.2.2 NL.tree

Nine cable-companies established a subsidiary company called NL.tree. NL.tree was selected following a tender by the Netherlands Ministry of Education to offer broadband internet services via (coaxial) cable to all primary and secondary schools in the Netherlands (about 11.000 institutions). The agreement terminated on December 31, 2003. From January 1, 2004, each educational institution had the opportunity to choose its own internet service provider.

In September 2003, Royal KPN (hereafter: KPN) started to offer broadband internet services to the same institutions for free, for a period of three years. KPN is the owner of the fixed telephony network and also the dominant player on the fixed telephone wholesale en retail markets. According to the NMa, in an informal opinion on this matter, KPN did not have a dominant position on the relevant market (internet services) and hence, the NMa did not object to KPN's offer.

NL.tree lodged a complaint against KPN before a Dutch court. KPN was charged with (inter alia) predatory pricing, price squeeze and cross-subsidization.

With regard to dominance, the court reviewed all kinds of market definitions as proposed by NL.tree and KPN. The court put the emphasis on different market definitions in order to determine what the effect would be on market shares (especially that of KPN). Because of lack of clarity in some of the market definitions and calculations of market shares as put forward by NL.tree, these specific market definitions were rejected. The court then based its reasoning on the one remaining market which was the market for broadband internet access. The court concluded that the market for broadband internet access was a dynamic one in the sense that technical developments were accelerating quickly. It also considered that the cable companies together had a market share of 39%, KPN's share was under 50% and other companies offered the same broadband services. According to the court, KPN thus experienced competitive pressure so that it did not have a dominant position. The court went on to consider that the relevant part of demand (primary and secondary schools) only constituted at most 0,25% of total demand and that this was too small a percentage to be of any consequence for NL.tree.

The court also determined that KPN's infrastructure was not essential for offering internet services.

3.2.3 Cable television

Another complaint, this time received by the NMa, concerned the price rises for analogue cable television as announced by cable companies UPC and Canal+. The complaint was excessive price rise. According to the complainants UPC and Canal+ used the excessive receipts from analogue cable television to provide broadband internet and digital television at predatory prices in order to drive KPN from these markets.

The complaints were rejected for a couple of related reasons. An in-depth cost analysis showed that analogue cable television tariffs were not excessive, taking account of the following elements: (i) in the past there was no (large) disproportion between costs and turnover, (ii) the NMa considered that current developments, like (digital) television via the ether and ADSL and broadband internet via ADSL, would

[24] The NMa appealed to a higher court: session is due on July 11, 2006.

create greater uncertainty and this uncertainty should be reflected in the (higher) risk that UPC and Canal+ now take in their investments.

Although in the end the conclusion was that UPC and Canal+ did not abuse their (possibly) dominant position on the cable television market, the arguments can also be interpreted as casting doubt (from a dynamic point of view) on the dominant position in the first place. The NMa is reluctant to interfere in markets with high investments and fast development, because that could stifle incentives to develop those markets in the first place.

3.3 Conclusion

Dominance is a difficult concept to define and to establish in practice, especially if a dynamic point of view is taken, both with regard to establishing dominance itself as with regard to the determination of (possible) behaviour as abusive. Conceptual problems are (inter alia):

- dominance is significant market power, but what is significant?
- dominance can be a consequence of and hence be a part of the dynamic competitive process. How does this interact with the concept of possible abuse?
- how to deal with the cellophane fallacy?

In this submission, the NMa has presented some of its thoughts on these and other, related, problems. Three cases have been used to illustrate how the NMa and the Dutch courts have dealt with the concept in practice. The NMa thinks that these cases illustrate that the NMa is open to a dynamic point of view on establishing dominance.

The Dutch courts seem to prefer to commence their analysis of dominance with an assessment of market-shares. To what degree this preference would lead to tension with a more dynamic view, is still an open question. This question is all the more relevant in the context of the Commission's process of modernization of art. 82.

The court's decision in the Nuon-Reliant case seems to point to the tension between an analysis of dominance in terms of market shares on the one hand and (direct) econometric evidence of dominance on the other. The case is quite complicated though and final judgment is still pending, so final conclusions on this point would be premature. Still, the issues involved, like the usefulness of market share analysis, the use of econometric evidence, and the possibility of directly measuring dominance, are clearly important for the roundtable discussion.

POLAND

According to the Polish law and the definition included in the Act of 15 December 2000 on competition and consumer protection ("the Act"), a dominant position means a position of an entrepreneur which enables him to prevent efficient competition on the relevant market by allowing it to act to a significant extent independently from competitors, contracting parties and consumers. It is assumed that entrepreneur holds a dominant position where his market share exceeds 40%.

It is to be emphasized that both the community law and the Polish Act on competition and consumer protection do not include a prohibition of dominant position, but only a prohibition of its abuse. The prohibition of abuse of a dominant position on the relevant market by one or more entrepreneurs is defined in Article 8 (1) and Article 8 (2) of the Act, which include a list of competition restricting practices. Those may consist in:

- direct or indirect imposition of unfair prices, including predatory prices or prices grossly low, significantly delayed payment terms or other conditions of purchase or sale of products,
- limiting production, supply or technical development to the detriment of contractors or consumers,
- application in similar transactions with third parties strenuous or not homogenous contract terms, thus creating for these parties diversified conditions of competition,
- making conclusion of an agreement under conditions of accepting or fulfilling by the other party of another service having neither substantial nor customary relation with the subject of agreement,
- counteracting formation of conditions necessary for emergence or development of competition,
- imposition by the entrepreneur of onerous contract conditions, yielding to this entrepreneur unjustified profits,
- creating for consumers onerous conditions of redress,
- division of market according to territorial, product, or subject related criteria.

It is an open list and the practices mentioned there should be regarded as the most frequent.

The Act also introduces a presumption, according to which an entrepreneur has a dominant position if its market share exceeds 40%. The essence of this presumption is that it may be refuted both by undertakings and by the Office of Competition and Consumer Protection ("OCCP"). This means that an entrepreneur may be recognized as having a dominant position even if its market share is less than 40%, and it may also be stated that although the entrepreneur's market share exceeds 40%, it does not have a dominant position. Ultimately, in the event of a dispute regarding the dominant position, the fact of having appropriate market power shall be decisive. While in the first case, the burden of proof of a dominant

position rests on the Office of Competition and Consumer Protection ("OCCP"), in the latter case this burden rests on the entrepreneur with a market share exceeding 40 %.

Therefore, the first step to verify the dominance in the market is the definition of the product and geographic market on which a certain entrepreneur conducts an economic activity. When it is already known which products (and therefore which producers), and in which area, constitute competition to the entrepreneur, it is easy to define the share on the market. It is described on the basis of the value of sales of the entrepreneur. If it is impossible to calculate it, it should be defined on the basis of the volume of the products sold.

With reference to the using of the argument of market power to state a possible dominance on the market, the following should be taken into consideration:

- entry barriers in the market for potential competitors,
- maturity of the market,
- power of the closest competitors.

Among the entry barriers in the market for potential competitors we can name: legal barriers, access to advanced technologies, access to capital, economies of scale, internal integration of the system.

The above principles for defining barriers indicate that in each case an individual evaluation of the barriers is vital in stating whether a company has or does not a dominant position. Additionally, it should be remembered that it is important whether the market is stable, mature or young and dynamic. It is obvious that if the market is not sufficiently mature it is characterized by a great dynamics of growth, which makes it difficult for a company to gain a dominant position. Another important factor is the position of the direct competitors. If the share of the entrepreneur in the market constitutes less then 40% (therefore there is not even a presumption of dominance) but the competitors are very dispersed and the biggest competing company does not pass the threshold of 10-15% then after considering other indicators of dominance, such as entry barriers in the markets, it may be stated that the entrepreneur has sufficient market power to act independently from the competitors. And on the other hand, conversely, possessing 43% of the market share does not have to mean that the company is dominant, if the closest competitors possess 30% and 27% of the share of the market.

In the event the abuse of a dominant position by an entrepreneur is found, the President of the Office of Competition and Consumer Protection issues a decision recognising a practice as restricting competition and orders the cessation of its use. In the event the market behaviour of an entrepreneur no longer infringes the prohibitions specified in Article 8, the President of the Office shall issues a decision recognising a practice as restricting competition and declares the cessation of its use.

In 2005 the OCCP held 268 antitrust proceedings in cases of abuse of a dominant position. (proceedings concluded in 2005 – 118 and proceedings not concluded in 2005 – 150).

One of the most interesting cases held by the OCCP in 2005 concerning abuse of dominant position referred to the sign "Green Point" marking used by the waste recycling company Rekpol - Organizacja Odzysku. The President of the Office of Competition and Consumer Protection ordered to immediately discontinue the competition restricting practices that it was charged with.

The Act on the duties of undertakings on waste management imposes an obligation of waste recycling on those entrepreneurs who are involved in the production or import of goods. This can be done by

themselves or by specialised companies. Among many companies operating in the market, only one – Rekopol-Organizacja Odzysku – holds the right to licence and use the mark "Green point", which is a world-recognisable sign associated with care for the natural environment.

Since January 2004, at request of Zakład Gospodarki Komunalnej Organizacja Odzysku Biosystem, the OCCP started conducting an investigation against Rekopol. In the opinion of the applicant, Rekopol breaches the market rules since enterprises that want to use the "Green Point" marking are forced to enter into recycling contracts exclusively with that company. If they wished to make use of a competitive offer and be able to lawfully place the "Green Point" mark on packaging, they would have to pay double.

The information collected by the Office shows that there no assumption of possessing a dominant position by Rekopol when it comes to market share (the market share does not exceed 40%). Nevertheless, other factors were taken into consideration while issuing the decision. The company was considered to have breached the provisions of the antimonopoly law with its practices, namely by the conditional use of the "Green Point" marking. In the opinion of the OCCP, the practices of Rekopol result in a worse market situation of the other recycling organisations as they could lose their clients or have difficulties in obtaining new ones. Thus Rekopol's position in the market could have been significantly consolidated.

The provisions of the Act on competition and consumer protection give a right to the President of the OCCP to oblige an undertaking to discontinue specific practices before the antimonopoly proceeding has been completed. Then it is necessary to collect evidence that the law has been breached. Such situation occurred with respect to practices by Rekopol.

As continuation of the practices may cause major and difficult to repair effect on the competition, the President of the OCCP ordered Rekopol to immediately discontinue the questioned practices, even before a final decision in the matter has been issued. Pursuant to the decision, the company may not use the practices by 31 December 2006.

In accordance with the law, if Rekopol appeals against the decision of the President of the OCCP, it will remain in force. If the company fails to observe the decision issued by the Office, it will be possible to impose on it a fine of 10 thousand EUR for each day of delay.

SWITZERLAND

1. Introduction

Depuis le 1er avril 2004, la Commission de la concurrence suisse (Comco) peut imposer des sanctions pécuniaires aux entreprises qui abusent de leur position dominante. Avant cette date, les procédures d'abus de position dominante avaient essentiellement pour but de faire cesser l'abus. Lorsque les entreprises abandonnaient le comportement incriminé au cours des investigations, l'enquête était en général close pour manque d'intérêt public à la poursuite de l'enquête sans examen de la position dominante. La contribution aborde la dominance dans le cadre du contrôle comportemental selon l'art. 4 al. 2 LCart et art. 7 LCart et ne traite pas de la dominance dans le cadre du contrôle des concentrations d'entreprises. La dominance collective n'est pas non plus abordée de manière approfondie.

2. Qu'est-ce que la dominance/le pouvoir monopolistique ?

Le droit suisse connaît la notion de position dominante.

L'art. 4 al. 2 de la Loi fédérale sur les cartels et autres restrictions à la concurrence de 1995, (LCart) définit une entreprise en position dominante sur le marché comme « […] *une ou plusieurs entreprises qui sont à même, en matière d'offre ou de demande, de se comporter de manière essentiellement indépendante par rapport aux autres participants au marché (concurrents, fournisseurs ou acheteurs)*.»

La parenthèse (concurrents, fournisseurs ou acheteurs) a été ajoutée lors de la révision de 2003 de la loi. Certains commentateurs interprètent cette référence explicite aux fournisseurs et aux acheteurs comme l'ancrage dans la loi d'un concept de dominance dite «relative». Un seul cas de la Comco a abordé cette problématique depuis la révision de la loi (cf. partie B. Dominance «relative»)

Le législateur suisse a renoncé dans la loi actuelle à prescrire des tests précis comme dans la loi précédente de 1985 (test de structure, de comportement, de résultat) ou à donner un catalogue de critères. L'accent est mis en général sur le test de comportement. Faut-il alors donner la priorité au comportement et reléguer au deuxième plan les critères structurels? La discussion est stérile dans la mesure où la structure et le comportement sont étroitement liés et se co-déterminent. En effet, un comportement n'est rendu possible que par la structure du marché et un comportement n'est possible que si l'entreprise a un certain poids sur le marché.

Même en l'absence d'abus, la constatation d'une position dominante revêt une importance pour l'entreprise concernée. En effet, toute entreprise constatée en position dominante sur un marché par une décision des autorités de la concurrence, doit notifier selon l'art. 9 al. 4 LCart les concentrations d'entreprises sur un marché voisin indépendamment de l'atteinte des seuils de chiffres d'affaires.

3. Preuves utilisées pour prouver le pouvoir de marché dans des cas de monopolization/abus de dominance

3.1 Dominance «traditionnelle»

Pour prouver en Suisse une position dominante, les autorités de la concurrence examinent la concurrence actuelle, la concurrence potentielle et la position des partenaires à l'échange.

De nombreux indices ont été utilisés pour prouver une position dominante selon les spécificités du cas d'espèce. Les indices les plus souvent utilisés pour prouver une position dominante sont présentés ci-après sans exigence d'exhaustivité.

3.1.1 Concurrence actuelle

- Part de marchés de l'entreprise en cause (critère 1)

  Toute décision pour constater une position dominante commence par l'examen des parts de marché de l'entreprise en cause. Une importante part de marché sert seulement d'indice mais n'est jamais suffisante pour conclure à une position dominante. Une faible part de marché ne permet pas non plus d'exclure automatiquement la dominance en l'absence d'examen de la position de l'entreprise en cause par rapport à ses concurrents. Une argumentation qui se fonde essentiellement sur une importante part de marché est fragile car très dépendante de la définition du marché pertinent (cf. TicketCorner, DPC 2006/1, p. 672 ss, part de marché de 70-80% sur le marché relevant).

  De plus, les parts de marché dépendent de la méthode de calcul utilisée. Dans le cas TicketCorner, la Commission de recours pour les questions de concurrence (Reko) a estimé que la Comco n'avait pas justifié de manière suffisante le choix de la méthode de calcul basée sur le chiffre d'affaires et non sur le nombre de tickets vendus et que, par conséquent, l'appréciation des parts de marché n'était pas fiable.

- Parts de marché relatives (critère 2)

  La part de marché de l'entreprise en cause est comparée avec les parts de marché des concurrents. Ce type de critère permet d'apprécier le nombre, la qualité et la situation des concurrents.

  Les critères 1 et 2 sont toujours utilisés.

- Évolution des parts de marché (critère 3)

  La faible évolution des parts de marché constitue un indice parmi d'autres qui peut corroborer le fait qu'il y a une position dominante (Intensiv, DPC 2001/1, p. 101 ss). En revanche, si les parts de marché ont évolué, par exemple si l'entreprise en cause a perdu des parts de marché au profit de concurrents ou si une entreprise a changé sa position sur le marché, c'est un signe très fort que la concurrence fonctionne et que l'existence d'une position dominante peut être écartée (Kaladent, 2001/1, p. 92 ss; marché téléphonie mobile, DPC 2002/1, p. 123 ss).

- Aptitude à maintenir des prix élevés (critère 4)

  Le fait qu'une entreprise soit à même d'avoir des prix plus hauts que ses concurrents sans perdre de parts de marché peut être un indice de position dominante. Le fait que les prix plus hauts de

l'entreprise en cause n'aient pas changé durant les dernières années est également un indice que l'entreprise peut se comporter de manière indépendante (Intensiv, DPC 2001/1, p. 101 ss).

- Avance technologique, savoir-faire, brevets et autres droits de la propriété intellectuelle (critère 5)

  Les autorités suisses n'ont jamais eu jusqu'à présent de cas où la détention de droits de la propriété intellectuelle suffisait à fonder l'existence d'une position dominante. En revanche, l'autorité a pris en compte plusieurs fois l'avance technologique et le savoir-faire. Ces critères peuvent être aussi examinés dans l'appréciation de la concurrence potentielle si ces indices sont propres à constituer des barrières à l'entrée.

- Effets de marques et de notoriété (critère 6)

  L'autorité examine si sur le marché pertinent la renommée et une longue expérience sont des avantages décisifs. Par exemple, dans le cas TicketCorner, l'autorité a interrogé des organisateurs de manifestations sportives et culturelles. Beaucoup d'entre eux n'étaient pas à même de nommer une entreprise de billetterie autre que TicketCorner. L'autorité en a conclu que TicketCorner jouissait d'une grande renommée.

- Étendue du réseau géographique ou de la gamme (critère 7)

  L'entreprise en cause peut posséder un réseau d'une couverture géographique supérieure à celle de ses concurrents ou une gamme de produits étendue qui lui permet de réaliser des synergies entre plusieurs marchés. Dans plusieurs cas, la Comco a mentionné que l'entreprise en cause était la seule à disposer d'un réseau national (Swisscom ADSL, DPC 2004/2, p. 407 ss; TicketCorner DPC 2004/3, p. 778 ss).

- Comportement unilatéral imposé et comportement inhabituel dans la branche (critère 8)

  Le fait qu'une entreprise puisse imposer unilatéralement des prix ou avoir un comportement inhabituel peut être un indice qui confirme qu'elle est à même de se comporter de manière indépendante (Veterinärmedezinisches Tests/Migros, DPC 2003/4, p. 763 ss). Dans le cas TicketCorner, les clauses d'exclusivité mises en cause dans l'enquête étaient imposées de manière unilatérale à une grande majorité des organisateurs de manifestations sportives et culturelles. Dans le cas Espace Media Gruppe/Berner Zeitung AG/Solothurner Zeitung (DPC 2003/1, p. 62 ss), la Comco a fait référence à plusieurs reprises aux comportements habituels dans la branche lors du lancement d'un nouveau journal pour démontrer que la politique des prix n'était pas prédatoire. Ces indices comportementaux peuvent servir de confirmation mais ne sauraient suffire à eux seuls pour démontrer un comportement indépendant.

3.1.2 Concurrence potentielle

Si la concurrence actuelle n'est pas à même d'empêcher un comportement indépendant de l'entreprise en cause, l'autorité doit obligatoirement examiner la concurrence potentielle.

La concurrence potentielle est capable de discipliner suffisamment l'entreprise en cause si des entrées sur le marché d'autres entreprises sont prévisibles. Ces entrées doivent survenir suffisamment rapidement (1 à 2 ans) et être d'une importance suffisante pour que l'entreprise en cause en tienne compte dans son comportement. La concurrence potentielle est liée à l'existence de barrières à l'entrée au marché.

3.2 Barrières à l'entrée

- Barrières à l'entrée de type réglementaire

  Les autorités examinent s'il existe des barrières réglementaires à l'entrée. Les autorités suisses demandent une prise de position des autorités chargées d'octroyer les autorisations. Par exemple, dans le domaine de l'électricité, l'organe cantonal a estimé que l'octroi d'une autorisation pour un réseau parallèle électrique serait impossible pour des raisons de sécurité (Watt/Migros- EEF, 2001/2, p. 275 ss).

- Barrières structurelles (sunk costs)

  Les infrastructures (en particulier les facilités essentielles) représentent des coûts d'entrée très élevés. Dans le cas Eta/Swatch (DPC 2005/1, p. 128 ss), l'autorité a pris en compte l'importance financière des investissements engendrés pour entrer sur le marché ainsi que la durée, chiffrée à plusieurs années, pour que des concurrents puissent entrer sur le marché. Cette constatation sur les barrières à l'entrée reposait sur les business plans de plusieurs concurrents potentiels.

En dehors de ces cas, dans lesquels les barrières à l'entrée sont notoirement très hautes, il est difficile en pratique (par ex. les prestations de service) d'apprécier à partir de quel niveau des coûts doivent être considérés comme des barrières à l'entrée au marché et prouver que la concurrence potentielle ne suffit pas à discipliner l'entreprise en question.

D'après la décision de la Reko déjà mentionnée (TicketCorner, DPC p. 697), des coûts d'entrée sur le marché ne peuvent être qualifiés de barrières que s'il s'agit de coûts élevés sous forme de coûts irrécupérables (sunk costs). En effet, toute entrée sur un marché implique inévitablement certains coûts et risques. Il ne suffit pas de constater que les coûts sont élevés. La Reko demande par exemple des estimations concrètes des coûts d'entrée ou tout au moins quels sont les éléments nécessaires à prendre en compte pour une telle entrée. Ces coûts peuvent être déterminés en questionnant par exemple des entreprises concurrentes récemment entrées sur le marché ou des entreprises qui envisagent d'entrer prochainement sur le marché. D'après la Commission de recours, la billetterie pour des manifestations sportives et culturelles n'est pas un exemple typique d'un marché caractérisé par des hauts coûts irrécupérables pouvant constituer comme tels des barrières à l'entrée au marché. Par exemple, le raccordement à un nouveau call center ou la création d'un nouveau call center ne semble pas engendrer de si grands coûts. De plus, le fait que des entreprises concurrentes soient entrées sur le marché ou aient amélioré sensiblement leur position sur le marché après la décision de la Comco constitue un indice que l'appréciation de la Comco de la concurrence potentielle était erronée.

- Probabilité de profits

  Un marché en expansion attire de nouveaux concurrents respectivement incite les concurrents actuels à l'expansion. Sur un tel marché, la concurrence potentielle est plus probable.

- Barrières stratégiques

  Dans le cas TicketCorner, la Comco a considéré que les clauses d'exclusivité constituaient des barrières à l'entrée de nouveaux concurrents resp. à l'expansion des entreprises de billetterie existantes.

3.3 Substituabilité de l'offre

Dans le cadre de la concurrence potentielle, les autorités doivent, dans la mesure cela n'a pas déjà été examiné lors de la définition du marché, également considérer si des entreprises déjà présentes sur d'autres marchés pourraient rapidement et sans coûts considérables réorienter ou élargir leur offre. Dans le cas TicketCorner, la Reko a relevé que la Comco n'avait pas examiné cet aspect et que son appréciation de la concurrence potentielle était pour cette raison déficiente. Des entreprises concurrentes à TicketCorner ont la possibilité de coopérer avec des réseaux de distribution existants (La Poste, kiosques, etc.) pour vendre leurs billets sans devoir implanter leur propre réseau de vente. De tels projets de coopération étaient d'ailleurs connus. Dans un autre cas, l'affaire Eta/Swatch, la Comco a constaté que la substituabilité de l'offre était quasi inexistante car des entreprises déjà présentes dans l'horlogerie (microtechnique) ne pouvaient pas rapidement et sans coûts considérables se mettre à produire des ébauches concurrentes à Eta.

3.3.1 Partenaires à l'échange

Les partenaires à l'échange (acheteurs ou fournisseurs) peuvent limiter la marge de manœuvre de l'entreprise en cause. En ce sens, la position des partenaires à l'échange peut limiter l'abus mais ne peut pas influencer la concurrence sur le marché au niveau horizontal. Par conséquent, la Comco n'accorde pas à ce paramètre une importance déterminante à l'exception des cas de dominance collective. Le contre-poids que peut exercer les partenaires à l'échange s'exprime en général à l'aide de deux indices:

- Volume des ventes

  Si les partenaires à l'échange réalisent un grand volume de ventes, leur position de négociation face à l'entreprise en question est renforcée. Des coopératives d'achat permettent par exemple de renforcer ce poids. Toutefois, une part élevée du volume des ventes ne suffit pas pour que le partenaire à l'échange puisse limiter la marge de manœuvre de l'entreprise en cause (Watt/Migros- EEF, DPC 2001/2, p. 275 ss).

- Possibilités alternatives et switching costs

  Le partenaire à l'échange doit en effet disposer de possibilités alternatives ou être en mesure de se passer du bien en question. Cela implique notamment que les «switching costs» pour changer de fournisseur ou de production ne soient pas rédhibitoires. Par exemple, dans le cas du marché de la téléphonie mobile, l'autorité a estimé qu'il n'y avait pas de position dominante de Swisscom (69% de parts de marché) notamment en raison de la similarité des prestations des concurrents (prestations alternatives), des faibles coûts et de la facilité de changement de prestataires de téléphonie mobile (par ex. portabilité du numéro de téléphone).

3.3.2 Dominance «relative»

L'autorité suisse n'a eu jusqu'à présent qu'un seul cas qui touche la problématique de la dominance relative. Il s'agit du cas CoopForte (DPC 2005/1, p. 146 ss) dans le domaine de la puissance d'achat dans la grande distribution alimentaire. L'existence d'une position dominante relative a été laissée ouverte par l'autorité suisse suite à l'accord amiable passé avec le distributeur.

Les faits étaient les suivants: Coop, la deuxième chaîne suisse de supermarchés avait décidé de prélever un bonus «Coopforte» de 0,5% sur toutes les factures de ses fournisseurs. Ce bonus devait servir à financer la nouvelle stratégie de Coop notamment un meilleur profilement et une meilleure présentation des produits. La Comco devait déterminer si le prélèvement de ce bonus constituait un abus d'une éventuelle position dominante de Coop. La Comco a d'abord nié l'existence d'une position dominante

«traditionnelle» simple ou collective de Coop, puis a concentré son attention sur l'existence d'une éventuelle position dominante «relative» de Coop par rapport à ses fournisseurs sur le marché de l'approvisionnement. A cet égard, les critères suivants ont été examinés: a) importance de Coop dans la distribution des produits, b) force de négociation des partenaires à l'échange, c) relations de dépendance individuelle des fournisseurs.

D'après le rapport CoopForte, un fournisseur est dépendant d'un distributeur lorsque les conditions suivantes sont remplies:

- Il n'existe pas pour le fournisseur d'autre client d'une taille comparable et la demande additionnelle des autres clients ne peuvent que marginalement compenser la perte de ce fournisseur, ne lui permettant pas de couvrir ses coûts fixes. Les trois critères suivants sont utilisés pour déterminer si cette condition est remplie:

  - Part du distributeur dans les ventes du fournisseur

  - Pouvoir de négociation dont dispose le fournisseur ainsi que sa position sur le marché.

  - Existence de solutions alternatives pour le fournisseur. Les débouchés alternatifs peuvent exister aussi bien à l'intérieur du marché de la grande distribution que sur d'autres marchés ou canaux de vente, dès lors que le report est supportable, c'est-à-dire qu'il ne remet pas en cause la survie de l'entreprise.

- Les facteurs de production (équipement, personnel) et, le cas échéant, la recherche et développement du fournisseur, sont en tout ou partie spécialisés dans la fabrication de biens ou de services destinés au distributeur et ne peuvent être ni utilisés, ni adaptés à la production d'autres biens et services à un coût économiquement acceptable. Les trois critères suivants sont utilisés pour déterminer si cette condition est remplie:

  - Examen de l'histoire récente de l'entreprise, notamment la date et l'ampleur de ses investissements (par ex. analyser le développement de nouveaux produits en collaboration avec la grande distribution, marques de distributeur).

  - Analyse des contrats que le fournisseur a passés avec ses différents distributeurs (contrats d'exclusivité, contrats à long terme, etc.).

  - Ampleur du coût du report des ventes sur d'autres marchés ou d'autres canaux (switching costs).

Suite à l'accord amiable passé avec Coop (le comportement n'était pas sanctionnable car encore soumis à l'ancien droit), la Comco a laissé ouverte la question de savoir si Coop était dominante par rapport à certains de ses fournisseurs. De plus, Coop s'est engagée à rembourser rétroactivement le montant du bonus si l'entreprise démontrait de manière vraisemblable qu'elle ne retirait pas d'avantages de celui-ci.

4. Conclusions

Les standards de preuve d'un comportement indépendant ont été placés extrêmement hauts par les autorités de recours. En ce qui concerne la dominance relative, la pratique doit encore montrer comment les critères dégagés dans le cas CoopForte doivent être appliqués dans un cas concret. La constatation de la position dominante ne doit pas se limiter à quelques indices, aussi probants qu'ils soient, mais examiner

toutes les étapes mentionnées dans cette contribution. La constatation de la position dominante doit donc se baser sur un maximum d'indices possibles. Au niveau de la concurrence actuelle, les critères structurels comme les parts de marché sont très dépendants de la définition du marché pertinent adoptée. Même si la concurrence actuelle est faible, la preuve de l'absence d'une concurrence potentielle est difficile à apporter pour la première instance, particulièrement dans les marchés caractérisés par un rapide développement technologique. Il est souvent difficile pour l'autorité de prévoir, au moment de la décision, le développement technologique futur et le développement des habitudes de consommation.

TURKEY

Dominant position has been defined in Article 3 of the Law on the Protection of Competition No: 4054 (the Turkish Competition Law) as "*the power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers*".

Case law of the Turkish Competition Authority (the TCA) provides that independence and consequentially the power to prevent competition substantially appears as the most important condition for the existence of dominant position.[1] However, it is also important that there is no need for an absolute independence and therefore it is not compulsory that competition is totally eliminated in the market where an undertaking is in a dominant position. Rather, it is enough for the existence of a dominant position that the position should enable the undertaking to determine the conditions in which competition will develop or enable it to have substantial influence on these conditions. Moreover, dominance should last long enough based on the market structure. Generally, this period is the period required for the undertaking to be able to affect and change the conditions of competition in the market.

While determining whether an undertaking satisfies the conditions of the definition of dominant position and is therefore dominant in the market, it is usually taken into account the market characteristics, market shares of the undertakings in question, duration of the market position of the undertakings in question, market shares of the competitors, economic and legal entry barriers etc. There are no market share thresholds constituting presumption of dominance in the Turkish Competition Law and case by case analysis becomes important.

The TCA's assessment of market shares in dominance cases is well illustrated in its *Turkcell*[2] decision. According to the decision, although market share alone is not sufficient to establish a dominant position, it is always more important compared to other factors and a very high market share is a strong indication of existence of a dominant position. Moreover, market shares remaining constant for a certain and long period of time express market power of the undertakings in the market and it can be accepted that an undertaking that has preserved its high market share for a long time holds a dominant position. A table comparing the market share of an undertaking with those of its closest competitors might play a role in establishing a dominant position and to the extent that market share of the allegedly dominant undertaking is obviously much larger than its competitors, it can be a significant indication for deciding a dominant position.

As mentioned above, although market shares are an important element in determining the existence of dominant position, it is obvious that it could be wrong to consider only high market shares and the concentration degree in the market as conclusive. Rather, *Cisco*[3] decision overtly provides that all market characteristics should be taken into consideration and barriers to entry and potential competition are

1 *Karbogaz,* 23.8.2002; 02-49/634-257.

2 *Turkcell*, 20.7.2001, 01-35/347-95. The TCA refers to decisions of European Court of Justice, namely Hoffmann-La Roche v. Commission, Michelin v Commission and AKZO Chemie BV v Commission.

3 *Cisco*, 02.05.2000, 00-16/160-82.

important elements. Therefore, in merger context of *Cisco* decision, the TCA did not conclude that increase in concentration degree and market share of the acquiring undertaking in the router market through acquisition of intellectual property rights of IBM by Cisco Systems Inc would significantly decrease competition in the market although Cisco's market share would become 70,5% and CR4 would become 89,7% in the router market. The TCA took into account the factors that average growth rate was 30-40% in the network sector, the forecasts showed that the growth would continue increasingly, new entry was encouraged by the speedy growth, innovation in the sector was done mostly by small players of flexible structure concentrated on certain fields, the behaviours of customers encouraged new entry to the market, the buyers bought the products from different sellers, new undertakings were attracted into the sector and the new comers could find place in the market and new progress in recent years in information technology led suppliers of telephone equipments to realize great investment for computer network technology via both research and development and acquisitions.

Similarly, in its *Turkcell*[4] decision, although Turkcell's market share was much larger than its one and the only competitor at that time, the TCA in addition to market shares, considered other factors such as;

- structure of the demand,
- legal barriers to market entry,
- other barriers to entry (sunk costs; infrastructure investment costs; marketing, sales and distribution expenditures; product dependency and network externalities; vertical integration, and group advantages) and decided that Turkcell could preserve its market position for a long time due to not only its high market share but also entry barriers granting it a freedom of action to a certain extent, vertical integration advantages, advantages of being large and widespread and its freedom in its market conduct for 6 years that could not be realized in competitive market conditions and as a result it had the power to determine, independently of its competitors and customers, according to its own strategies to a large extent the variables playing a decisive role on demand such as amounts of subsidies, quantity of the offer of lines independently of its competitors and customers and therefore it held a dominant position.

To cite another case handled within the TCA may be important to see a collection of criteria that have been taken into account to establish dominance, especially in collective dominance cases.

In a collective dominance case[5] where two undertakings (BBD and YAYSAT), operating in the market for the distribution of newspapers and journals, created a joint venture (JV or namely BIRYAY) to jointly distribute newspapers and journals, following evidence was considered to establish joint dominance.

Market shares of the undertakings in question during the last five years

- Combined market share of the two undertakings (and their JV) in question operating in the market for the distribution of newspapers and journals was almost 100%.

4 20.7.2001, 01-35/347-95. The TCA refers to decisions of European Court of Justice, namely Hoffmann-La Roche v. Commission, Michelin v Commission and AKZO Chemie BV v Commission.

5 *BİRYAY*, 17.07.2000; 00-26/292-162

Market characteristics

- Substantial changes in the market shares of the relevant parties and the competitors might be important while deciding the existence of a dominant position.

Market history

- Whether the market has been highly concentrated well before the case at hand.

Joint conduct

- Whether the relevant parties acted jointly in a large number of issues after they set up JV.

Degree of Concentration

- As the combined market share covering the entire market indicated, the concentration degree was very high.

Low potential of new competitors

- As it would be inferred from the examination of market history including the fact that, after the concentration operation, only one company distributing only its own publications has managed to enter the market, the probability of a new competitor entering the market was very low.

Low price elasticity of demand

- Publishers had no alternative in response to price changes and their reactions were weak due to the existence of few undertakings operating in the market for distribution of newspapers and journals and sharing of the market.

Low bargaining power of customers

- JV was assigned by the parent undertakings to distribute the publications exclusively and the publishers had no alternatives for the distribution of their publications.

Economic Barriers to Market Entry

- Large size of the need for physical capacity and manpower necessary to establish a distribution firm; requirements for a good organization, technical equipment, experience to distribute most of the newspapers and journals, cost of initial investment and other process; allowed only owners of big capital to enter this market. The requirement for each distribution company willing to enter the market to develop final sale points numbering in tens of thousands, while the substitution of existing sale points was difficult and economically irrational, constituted a serious barrier to market entry.

The TCA, after taking into account these criteria, decided that BBD, YAYSAT and BİRYAY were collectively dominant in the market for the distribution of newspapers and journals with the following considerations;

- relevant market showed the characteristics of an oligopoly or even a duopoly as the combined market share of BBD, YAYSAT and BİRYAY reached 100% in the last five years,

- it was difficult to find a single firm holding a dominant position in such markets because it was the existence of undertakings with the same or similar size and strength that made the market an oligopoly,

- the most important characteristics of oligopolistic markets was that the undertakings were aware of the high degree of concentration in the market and determined their course of conduct depending on the conduct of other undertakings in the market and as a result it was possible for undertakings in such markets to be able to act jointly independently of their customers,

- in markets such as the market for distribution of newspapers and journals which did not offer much perspective for development and expansion, the potential of new entry was low and therefore it was assumed that the existing undertakings would retain their market shares,

- the fact that market shares at the time the charter for JV was signed and afterwards did not change much was an indication that balance of power was somehow maintained,

- competition in the market for distribution of newspapers and journals was limited to a great extent because the market was already very concentrated before the foundation of the JV, there was only two undertakings distributing the client publications, these two undertakings, that were competitors, established a JV and made it compulsory to distribute the client publications via it

- BBD, YAYSAT and BİRYAY acted jointly in a large number of issues such as fixing price and commission rates with the consensus of BBD and YAYSAT, existence of common dealers, joint decisions to exclude products coming from other distribution channels.

In another collective dominance case[6], following non-exhaustive list of factors was taken into account to determine that two undertakings owning separate GSM infrastructures were collectively dominant;

- Small number of market players
  - Only two undertakings in GSM infrastructures market at that time
- Mature market structure
- Stagnant and moderate growth in demand
- Low elasticity of demand
  - Demand elasticity for GSM infrastructure service was low due to its essential facility characteristic
- Homogenous products
  - GSM infrastructure services are homogenous products from the view point of those demanding them
- Similar cost structures

6 *National Roaming,* 9.6.2003; 03-40/432-186.

- Similar market shares

  - As there were only two undertakings each with 90% coverage area, their market shares were equal to each other in GSM infrastructures services market

- Transparent market conditions

  - Process experienced regarding national roaming gained great popularity and attracted great interest from the press. Morever, commercial negotiations, arbitration and the intervention by Telecommunications Authority brought transparency facilitating the market players to understand the strategies of the competitors. The transparency in this market enabled undertakings to monitor each other's conduct and determine the deceptions.

- Low technological innovation

- Non-existence of excess capacity

- High barriers to market entry

  - Frequency band as a limited source, requirement to obtain a licence to enter the market were legal barriers whereas high licence fees, large amount of investment cost required for building GSM networks were economic barriers to market entry

- Absence of buyers' power

  - Quantity of GSM infrastructure services demanded by the new entrant and impossibility to build the alternative to this service prevented the emergence of buyers' power.

- Absence of potential competition

  - Permission required to enter the market for GSM infrastructures services and high economic entry barriers prevent potential competitors to enter.

- Existence of various informal and other links between the relevant undertakings

  - Undertakings in the relevant market met in connection with the Network Interconnection and Cooperation Agreement between the parties in the market and their representatives attended nearly all meetings in the telecommunications sector.

- Existence of retaliation mechanisms

  - Process of provision of national roaming services looked like a recurring game model rather than a one-move game model. Undertakings in question knew they would encounter each other many times. Therefore, they would be making their decisions according to past behaviours of their competitors and they were aware that their current decisions would have impact on prospective conduct of their competitors. This showed the possibility of retaliation.

- Absence or lowness of price competition

  - There was no competition between the two undertakings in question to provide national roaming services.

In addition to the above mentioned criteria in various decisions on TCA, technological superiority has also been taken into account as a criterion in dominance cases.[7] The undertaking in question caught international standards in technical facilities it provided which enabled it to acquire an important image for customers. Technical superiority caused the undertaking in question to increase the large gap with its closest competitor. Moreover, economic dependence is also cited as a very important criterion in this case while establishing dominance. In some cases, economic dependence alone can also be regarded as sufficient to establish dominance. An undertaking which the clients are dependent on economically becomes in a sense an essential business partner. Due to peculiar conditions of the market of liquid carbon dioxide market, the customers, who did not feel the need for an alternative to the undertaking in question or need for doing business with a new entrant, became dependent on the undertaking in question in *Karbogaz*.

Finally, undertakings owning essential facilities such as electricity transport infrastructures[8], GSM infrastructures[9] become automatically dominant.

In conclusion, as it is seen from the case law of the TCA, several elements such as market shares, entry barriers, market characteristics are taken into account on a case by case basis before establishing dominance in order to avoid hasty and erroneous conclusions.

7 *Karbogaz*, 23.8.2002; 02-49/634-257.

8 *ÇEAŞ,* 10.11.2003; 03–72/874-373.

9 *National Roaming,* 9.6.2003; 03-40/432-186.

UNITED KINGDOM

1. Introduction

This paper focuses on five issues:

- the definition of dominance;
- the weight to place on market shares in assessing dominance;
- the link between the abuse and the assessment of dominance;
- a sliding scale of dominance (the link between dominance and the assessment of abuse); and
- the concept of collective dominance.

It is important to recognise that this is a complex area and this paper only touches on some aspects rather than trying to be comprehensive. The paper also aims to raise questions, that provide the basis for debate, rather than necessarily to provide answers.

2. The definition of dominance

A starting point is the definition of "dominance". Article 82 of the EC Treaty (Article 82) prohibits 'any abuse of a dominant position' as incompatible with the common market in so far as it may affect trade between Member States.[1] However Article 82, and the Chapter II prohibition in the UK, does not define

[1] Section 18(1) (the Chapter II prohibition) of the Competition Act 1998 (the Act) prohibits any conduct on the part of one or more undertakings which amounts to 'an abuse of a dominant position' if it may affect trade within the United Kingdom. Under section 60 of the Act, when determining a question arising under Part I of Act, including under the Chapter II prohibition, the OFT (and any UK court of tribunal) must act with a view to securing that there is no inconsistency with the principles laid down by the EC Treaty and the Community Courts and any relevant decision of those Courts. In addition, the OFT must have regard to any relevant decision or statement of the Commission.

the concept of 'dominance'. Similarly, market power is not defined in the Enterprise Act 2002 for the purposes of the United Kingdom's Market Investigations regime.[2]

The DG Competition Discussion Paper on the application of Article 82[3] draws on settled jurisprudence[4] in stating that:

> *Dominance is 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 the consumers.*[5]

The OFT agrees with this definition, and in particular the fact that it incorporates both the power to behave to some extent independently of competitors and the ability to prevent effective competition.

The Discussion Paper also suggests that for dominance to exist an undertaking must have substantial market power, which means that it must be "capable of substantially increasing prices above the competitive level for a significant period of time".[6] While the OFT agrees that substantial market power is a necessary condition for dominance, we are less clear that the ability to "substantially increase prices above the competitive level for a significant period of time" provides an ideal definition of substantial market power. Firstly, there may be many oligopolistic markets in which prices lie above the competitive level, but in which no individual firm would be found dominant.[7] Secondly, this definition does not capture any element of "ability to prevent effective competition". This would seem to be an important element in the definition of dominance, especially where the alleged abuse is exclusionary.

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2 Section 134 of the Enterprise Act 2002 provides for Market Investigations to be carried out by the Competition Commission (CC). Here, the focus is upon investigating whether markets are not functioning properly, as opposed to identifying breaches of prohibitions of the abuse of dominance or the misuse of market power established in statute. On receipt of a market investigation reference from the OFT or a sectoral regulator, the CC is required to decide whether any "feature", or combination of features, of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods and services in the UK or a part of the UK. If so, there is an adverse effect on competition. A 'feature' means market structure, conduct of suppliers or purchasers or conduct of customers. See generally CC Guidelines on Market Investigation References (CC3) (2003) and in particular paragraphs 1.15 to 1.20. The analysis of the existence, degree and use of market power is central to the CC's determination.

3 DG Comp Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses, Brussels, December 2005.

4 See Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207, paragraph 65, and Case 85/76, *Hoffman-La Roche & Co. AG v Commission* [1979] ECR461, paragraph 38 and Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, paragraph 70. This definition has been adopted in the UK by the courts (see *Hendry v World Professional Billiards and Snooker Association* [2002] UKCLR 5, [2002] EuLR 770, [2002] ECC 96) and by the Competition Appeal Tribunal (the CAT) (see *Genzyme Ltd v Office of Fair Trading* [2004] CAT 4, para 188).

5 DG Competition Discussion Paper (above n 3), para 20.

6 ibid, para 24.

7 The UK banks provide a good example of such an oligopolistic market. This market was reviewed by the UK Competition Commission in 2002, and the banks were found to be making super-normal profits, despite the lack of any individual firm dominance (CC report on *The supply of banking services by clearing banks to small and medium-sized enterprises*, Cm 5319).

3. Weight to place on market shares in assessing dominance

There can be a temptation to rely on market shares as the key indicator of substantial market power. In the enforcement process, it is easy for too much energy to be spent on market definition and calculation of market shares and too little time and effort on other more important factors such as barriers to entry and expansion and market dynamics. Whether or not an undertaking has substantial market power will depend upon the constraints upon it from its existing competitors, potential competitors and countervailing buyer power.

Where market shares may be able to play a more prominent role is as a filter at a preliminary stage of a case – that is, as a safe harbour rather than as posing any initial legal presumption of dominance. A low market share generally indicates a low likelihood of consumer harm.

Constraints will almost certainly be much wider than those captured within a mere assessment of market shares. Other relevant factors in assessing dominance include the following:[8]

- **Low entry barriers** – A firm (or group of firms) with a persistently high market share may not necessarily have market power where there is a strong threat of potential competition. If entry into the market is easy, the incumbent firm might be constrained to act competitively so as to avoid attracting entry over time by potential competitors.

- **Buyer power** – If buyers have a strong negotiating position this will constrain the potential market power of a seller. For example, a rival representing 5% of sales may be an effective constraint if customers are able to sponsor its rapid expansion and have exercised this constraint in the past. Size alone is not sufficient for buyer power. Buyer power requires the buyer to have choice either by sponsoring entry or expansion or by switching between suppliers easily and readily.

- **Bidding markets** - Sometimes buyers choose their suppliers through procurement auctions or tenders. In these circumstances, even if there are only a few suppliers, competition might be intense. This is more likely to be the case where suppliers are not subject to capacity constraints (so that all suppliers are likely to place competitive bids), and where suppliers are not differentiated (so that for any particular bid, all suppliers are equally placed to win the contract). In these types of markets, a firm might have a high market share at a single point in time and for the period of the contract, which may be several years. However, if competition at the bidding stage is effective, this currently high market share would not necessarily reflect market power.

- **Successful innovation** - In a market where firms compete to improve the quality of their products, a persistently high market share might indicate persistently successful innovation and so would not necessarily mean that competition is not effective. An effective constraint on market power can come entirely from the threat of rival companies superseding the incumbent's product. A persistently high share could also arise if one firm is significantly more efficient than its competitors.

- **Product differentiation** - Sometimes the relevant market will contain products that are differentiated. In this case firms with relatively low market shares might have a degree of market power because other products in the market are not very close substitutes.

8 See OFT Guideline on the Assessment of Market Power (December 2004), OFT 415, para 4.4.

- **Responsiveness of customers** - Where customers are very price sensitive, substantial market shares may not reflect a firm's market power. In such cases a price increase may lead to consumers switching to a close substitute, or choosing not to buy the product. In contrast, where switching costs are high, a firm may have market power over its 'captive' customer base even if its share of the market is relatively low.[9]

- **Price responsiveness of competitors** - Sometimes a firm's competitors will not be in a position to increase output in response to higher prices in the market. For example, suppose a firm operates in a market where all firms have limited capacity (e.g. are at, or close to, full capacity and so are unable to increase output substantially). In this case, the firm would be in a stronger position to increase prices above competitive levels than an otherwise identical firm with a similar market share operating in a market where its competitors are not close to full capacity.

- **Profitability** - An analysis of profitability in a market may provide an indication of limitations in the competitive process.[10] A methodology that has been employed in the UK Market investigations regime is to use Return on Capital Employed (ROCE) as the principal profitability measure. The ROCE is compared to the estimated cost of capital for a typical firm in the market being investigated. There is no threshold, over which profits might be said to be "substantially in excess of the cost of capital", but the greater the excess profitability, the stronger may be the inference of limitations on the competitive process.[11]

Another reason for caution over market shares is the well recognised difficulty of market definition where prices are not at competitive levels. This is likely to be the position in markets where an undertaking has substantial market power. If prices are significantly above competitive levels, the Hypothetical Monopolist or SSNIP test will indicate too wide a market.[12] If prices are below competitive levels the test may also provide an inappropriate market delineation (which may be too wide or too narrow). In addition, there is a tendency to conclude, erroneously, that all products within the defined relevant market are perfect substitutes while those outside offer zero substitutability or constraint on products in the market – the so-called zero-one fallacy. This may be particularly problematic with differentiated products.

While market shares alone should not be relied upon to establish dominance, low market shares are generally a sufficiently strong indication of low likelihood of consumer harm. They may, therefore, be

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9 *See, for instance, the switching analysis carried out by the Competition Commission in* Domestic bulk liquefied petroleum gas (LPG). *The proposed Final Report is available at* http://www.competition-commission.org.uk/inquiries/current/gas/proposed_final_report.htm.

10 OFT Guidelines on the Assessment of Market Power (December 2004), OFT 415 para 6.6; CC Guidelines on 'Market Investigation References (CC3) (2003) para 3.82.

11 That said, profitability evidence should be treated with caution. Low profits may conceal ineffective competition if firms with market power are able to operate inefficiently with higher levels of cost than might be seen in a more competitive market. Equally, a firm that is engaging in exclusionary behaviour may sometime have low profits during the exclusionary period. At the same time, firms may make returns in excess of the cost of capital due to superior efficiency and not because of market power. It is also important to recognise that in "markets with high fixed costs undertakings must price significantly above their marginal costs of production in order to ensure a competitive return on their investment. The fact that undertakings price above their marginal costs is therefore not in itself a sign that the market is not functioning well and that undertakings have market power that allows them to price above the competitive level" (Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty, 2004 OJ C101/97, para 25).

12 This problem is known as the *cellophane fallacy* which is named after the *Du Pont* case in the United States: *US v El Du Pont de Nemours & Co* [1956] 351 US 377.

employed as a preliminary filter to identify cases that are unlikely to raise sufficient competition concerns that justify intervention.

It is an open question what the most effective filter should be and the OFT looks forward to further debate on this. One potential option would be to adopt an explicit safe harbour for undertakings with a market share below a certain threshold. Low market shares, in the absence of exceptional circumstances, may make a good proxy for the lack of substantial market power. The threshold could thus be stated with an explicit market share in order to give business a sufficient degree of certainty. The safe harbour should be such that a firm with a lower market share is unlikely to be able to "behave to an appreciable extent independently of its competitors" unless its competitors are uncharacteristically weak, or barriers to entry and expansion are high. An argument for a higher, rather than lower, safe harbour threshold might be that this will help ensure enforcement resources are focussed on clearly harmful conduct and minimise the risk of deterring pro-competitive conduct which benefits consumers by undertakings uncertain as to whether they might be alleged to be dominant.

4. Link between the abuse and the assessment of dominance

Currently dominance cases take a sequential approach: reviewing dominance and then the assessing abuse. It is arguable that this is not always either desirable or feasible. The abuse and the position of market power are often closely intertwined. For example:

- **Abuse as a barrier to entry:** It is clear that many types of exclusionary abuse create or heighten barriers to entry and expansion. Where this is the case, it may sometimes be necessary to examine the alleged abuse in order to reach a final view on dominance. For example, in the *Napp Pharmaceuticals* case one of the barriers to entry identified by the OFT as giving Napp a dominant position arose from its pricing behaviour, which was also condemned as evidence of an abuse. It had engaged in selective discounting to hospitals which amounted to predation. This exclusionary conduct in the hospital sector also created a barrier to entry in the community sales sector as GPs tend to prescribe the same brand of medication as the patient has been prescribed in the hospital.[13] Similarly in the *Genzyme* case, the exclusionary effect of a margin squeeze, which was found to constitute an abuse, also raised entry barriers, thereby reinforcing Genzyme's market power[14].

- **Different forms of dominance:** There may be a case for focusing on particular aspects of market power, depending on the nature of the alleged abuse. For example, in examining exclusive contracts, the key question in respect of market power may be whether competition occurs at the stage of awarding such contracts, and whether alternative routes to market may form a significant constraint[15].

- **Existing (*ex ante*) versus prospective (*ex post*) dominance**: Some exclusionary pricing benefits consumers in the short term through low prices. Only in the long-term are consumers likely to be harmed, through diminished competition[16]. This raises the issue of whether, in such cases, it is

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13 Decision No CA98/2/2001 *Napp Pharmaceuticals Holdings Ltd*, 31 March 2001. The markets here were for the supply of sustained released morphine to hospitals and to the community.

14 Decision No CA98/3/2003 *Exclusionary behaviour by Genzyme Limited*, 27 March 2003.

15 This should not be read as an exhaustive list of avenues of investigation in such a case.

16 For example see P Bolton, J Brodley, and M Riodan (2000) "Predatory Pricing: Strategic Theory and Legal Policy", (2000) 88(8) Georgetown Law Review, on possible tests for predation.

more appropriate to look at existing (*ex ante*) dominance, or whether it might be more relevant to look at the prospective (*ex post*) market power that could emerge post-predation.

5. A sliding scale of dominance (the link between dominance and the assessment of abuse)

Under Article 82 or the Chapter II prohibition, by dominance we mean substantial market power. A finding of dominance is an important jurisdictional hurdle, and thus must necessarily be - to some extent - a zero one assessment; an undertaking is either dominant or not. However, dominant firms may vary in the extent of their market power. The OFT guidelines state:[17]

> *Market power is not an absolute term but a matter of degree, and the degree of market power will depend on the circumstances of each case.*

The degree of market power held by a dominant company can have implications for the assessment of abuse for at least two reasons. First, the degree of market power can affect the likelihood of conduct being harmful. Secondly, the degree of market power can affect the potential extent of harm arising from the conduct.[18]

5.1 The degree of market power may affect the likelihood of conduct being harmful

Typically, the ability of an undertaking to exclude rivals will be at least partially dependent on the degree to which customers are able and willing to switch to rivals. For example, loyalty rebates will typically only have an anti-competitive effect if customers are unwilling to switch all of their business to a competitor (such that the competition that exists between firms only relates to a subset of the dominant firm's business), which in turn is more likely to be the case if the dominant firm has a greater degree of market power.[19]

Competition authorities are not infallible, nor do they have access to perfect and limitless information when assessing potential abuse of dominance cases. Consequently when deciding whether to intervene, it is necessary to take into account the likelihood of erroneous decisions.[20] If the degree of market power has a bearing on this, it may arguably make sense to set a higher standard of evidentiary burden on competition authorities when bringing abuse cases against dominant firms with relatively lower levels of market power than against firms with higher levels of market power.

5.2 The degree of market power can affect the extent of harm

The degree of dominance may also affect the extent of harm associated with any anti-competitive conduct.[21] In many cases, the greater the degree of market power, the greater the potential deadweight loss from any increment in market power[22] and the larger the potential harm to consumers.[23]

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17 OFT Guidelines on the "Assessment of market power" (December 2004), OFT 415, para 2.10.

18 This is apparent from the CC Market Investigation into *StoreCards* (2006) and *Home Credit* (Provisional Findings published April 2006).

19 For a more detailed examination of loyalty rebates see OFT804, "Selective price cuts and fidelity rebates", A report prepared for the Office of Fair Trading by RBB Economics, July 2005.

20 As well as the likelihood of an erroneous decision/non-decision, the magnitude of the cost of errors also matters. The OFT have commissioned research into the costs of inappropriate intervention/non-intervention under Article 82 which will be completed soon.

21 This can also vary by the type of conduct in question which is not covered in this paper.

The degree of market power may also have a bearing on the long term implications of intervention/non-intervention. It has been argued that there is a tendency for market power to erode over time thus limiting the need for completion law intervention. Whilst we would clearly have reservations about this statement,[24] it may be reasonable to argue that the lower the extent of market power, the more likely it is that the market power will be eroded without the need for intervention.

These two points are not divorced; where the likelihood and extent of harm is lower the potential benefits from intervention are, by definition, lower.

5.3 How this links to existing case law

Existing case law recognises that the degree of market power affects the analysis of the abuse. This takes the form of the concept of "super dominance", which imposes further "responsibilities" on undertakings. However, the concept of "super-dominance" ignores the fact that market power is a continuum. Arguably, a better approach would be directly to assess the harm to consumer welfare caused by the behaviour under review, the extent of which will be affected by, among other things, the degree of market power of the dominant undertaking.

There is a body of case law within the UK and EC differentiating between dominance and "super dominance" with the latter representing a firm enjoying a quasi-monopoly.[25] The concept of super-dominance is founded in the assumption that the same behaviour is deemed to be "more abusive" (that is "more harmful" to consumer welfare) the larger and more powerful the dominance of the undertaking in question.

Genzyme[26] is an example of how the degree of market power an undertaking enjoys interlinks with the extent of harm from the abuse. In that case, the dominant undertaking (90% shares in the market for drugs for the treatment of Gaucher disease), had a stranglehold on the related market (the market for the supply of homecare services). The margin squeeze or any effective refusal to supply on reasonable terms was rendered more serious by the fact that the incumbent had a quasi-monopoly position and the product required was indispensable to the rival's business:

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22 Abuses of dominance are largely concerned with increments in market power even if put in terms of maintenance of market power which would otherwise diminish. In terms of welfare analysis; the closer to the monopoly price a firm is, the greater the impact on the deadweight loss to society from an incremental increase.

23 It also depends on the size of the market in question.

24 Indeed, exclusionary abuses can be specifically designed to extend dominance over time.

25 The concept was first mentioned by Advocate General Fennelly in his opinion in Joined cases C-395/96P and C-396/96P *Compagnie Maritime Belge Transports SA v Commission* [2000] ECR I-1365, [2000] 4 CMLR 1076. The CAT in *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1 repeatedly referred to the concept of "special responsibility" of a dominant undertaking, which was rendered more acute in the case of a firm enjoying "super-dominance" amounting to a virtual monopoly. It effectively implied that an undertaking such as Napp, holding over 90% of the market, commits an abuse even if it could not be shown that it had priced below average total costs, where it selectively cut prices to match those of a competitor, without economic justification, and with the intention of eliminating competition. The CAT stated that the limit below which a dominant undertaking may not go when reducing its prices was "at the very least" the point where its prices go below AVC, on a selective basis, in order to see off the competitor on the particular products where the dominant enterprise is facing competition, leaving other prices unchanged (para 343).

26 Decision No CA98/3/2003 *Exclusionary behaviour by Genzyme Limited*, 27 March 2003 and, on appeal to the CAT, *Genzyme Ltd v Office of Fair Trading* [2004] CAT 4.

> *[T]he effect of blocking or delaying entry of a new competitor is all the more serious in a market (such as the present one) where the incumbent has a monopoly position and new entry is the only way its market power could be challenged.*[27]

A dominance/super-dominance calibration may be a helpful tool in understanding why certain types of behaviour, such as selective price cutting and refusal to supply, are treated more seriously in some cases than in others. The concept of super-dominance is nevertheless problematic in several respects.

First, the concept of super-dominance is often used as a form-based threshold rather than as a sliding scale. Companies with especially high market shares are held to have additional responsibilities not applicable to other dominant companies. It is arguably true that the abusive behaviour of a super-dominant firm has a greater potential to harm consumers than the same behaviour by a 'regular' dominant firm. However, it does not necessarily follow that a super-dominant firm should refrain from certain behaviour even if the same conduct would still be allowed in the case of a 'regular' dominant undertaking. Super-dominant firms should still be able to compete on the merits. The likely effect on competition and the likely harm to consumer welfare could be directly assessed in the analysis rather than making a form based presumption against super-dominant firms.

Second, there is no objective economic test for determining when, outside the situation of pure monopoly, a firm could be said to possess a position of "super-dominance". In other words, when does the 'dominant' undertaking actually cross the threshold into 'super-dominance'?

Finally, to equate the concept of "super-dominance" with a firm's high levels of market share is not a sound approach. As discussed previously, the determining factor may not be a firm's market share, but other factors.[28]

6. Collective dominance

The Chapter II prohibition and Article 82 would appear to prohibit the abuse of a jointly-dominant position. Such a collectively dominant position could be held due to tacit or explicit collusion. However, where it is due to explicit collusion, it is likely to be best addressed under section 2 of the Act (the Chapter I prohibition) and Article 81 of the Treaty as a breach of the prohibition of anti-competitive agreements.

There have been a number of cases at EC level dealing with exclusionary abuses of joint dominance under Article 82.[29] However, structural links which were caught by Article 81 also existed between the oligopolists in these cases. Although the case law states that collective dominance can be established in the absence of structural links,[30] there do not appear to have been any such cases to date. Where an abuse occurs it is, by nature, more likely to be an issue of explicit collusion and therefore a matter for Article 81 and Chapter I. Whilst there is a theoretical possibility of undertakings abusing a position of market power

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27 *Genzyme* decision, para 345.

28 For example, in *Genzyme* (see n 26 above) a serious consideration was whether the NHS had countervailing buyer power.

29 See for example *French-West African Shipowners' Committees* decision: OJ [1992] L 134/1, [1993] 5 CMLR 446; Cewal OJ [1993] L34/2 [1995] 5 CMLR 198. The findings of abuse were upheld on appeal to the CFI, Joined cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge Transports SA v Commission* [1996] ECR II-1201, [1997] 4 CLMR 446 and the ECJ, Joined cases C-395/96P and C-396/96P [2000] ECR I-1365, [2000] 4 CMLR 1076.

30 Case C-396/96P *Compagnie Maritime Belge Transports SA v Commission* [2000] ECR I-1365, [2000] 4 CMLR 1076.

due to tacit collusion, it is difficult to imagine a scenario in which exclusionary abuses could flow from such behaviour. Cases of this type would seem extremely rare and unlikely to be a priority given the potential for erroneous intervention. However, they are eminently suitable for inclusion in the UK's Market Investigations regime.

7. Other issues

We have drawn out several issues in the proceeding sections but it is important to note this is a non-comprehensive list of topics associated with assessment of dominance. Examples of other questions are:

- Currently dominance cases involve two steps: showing dominance and then proving abuse. But can these two steps really be separated? Some of the linkages were described above. The Economic Advisory Group for Competition Policy (EAGCP) has taken the interdependence between abuse and dominance to mean there is no role for assessment of dominance in a fully effects-based approach to abuses.

  "The economic approach implies that there is no need to establish a preliminary and separate assessment of dominance. Rather, the emphasis is on the establishment of a verifiable and consistent account of significant competition harm, since such an anti-competitive effect is what really matters and is already proof of dominance."[31]

  Some have argued that this would make dominance meaningless – and that dominance is both a necessary legal requirement and an important analytical discipline in differentiating between firms as to whether their conduct may cause harm. However, these criticisms fail to recognize that dominance is not necessarily made meaningless if it is assessed as part of the abuse analysis. It actually acquires its true meaning as a powerful tool in the analysis of whether conduct is harmful to consumers and, therefore, should be prohibited. There is a growing consensus that an effects-based approach to Article 82 is appropriate, and the OFT strongly supports this approach. This is likely to lead to more of an integration of dominance within the abuse analysis. Even so, an initial assessment of market power should continue to form an important role as a safe harbour and a filter.

- As discussed above, the existing jurisprudence on Article 82 gives weight to the ability of a firm "to prevent effective competition being maintained on the relevant market". In practice, however, the assessment of dominance has arguably often placed too much weight on the ability of the firm to raise prices and too little on its ability to exclude in order to gain or retain market power and so prevent effective competition. Such an approach may have made sense in a more 'form-based' world, since exclusion and harm to consumers do not go hand in hand, and there might have been a risk of competition authorities treating all forms of exclusion as abusive. However, in a world where effect on competition and harm to consumers post-exclusion are directly assessed, it could be appropriate to give more weight to ability to exclude.

8. Conclusion

- Dominance involves substantial market power, the ability to prevent effective competition, and the ability to behave to an appreciable extent independently of competitors.

- Current practice places far too much weight on market shares as an indication of substantial market power. Whether or not an undertaking has substantial market power will depend upon the

[31] See Report by the EAGCP, "An economic approach to Article 82", July 2005.

constraints upon it from its existing competitors, potential competitors and countervailing buyer power.

- There are sound arguments for a market share safe harbour in relation to dominance. Dominance should continue to play this role as a filter at a preliminary stage.

- There are strong links between the abuse and the assessment of dominance, which may make it difficult to assess dominance without also reviewing abuse.

- The degree of market power should be an integral part of the assessment of the abuse. The effect on competition and harm to consumer welfare should be directly assessed in the abuse analysis whether an undertaking is dominant or so-called super-dominant.

- Article 81 (and Chapter I of the UK Competition Act) should be used for enforcement action against abuse by so-called collectively dominant undertakings rather than Article 82 (and Chapter II).

UNITED STATES

In the United States, single-firm conduct is governed by section 2 of the Sherman Act, which encompasses the distinct offenses of unlawful acquisition of monopoly power, unlawful maintenance of monopoly power, and unlawful attempt to acquire monopoly power. An element of the first two offenses is the possession of monopoly power,[1] and an element of the third is a "dangerous probability" of obtaining monopoly power.[2]

1. The Meaning and Proof of Monopoly Power

The concept of "monopoly power" in U.S. antitrust law is closely related to the economic concept of "market power," but monopoly power entails both greater and more durable power over price than mere market power.[3] Monopoly power, in particular, has been defined as "the ability (1) to price substantially above the competitive level *and* (2) to persist in doing so for a significant period without erosion by new entry or expansion."[4]

Courts in the United States traditionally took the view that monopoly power "ordinarily may be inferred from the predominant share of the market."[5] Modern jurisprudence, however, recognizes that "market share is only a starting point for determining whether monopoly power exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share."[6] A dominant market share is now viewed as necessary for monopoly power, but far from sufficient. Courts in

1 Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

2 Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993).

3 *See, e.g.*, Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 481 (1992) ("Monopoly power . . . requires, of course, something greater than market power . . . ."); Reazin v. Blue Cross and Blue Shield of Kansas, Inc., 899 F.2d 951, 967 (10th Cir. 1990) ("Market and monopoly power only differ in degree—monopoly power is commonly thought of as 'substantial' market power."); Deauville Corp. v. Federated Department Stores Inc., 756 F.2d 1183, 1192 n.6 (5th Cir. 1985) (Monopoly power is an "extreme degree of market power.").

4 AD/SAT v. Associated Press, 181 F.3d 216, 227 (2d Cir. 1999) (quoting 2A PHILLIP E. AREEDA, HERBERT HOVENKAMP & JOHN L. SOLOW, ANTITRUST LAW ¶ 501, at 86 (1995)).

5 United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).

6 American Council of Certified Podiatric Physicians & Surgeons v. American Board of Podiatric Surgery, Inc., 185 F.3d 606, 623 (6th Cir. 1999). *See* Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 98 (2d Cir. 1998) ("A court will draw an inference of monopoly power only after full consideration of the relationship between market share and other relevant characteristics.").

the United States have held that a market share below 50% precludes finding monopoly power,[7] and the leading treatise suggests that a share of over 70–75% for at least five years is required.[8]

"Monopoly power must be shown to be persistent in order to warrant judicial intervention, which is always costly."[9] As one court explained: "In evaluating monopoly power, it is not market share that counts but the ability to *maintain* market share."[10] Because "anticompetitive exclusionary practices would be unprofitable and presumably would not occur" if "entry would deny firms monopoly profits,"[11] U.S. courts require proof that entry would not effectively discipline a competitor alleged to possess monopoly power. Firms with market shares well in excess of 50% have been found not to possess monopoly power because their power over price was not sufficiently durable.[12]

The plaintiff has the burden of proving monopoly power in U.S. courts. "Plaintiffs relying on market share as a proxy for monopoly power must plead and produce evidence of a relevant product market, of the alleged monopolist's dominant share of that market, and of high barriers to entry."[13] Such evidence may give rise to a presumption of monopoly power, which may be overcome by "evidence of a defendant's inability to control prices or exclude competitors."[14]

2. The Rationale of the Monopoly Power Requirement

The monopoly power requirement reflects the fact that conduct "that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist," so the actions of a dominant firm are properly "examined

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7 *See, e.g.*, Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406, 1411 (7th Cir. 1995) (Posner, J.) ("Fifty percent is below any accepted benchmark for inferring monopoly power from market share . . . .").

8 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 801a, at 319 (2d ed. 2002). *See also* Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America, 885 F.2d 683, 694 n.18 (10th Cir. 1989) (To establish "monopoly power, lower courts generally require a minimum market share of between 70% and 80%."); Exxon Corp. v. Berwick Bay Real Estate Partners, 748 F.2d 937, 940 (5th Cir. 1984) ("monopolization is rarely found when the defendant's share of the relevant market is below 70%").

9 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 801d, at 323 (2d ed. 2002).

10 United States v. Syufy Enterprises, 903 F.2d 659, 665–66 (9th Cir. 1990).

11 2A PHILLIP E. AREEDA, HERBERT HOVENKAMP & JOHN L. SOLOW, ANTITRUST LAW ¶ 420, at 58 (2d ed. 2002).

12 *E.g.*, Western Parcel Express v. United Parcel Service of America, Inc., 190 F.3d 974, 975 (9th Cir. 1999) (A firm with a "dominant share" was found not to possess monopoly power because of a failure to "demonstrate that there are significant barriers to entry."); Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 99 (2d Cir. 1998) (Successful entry refuted "any inference of the existence of monopoly power that might be drawn" from the defendant's market share of over 70%.); Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America, 885 F.2d 683, 695–96 (10th Cir. 1989) (A firm was found not to possess monopoly power because its "ability to charge monopoly prices will necessarily be temporary.").

13 Harrison Aire, Inc. v. Aerostar International, Inc., 423 F.3d 374, 381 (3d Cir. 2005). *See* Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995) (A plaintiff must "(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry . . . .").

14 Oahu Gas Service, Inc. v. Pacific Resources Inc., 838 F.2d 360, 366 (9th Cir. 1988). *See also* Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc., 386 F.3d 485, 501 (2d Cir. 2004) (Only "after considering market share in conjunction with other characteristics of the market" may a court conclude that a defendant possesses monopoly power.).

through a special lens."[15] Application of a special lens is appropriate, however, only with truly dominant firms, and there are additional reasons for making the monopoly power requirement rigorous.

First, a rigorous monopoly power requirement recognizes that it is often "difficult to distinguish robust competition from conduct with long-term anticompetitive effects."[16] Errors in the administration of competition policy toward single-firm conduct are easily made, and the monopoly power requirement reduces the possibility of erroneously condemning much conduct that merely disadvantages rivals. Such "false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect."[17]

Second, a rigorous monopoly power requirement acts as a useful screen. It avoids difficult issues in the evaluation of conduct that may or may not be exclusionary. This screening process makes the administration of section 2 of the Sherman Act far less costly by keeping many meritless cases out of court and allowing others to be resolved without a trial. This screen also provides certainty to the vast majority of competitors confident they would not be found to possess monopoly power.

3. Four Recent Cases in the United States

Four recent cases illustrate the application of the monopoly power requirement in the United States. The U.S. Department of Justice successfully challenged maintenance of monopoly in two cases—*Microsoft* and *Dentsply*, and the Federal Trade Commission (FTC) successfully negotiated settlements in two cases involving misuse of government processes to acquire or maintain monopoly power—*Unocal* and *Bristol-Meyers Squibb*.[18]

Microsoft.[19] Microsoft Corp.'s share of the PC operating systems market had exceeded 90% for over a decade and had risen to 95% at the time of trial, causing the court to find that it had a "dominant, persistent, and increasing share of the relevant market."[20] Microsoft's enormous market share, however, was insufficient by itself to establish monopoly power. The trial court went on to find that "the applications barrier to entry protects Microsoft's dominant market share"[21] and held that "proof of a dominant market share and the existence of a substantial barrier to entry create the presumption that

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15 Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 488 (1992) (Scalia, J., dissenting). *See also* United States v. Dentsply International, Inc., 399 F.3d 181, 187 (3d Cir. 2005) ("Behavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist.").

16 Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993).

17 Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (internal quotations omitted). *See also* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775 (1984) ("Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote.").

18 The FTC in recent years has pursued various investigations of anticompetitive unilateral as well as joint conduct that might be characterized as "cheap exclusion." *See* Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker & Ernest A. Nagata, *Cheap Exclusion*, 72 ANTITRUST LAW JOURNAL 975 (2005).

19 United States v. Microsoft Corp., 84 F. Supp. 2d 9 (D.D.C. 1999) (findings of fact), 87 F. Supp. 2d 30 (D.D.C. 2000) (conclusions of law), *affirmed*, 253 F.3d 34 (D.C. Cir. 2001) (en banc).

20 84 F. Supp. 2d at 19; 87 F. Supp. 2d at 36.

21 87 F. Supp. 2d at 36–37. *See* Gregory J. Werden, *Network Effects and Conditions of Entry: Lessons from the* Microsoft *Case*, 69 ANTITRUST LAW JOURNAL 87 (2001).

Microsoft enjoys monopoly power."[22] The court elaborated at great length the workings of the "applications barrier to entry."[23] In brief, that barrier arose from "an intractable 'chicken-and-egg' problem": "Users do not want to invest in an operating system until it is clear that the system will support generations of applications that will meet their needs, and developers do not want to invest in writing or quickly porting applications for an operating system until it is clear that there will be a sizeable and stable market for it."[24]

Dentsply.[25] Dentsply International, Inc.'s share of the market for artificial teeth in the United States was "between 75% and 80%" for "at least the past 10 years," but the trial court held that the monopoly power "inquiry does not end with proof of high market share."[26] Indeed, the trial court held that the Justice Department had failed to prove that Dentsply possessed monopoly power because the challenged exclusive arrangements with dealers had not be shown to act as a "barrier to entry in the artificial tooth market."[27] The appeals court reversed, however, concluding that by "blocking . . . access to the key dealers" Dentsply had maintained "monopoly power over the market for artificial teeth."[28] The appeals court found that using dealers provided customers with many advantages and that it was "impracticable for a manufacturer to rely on direct distribution to the [customers] in any significant amount."[29]

Unocal.[30] A 2003 FTC administrative complaint charged that Unocal Corp. illegally acquired monopoly power in the market for the technology used in producing reformulated gasoline that met certain standards set by the California Air Resources Board (CARB), a state environmental regulatory agency. According to the complaint, Unocal acquired this power by misrepresenting that certain research was non-proprietary and in the public domain, while at the same time pursuing patents that would enable it to charge substantial royalties once the research was incorporated by CARB in its reformulated gasoline regulations. The combination of the patent received and CARB regulations ultimately gave Unocal a monopoly. Under the terms of a 2005 settlement, reached in connection with the Chevron Corp.'s acquisition of Unocal,[31] Unocal agreed to stop enforcing the patents in question and to release them to the public by the merger's effective date.

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22 87 F. Supp. 2d at 36. The court also held that the presumption was not overcome by other evidence. *Id.* at 37. Microsoft argued that its pricing and innovation proved that it did not possess monopoly power. Affirming the trial court, the court of appeals, found that Microsoft's pricing and innovation were consistent with monopoly power and that "some aspects of Microsoft's behavior are difficult to explain unless Windows is a monopoly." 253 F.3d at 56–58.

23 84 F. Supp. 2d at 19–24.

24 *Id.* at 18.

25 United States v. Dentsply International, Inc., 277 F. Supp. 2d 387 (D. Del. 2003), *reversed*, 399 F.3d 181 (3d Cir. 2005).

26 277 F. Supp. 2d at 423.

27 *Id.* at 451–52.

28 399 F.3d at 189–91.

29 *Id.* at 192–93.

30 In the Matter of Union Oil Co. of California, Docket No. 9305 (FTC complaint issued March 4, 2003), *available at* http://www.ftc.gov/os/adjpro/d9305/index.htm.

31 *See* In the Matter of Union Oil Co. of California, Docket No. 9305, Agreement Containing Consent Order (June 10, 2005), *available at* http://www.ftc.gov/os/adjpro/d9305/050610agreement9305.pdf.

Bristol-Myers Squibb.[32] Bristol-Myers Squibb Co. held patents on three important pharmaceuticals—two anti-cancer drugs, Taxol and Platinol, and the anti-anxiety agent BuSpar. Because of the distinctive characteristics of these pharmaceuticals, the FTC found that each (and its generic equivalent) was a separate antitrust market in which the manufacturer had a total monopoly as a result of its patents. Further, the FTC found that the manufacturer wrongfully maintained that power by conduct designed to delay the eventual entry of generic competition. As these patents for these products grew close to expiration, and as generic entry was planned, Bristol-Myers listed additional patents on them with the Food and Drug Administration. Under the FDA regulatory process, these new listings made it possible to retard generic entry by several years. According to the FTC complaint, however, the alleged new patents had not been properly eligible for listing, and Bristol-Myers could not have reasonably believed that they were. The company was therefore charged with illegally maintaining its monopoly power. Among other terms of the negotiated settlement, Bristol-Myers agreed to give up its ability to obtain entry stays on the basis of later-listed patents, thus helping return the pace of cost-lowering generic entry to normal.

[32] In the Matter of Bristol-Myers Squibb Co., File Nos. 001-0221, 011-0046, and 021-0181 (March 7, 2003), *available at* http://www.ftc.gov/opa/2003/03/bms.htm.

EUROPEAN COMMISSION

1. What is Dominance?[1]

According to settled case law of the EC Courts, dominance is 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 the consumers.[2] Dominance can exist on the part of one undertaking (single dominance) or two or more undertakings (collective dominance).[3] In the case of collective dominance the undertakings concerned must, from an economic point of view, present themselves or act together on a particular market as a collective entity.[4]

This definition of dominance consists of three elements, two of which are closely linked: (a) there must be a position of economic strength on a market which (b) enables the undertaking(s) in question to prevent effective competition being maintained on that market by (c) affording it the power to behave independently to an appreciable extent.

The first element implies that dominance exists in relation to a market. It cannot exist in the abstract. It also implies that an undertaking either on its own or together with other undertakings must hold a leading position on that market compared to its rivals.

The second and third elements concern the link between the position of economic strength held by the undertaking concerned and the competitive process, i.e. the way in which the undertaking and other players act and inter-act on the market. Dominance is the ability to prevent effective competition being maintained on the market and to act to an appreciable extent independently of other players. The notion of independence, which is the special feature of dominance[5], is related to the level of competitive constraint facing the undertaking(s) in question. For dominance to exist the undertaking(s) concerned must not be subject to effective competitive constraints. In other words, it thus must have substantial market power.

Market power is the power to influence market prices, output, innovation, the variety or quality of goods and services, or other parameters of competition on the market for a significant period of time. In this paper, the expression "increase prices" is often used as shorthand for the various ways these

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1 See DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, published in December 2005 at DG Competition web-site: http://europa.eu.int/comm/competition/antitrust/others/article_82_review.html

2 See Case 27/76 United Brands Company and United Brands Continentaal BV v Commission [1978] ECR 207, paragraph 65, and Case 85/76 Hoffmann-La Roche & Co. AG v Commission [1979] ECR 461, paragraph 38.

3 See Joined Cases C-395/96 P and C-396/96 P Compagnie maritime belge transports SA, Compagnie maritime belge SA and Dafra-Lines A/S v Commission [2000] ECR I-1365, paragraph 36.

4 Idem.

5 See Case 85/76 Hoffmann-La Roche, cited in footnote 2, paragraphs 42-48.

parameters of competition can be influenced to the harm of consumers. An undertaking that is capable of substantially increasing prices above the competitive level for a significant period of time holds substantial market power and possesses the requisite ability to act to an appreciable extent independently of competitors, customers and consumers. Unlike undertakings in a market characterised by effective competition, a dominant undertaking not subject to effective competitive constraints is able to price above the competitive level. It can do so by reducing its own output or by causing rivals to reduce their output. The foreclosure of competitors may therefore allow the dominant company to further raise price or keep prices high.

Both suppliers and buyers can have market power. However, for clarity, market power will usually refer here to a supplier's market power. Where a buyer's market power is the issue, the term 'buyer power' is employed.

Higher than normal profits may be an indication of a lack of competitive constraints on an undertaking. More in general, the way in which a firm acts in a market may in itself be indicative of substantial market power, for instance where an undertaking increases its price while benefiting from falling costs. However, an undertaking's economic strength cannot be measured by its profitability at any specific point in time; even short-run losses are not incompatible with a dominant position.[6]

It is also not required for a finding of dominance that the undertaking in question has eliminated all opportunity for competition on the market.[7] For Article 82 to apply it is not a condition that competition has been eliminated.[8] On the other hand, the fact that an undertaking is compelled by the pressure of its competitors' price reductions to lower its own prices on a durable basis is in general incompatible with the independent conduct which is the hallmark of a dominant position. In that case the undertaking concerned is likely to be subject to effective competitive constraints, which is incompatible with the existence of substantial market power.

2. Single Dominance

When the relevant market has been defined, it can be analysed whether on that market the allegedly dominant undertaking "has the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers", that is, whether it holds substantial market power. In conducting this analysis it is relevant to consider in particular the market position of the allegedly dominant undertaking, the market position of competitors, barriers to expansion and entry, and the market position of buyers. The existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative.[9]

2.1 Market position of allegedly dominant undertaking and its rivals

The analysis of the market position of the allegedly dominant undertaking and its rivals provides insight into the degree of actual competition on the market. The starting point for this analysis is the market shares of the various players. Market shares provide useful first indications of the market structure and of

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6 See Case 27/76 United Brands, cited in footnote 2, paragraph 126, and Case 322/81, NV Nederlandsche Banden Industrie Michelin v Commission (Michelin I) [1983] ECR 3461, paragraph 59.

7 See Case 27/76 United Brands, cited in footnote 2, paragraph 113, and Case T-395/94 Atlantic Container Line AB and Others v Commission [2002] ECR II-875, paragraph 330.

8 See paragraphs 91-92 of the DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, cited in footnote 1.

9 See Case 85/76 Hoffmann-La Roche, cited in footnote 2, paragraph 39.

the competitive importance of various undertakings active on the market. If the undertaking concerned has a high market share compared to other players on the market, it is an indication of dominance, provided that this market share has been held for some time.[10] If market shares have fluctuated significantly over time, it is an indication of effective competition. However, this is only true where fluctuations are caused by rivalry between undertakings on the market. Fluctuations caused, for instance, by mergers are not in themselves indicative of such rivalry.

Normally, the Commission uses current market shares in its competitive analysis.[11] However, historic market shares may be used if market shares have been volatile, for instance when the market is characterised by large, lumpy orders. Changes in historic market shares may also provide useful information about the competitive process and the likely future importance of the various competitors, for instance, by indicating whether firms have been gaining or losing market shares. In any event, the Commission interprets market shares in the light of likely market conditions, for instance, whether the market is highly dynamic in character and whether the market structure is unstable due to innovation or growth.

It is very likely that very high markets shares, which have been held for some time, indicate a dominant position.[12] The strength of any indication based on market share depends on the facts of each individual case. Market share is only a proxy for market power, which is the decisive factor. It is therefore necessary to extend the dominance analysis beyond market shares, especially when taking into account the difficulty of defining relevant markets in Article 82 cases.

The importance of market shares may be qualified by an analysis of the degree of product differentiation in the market. Products are differentiated when they differ in the eyes of consumers for instance due to brand image, product features, product quality, level of service or the location of the seller. The level of advertising in a market may be an indicator of the firms' efforts to differentiate their products. When products are differentiated the competitive constraint that they impose on each other is likely to differ even where they form part of the same relevant market. Substitutability is a question of degree. In assessing the competitive constraint imposed by rivals, it must therefore be taken into account what is the degree of substitutability of their products with those offered by the allegedly dominant undertaking. It may be that a rival with 10% market share imposes a greater competitive constraint on an undertaking with 50% market share than another rival supplying 20% of the market. This may for instance be the case where the undertaking with the lower market share and the allegedly dominant undertaking both sell premium branded products whereas the rival with the larger market share sells a bargain brand.

2.2 Barriers to expansion and entry

If the barriers to expansion faced by rivals and to entry faced by potential rivals are low, the fact that one undertaking has a high market share may not be indicative of dominance. Any attempt by an undertaking to increase prices above the competitive level would attract expansion or new entry by rivals thereby undermining the price increase.

In assessing whether expansion or entry has been, would have been or is likely to be timely, the Commission will look at whether any such expansion or entry has been or would have been or will be

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10 See Case 27/76 United Brands, cited in footnote 2, paragraph 111 and Case 85/76 Hoffmann-La Roche, cited in footnote 2, paragraph 41.

11 As to the calculation of market shares, see also Commission Notice on the definition of the relevant market, OJ C 372, 09.12.1997, p. 5, paragraphs 54-55.

12 See Case 85/76 Hoffmann-La Roche, cited in footnote 2, paragraph 41.

sufficiently immediate and persistent to prevent the exercise of substantial market power. The appropriate time period depends on the characteristics and dynamics of the market. The period of time needed for undertakings already on the market to adjust their capacity can be used as a yardstick to determine this period. Expansion or entry which is not of sufficient scope and magnitude is not likely to constitute an effective constraint on the undertaking concerned. Small-scale entry, for instance into some market 'niche', may not be considered sufficient.

The Commission will look carefully at the history of the industry when assessing barriers to expansion or entry. It is not likely that the Commission will find barriers to expansion and entry in an industry that has experienced frequent and successful examples of entry. On the other hand if previous attempts to expand in or enter into the market have been unsuccessful, perhaps due to deterring behaviour by incumbents, then expansion and entry would seem less likely to have constituted an effective constraint.

Entry may be particularly likely if suppliers in other markets already possess production facilities that could be used to enter the market in question, thus reducing the sunk costs of entry.

Barriers to expansion and entry are factors that make entry impossible or unprofitable while permitting established undertakings to charge prices above the competitive level. Undertakings expand output and enter markets to earn profits. Whether expansion or entry is profitable depends in particular on the cost of (efficient) expansion or entry and the likely prices post expansion or entry. The higher the cost of expansion or entry and the lower the likely post expansion or entry prices, the greater the risk that expansion or entry will be unprofitable and therefore not attempted.

The prices post expansion or entry depend firstly on the impact on prices of the additional output put on the market by the expansion or by the new entrant, but also on the reaction of incumbents, in particular the allegedly dominant undertaking. Likely strategic responses from the incumbents are therefore taken into account. An aggressive competitive response from incumbents would be particularly likely if they have committed to large excess capacity. The allegedly dominant undertakings may also have built a reputation of responding aggressively to expansion or entry. When assessing whether or not expansion or entry would be profitable, the likely evolution of the market should also be taken into account. Expansion or entry is more likely to be profitable in a market that is expected to experience high growth in the future relative to a market that is expected to decline or stagnate.

When identifying possible barriers to expansion and entry it is important to focus on whether rivals can reasonably replicate circumstances that give advantages to the allegedly dominant undertaking. Barriers to expansion and entry can have a number of origins relating to the legal or economic environment that pertains on the relevant market:

- Legal barriers: the legislative framework covering the relevant market can be an important barrier. Such legislation may limit the number of market participants, for example by granting special or exclusive rights in the shape of concessions, licenses or intellectual property rights. Legislative measures that grant a single undertaking the exclusive right to perform a certain activity excludes rivals and may lead to such an undertaking having a legal monopoly in a relevant market. Planning laws and licensing laws that impose limits on the number of retail outlets limits expansion possibilities of existing and entry possibilities for new retailers, which in turn may make it more difficult for suppliers to gain access to efficient distribution. Intellectual property rights may also prevent expansion and entry or make it more difficult. However, intellectual property rights do not as such confer dominance on the holder. The impact of intellectual property rights on expansion and entry depends on the nature and actual strength of the intellectual property right held by the allegedly dominant undertaking. Finally, also tariff and non-tariff barriers can give advantages to incumbent firms.

- Capacity constraints: competitors may have to commit large sunk investments in order to expand capacity. An investment or cost is sunk when it cannot be recovered if the undertaking exits the market. Moreover, even existing excess capacity may be so expensive to employ that these costs constitute a barrier to expansion; for instance, the costs of introducing another shift in a factory may constitute a barrier to expansion.

- Economies of scale and scope: large-scale production or distribution may give the allegedly dominant undertaking an advantage over smaller competitors. Scale and scope economies result from the spreading of fixed costs over larger output or a broader set of products, leading to a reduction of average costs. When economies of scale or scope are important and require a substantial production capacity compared to the size of the market, efficient expansion or entry is more costly and risky. Large fixed costs have to be committed and the output produced will constitute a significant increase in output, which is likely in itself to have a significant impact on price post expansion or entry. If expansion or entry occurs at an inefficient scale, the competitive constraint imposed on the incumbents will be less effective. In assessing barriers to expansion and entry it is therefore useful to consider the minimum efficient scale in the market concerned. The minimum efficient scale is the level of output required to minimise average cost, exhausting economies of scale.[13]

- Absolute cost advantages: these include preferential access to essential facilities, natural resources, innovation and R&D, intellectual property rights and capital conferring a competitive advantage on the allegedly dominant undertaking, which makes it difficult for other undertakings to compete effectively. In the large majority of cases financial strength is unlikely to be an issue. However, in some cases it may be one of the factors that contribute to a finding of a dominant position, in particular in those cases where (i) finance is relevant to the competitive process in the industry under review; (ii) there are significant asymmetries between competitors in terms of their internal financing capabilities; and (iii) particular features of the industry make it difficult for firms to attract external funds.

- Privileged access to supply: the allegedly dominant undertaking may be vertically integrated or may have established sufficient control or influence over the supply of inputs that expansion or entry by smaller rival firms may be difficult or costly.

- A highly developed distribution and sales network: the allegedly dominant undertaking may have its own dense outlet network, established distribution logistics or wide geographical coverage that would be difficult for rivals to replicate.

- The established position of the incumbent firms on the market: it may be difficult to enter an industry where experience or reputation is necessary to compete effectively, both of which may be difficult to obtain as an entrant. Factors such as consumer loyalty to a particular brand, the closeness of relationships between suppliers and customers, the importance of promotion or advertising, or other reputation advantages will be taken into account. Advertising and other investments in reputation are often sunk costs which cannot be recovered in the case of exit and which therefore make entry more risky.

- Other strategic barriers to expansion or entry: these encompass situations where it is costly for customers to switch to a new supplier. This may for example be the case where personnel have been trained to use the product of the allegedly dominant undertaking or where due to network

[13] Scale economies are normally exhausted at a certain point. Thereafter average costs will stabilise and eventually rise due to, for example, capacity constraints and bottlenecks.

effects the value of rivals' products are lower because they do not have a large installed base of customers. For instance the value of a piece of software may not only depend on the intrinsic qualities of the product but also on how many people use it and thus with whom the new buyers can exchange files. Finally, the incumbent firms may through the use of long-term contracts with customers have made it difficult for rivals at a particular point in time to find a sufficient number of customers able to switch supplier that expansion or entry would be profitable.

2.3 Market position of buyers

The market position of buyers provides an indication of the extent to which they are likely to constrain the allegedly dominant undertaking. However, given the fact that dominance is assessed in relation to a market, it is not sufficient that certain strong buyers may be able to extract more favourable conditions from the allegedly dominant undertaking than their weaker competitors. The presence of strong buyers can only serve to counter a finding of dominance if it is likely that in response to prices being increased above the competitive level, the buyers in question will pave the way for effective new entry or lead existing suppliers in the market to significantly expand their output so as to defeat the price increase.[14] In other words, the strong buyers should not only protect themselves, but effectively protect the market.

On the other hand, if one or more strong buyers are able to extract more favourable conditions from the allegedly dominant undertaking than their weaker competitors, it may be appropriate to define separate relevant markets for, respectively, strong and weak buyers.[15]

3. Collective Dominance

Article 82 EC prohibits any abuse by one or more undertakings of a dominant position. It follows that the application of Article 82 is not confined to cases where a single undertaking holds a dominant position; it is also applicable where two or more undertakings together hold a dominant position.

For collective dominance to exist under Article 82, two or more undertakings must from an economic point of view present themselves or act together on a particular market as a collective entity.[16] It is not required that the undertakings concerned adopt identical conduct on the market in every respect.[17] What matters is that they are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers.[18]

In order to establish the existence of such a collective entity on the market, it is necessary to examine the factors that give rise to a connection between the undertakings concerned.[19] Such factors may flow from the nature and terms of an agreement between the undertakings in question or from the way in which it is implemented[20], provided that the agreement leads the undertakings in question to present themselves

14 See in this respect Case T-228/97, Irish Sugar plc v Commission [1999] ECR II-2969, paragraph 101.

15 See Commission Notice on the definition of the relevant market, cited in footnote 11, paragraph 43.

16 See Joined Cases C-395/96 P and C-396/96 P Compagnie maritime belge transports, cited in footnote 3, paragraph 36.

17 See in this respect Case T-228/97 Irish Sugar, cited in footnote 18, paragraph 66.

18 See Joined Cases C-68/94 and C-30/95, French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission [1998] ECR I-1375, paragraph 221.

19 Idem.

20 Case C-393/92 Municipality of Almelo and others v NV Energiebedrijf Ijsselmij [1994] ECR I-1477, paragraphs 41 to 43.

or act together as a collective entity. This may, for instance, be the case if undertakings have concluded cooperation agreements that lead them to co-ordinate their conduct on the market. It may also be the case if ownership interests and other links in law lead the undertakings concerned to co-ordinate.

However, the existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position. Such a finding may be based on other connecting factors and depends on an economic assessment and, in particular, on an assessment of the structure of the market in question.[21] It follows that the structure of the market and the way in which undertakings interact on the market may give rise to a finding of collective dominance.[22]

Undertakings in oligopolistic markets may sometimes be able to raise prices substantially above the competitive level without having recourse to any explicit agreement or concerted practice. Coordination is more likely to emerge in markets where it is relatively simple to reach a common understanding on the terms of coordination. The simpler and more stable the economic environment, the easier it is for undertakings to reach a common understanding. Indeed, they may by able to co-ordinate their behaviour on the market by observing and reacting to each other's behaviour. In other words, they may be able to adopt a common strategy that allows them to present themselves or act together as a collective entity. Coordination may take various forms. In some markets, the most likely coordination may involve directly coordinating on prices in order to keep them above the competitive level. In other markets, coordination may aim at limiting production or the amount of new capacity brought to the market. Firms may also coordinate by dividing the market, for instance by geographic area or other customer characteristics, or by allocating contracts in bidding markets. The ability to arrive at and sustain such co-ordination depends on a number of factors, the presence of which must be carefully examined in each case.

Firstly, each undertaking must be able to monitor whether or not the other undertakings are adhering to the common policy. It is not sufficient for each undertaking to be aware that interdependent market conduct is profitable for all of them, because each undertaking will be tempted to increase his share of the market by deviating from the common strategy. There must, therefore, be sufficient market transparency for all undertakings concerned to be aware, sufficiently precisely and quickly, of the market conduct of the others.[23]

Secondly, the implementation of the common policy must be sustainable over time, which presupposes the existence of sufficient deterrent mechanisms, which are sufficiently severe to convince all the undertakings concerned that it is in their best interest to adhere to the common policy.[24]

Finally, it must be established that competitive constraints do not jeopardise the implementation of the common strategy.[25] As in the case of single dominance, it must be analysed what is the market position and strength of rivals that do not form part of the collective entity, what is the market position and strength of buyers and what is the potential for new entry as indicated by the height of entry barriers.

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21 See Joined Cases C-395/96 P and C-396/96 P Compagnie maritime belge transports, cited in footnote 3, paragraph 36.

22 See also the Commission's Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 05.02.2004, pp. 5-18, paragraphs 39-57.

23 See Case T-342/99, Airtours plc v Commission [2002] ECR II-2585, paragraph 62, and Case T-193/02, Laurent Piau v Commission (26 January 2005), not yet reported, paragraph 111.

24 Idem.

25 Idem.

4. Quantitative Assessment of Dominance

Quantitative analysis can be useful to determine the extent of market power of a given firm. Demand estimation and the estimation of cross price elasticities can determine whether firms impose on each other an important competitive constraint. When possible, exogenous changes in the market structure or in the institutional setting in similar markets can also shed light on the extent of market power exerted by a firm in a particular market. A careful and informed analysis of margins prevailing in the industry can also reveal asymmetries and the existence of market power among some of the firms. Quantitative analysis of collective dominance is possible but more complex. It is only possible to identify collective dominance from market data under specific circumstances and qualitative analysis is bound to play a much more important role.

All empirical and quantitative techniques need to be carefully applied by personnel familiar with empirical analysis and need to be backed by extensive qualitative work. Quantitative analysis should never determine on its own the existence of dominance but it can be very useful to lend additional credibility to a qualitative assessment. Also it can work as a useful check since a qualitative assessment that does not match the data should be reconsidered.

Quantitative techniques are not generally informative regarding the source of market power. Also, assessments on the likelihood of entry or on the dynamic aspects of market power are not likely to be dealt satisfactorily with simple quantitative analysis. Still, where existing market power can be measured, investigators will be encouraged to do so.

5. Case examples

5.1 Wanadoo Interactive case[26]

In this case the European Commission adopted in July 2003 a decision against Wanadoo Interactive, a subsidiary of France Télécom, for abuse of a dominant position in the form of predatory pricing in ADSL-based internet access services for the general public. The Commission found that, from the end of 1999 up to October 2002, the retail prices charged by Wanadoo were below costs. Since the mass marketing of Wanadoo's ADSL services began only in March 2001, the Commission considers that the abuse started only that date. From that date until the end of July 2001 Wanadoo's prices were far below adjusted variable costs, and from August 2001 until October 2002 the prices were approximately equivalent to variable costs, but significantly below total costs. Wanadoo suffered substantial losses up to the end of 2002 as a result of this practice. The practice coincided with a company plan to pre-empt the strategic market for high-speed Internet access. Wanadoo's policy was deliberate, since the company, according to in-house company documents, was fully aware of the level of losses which it was suffering and of the legal risks associated with its practices. These practices restricted market entry and development potential for competitors. In view of the gravity of the abuse and the length of the period over which it was committed, the Commission imposed a fine of € 10,35 million.

5.1.1 Assessment of Wanadoo's dominant position

In its assessment of Wanadoo's dominant position the Commission, first, by a reference to the *United Brands* judgment[27], rejected the company's claim that it should not be considered as dominant because it

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[26] The European Commission's decision COMP/38.233 from 16.07.2003. The English version available at http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38233/en.pdf (hereinafter: "the Wanadoo decision"). See also the Press Release IP/03/1025, dated 16.07.2003.

[27] See Case 27/76 United Brands, cited in footnote 2, paragraph 65.

could not behave "independently of its competitors". The Commission stressed in the decision that the power to behave independently does not mean that the dominant undertaking is in a position of complete invulnerability vis-à-vis existing or potential competitors. Enjoying a dominant position does not mean that there is no competitive pressure. The dominant position simply enables the relevant undertaking "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 so long as such conduct does not operate to its detriment"[28]. The Commission found in this case that the various elements of dominance, which will be discussed hereunder, gave Wanadoo the means to engage in a large-scale market penetration strategy that was untenable for its competitors, which were unable to follow suit.[29] The Commission, in its analysis examined a combination of elements which, taken together, are such as to give Wanadoo a dominant position on the relevant market.[30]

5.1.2 Relevance of market shares

Wanadoo increased its market shares from 40-50% at the end of 2000 to 70-80% in August 2002. In accordance with established case law of the EC Courts, the decision states that "very large market shares, in excess of 50%, must be regarded as serious, and indeed sufficient, evidence of the existence of a dominant position, save in exceptional circumstances".[31] However, since the market in this case was still at a fairly immature stage at the beginning of 2001,[32] other key considerations were taken into account in addition to absolute market shares.

Wanadoo's relative position vis-à-vis its next largest competitors was examined first.[33] It was found that not only did Wanadoo have a clear lead over its largest competitor throughout the period, it also widened its lead over it to a striking extent.[34] In addition, particular attention was given, within the relevant market, to the market segment involving ADSL offerings. The cable modem offerings segment was found as less potential in terms of geographical deployment capacity than the ADSL segment. If one looks only at the segment involving ADSL internet access services for residential customers, Wanadoo's market shares were very large: consistently close to the range of 90-100% from the beginning of 2001 to the end of the summer 2002, and still in ranges 80-90% in August 2002.[35] Consequently, the market shares held by Wanadoo, in view of the above considerations, constituted strong evidence of dominance.[36]

Finally, the decision points out that the fact that a sector is a growth sector does not in itself mean that it is not covered by the competition rules, and in particular Article 82 of the EC Treaty. Analysis of the market position must take account not only of market shares, but also of the specifics of a dynamic market.

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28 See Case 85/76 Hoffmann-La Roche, cited in footnote 2, paragraph 39.

29 The Wanadoo decision, paragraph 209.

30 Idem, 210.

31 See Case 62/86 AKZO, cited in footnote 13, paragraph 60.

32 Since the mass marketing of Wanadoo's ADSL services began only in March 2001, the Commission considered that the abuse started only on that date.

33 Relative market shares and the relationship between the market shares of the undertaking concerned and of its competitors, especially those of the next largest, are held by the EC Court of Justice to be relevant factors in assessing a dominant position. See Case 85/76 Hoffmann-La Roche, cited in footnote 2, paragraph 48.

34 The Wanadoo decision, paragraph 213.

35 Idem, 214. For confidentiality reasons, the exact figure is replaced by a range.

36 Idem, 215.

However, the position of an undertaking on a growth market pending its final consolidation must be examined, otherwise this would mean ex post acceptance of any abuses committed.[37] The Commission found that in this case it could not be argued that there was any volatility, fragility or instability in Wanadoo's position on an emerging market that would invalidate an examination of market shares and their inclusion amongst the factors determining dominance.[38]

5.1.3 The link-up with France Télécom

Amongst internet service providers in France, Wanadoo occupied a special position because it formed part of the France Télécom group. That fact gave Wanadoo commercial and technical deployment facilities and potential financial support which were liable to be of crucial importance in gaining massive penetration of a developing market involving a new type of activity.[39] Wanadoo disputed that it has benefited from the support provided by France Télécom, pointing out that other providers of high-speed internet access were backed by powerful global companies. The Commission rejected this argument, pointing out that, according to the EC Court of Justice ("ECJ"), the size, financial strength and degree of diversification of competitors at world level do not necessarily deprive the dominant undertaking of its privileged position.[40] The situation therefore has to be analysed in the light of the circumstances of the specific case.

In this context, the Commission examined *first* Wanadoo's advantages derived from its *synergy within a large group*. In its stock exchange listing prospectus issued in July 2000, Wanadoo described the general advantages it would acquire from the support of the France Télécom group, such as the use of 700 France Télécom sales outlets and its strong regional representation, benefit from France Télécom's know-how in marketing to the general public and industry, and others.[41] The *second* factor considered as relevant, was *the technical support* provided by France Télécom to Wanadoo,[42] which reflected the vertical integration between Wanadoo and France Télécom, its main supplier.[43] The fact that Wanadoo was legally a separate entity distinct from France Télécom did not detract from the effects of the vertical integration of the group as a whole.[44] France Télécom's technical support gave Wanadoo an advantage to which its competitors did not have access, which was regarded as constituting a strategic entry barrier and, consequently, as a factor of dominance.[45] The *third* factor taken into account was the c*ommercial support* from France Télécom, whose network of agencies gave it a comprehensive physical presence throughout the national territory.[46] The support which Wanadoo derived from its exclusive presence in France Télécom's agencies was considered as a particularly important factor liable to underpin its dominant position, in a situation where

37 The Wanadoo decision, paragraph 217.

38 Idem, 222.

39 Idem, 223.

40 See Case 322/81 Michelin, cited in footnote 6, paragraph 59.

41 The Wanadoo decision, paragraph 229.

42 Idem, 231 – 234.

43 The ECJ has held that a vertical integration effect could be regarded as one of the factors contributing to a dominant position. See Case 27/76 United Brands, cited in footnote 2, paragraphs 70 and 71.

44 The Wanadoo decision, paragraph 235.

45 Idem, 237.

46 Idem, 238. In *Michelin*, the ECJ considered the question of commercial networks giving direct access to consumers and the possibilities of commercial synergies with other elements in the product range of a company or of the group to which it belongs as a factor contributing to the establishment of a dominant position. See Case 322/81 Michelin, cited in footnote 6, paragraphs 55, 56 and 58.

products have entered a phase of rapid growth. The cost and time required for a company to set up its own distribution network or a network involving an exclusive commercial relationship comparable to that enjoyed by Wanadoo was regarded as an obstacle to market penetration by competitors and as an important factor in Wanadoo's dominant position.[47] *Finally*, *logistical and financial supports*, such as favourable payment terms received by Wanadoo from France Télécom, were taken into account.[48]

5.1.4 Wanadoo's position on the directory publishing markets

In 2000, France Télécom brought together within Wanadoo its telephone directory publishing activities and its activities involving the sale of advertising space in business directories, which had previously been divided between its own departments and the Office d'Annonces. These activities brought in very considerable revenue and are very profitable activities of the Wanadoo group.[49] The benefits deriving from the directory publishing business were such as to reinforce the dominant position on the market for high-speed internet access, particularly during a period of cyclical downturn and the drying-up of the financial resources available for the internet sector.[50]

5.1.5 Conclusion

A dominant position may derive from a combination of several factors which, taken separately, are not necessarily determinative.[51] In this case the Commission considered that the market shares held by Wanadoo since the beginning of 2001, the multiple effects of the link-up with the France Télécom group and the position held by the Wanadoo group on the directories market were, taken together, liable to give Wanadoo a dominant position on the French market for high-speed internet access for residential customers.

5.2 Astra Zeneca case[52]

In June 2005, the European Commission adopted a decision finding that the Anglo-Swedish group AstraZeneca ("AZ") abused its dominant position by misusing the patent system and the procedures for marketing pharmaceuticals to block or delay market entry for generic competitors to its ulcer drug Losec. The Commission imposed on AZ a fine of €60 million. From 1993 to 2000 AZ infringed EC and EEA competition rules by blocking or delaying market access for generic versions of Losec and preventing parallel imports of Losec. AZ did this, *inter alia*, by:

- giving misleading information to several national patent offices in the EEA resulting in AZ gaining extended patent protection for Losec. In this specific case, the patent offices essentially relied on information supplied by AZ and they were not obliged – as in normal patent assessments – to consider whether the products were innovative.

47 The Wanadoo decision, paragraph 243.

48 Idem, 244-246.

49 Idem, 247.

50 Idem, 252.

51 See Case 27/76 United Brands, cited in footnote 2, paragraph 66.

52 The European Commission's decision COMP/37.507 from 15.06.2005. The English version available at http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37507/prov_version.pdf (hereinafter: "the AZ decision"). See also the Press Release IP/05/737, dated 15.06.2005.

- misusing rules and procedures applied by the national medicines agencies which issue market authorisations for medicines by selectively deregistering the market authorisations for Losec capsules in 3 EEA Member States with the intent of blocking or delaying entry by generic firms and parallel traders. At the time, generic products could only be marketed and parallel importers only obtain import licenses if there was an existing reference market authorisation for the original corresponding product (Losec).

5.2.1 Assessment of AZ's dominant position

At the outset of its assessment, the Commission, by reference to the *United Brands* judgment, rejected AZ's contention that its investments in R&D and product promotions are clear indicators of the lack of its dominance. The Commission stressed that dominance does not imply the absence of any competitive constraint. In particular, in dynamic markets, such as the pharmaceutical sector, where innovation plays an important role, dominance can not be limited to situations where the dominant company would simply refrain from investing in R&D. In such markets, a dominant company has to invest regularly if it wants to preserve its market position. The mere fact that a company invests in promotion and R&D does not by itself rule out dominance.

In this case too the Commission examined a combination of elements which taken together showed that AZ held a dominant market position. Due to fact that in this case there were several relevant geographic markets, the Commission assessed AZ's market position with reference to each of the market's specific factors.[53]

5.2.2 Relevance of market shares

The Commission pointed out that, according to the case law of the ECJ,[54] the market shares of the allegedly dominant undertaking in absolute terms as well as in relative terms (i.e. in comparison with the market shares of its main competitors) are a very important parameter.[55] The country by country analyses conducted in this case showed that AZ maintained at least high market shares over the entire relevant period in the countries concerned.[56]

5.2.3 AZ's technology and regulatory rights as barriers to entry and constraints on its competitors

A factor considered as a very important one in this case related to AZ's technology in the form of intellectual property and other rights delivered from pharmaceutical law. The Commission made a reference to an OECD study[57] which provided evidence to the effect that, generally speaking, intellectual property rights are relatively more important in the pharmaceutical industry than in many other sectors. According to this report, those IP rights also result in barriers to entry into the pharmaceutical sector. In particular, until the expiry of data exclusivity, applications for market authorisation need to rely on costly and lengthy preclinical and clinical trials. In addition, national market authorisation and price approval

53 Idem, from paragraph 567 on.

54 e.g. Case 62/86 AKZO, cited in footnote 13, Case 85/76 Hoffmann-La Roche, cited in footnote 2.

55 The AZ Decision, paragraph 515.

56 e.g. 80-90% in Belgium, around 75% in Denmark. See Idem, from 567 on.

57 S. Jacobzone, *Pharmaceutical Policies in OECD Countries: Reconciling Social and Industrial Goals* [Labour Market and Social Policy – Occasional Papers No. 40], DEELSA/ELSA/WD(2000)1. Available at http://www.olis.oecd.org/OLIS/2000DOC.NSF/LINKTO/DEELSA-ELSA-WD(2000)1

rules and bodies, which entail costs and often long delays, in a large number of OECD countries constitute additional barriers to entry.[58]

It was found in this case that AZ, as the pioneer inventor and holder of the key technology, has been able to act as a "gatekeeper" and to extend, legally or de facto, the period of protection of its technology, thereby strengthening or at least maintaining its position on the market. AZ has put pressure on its research based competitors through patent litigation in several countries. Moreover, it was able to determine the conditions of competitors' access to the market if a settlement has been reached in a legal dispute. It was able, through its patents, to put pressure on and raise the costs of its smaller competitors.[59] AZ also enjoyed so-called data exclusivity, a form of regulatory protection that during its term prevents the issuing of market authorisations in respect of generic products. By deregistering or varying its marketing authorizations AZ was able to hinder or attempt to hinder generic authorisations of its competitors.[60]

The existing parallel trade in Losec was considered not to have detracted from the relative strength of the position of AZ's technology on the market in the import countries, since parallel traders sold, in fact, repackaged and/or relabelled AZ's product.[61]

5.2.4 Advantages related to incumbency

Beyond the rights related to its pioneer technology, AZ enjoyed significant competitive advantages as incumbent on the market. According to the OECD study,[62] the experience of the market and domestic status constitute very significant advantages. The Commission also found that an often strong component of inertia in doctors' prescribing behaviour, as well as brand loyalty, confers an additional advantage on the first mover into a relevant market. Several documents found at AZ's premises (e.g. a company strategy document) confirmed that the strength and reputation of the Losec trademark and image, as well as Losec's first-mover advantage, were considered as competitive strengths by the company itself.[63]

5.2.5 Relevance of price as a competition parameter in the pharmaceutical sector

The fact that AZ has been able to maintain higher prices than its competitors was considered as an evidence of its market power. First, the higher prices reflected greater (compared to AZ's competitors) bargaining power vis-à-vis the national authorities to extract higher prices for AZ's products, and thus greater market power. Second, to the extent that the price differences between AZ's products and those of its competitors resulted from AZ's ability to charge a price premium above the reimbursement level for the products, it also reflected AZ's relatively greater competitive strength on the market. AZ accepted that it is common in pharmaceutical markets for the first entrant in a specific category to maintain a "price premium" over later entrants. Thus, such a pricing power is further advantage related to incumbency in the pharmaceutical sector.[64]

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58 The AZ Decision, paragraph 518.

59 Idem, 520 – 523.

60 Idem, 527.

61 Idem, 529.

62 See footnote 61.

63 The AZ Decision, paragraph 542.

64 Idem, 544 – 548.

5.2.6 Relevance of monopsony buyers and price regulation in the pharmaceutical prescription markets

The Commission rejected AZ's argument that the presence of monopsony buyers and price regulation in pharmaceutical markets deprive pharmaceutical companies of the ability to either determine their prices or exercise market power in respect of price. In fact, the influence on pricing exercised by the health systems confers more power on pharmaceutical companies compared to a situation where the final consumer would bear the full cost of the medicines. This is due to the very inelastic demand which existed at the time of the assessment within the EEA pharmaceutical markets. The inelasticity of demand mainly derived from two factors. First, the consumer was fully or to a large extent insured against the costs of his/her medicines by the health system. Second, the key decision-maker in most cases – the prescribing doctor – did not bear the cost for the medicines.[65] Beyond that, a national health system could negotiate a price for a medicine, but it couldn't normally determine the quantity of the medicine that will be bought, as the decision was mainly taken by a third party (normally the prescribing doctors and, to a limited extent, the final consumer).[66] In any event, the fact that a dominant undertaking may make more limited use of price as a parameter of competition does not mean that it may not behave to some extent independently of its competitors.[67]

5.2.7 Relevance of R&D, promotion, financial strength and resources

The Commission rejected AZ's argument that dominance in pharmaceutical markets can be reflected in reduced R&D efforts. The maintenance of dominance is necessary linked to the development of new generations of medicines (or improved versions of existing medicines) which enable the dominant company to maintain its lead.[68]

The fact that AZ had to invest in promotion activities relative to its sales less than later entrants to the market, was held as further evidence of AZ's dominance in this case, as well as of the advantages linked to incumbency in the pharmaceutical sector.[69]

The pharmaceutical industry is characterised by very high R&D and marketing costs, which constitute further barriers to entry. Therefore, it was relevant to the assessment of AZ's dominance to compare AZ's financial strength, resources and specialisation in the pharmaceutical sector with those of its two main research competitors. The comparison revealed AZ's superiority on the relevant market in terms of a number of parameters, such as the annual turnover, total assets, after tax earnings, R&D and marketing resources.[70]

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65 Idem, 553 – 554.

66 Idem, 558.

67 Idem, 561.

68 Idem, 562.

69 Idem, 563.

70 Idem, 565 – 566.

CHINESE TAIPEI

1. Background

Article 5 and Article 5-1 of the Fair Trade Act of Chinese Taipei (hereinafter "the Law") define the meaning of monopolistic enterprises, and no monopolistic enterprises shall abuse their market power as described in Article 10 of the Law. The Fair Trade Commission of Chinese Taipei (hereinafter "the Commission") proves that the enterprises are in a monopolistic position by measuring the market share and market scale, and by providing evidence that entry barriers exist in the relevant market so as to enable such enterprises to exclude the competition.

Before the Law was amended for the first time in 1999, in order to help the monopolistic enterprises understand their market positions in the relevant market, the Commission would periodically announce to the public the names of such enterprises and prevent them from violating the provisions of Article 10 with criminal punishment. The Commission announced the names of 40 enterprises that were in a monopolistic position in 34 different relevant markets in 1993. From this announcement until the Law was first amended in 1999, none of the dominant enterprises so previously announced was deemed to have violated the Law.

Due to the market changing all the time and the fact that the original roster of monopolistic enterprises based on statistical data obtained in 1993 might not reflect the real market position of the present dominant firms, the Commission was no longer required to compile and publish a roster of the monopolistic enterprises for the general public as a result of the 1999 amendments to the Law.

The market share thresholds defining a monopolistic enterprise were included in the statute instead of the enforcement rules in the 2002 amendments, because the Administrative Procedure Act required that legally-binding standards be included in the statutes rather than the enforcement rules. In general, to conclude, for a firm that possesses monopoly power, the relevant market scope shall be initially defined so as to be based on the market share or an evaluation of the entry barriers to the market, and then the conduct of such a monopolistic enterprise will be reviewed.

2. What is monopoly power/dominance?

The term "market power" is used according to Article 10 of the Law to prohibit monopolistic enterprises from abusing dominance by means of the following acts:

- directly or indirectly preventing any other enterprises from competing by unfair means;
- improperly setting, maintaining or changing the prices of goods or the remuneration for services;
- making a trading counterpart give preferential treatment without justification; or
- otherwise abusing its market power.

Before applying Article 10 of the Law to the monopolistic enterprise, the market position of such enterprise shall be take into consideration the basis of Article 5 and Article 5-1 of the Law, and Article 3 of the Enforcement Rules to the Law. The contents of the said articles are as follows:

- Article 5 of the Law

  The term "monopolistic enterprise" as used in this Law means any enterprise that faces no competition or has a dominant position to enable it to exclude competition in a relevant market.

  Two or more enterprises shall be deemed monopolistic enterprises if they do not in fact engage in price competition with each other and they as a whole have the same status as the enterprise defined in the provisions of the preceding paragraph.

  The term "relevant market" as used in the first paragraph means a geographic area or a coverage wherein enterprises compete in respect of particular goods or services.

- Article 5-1 of the Law

  An enterprise shall not be deemed a monopolistic enterprise as defined in the preceding article if none of the following circumstances exists:

  1. *the market share of the enterprise in a relevant market reaches one-half of the market;*

  2. *the combined market share of two enterprises in a relevant market reaches two-thirds of the market; and*

  3. *the combined market share of three enterprises in a relevant market reaches three-fourths of the market.*

  Under any of the circumstances set forth in the preceding paragraph, where the market share of any individual enterprise does not reach one-tenth of the relevant market or where its total sales in the preceding fiscal year are less than one billion New Taiwan Dollars, such enterprise shall not be deemed to be a monopolistic enterprise.

  An enterprise exempted from being deemed to be a monopolistic enterprise by either of the preceding two paragraphs may still be deemed to be monopolistic enterprise by the Central Competent Authority if the establishment of such enterprise or any of the goods or services supplied by such enterprise to a relevant market is subject to legal or technological restraints, or there exists any other circumstance under which the supply and demand of the market are affected and the ability of others to compete is impeded.

- Article 3 of the Enforcement Rules to the Law

  1. *the market share of the enterprise in a particular market;*

  2. *the possibility of substitution of the goods or services amidst changes in a particular market, giving regard to considerations of time and place;*

  3. *the ability of the enterprise to influence prices in a particular market;*

  4. *whether formidable difficulties exist to entry to a particular market by other enterprises;*

5. import and export status of the goods or services.

In light of Article 5-1 of the Law, the market share criteria are in the form of negative presumptions. An enterprise is not considered to be a monopolistic enterprise if its market share is below 50%, the top two firms together have a share below 67%, and the top three firms have a share below 75%. A firm with a share under 10% or annual sales of such firm's relevant market below 1 billion New Taiwan Dollars (NTD) shall not be considered to be a monopolistic enterprise.

In addition to the negative presumption rules above, an enterprise may still be deemed to be a monopolistic enterprise if the establishment of such enterprise or any of the goods or services supplied by such enterprise to a relevant market are subject to legal or technological restraints, or there exists any other circumstance under which the supply and demand in the market are affected and the ability of others to compete is impeded. In practice, in most abuse of dominance cases, the evidence needed to prove that the enterprises have dominant positions is that entry barriers such as legal or technological restraints in the relevant market exist rather than there being the need to make the decision based on the measurement of market shares.

3. Evidence used to prove market power in monopolization/abuse of dominance cases

Market share is one of the measures of monopoly contained within the Law. The market share of a certain enterprise is the value of its sales over the total sales value of the relevant market. In order to assess the different indexes of the market effectively, the market data collected by the Office of Statistics of the Commission has applied the Standard Industrial Classification System (S.I.C.) and the Harmonized Commodity Description and Coding System (H.S.) to develop a system referred to as the Industry Databank in order to categorize the output of the business. The Industry Databank of the Commission gathers production, sales, inventory, export and import data surveyed from manufacturing and service businesses on an annual basis so as to provide a resource to determine an enterprise's market share. Article 4 of the Enforcement Rules to the Law regulates the factors used in calculating the market share:

- Article 4 of the Enforcement Rules to the Law

  Production, sales, inventory, and import/export value (volume) data for the enterprise and the particular market shall be taken into account when calculating the market share of an enterprise.

  Data necessary for the calculation of the market share may be based on that obtained upon investigation by the central competent authority or that recorded by other government agencies.

In addition to the market share, the annual sales value of the relevant market is also a negative presumption to be considered. An enterprise should not to be considered to be a monopolistic enterprise when the annual sales value of its relevant market less than NT$ 1 billion. The annual sales value here is the sum of the sales of individual businesses in the relevant market.

A positive presumption rule is applied to test the market position of a firm when the market is characterized by entry barriers according to Article 5-1 of the Law. Legal or technological restraints, or any other circumstance under which the supply and demand in the market are affected and the ability of others to compete is impeded, shall be deemed to be barriers affecting the ability of potential competitors to enter the market and the incumbent firms in such market will be deemed to have monopolistic power.

4. Case examples

4.1 Case I

The Commission's decision regarding CD-R patents licensing will be illustrated as a case to determine enterprises with dominant positions. This case originated with several CD-R manufacturers filing a complaint to the Commission in 1999, alleging that three major CD-R patent owners pooled their CD-R patents in a package and jointly licensed the patent pool to domestic CD-R producers. The licensors' behavior above enabled them to monopolize the CD-R technology market and involved a breach of the Law.

After almost 4 years of investigation, the Commission found that the licensors had abused their joint monopolistic position, as a result of including non-essential, invalid and substitute patents in their license, improper maintenance of the royalty rate, and failure to provide information related to the patents, which together constituted a concerted action and the abuse of dominance. In August 2005, the High Administrative Court reversed the Commission's decision, finding that the pool was not a horizontal agreement because its members' technology contributions did not compete with each other. The Commission appealed further.

Just like other abuse of dominance cases, the Commission defined the market position of the CD-R patent licensors by taking the following steps: 1. determine the market scope; 2. measure the market share; 3. evaluate the entry barriers; and 4. identify the ability to exclude the competition.

4.2 Determine the market scope

The market scope of this case focused on the technology market related to CD-R manufacture rather than the CD-R and its substitute goods market. A CD-R is a blank optical disk with the unique characteristic that it can be written once only by the CD-R drive and is commonly used in the storage of data for medical, financial, criminal and musical records. In view of the present manufacture of CD-R technology and the use of the CD-R, other possible substitute technologies related to the manufacture of hard disks, floppy disks, optical disks such as the CD-RW and DVD-R, magnetic disks and other alternative storage media are ignored in determining the scope of the market, and the focus is only on the CD-R.

The dispute involving the licensors in relation to the monopoly position was that the CD-R technology market should consist of the technology needed to produce the CD-R and other relevant substitute storage media. The argument arose from the standard specification to manufacture the CD-R that was formulated by the licensors and known as the CD-R "Orange Book". This standard specification is the only existing standard related to the manufacture of the CD-R in the present market. Thus, once the market scope is defined as the technology market related to the manufacture of the CD-R, the licensors will undoubtedly be deemed to be monopolistic enterprises in this regard.

This case shows the challenges faced by a young agency like the Commission to determine the market scope in an abuse of dominance case. However, when the substitution effect in relation to the technology market was considered, and that firms with a dominant position were not necessarily abusing their position, the Commission decided that the scope of the market in this case encompassed the technology market related to the manufacture of the CD-R.

4.3 Measure the market share

The measurement of market share constitutes one of the sufficient forms of evidence to prove whether licensors have dominant positions in the technology market that are related to the manufacture of the CD-

R. However, in this case, the Commission does not calculate the market share of the licensors in the relevant technology market because the total value of the 109 patents in the list of patents included in the joint licensing contract could hardly be measured on a monetary basis as in the case of most intangible intellectual properties.

The other issue related to market shares raised by the High Administrative Court concerns the Commission announcing the names of the licensors holding monopolistic positions before reviewing their conduct in relation to the effectiveness of the contract. Since the contract had lasted until the 1999 amendments to the Law and the Commission no longer has any responsibility to announce the names of monopolistic enterprises following the 1999 amendments, the Commission now determines the licensors' market position by evaluating the market entry barriers.

4.4 Evaluate the entry barriers

According to Article 5-1 of the Law, legal or technological restraints could be considered to be entry barriers to the relevant market, and the enterprises in such a market may still be deemed to be monopolistic enterprises.

The Commission found that when the CD-R manufacturing technologies began to be developed, the licensors competed against each other and conducted research individually for their own benefit. Each individual patent owner had the ability to develop substitutes for the existing CD-R standard specifications. When the demand for the CD-R grew, the licensors formulated standard specification by granting the assigned licensor an exclusive and sub-licensable license including all of the relevant patents for manufacturing the CD-R to enable the assigned licensor to grant a license to all CD-R producers. The formulation of the standard specifications has resulted in narrowing down the space for other competitors to develop other specifications. Although other firms may still freely develop other specifications for producing the CD-R or provide competitive products replacing the CD-R, however, at present, that all global CD-R manufacturers follow the unified standard specification prepared by the licensors is an undeniable fact. Thus, due to there being insufficient substitution of CD-R technology, the licensors are in a monopolistic position in the CD-R technology market .

4.5 Identify the ability to exclude the competition

To prove that the joint licensing arrangements exclude competition, the Commission has submitted some of the controversial patents to the technology research institutes for comments. It was found that 28 of the patents were characterized by mutual substitution effects, or were possibly not involved in the manufacture of the CD-R. Under such circumstances, the licensees may look for substitute patents at the same level of the royalties and turn the pool into a price-fixing mechanism. The research results also reflect the finding that the joint licensing arrangements include non-essential patents that may discourage the licensors from engaging in ongoing research related to the standard specification.

4.6 Influence of Case I

As technology has advanced, intellectual property rights licensing has become the subject of many transactions in the business world. The licensing of intellectual properties allows licensors to gain economic benefits, while licensees can acquire the use of the technology to develop new goods markets. Thus the thorough utilization of technology brought about through the licensing of patented technology or specialized know-how serves to enhance competition. However, as a means to gaining greater profits or enhancing market position, limitations clauses are often added to licensing arrangements in order to give the licensor further influence over the market or to prevent competition between the parties to the arrangement. The inappropriate use of such limitations clauses may lead to monopolization of the licensed

technology, or further, lead to restraints on competition or to unfair competition in a manner inconsistent with the Law.

In order to consolidate the application of the provisions of the Law, the Commission referred to the experiences of the previous case and passed the Guidelines on Technology Licensing Arrangements in 2001 to clarify the criteria for the enforcement of the Law. The Guideline determines the steps for reviewing cases related technology licensing arrangements and the consideration factors for analyzing the relevant markets.

4.7 Case II

This case is related to a market with a network effect, which resulted in the users lacking the interest to alter the original network suppliers and became a barrier for new entrants. The Ministry of Finance established the Cargo Clearance Automation Division in 1990 to put the Electronic Data Interchange (EDI) standard in place to facilitate the cargo clearance procedures. The Division was reformed into a company that became known as Tradevan Information Services, Co. ("Tradevan") in 1996 and it subsequently monopolized the cargo clearance information transmission network market. Without any legal restraints in the form of barriers to entering the market, the profits of the incumbent firm attracted a new entrant Universal EC Inc ("Universal") into the market as a horizontal competitor. However, Tradevan rejected Universal's request to access Tradevan's network. The Commission was of the opinion that the ways in which Tradevan was deterring the new entrant to the market constituted an abuse of dominance and were in violation of the regulations contained within the Law.

The services provided by the cargo clearance information transmission network have to be simultaneously accessed by customs officials, customs brokers, cargo transportation enterprises, and financial institutions so as to achieve the network effects. Thus, the users of the cargo clearance information transmission network have a tendency to participate in the network on a larger scale and with numerous customers. The incumbent firms in the market due to the network effect have, relatively speaking, the first-mover advantage compared to the new entrants. The network effect results in the users lacking the interest to alter the original network suppliers and this becomes a barrier for new entrants in this case. Thus Tradevan was deemed to be a monopolistic enterprise in the cargo clearance information transmission network market.

LITHUANIA

1. What is Monopoly Power/Dominance?

The concept of dominance is defined in the Law on Competition of the Republic of Lithuania[1] and thoroughly explained in the Explanations of the Competition Council Concerning Definition of the Dominant Position (further referred as the Explanations)[2]. According to the Law on Competition a dominant position means the position of one or more undertakings in the relevant market directly facing no competition or enabling it to make unilateral decisive influence in such relevant market by effectively restricting competition. Unless proved otherwise, the undertaking with the market share of not less than 40% shall be considered to have a dominant position in the relevant market. Unless proved otherwise, each of a group of three or a smaller number of undertakings with the largest shares of the relevant market, jointly holding 70% or more of the relevant market shall be considered to enjoy a dominant position.

The aforementioned Explanations clarify that

> *[t]he unilateral decisive influence is understood as an ability of the undertaking to operate in the relevant market sufficiently independently from competitors, suppliers or buyers and eventually from consumers by exercising an influence upon the product prices, market entry possibilities or other operating terms whereby competition in the market is significantly restricted.*

Although the concept of unilateral decisive influence is used in the Explanations instead of market power, the meaning of the former is essentially equivalent to the latter.

The definition of dominance provided by the Law on Competition contains a threshold of 40% market share as a sufficient condition to presume that a business entity is dominant. However, in the Explanations the Competition Council has acknowledged that "the market share … is not the only and indisputable criterion demonstrating the dominance of the undertaking." The Competition Council has also promised to assess other factors potentially impeding the undertaking from operating in the market sufficiently independently from competitors, suppliers or buyers even when the market share of the undertaking concerned is relatively large, or would enable an undertaking enjoying a relatively small market share to exercise a unilateral decisive influence. Such factors shall include shares in the market held by other competitors, distribution and stability of market shares, possibilities for the increase of market shares of the competitors, or barriers to market entry impeding potential competition.

The emphasis on stability of market shares and possibilities of expansion and/or barriers to entry suggests that the successful rebuttal of the presumption of dominance should prove that alleged dominance is not durable. On the other hand, the Competition Council could be able to prove dominance even when a business entity does not have 40% market share by demonstrating that its competitors are much smaller and face significant barriers to expansion and/or entry.

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1 Article 3(1)(1) Law on Competition, 23 March 1999, No VIII-1099, Vilnius. (As amended by 15 April 2004 No. IX-2126.)

2 Resolution No.52 of the Competition Council, 17 May 2000. (Official Gazette, 2000, No. 24-363.)

Nevertheless, this still remains a theoretical possibility because in most of the cases in which the Competition Council has found abuse dominance, the market shares of dominant firms were significantly higher than 40%.

2. Evidence Used to Prove Market Power in Abuse of Dominance/Monopolization Cases

According to the Explanations evidence used to prove a position of dominance can be grouped into three categories: market shares, barriers to entry and/or expansion, and other factors.

First of all, the Competition Council treats the distribution of market shares among competitors as an important indicator of the existing competition intensity. According to the Explanations an undertaking may not be dominant even with a market share in excess of 40% provided there are one or more undertakings in the market holding a relatively large market share and capable of effectively constraining the undertaking's ability to exercise a unilateral decisive influence. Another important factor is the stability of market shares. When market transactions are large-scale, long-term, and irregular, the Competition Council may choose to analyze changes in market shares for a period of 4-5 years. In a lot of other markets it should be enough to analyse a relatively shorter period of time.

In order to assess probable changes in market structure the Competition Council tries to assess barriers to entry and/or expansion. The possibility of existing rivals to increase their market share depends on the availability of excess capacities, whether existing capacities could be expanded without delay, or capacities used to produce other products could be redeployed. The Competition Council views the barriers to entry as belonging to the three broad categories: absolute advantages, strategic advantages, and exclusionary behaviour.

The first category encompasses factors that allow incumbents to enjoy privileged position created by the government regulation that restricts access to the market, e.g. licensing rules. On the other hand, an incumbent might derive an absolute cost advantage from owning an essential facility or important patents that allow an exclusive use of crucial technology.

The second category includes factors that make entry strategy riskier. In this case sunk costs play a prominent role. The presence of substantial sunk costs makes the Competition Council think that the potential entrant will face a significant risk when deciding whether to enter and therefore the entry might be unlikely. The asymmetry of information concerning production costs might play a similar role.

The first two categories consist of factors that might be taken as given by an incumbent, however the last category relates to incumbent's behaviour. One of the ways by to exclude other competitors is by using vertical restrains. An incumbent might be able to prevent the entry by foreclosing access to related markets. This could take a form of vertical restraints on distribution channels or vertical integration upstream.

When assessing whether the entry into the market is efficient all available and relevant evidence should be used. The Competition Council often asks the undertakings operating in the market and potential entrants to express their views concerning duration and costs of capacity expansion and/or new entry.

The facts related to a new entry or expansion of existing capacity are crucially important in the assessment of barriers to entry and/or expansion. The Competition Council seeks to find out about entry attempts that have taken place recently (successful or not) and documented plans to enter the market and/or expand existing capacity in the future.

On the other hand, the absence of entrants does not necessarily mean that the entry is difficult. It may be the case that the market is highly competitive and therefore there is no excess profit to attract entrants.

Profit and loss statements and analysis of financial standing of incumbents can provide evidence on incentives to enter or expand.

The last important factor mentioned in the Explanations is the existence of a strong buyer who is likely to constrain the ability of a seller to exercise a unilateral decisive influence. For example, large-scale multi-product retail chains often significantly constrain the ability a supplier to exercise market power, are also well informed about the alternative supply sources, and may often immediately substitute supply source at low cost.

3. Case Examples

All available evidence has to be assessed very thoroughly in order to avoid misdiagnosing market power. Certain practices can be found abusive when exercised by a dominant firm and harmless when exercised by firms lacking market power. On the other hand, misdiagnosing possible creation or strengthening of a dominant position could result in preventing efficiency enhancing mergers from taking place.

In 2004 the Competition Council received the notification concerning the intended merger of AB Alita and AB Anykščių vynas[3]. Both of them were national producers of strong alcoholic beverages and wines. The Competition Council identified that the sum of pre-merger market shares significantly exceeded 40% in several product categories, i.e. fortified wine segment and brandy. The Competition Council also received complaints from the merging firms' competitors, claiming that the merged company would be able to bundle the expanded range of its products thereby creating barriers to entry and/or expansion for other undertakings. Nevertheless, these circumstances were not enough for the Competition Council to find creation of a dominant position. When clearing the merger, the Competition Council chose to rebut presumption of dominance by taking into account the combination of the recent abolishment of the state monopoly on production of strong alcoholic beverages, the liberalization of trade following the EU accession and the countervailing buyer power exercised by the large retail chains. All these factors were supposed to constrain the ability of the merged entity to behave independently and to significantly impede competition in the market. The events that followed confirmed the judgement of the Competition Council. During the next year the general level of prices of strong alcoholic beverages significantly decreased (especially in the premium quality segment), the market share of the merged company also decreased while the total production of strong alcoholic beverages in Lithuania increased by 15%.

In 2002 the Competition Council began the investigation of the alleged tying practices exercised by the bank AB Lietuvos žemės ūkio bankas after receiving the complaint. The investigated bank used to issue loans for activities in the sectors of agriculture, hunting and forestry under condition that borrower also acquired insurance policy from the subsidiary of the aforementioned bank. Although the market share of the investigated bank in the relevant market of the loans for activities in agriculture, hunting and forestry exceeded 40%, there was a significant fluctuation of market shares in the past. Three years ago the investigated bank had only approximately 30% market share. The Competition Council conducted a survey of competing banks in order to find out their views on barriers to entry and/or expansion. All responses

[3] Resolution No. 1S-80 of the Competition Council of the Republic of Lithuania on issuing permission for AB Alita to implement a concentration by acquiring a share package of 100 percent in AB Anykščių vynas, 27 May 2004.

indicated the growing demand for loans and the absence of significant barriers to entry into the relevant market. As a result, the Competition Council didn't find dominance and terminated investigation.[4]

In 2005 the Competition Council adopted the decision concerning the abuse of a dominant position by the local oil refinery AB Mažeikių nafta.[5] This was the first application of EC competition rules in Lithuania that resulted in the highest fine ever imposed by the Competition Council (LTL 32 million – approximately EUR 9.27 million). The Competition Council established that the two relevant markets of the ex-refinery sales of diesel and the ex-refinery sales of petrol included only the territories of Lithuania, Latvia and Estonia. The high barriers to entry resulting from the lack of adequate storage facilities for imported products reinforced the strong position of the local oil refinery. AB Mažeikių nafta was found guilty of infringing both Article 82 of the EC Treaty and Article 9 of the Law on Competition. Although most of the charges were related to the discrimination of customers, the dominant oil refinery was also accused of forcing its largest customers (three regional retailers of oil products with refineries abroad) into signing annual contracts with a minimum purchase obligation in exchange for the economically unjustified price reductions equivalent to loyalty-inducing target rebates.

AB Mažeikių nafta argued that the definition of the geographic market was too narrow and as a result the company was assigned a larger market share than it actually had. Furthermore, according to the oil refinery the barriers to entry and/or expansion were not significant because there was no lack of adequate storage facilities. If the company had not been declared dominant, it would have only engaged in the legitimate import parity pricing which is an accepted industry practice. According to the AB Mažeikių nafta, the company only reacted to the competitive pressure of the alternative sources of supply. Presently the case is appealed and it is for the courts to decide which party is right.

4 Resolution of the Competition Council on the termination of the investigation of compliance of actions of AB Lietuvos žemės ūkio bankas and UAB Lietuvos žemės ūkio banko draudimas with Articles 5 and 9 of the Law on Competition, 3 April 2003.

5 Resolution of the Competition Council on compliance of actions of AB Mažeikių nafta with Articles 5 and 9 of the Law on Competition and Article 82 of EC Treaty, 22 December 2005.

ROMANIA

1. Introduction

The principal instruments of the Romanian Competition Law against anticompetitive behaviour in the markets are the provisions of the Articles 5 and 6 of the Competition Law which were conceived following the model of Art.81 and 82 of the European Community Treaty. These two articles deal with the prohibition of anticompetitive practices and other actions that may give rise to problems and may be subject to scrutiny by the competition authority.

Art.6 of the Romanian Competition Law provides for the prohibition of certain unilateral conducts that jeopardize competition on the market of goods and services. This article stipulates that: "Any abuse of a dominant position held by one or more undertakings on the Romanian market or on a substantial part of it, by resorting to anticompetitive practices, which have as object or may have as effect the distortion of the economic activity or the prejudice of consumers, is prohibited."

The tests applied under Art.6 of Romanian Competition Law (which is similar to Art.82 of EC Treaty) consist in two elements: if an undertaking is dominant on a relevant market, respective on the Romanian market or on a substantial part of it, and, if so, whether it abuses of that dominant position or not. The prohibition under Art.6 has as subject the abuse of a dominant position and not the position itself.

According to the Romanian legislation, the term "substantial part" of the Romanian market refers to the part of the Romanian territory which represents the relevant market affected by the incumbent's behaviour, who abuses of its dominant position, with considerable consequences for the Romanian economy.

2. Definition

The definition of dominant position, used by both the Romanian Competition Council and the Romanian courts, is the position that allows an undertaking, to a significant extent, to behave independently of its competitors and its customers on that market. The definition includes potential competitors too.

According to this definition, the presence on the market of an undertaking holding what is called "market power", is required. An undertaking with market power has the possibility of limiting output and raising prices above the competitive level, clearly causing impairment to consumers. The ability of the firm to reduce output or to raise prices derives from its independence of its competitors and its consumers.

Competition Council qualifies an undertaking's behaviour as an abuse only after a detailed examination of the market concerned. Consequently, the relevant market provides a framework for analyzing whether the incumbent holds a dominant position and, therefore, whether its conduct may be abusive. The objective of defining the market is to identify all actual competitors of the undertaking concerned that are capable of constraining its behaviour.

In determining the relevant product market, the usual approach used by the Competition Council is the substitutability test, view that the SSNIP test may be subject to the fallacy of defining the market too widely. Hence, the identification of the relevant product market requires an analysis establishing those products belonging to that market, taking into consideration significant factors, such as: substitutability, prices, product demand elasticity depending on the prices of other products, etc.

Dominance cannot be proved by taking into account only a certain moment in time. In order to demonstrate an undertaking's dominant position, the analysis must be made for a sufficiently long enough time period because it is already known that an undertaking must hold a high market share for some time before it is deemed as dominant, otherwise the existence of dominance can be contested.

3. Evidence used to prove market power in monopolization/abuse of dominant position cases

3.1 Types of evidence used in Romanian jurisdiction

On a given relevant market, a dominant company can be identified through the degree of its exposure at competitive constraints. Thus, a large market share, the overall size and strength of the incumbent, distribution networks, small competition, barriers to the entry or to expansion, can be indications of lack of constraints.

This detailed analysis should give a useful insight for the future evolution of the market and implicitly for the future position of the so-called dominant undertaking. A cautious approach will be required for particular circumstances such as a network activity or a recently liberalized industry.

However, the determination of the dominance is a complex process during which the Competition Council takes into account all the factors characterizing the given market, in order to assess their conjoint effect.

3.2 Market structure

In general, the starting point in assessing market power is the market share held by the undertaking on the relevant market. Even if, according to the European and Romanian practice, the market share by itself does not determine if an undertaking possesses market power, this represents a very important point in investigating a case of dominance.

Obviously, the larger the market share is, the more likely is the finding of dominance. However, other factors that could indicate dominance, such as barriers to entry, must be taken into consideration. It is important to stress that Romanian legislation does not provide for a specific level of market share that indicates a company's dominance.

According to the practice, dominance can be taken to exist when a firm has a market share of at least 40-45%. However, the strength of any indication based on market share depends on the fact of each individual case. For example, in one of our cases, a very large market share (95% of the market) led to the conclusion that the firm has a dominant position, without additional analysis.

Thus, it is also necessary to consider the position of other undertakings operating in the same market and the historical evolution of the market shares. An undertaking is more likely to be dominant if its competitors enjoy relatively weak positions or if it has enjoyed a high and relatively stable market share.

3.3 Additional evidence to prove monopoly power

In addition or alternatively to high market shares, in our practice we analyze barriers to entry on a market as a determinative test of dominance and the market position of buyers. Other factors indicative of a market power are: relations of the market leader with competitors, suppliers and customers, time scale over which the leading position has been enjoyed, the possession of material technology.

Entry barriers are factors that block the new entry on a market by rendering it unprofitable. They allow the dominant incumbent to earn exceptional profits (monopoly profits), leading to a less contestable market.

The assessment of the entry barriers must take into careful consideration the specificity of the market analyzed; thus, the new economy is characterized by limiting factors (high fixed cost, network externalities, considerable investments R&D) and the entry is technologically constrained, but theory has shown that these factors act in a pro-competitive way.

Last entries or the possibility of the undertakings already present on the market to expand or adapt the technology are valuable indicators for assessing the existence of barriers to entry or expansion. An undertaking already on the market needs a certain period of time to adjust its capacity. In order not to be considered a barrier, it has to do that in an appropriate period of time, which depends on the characteristics of the market.

Finally, one can assert that the effect of entry barriers is a cumulative one. So, in conducting its insight of the market, the Competition Council will always assess the joint effect of the barriers found, taking account of the particular market they act on.

Usually, in order to refute the findings of the Competition Council, the defendants may use other definition of the relevant market than the one given by the competition authority. They may try to demonstrate that the relevant market is defined too narrow, having as consequence the large market share.

4. Costs of misdiagnosing monopoly power

It is important to stress out that Romanian Competition Council is very careful in assessing market power. The costs of misdiagnosing monopoly power or the cost of a false conclusion that a firm has monopoly power could be the distortion of the economic activity of the company in question.

Whenever an investigation was started due to a distortion of the competitive environment, but did not reveal a dominant position, a new approach of the case must be considered. Such change of direction obviously generates a loss of both time and resources, as well as an extended restriction of competition, leading to disadvantages for users or consumers.

4.1 Measures against the misdiagnosis

We interpret market share in the light of the concrete market structure. The dominance is analyzed only in relation with a relevant market. An examination limited only to the objective characteristics of the relevant products is not sufficient; the competitive conditions and the structure of supply and demand on the market must also be taken into account. Finally, the concrete economic effect on the consumers must be cautiously monitored, together with the real degree of competitive pressure.

Nonetheless, a more efficient merger control may trigger a better maintenance of the competitive market structures, knowing that competitive markets are more beneficial than the oligopoly ones.

In this respect, Romanian Competition Law provides for the possibility to eliminate the risk of a future abuse of dominance by ensuring that the merger would not lead to the creation or strengthening of a position of economic power, which may impede competition on the market.

5. Case example

One of the cases instrumented by the Romanian Competition Council, where the need to prove the existence of a dominant position was a critical element, is the case of a Group that abused of its dominant position on a certain Romanian market, by unjustifiably increasing the prices of the products sold in Romania with almost 50%. The case is still pending and therefore reason why the names of the companies involved and the relevant markets will not be specified.

The Competition Authority opened an ex-officio investigation and the immediate effect of its intervention was that prices of the products sold on the Romanian market decreased, with positive consequences on the downstream market.

At the moment of opening the investigation, the Group had a significant position on the defined relevant markets:

- producing and selling product 1;
- producing and selling product 2.

In Romania, the Group is controlling two companies, Y and Z.

- The company Y is a Romanian producer and seller of products 1 and 2.
- The company Z is an importer and distributor on the Romanian territory of similar products to the ones fabricated by company Y. These similar products are fabricated abroad by member companies of the Group.

By adding the market shares of Y and Z, companies that are active on the same markets, one can reach the conclusion that the Group holds significant market shares. These market shares are:

- 59% (40% Y + 19% Z) on market 1;
- 75% (18% Y + 57% Z) on market 2.
    - On market 1, there are 7 Romanian producers, competitors of Y and Z, holding together 41% of the market. Apart from company Z, on the Romanian market there are no other importers for product 1.
    - On market 2, there are only importers as competitors of companies Y and Z. Two of these importers hold market shares of 15% and 8%, while 2% of the market belongs to a small group of other companies.

It has to be mentioned that, in evaluating the Group's dominant position on the Romanian market, the following were also taken into consideration: the possibility of the competitors to oppose the Group's position on the market, entry barriers, especially the costs of a new investment to enter the market and also the market evolution.

In only one year since its establishment in Romania, company Y has gained an important market share, consisting in 40% on market 1 and 18% on market 2. This was due to the following:

- Y's competitors had old production technologies;
- Y's competitors were producing only product 1;
- Product 1 and 2 are complementary products, product 1 being in fact an input in obtaining product 2;
- Many customers from the downstream market had oriented towards the products fabricated by company Y, because these products suited their demands.

Until the establishment of company Y in Romania, the market of product 2 was disputed only among importers. After that, these competitors started to lose approximately 7% market share in favour of company Y, thus increasing Y's market share to 18%.

Since transportation costs are almost the same, a part of these importers could effectively compete with company Z, also an importer. The importers are situated in geographical areas close to the foreign producers whose products are imported in Romania by company Z. But, as some of the customers claimed, the quality of the products imported by company Z better suits their demands.

During the investigation, the company Y did not bring any reasonable justification for imposing increased prices to domestic consumers; that is why the Group's abuse of dominant position was sanctioned by the Competition Council.

The Decision of the Competition Council was appealed in Court. Among the reasons for which the Decision was appealed in Court, some of them were related to the dominant position of the respective Group on the Romanian market, as follows:

- The incumbent claimed that company Y does not have a significant position on the defined relevant markets, with a share market of 40% on the market 1 and 18% on the market 2.

  Since the position of company Y on market 1 was assessed in comparison with each of its competitors, the statement that company Y has a share market much lower than its competitors does not stand, as long as all competitors hold together a market share of 41% on market 1. The rest of 19% is held by company Z, member of the Group, active on the same market.

  In the meantime, the 18% market share held by company Y on the market 2 was compared to the competitors' market shares of 15%, 8% and 2%. On the same market, company Z, member of the Group, has a 57% market share.

- In the same manner, the incumbent claimed that summing the market shares of company Y and company Z in concluding the dominant position is not justified because company Z is only a distributor of similar products to those fabricated by company Y and not a producer.

A relevant market includes a product or a group of products and the geographical area where these products are made and commercialized. From this point of view, it is not relevant if company Z, the seller of the company Y's products, is also a producer, as long as the analysis had in view the unjustified increases of sale prices and not the respective production markets.

As companies Y and Z are selling the same products, the sum of their market shares resulted according to their sales on the Romanian market, was naturally taken into consideration in establishing the market position of the Group.

RUSSIAN FEDERATION

Article 4 Of the Law of the Russian Federation adopted on March 22, 1991 № 948-1 "On Competition and Limitations on Monopolistic Activities on Consumer Market" (further referred to as the Law on Competition) defined the terms used by antimonopoly bodies and courts when considering cases of the violation of antimonopoly legislation.

In cases of the abuse by economic subjects of the dominating position the following terms would be in use:

- consumer market – the sphere of the circulation of the consumer goods having no substitute or interchangeable goods on the territory of the Russian Federation or its part; it is determined by the economic possibility for the consumer to acquire the commodity on the given territory and lacking such a possibility beyond this territory;

- economic subjects – commercial organizations (Russian and foreign), non-commercial organizations with the exclusion of those not engaged in entrepreneurial activities, including agricultural consumer cooperatives as well as individual entrepreneurs;

- commodity – products of the activity (including services) intended for trade, exchange or other type of circulation;

- interchangeable goods – the group of commodities, that could be comparable in their function, usage, qualitative and technical characteristics, price and other parameters so that a consumer would be able to substitute or be ready to substitute one for another in the process of consumption and/or production;

- dominating position – exclusive position of an economic subject or several economic subjects on the commodity market having no substitute or interchangeable goods, further referred to as particular goods, providing a possibility to exercise decisive influence on the general conditions of the commodity circulation on the particular market or to obstruct the access to the market to other economic subjects. The position of the economic subject would be characterized as dominating if its share in the market of a particular commodity would comprise 65% or more with the exclusion of those cases, when an economic subject could prove that even with a higher percentage its position in the market was not dominating. The position of the economic subject would be characterized as dominating if, though its share on the consumer goods market comprised less then 65%, it had been established as such by an antimonopoly body - taken the stability of the share of the economic subject in the market, the relative volume of the shares in the market belonging to the competitors, the possibility of the access to the market of new competitors as well as other criteria characterizing the commodity market. Position of an economic subject can not be characterized as dominating, if its share in the market of particular consumer goods does not exceed 35%;

- monopolistic activities – economic activities or lack of such that contradict antimonopoly legislation and could lead to the disallowance, limitation or extinction of competition;

- monopolistic high price – price of consumer goods that is established by an economic subject having dominating position on the commodity market, enabling the economic subject to compensate unwarranted costs or get income, that is considerably higher, than whatever could be received under comparable conditions or under conditions of competition;

- monopolistic low price – price of comodity, established by an economic subject having dominating position on the commodity market as a buyer in order to get additional profit and/or compensate unwarranted costs at the expense of the seller or else the price of commodity consciously established by the economic subject having dominating position on the commodity market as a seller on the level, at which the sales could lead to losses and which could result in the limitation of competition through pressing competitors out of the market.

Dominating position of the economic subject can result from exterior as well as inferior factors namely:

- state policy, including the differentiated system of taxation, subsidies and other benefits;

- merges, joining and liquidation of economic subjects;

- industrial scientific and technological strategy, including introduction of innovations;

- activities of economic subjects to disable competitors in the market through non competitive means;

- agreement among economic subjects (open or secret);

- other factors.

Determination of the share of an economic subject in the consumer goods market is carried out in compliance with the Law of the MAP of Russia № 196 of December 20, 1996 "On the Order of Conducting Analysis and Estimate of the Condition of the Competitors' Environment at the Consumer Market".

The share of an economic subject in a particular consumer goods market, exceeding 35% must not be short term or determined by seasonal factors.

However there may be cases, when economic subjects get to the dominating position by acquiring the assets of other economic subjects, operating on the same commodity market. As a result the volume of the market resources and the consumer demand remain the same, but there develops the domination of a particular economic subject.

To estimate the conditions of the competitive environment at the commodity market analytic work and calculations are conducted to determine:

- product borders of the commodity market;

- subjects of the commodity market (quantity and composition of sellers and buyers);

- geographic borders of the market;
- volume of the commodity resource of the market;
- shares of the economic subject in the market;
- quantitative indices of the structure of the commodity market;
- qualitative indices of the structure of the commodity market, assess barriers;
- market potential of the economic subject.

The chief criterion to establish the dominating position of an economic subject on a particular commodity market is the share of the market, belonging to the economic subject.

Antimonopoly bodies would consider the position of an economic subject to be dominating if its share in the particular commodity market exceeds 65% with the exception of those cases, when the economic subject can prove that its position is not dominating even though the percentage may be higher.

The position of an economic subject would not be recognized as dominating if its share in the particular commodity market does not exceed 35%.

The position of an economic subject, whose share in the particular commodity market remains within 35 – 65% limits is qualified as dominating by antimonopoly bodies, if it has been proved with due account of the additional parameters, characterizing the market and proving the possibility for the economic subject to act independently of competitors.

An economic subject presently owning the share of the market that is within this 35 – 65% limit can not be for this reason characterized as having a dominating position. The lower level of the markets share – 35% - is set by the Law on competition to serve as a filter for economic subjects that have lower shares and can not be dominating and in order to locate economic subjects with larger shares in the market that can become objects of further attention and analysis.

Estimating the markets structure in order to qualify an economic subjects position as dominating if its share in a particular commodity market remains within 35 – 65% limits inclusively the following factors may be taken into account:

- the number of competitors and the relative volume of the market shares, belonging to the nearest competitors (the share of the commodity market belonging to the economic subject under study as compared with the shares of the market, belonging to the nearest competitor);
- stability in time of the market shares belonging to the economic subject under study and its nearest competitors;
- stability in time of the market itself;
- availability of potential competition, combined with the estimate of the obstruction to the assess of the competitors to the market, entry barriers to the competitors to the market under consideration;
- the estimate of facts and potential of the economic subject under study to act as a “price leader”.

This list of parameters to estimate markets structure is not exhaustive and could be extended as concrete cases come under consideration. However, it is not always that the establishment of the dominating position of economic subject demands that antimonopoly bodies analyze all these parameters, characterizing the market and these would be determined by the antimonopoly body itself. The list of the market parameters under study in order to estimate the domination of an economic subject is determined by antimonopoly bodies for each concrete case.

In case when the share of the economic subject exceeds 65% domination need not be proved.

When an economic subject has dominating position in the market it acquires real markets force. Its nature consists in the fact that the economic subject can dictate its own conditions and rules of conduct in the market and can raise or lower the prices for the consumer goods or services without justification and thus either receive higher profits or push competitors out of the market.

A well developed system of branches, within which the supply of goods from one branch could be substituted by the same from another can also be taken as evidence of high market power and the possibility to influence the general condition of consumer goods circulation.

Apart from this the dominating position enables the subject to influence price formation with the exclusion of those economic subjects whose services and consumer goods prices are regulated by the State. Thus, some economic subjects acting on the same market with a monopolist would form prices in relation to it. Therefore, the economic subject, enjoying dominating position, in some cases could be characterized as price leader.

The following sources of basic information on the market could be used:

- data of State statistics, characterizing the activities of economic subjects;
- information of taxation or customs bodies, banking structures, investment funds;
- information on the volume of production and realization of various kinds of produce (jobs or services) received by antimonopoly bodies directly from economic subjects;
- data of sample reviews of the consumers, characterizing consumer preferences, criteria of interchangeability of the goods, criteria of the determination of the geographic consumer market borders;
- data of commodity research expertise, proving or denying the interchangeability of commodity in the process of commodity group formation;
- data of specialized or independent information centers and services on the condition, structure and extent of commodity market, participation of separate producers and consumers in commodity circulation.

Information and materials, received from these sources, can be used as proof in determining the dominating position.

The main barriers to the entrance into the market are:

- exclusive rights, benefits or other privileges given to a region or a separate economic subject under study by bodies in administration and management including those connected to various programs of social economic development
- benefits to economic subjects established by law
- decisions of administrative bodies in relation to the limitations, put on import and export of a commodity within the territory of an "oblast'" or region having direct or indirect nature
- necessity to receive consent from the state bodies to particular types of activities and the time interval needed to get this assent
- patents and copyright
- technological secrets
- property to the total offer of a non reproducible resource
- exclusive long term agreement with suppliers of raw material with the effect that economic subjects, newly entering the market, would not be able to purchase them
- a possibility for consumers to go without the services of a traditional supplier and reorient themselves to the commodity offered by other economic subjects
- barriers put in the way of international trade

Import barriers could be:

- tariffs;
- quotas;
- direct limitations of the import;
- indirect limitations of the import;
- conditions formulated by the sellers (for instance demand of payment in free currency, the right to export profit, the necessity of the distributors system that can ensure technical maintenance etc);
- The presence of certain legislative and normative acts, creating obstruction to international trade as well as absence of the necessary legislative base in the buyer country, which could protect an international partner or which could admit him into the national regime of the economy.

The existing factors, that could raise barriers to the entrance into the market, are the following: rigged vertical integration, necessity of a well developed distributors system, brand names, that have already recommended, well established brand names, technological and financial resources and other.

The length of time interval, i.e. the period of time, needed for the organization of the production of a given commodity could be also considered as a barrier.

1. «Severstal» and MMP

Information On the case of «Severstal» and «Magnitogorsk metallurgical plant » (article 6 of the Law on Competition)

2. The gist of the matter

«Severstal» and «MMP» owning in common more than 65% of the market of steel strip, used to produce tubes in the oil and gas industry during the period between July 2002 and March 2003 have been raising prices of this product simultaneously - bringing them ultimately to the same level, exceeding that of July 2002, on the average, by 35%.

No direct proof of a collusion came to the attention of the Commission of MAP of Russia. However, information appeared in the media and at the official sites of the companies indicating that their directors were meeting regularly and developing common business projects in coal-mining industry.

The analysis of the market conducted by the MAP of Russia showed that no objective economic factors, such as stagnation of the metal-processing market, or growth of prices for energy and raw materials, or increase in the costs due to inflation processes could account for such a dramatic rise in prices. Those same objective factors failed to produce any similar jump in prices with other producers of steel strip.

On the basis of these data the MAP of Russia concluded that this situation could only be result of collusion and decided that the activities of "Severstal" and "MMP" had been coordinated and that they violated Paragraph 1 of article 6 of the Law on Competition. The companies mentioned were ordered to cease all coordinated activities designed to fix the level of prices and to provide the antimonopoly body with information on the current selling prices for steel strips on the quarterly basis with relevant economic analysis to substantiate any change in prices exceeding 5%.

"Severstal" and "MMP" submitted a complaint about this decision and order of the MAP of Russia to the court of arbitration.

3. Results of the court hearings

- The court of arbitration of first instance recognized the acts of the MAP of Russia invalid. The following motivation was offered by the court of first instance:
  - "the MAP of Russia did not demonstrate any documents or agreements from which it would clearly follow that the actions of "Severstal" and "MMP" were coordinated and led as a result to the rise of the prices for steel strip"*;*
  - the rise of the prices is not a limitation of the competition.
- Courts of Appeal left the decision unchanged, recapitulating its conclusions.
- The collegium of the judges of the Supreme Court of Arbitration of the Russian Federation refused to submit the case to the Presidium for reconsideration.

4. Problems

In the Opinion of FAS Article 6 of the Law on Competition was misinterpreted by the court.

- The Law on Competition does not give a definition of such notions as "agreement" and "coordinated activities". However, the content of Article 6 and the general meaning of the Law on Competition as well as the current court practices allow to conclude that **agreement** – is a **compact achieved** among economic subjects involving some coordination of the aspects of their entrepreneurial activities which may result in the limitation or suppression of competition on a particular commodity market. **Coordinated activities** are the **coordinated and co-oriented actions** of economic subjects **consciously bringing their conduct in line with that of other participants in the market** which also results (or may result) in the limitation or suppression of competition on a particular commodity market.

  It follows from these definitions that "agreement" would not be identical to "coordinated activities", though close in effect and that they constitute different forms of anti-competitive synchronized behavior (cartel). Unlike agreement, **coordinated activities do not presuppose** any oral or written compact between economic subjects to follow some definite course of action. **Coordination** of activities can be achieved when one economic subject merely repeats another's actions simultaneously or following.

  Thus, as a result of misinterpretation by the court of article 6 of the Law on Competition it has been concluded that coordinated activities of "Severstal" and "MMP" resulting in the raise of the price for steel strips could only be proved in case there existed formal agreements or other such documents.

- The analysis of the content of article 6 of the Law on Competition shows the following.

  – Paragraph 1 of article 6 enumerates types of activities to be disallowed as incompatible with competition in their very essence.

  – Collusive actions to establish prices presuppose that persons involved would refrain from competition in this area. They are, therefore, unlawful in accordance with paragraph 4 of article 6, even in those cases when their cumulative positive effect upon the socio-economic sphere exceeds their negative effect upon the consumer market.

  The decision of the court stating that the rise of the prices imposed no limitation on the competition would be valid only with enough proof that the rise did not result from a collusion.

5. Reasons for starting the discussion:

In the world practice of proscription of the price cartels the antimonopoly bodies would most often, in order to prove their very existence, try to get direct proof of collusion in the course economic subjects' inspection (described in EU countries as "early dawn visits"). When no direct proof is found indirect proof would be relied upon (e.g. such evidence as directors of the companies having had dinner together just before the synchronous raise in prices), - if there is no evidence that the change in prices was not due to the objective market factors.

But in the Russian legislative practice collusive activity undermining competition has been proscribed, as a rule, only in those cases when the antimonopoly body has found enough direct proof.

SUMMARY OF DISCUSSION

The Chair opened the roundtable discussion and thanked the delegates for the large number of interesting written contributions. He proposed to focus on two topics: First, tests and definitions used to describe the concepts of monopoly power or dominance; and, second, types of evidence that can be used for proving monopoly power and dominance.

1. Tests and definitions of monopoly power / dominance

At the beginning of the discussion, the European Commission presented several relevant issues which it had addressed in its 2005 Discussion Paper on Article 82. The Commission explained that European law defined dominance as a position of economic strength which enabled a firm 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 consumers. While acknowledging that this definition was not highly regarded by many industrial economists, the Commission explained that the definition provided the basis for an economically meaningful analysis of dominance which focused on whether or not a firm was subject to effective competitive constraints. In this assessment, looking at market shares would not be sufficient, although shares could be a useful first step in the analysis. The focus would have to be on the competitive constraints to which the firm was subject, and whether its market power was durable. In assessing competitive constraints, a key question was whether credible alternative sources of supply existed. When barriers to entry and expansion were low, there was no case for a dominant position, even if market shares were high. Careful analysis of barriers to entry and expansion would be important throughout the analysis. For example, when there was legitimate disagreement about whether the relevant market was defined too narrowly, there should be a discussion about barriers to entry which would be considered barriers to expansion in a more broadly defined market. The question would always be whether effective competitive constraints existed. The analysis of countervailing buyer power also would have to focus on barriers to entry as there would have to be alternative options for the buyer to exercise bargaining power. Present or future suppliers would have to be credible alternatives.

As regards market shares, the Commission referred to the presumption established in *AKZO* according to which a market share of more than 50% which was held over a period of time would usually be sufficient to establish dominance. In recent years, however, the Commission has never relied on this presumption. It used market shares threshold more as an initial indication and examined additional factors as well. The Discussion Paper confirmed this new approach.

A last issue was whether there was a need to establish dominance at all when exclusionary effects of certain conduct could be directly established. This approach had been suggested in the recent discussion paper of the Commission's economic advisory group. The Commission, however, was not yet persuaded that this proposed approach was sound. The approach appeared to be circular to some extent, and there was also concern that legal certainty would be undermined if the competition authority would no longer have to prove durable market power in dominance cases. More thought should be given to this issue.

The Chair then asked other countries about definitions and tests they use in dominance or monopolization cases and to explain whether they found any differences between their approach and approaches suggested by other delegates.

The United Kingdom emphasized that it was attached to the definition of dominance used by the European Court of Justice. However, it considered that this definition was not sufficient to describe the position of a dominant firm. The UK's contribution also referred to a firm's ability to price significantly above cost as a test of significant market power, but that concept needed to be qualified as well. An important additional factor was a firm's ability to hinder effective competition on the market. The UK also pointed out that in oligopolistic markets firms may earn supra-competitive prices over a significant period of time, but this situation should not be dealt with as a problem of dominance. In the UK it was possible to undertake market investigations which were a better instrument to address problems of market power in situations that did not involve single firm dominance. This instrument would avoid the temptation to distort article 82 standards to apply it to a situation that should properly not be subject to Article 82. Aftermarkets were another example for a situation in which a firm could raise price above cost over time which should not necessarily be captured by Article 82. In those cases it would be necessary to look at fundamental sources of market power, rather than the ability to price above cost in the aftermarket. This could be a difficult set of cases for competition authorities. As a hypothetical case, the UK referred to an airport that charges high prices for parking or franchise restaurants, but gives profits away for landing fees. Without careful analysis, dominance could be found in rather narrowly defined secondary markets where in fact monopoly rents earned in these markets are bid away. Those cases raised distributional concerns and can cause a dilemma for competition authorities as on the face of it firms appear to be able to raise price above cost.

The test which focused on the ability to price above cost was a rather conceptual test which could not be measured with sufficient precision, and in practice the UK would look at other more specific factors such as entry barriers, buyer power, product differentiation, innovation, and customer responses. Profitability analysis could be used as well, but only with great caution in particular in single firm dominance cases. Profitability analysis played a greater role in market investigations which examined whether markets did not function properly. In some of these cases the profitability of suppliers can indicate the existence of collective substantial market power for sustained periods. Profitability was not as important an element as other factors, but it could provide useful supporting indications of market power. Results based on profitability studies would have to be handled with extreme caution.

The United States stated that it agreed with much of what the previous speakers had said. It explained that courts have used very different language to describe the same phenomenon of market power. Agencies would have to live with the statements of their courts and interpret them in a way that made the most sense. For example, the United States pointed out that the European Commission had not relied heavily on the language used by the Court of Justice, but instead focused on whether a firm was subject to effective competitive constraints and had power over price. This was very similar to concepts used in the United States.

The United States added that the definition of monopoly power was not susceptible to a scientific definition and could not be measured with scientific precision. But agencies would have to do better than saying that they know dominance/monopoly power when they see it. The United States focused on power over price and durability of that power. It also attempted to make the distinction emphasized by the UK between transitory power over price as reward to investment or innovation and instances of durable market power, i.e., monopoly power. In many instances market power was not durable and therefore did not rise to the level of monopoly power.

The United States then pointed out that the language used by the European Court of Justice to define dominance could be unhelpful, even though the Commission had not been misled by the language. In particular the reference to the ability of a dominant firm to act independently of customer and consumers could be misleading. Microsoft provided a good example. There was agreement on both sides of the Atlantic that Microsoft was a dominant firm, but Microsoft demonstrated that even a monopolist would be subject to customer preferences and could never act independently of its customers. It had to constantly strive to be responsive to customer demands to sell as many products as possible.

The United States concluded that many countries were trying to get at the same concept, and that the various tests could not be applied literally in all cases. It also pointed out that in many monopolization cases in the United States there was no controversy over the question of whether a firm had monopoly power, and the disputes focused on the question whether the conduct in question was unlawful. The United States emphasized that it was important that competition authorities use a test to evaluate monopoly power or dominance, even if it was not always easy to apply, since agencies were sending signals to the market place. If there was too much uncertainty, they might deter aggressive competitive conduct competition laws should encourage. It was therefore important that agencies explained as good as they could how they applied their respective tests for monopoly power or dominance.

The Netherlands stated that it also essentially agreed with the previous speakers. It added that various definitions or tests could have shortcomings if not applied correctly. For example, in various oligopolistic markets firms would interact and have an impact on the market, but this situation would not be sufficient to find unilateral market power that could be characterized as dominance. Similarly, a finding that prices were higher than marginal cost would not be sufficient to establish dominance. The reference to the competitive process might also not be helpful. The test for dominance should focus on whether a firm's unilateral conduct had an impact on the market.

The Chair summarized that there appeared to be a fair amount of consensus on the basic concepts of monopoly power or dominance. He suggested exploring these basic questions further by addressing the concept of "super dominance." The European Commission explained that the concept of super dominance had occasionally been used in European law, but should be used with caution. The concept should not be viewed as introducing another threshold in the analysis of market power. Clearly, a greater degree of market power made it more likely that certain practices could be abusive. In addition, the greater the market power, the more evidence would be required to show that efficiencies would be passed on to consumers. Thus, the degree of market power was relevant. Closely related to the concept of super dominance was the notion of the "special responsibility" of dominant firms. Firms tended to fight being labelled dominant even if their conduct did not amount to a competition law violation because this could create a precedent for future cases in which they could be found to be subject to the "special responsibility" of a dominant firm.

The United Kingdom added that the concept of "super dominance" and the related concept of "special responsibility" had been imported by UK courts into UK case law. A very high degree of market power, which may be referred to as "super dominance," was relevant for the likelihood of harm and for the extent and amount of harm that certain conduct could cause. The notion of super dominance might be useful when a competition authority had to balance the risks of false positives and false negatives in the assessment of dominance. False positives were less of a concern in the case of "super dominant" firms since the number of firms affected would be small and it was less likely that an incorrect assessment of dominance would be made. In addition, in this case it was less likely that wrong decisions that would result in false negatives would be made.

The Chair then asked Switzerland to explain the notion of "relative dominance." Switzerland explained that the concept, which had been introduced in 2002 and 2003 and therefore was relatively new

in Swiss competition law, was based on similar concepts in German law. There was little practical experience with its application. So far, it had been applied only in two cases. Both concerned the food distribution sector which, as in other European countries, was highly concentrated and in which conflicts between suppliers and large distributors were common. The concept of relative dominance comprised two cumulative elements: First, the firm would have to be relatively important in the market. In the two cases the firms were, respectively, the second and third largest competitors. Second, the firm would have to be relatively important for the supplier. In practice, a share of 30% would be indicative of economic dependence. The principal difference to the classic concept of dominance was that in the case of relative dominance the firm's position in the market relative to its competitors was not relevant. What counted was only the individual relationship between the firm and its suppliers. The concept would therefore apply to a larger group of firms than the concept of dominance based on market power.

Germany added its views on the concept of relative dominance. It noted that the concept had frequently been criticized, including by OECD. But it was important for political reasons and to ensure public acceptance of competition law and policy. Relative dominance cases were not concerned with market power and the position of firms in the market, but with the relative economic power in the bilateral relation between two parties. This relationship could create a special responsibility, like the notion of dominance based on market power.

The United States raised the question whether the concept of durability was applied to the concept of relative dominance. Otherwise the concept might be mostly about bargaining power in private negotiations, and a party that was able to exercise bargaining power might find itself in a position of a dominant firm with special responsibility. Second, the United States asked whether the concept could be based on market power, but in a more narrowly defined market.

Germany replied that durability was relevant for the finding of relative dominance. As to the second question, it explained that the concept of relative dominance would apply only in cases where dominance based on market power did not exist. If there was market power, the special responsibility of a firm could be established directly, without reference to relative market power. Courts used the concept of relative dominance as a fallback position when it was unclear whether dominance based on market power could be established.

Brazil asked how a competition authority could intervene in cases of relative dominance and what remedies it could seek.

Switzerland explained that in merger cases a remedy could require a relative dominant firm to continue a relationship with a supplier during a transitional period to give the supplier an opportunity to find another customer.

Germany added that in German law the concept of relative dominance would apply only in single firm conduct cases and not in mergers. If the competition authority intervened, it could impose fines if it found that a firm had not complied with its special responsibility. But in most cases enforcement occurred by way of private enforcement. Approximately 75% of private competition cases were based on the concept of relative dominance.

The European Commission explained that this was an issue that created challenges to convergence in Europe. There was substantial convergence with respect to the notion of dominance based on market power which looked at the horizontal relationship between firms, and abuse of dominance. But the notion of relative dominance focused on dominance in a vertical relationship between firms. This concept would be wider than the concept of dominance under Article 82 which was based on durable market power and

the absence of competitive constraints imposed by other firms. Public enforcers had the responsibility to clarify these concepts before private enforcement could be encouraged more widely in Europe.

The United Kingdom supported the Commission's intervention. Many cases of relative dominance would arise in case of buyer power and enforcers should be careful when applying the framework developed for cases of seller power to cases of buyer power. Frequently these cases occurred in the context of agricultural processing and food processing where supermarkets tended to be larger than their suppliers. Whether or not market power existed could be determined only with respect to the side of the market in which the buyer was selling. Competition authorities would come under pressure to find dominance in cases of large buyers. Developing clarity for the application of dominance in buyer power cases required additional steps in analysis beyond the framework applied to seller markets.

The Chair raised the question whether the concept of relative market power could apply if a firm was not dominant and alternatives were available in the market.

In reply to the Chair's question, Germany explained that in relative dominance cases there could be alternatives in the market, but for the individual company which entered into a contract with a big resale chain no short-term alternative existed. Germany also clarified that the concept of relative dominance could apply also to horizontal relations. For example, it applied in cases concerning prohibitions of sales below cost where it protected small shops against big competing chains.

The United States added that buyer power can be relevant in certain circumstances, but the ultimate inquiry should always be the impact of buyer power on consumers. Suppliers frequently might not like cases of buyer power because it forces them to lower their prices, but consumers could greatly benefit from it. In these cases, buyer power should not be a competition problem.

2. Direct and indirect evidence of dominance / monopoly power

The Chair next turned to the use of market shares as evidence of dominance. Russia explained that according to its law a share of 65% would be sufficient to establish dominance, unless the firm could prove that despite the high market share it did not have a dominant position. At the other end of the spectrum, a firm with a share of less than 35% could not be found dominant. The quantitative assessment of dominance was supplemented by qualitative factors. In particular in the range between 35% and 65% the competition authority would have to prove dominance. The market share thresholds would be very useful for the competition authority and courts as dominance could be proved with the help of thresholds defined by federal law.

Korea explained that it found the statutory presumption of dominance based on a 50% or greater market share unsatisfactory. There has not been much enforcement in single firm conduct cases, but since the restructuring of the KFTC there was a new focus on this area of the law. The statutory presumption of dominance based on a 50% share was considered too high. Firms with a smaller market shares tended not to be scrutinized, even if they might be dominant in light of entry barriers and other factors. These concerns existed primarily in cases where a firm's share was just below 50% because something like a negative presumption had been developed when a market share did not reach 50%. Market shares therefore should play a lesser role in the assessment of dominance. Korea explained that it would prefer to see the presumption eliminated from the law or the threshold lowered to perhaps 35%, similar to thresholds that existed in other countries.

Poland discussed the *Rekopol* case as an illustration of a case in which dominance was found although the defendant firm's share was less than 40%. Poland explained that Rekopol had the exclusive right to license the use of the Green Point in Poland, and it was also active in the downstream market for recycling

services in which it held a share of less than 40%. The use of the Green Point was a prerequisite for firms in the recycling business. Rekopol was using its licensing monopoly for the Green Point to hinder competition in the downstream market for recycling. Firms which refused to enter into a business relationship with Rekopol in the downstream market had to pay double the license fees for the right to use the Green Point. Thus, this was a case in which an upstream monopolist restricted competition in the downstream market. The Rekopol case should be considered an exceptional case. In general, it was very difficult to find dominance in cases where the firm's share was less than 40%. The competition authority did not rely too much on the statutory presumption of dominance based on a 40% market share because the courts would require that other factors be taken into account.

Romania explained that the competition law did not provide for a specific market share threshold above which a firm was considered to hold a dominant position. A market share of 40-45% would merely be considered an indication that a firm could have a dominant position. However, if a firm held a very high market share and the Competition Council was satisfied that the market was correctly defined, a high market share would support the conclusion that the firm had a dominant position. In such a case, the assessment of other factors would only reinforce the initial finding that the firm had a dominant position.

Chinese Taipei explained its use of a 50% market share threshold as a screen. The law created a negative presumption of monopolistic power for firms with a market share of less than 50%. Firms that exceeded the threshold would be considered to have considerable market power to affect price. In practice, however, entry barriers were more important to establish whether a firm had significant market power. Concerning the significance of the 50% threshold, Chinese Taipei explained that if there were indications of abusive conduct, the case would not be quickly dismissed only because the firm held a share of less than 50%. Other statutes, in particular unfair competition laws, could be used to investigate such firms.

The Czech Republic explained how its decision practice was affected by changes in its competition law which replaced the conclusive presumption of dominance based on a 30% market share with negative presumption of dominance for firms with a less than 40% share. When the first competition law was adopted, the 30% threshold had been used to make it easier for the competition authority to enforce the statute. Firms with a share over 30% had to notify the competition authority. This notification procedure was no longer considered necessary in 2001 and a new definition of dominance was introduced which followed the European case law. The 40% threshold established a rebuttable presumption of the absence of dominance. The changes in the statute affected the decision making practice of the competition authority. For example, under the previous statute, up to three firms could be found dominant in the same market, even though the parties claimed that it was impossible for two or more firms to be dominant. Such a decision would no longer be possible.

The Chair raised the question how entry barriers would be used in the assessment of monopoly power or dominance. He referred to one contribution which had suggested that the absence of entry barriers should be sufficient to determine that the requisite market power was absent.

Mexico replied that it considered entry barriers as a key element in the analysis of dominance. The competition authority preferred to focus on entry barriers rather than defining markets and measuring market shares when determining dominance. In Mexico, trade liberalization had changed the structure of many markets. More competition has been introduced. Firms might still hold high shares in domestic markets, but the domestic market might no longer be the relevant antitrust market if entry barriers for foreign firms were low.

The United States explained that barriers to entry, although a key element in the analysis, would not be sufficient to establish whether a firm has monopoly power. Barriers to entry could support market power in an oligopolistic market in which competitive problems can exist, but in which no firm had

sufficient unilateral market power in terms of dominance. Dominance would depend on a firm's market position, something than can be reflected by market shares, and durability of the market position.

The European Commission added that the analysis of dominance should focus on markets and how they behave. Market shares only reflected outcomes of market processes and could not indicate future dynamics, unless a clear idea exist of the framework within which market shares have been obtained, such as entry barriers. Some of the techniques to define markets could be used to analyse behaviour of firms on the market, although this method has not yet been developed with sufficient certainty.

As regards oligopolistic dominance, the European Commission explained that the Article 82 Discussion Paper's section on collective dominance has been received with some scepticism. Comments had suggested that when competitors coordinated exclusionary conduct in an oligopolistic market, their arrangement should be analysed as a restrictive agreement and not under Article 82.

The United Kingdom suggested that market shares could be useful to initially decide whether a given case raised oligopoly issues or single firm dominance issues. After this initial step, the analysis should quickly focus on entry barriers. Useful lessons could be learned from merger analysis which has moved away from a more sequential analysis, where barriers to entry and efficiencies were taken into account at the end, to a more integrated analysis. Under the current unilateral effects approach in merger analysis, entry barriers were considered at the beginning of the analysis. If entry barriers are found to be low, frequently the competition authority already knew the right answer, even though attention had to be paid to other factors as well. Along the same lines, once the initial analysis of market shares showed that a case raised single firm dominance issues, the analysis should quickly move on to entry barriers.

In addition, the analysis should look not only at negatively sloped demand curves faced by a firm, but on whether entry can shift demand curves back in the long run. Countervailing buyer power and switching costs could be recast to a large extent in terms of barrier to entry. For example, if consumers could not switch easily, entry barriers could be said to exit. Entry analysis therefore applied to other factors in the analysis of dominance.

New Zealand explained that it supported the Canadian submission which stated that high shares are a necessary, but not sufficient condition to establish dominance. In the case of New Zealand, high market shares would not be sufficient in most cases. Barriers to entry and expansion would be more important factors. Not all barriers were equally significant. It was important to take a cumulative view of the impact of various barriers to entry and expansion. But identifying entry barriers was not sufficient. The critical step in the analysis was the LET test, which required an assessment of the likelihood, extent, and timeliness of entry.

The Chair next moved to the topic of direct evidence of market power. He invited several countries to explain the use of direct evidence in dominance cases based on cases that they had described in their submissions. Denmark first explained that its case concerned the wholesale market for electricity. The analysis first focused on market shares and traditional factors. But the authority also had a large amount of data on demand functions, supply functions, and firm costs. It therefore attempted to develop a model that would analyse what the optimal behaviour of a dominant firm would be in order to assess whether the actual firm conduct matched that predicted by the model. The market was characterized by different kinds of producers, such as windmill operators which could produce electricity only when the wind conditions were right. The dominant firm used traditional production methods. It could be described as residual monopolist: Other production methods were almost never sufficient to meet total demand, and the dominant firm could decrease or increase its production, depending on market demand. This allowed it to set prices for residual demand very high and therefore affect the equilibrium price. The capacity of connectors between Nordic countries was limited during peak demand periods. Sometimes there was one

Nordic market; sometimes there were separate national markets. During congestion, prices in Denmark were set as high as possible. In other periods, prices in Denmark were set to match prices in other Nordic countries.

Hungary explained a similar instance in which pricing documents were used as direct evidence of dominance. The case focused on the distribution and supply of electricity, for which statutory regional or local monopolies existed in Hungary. But some related markets were competitive. For example, with regard to the supply of electricity for temporary use in non-residential settings, services such as metering devices and other facilities could be provided by regional suppliers as well as other qualified suppliers. The regional electricity supplier had developed internal pricing formulae for these additional services and the Competition Council found evidence of internal rules according to which a relatively high price could be set for the competitive service unless a competitive offer existed, in which case the price could be lowered. In the Council's views, the pricing documents could be used as evidence of dominance. But the special background of this case should be kept in mind, and similar documents might not be evidence of dominance in other cases.

Ireland explained that in the Eircell case the court found that high prices were not sufficient evidence of dominance. The court focused on the number of competitors, low entry barriers and the significant share of the next largest competitor to conclude that Eircell was not dominant.

The Netherlands addressed the use of profitability studies as evidence of dominance. High profitability has in some cases been used to determine excessive prices, but it could in principle be relevant also for the assessment of dominance. But there were significant conceptual and practical problems with this method. For example, it was well-known that accounting profits had to be distinguished from economic profits. It was also difficult to determine how high or low profits were related to a dominant position. All the circumstances had to be taken into account to determine whether profitability was indicative of dominance. However, if all other factors had to be taken into account, it was unclear whether profitability analysis added anything to the assessment of dominance. Profitability analysis could be used if the circumstances were such that high profits likely would be indicative of dominance. This could be the case if the market environment was stable in the long run, investment was not high, not much innovation took place, and when it appeared that original investment has been earned back. In such a case high accounting profits over years could indicate dominance.

Canada explained that in some circumstances price discrimination could be used as indicator of market power. Difference in margins that ended up as different prices in different areas could be used as evidence of dominance. In *Canada Pipe*, for example, the Competition Tribunal agreed that different price margins in different territories could indicate that a firm was dominant. In most cases, however, price discrimination was used in the context of other factors such as market shares and entry barriers, and would not in itself be dispositive.

Japan discussed how it approached the analysis of dominance. The antimonopoly law prohibited private monopolization which was defined as an activity by a firm by which it controlled the business of another firm therefore causing a substantial restraint of competition. Whether a substantial restraint of competition occurred had to be analysed in a comprehensive and integrated analysis, taking into account all relevant factors, such as market shares, the situation of the industry, entry barriers and barriers to expansion. This holistic approach could be illustrated by the Paramount case: In this case, only three firms in Japan manufactured hospital beds. Paramount was the largest, and supplied approximately 90% of hospital beds to the Tokyo Metropolitan Government. Paramount's conduct was relevant in the analysis. It had approached government procurement officials to encourage the use of specifications in tenders that only Paramount's beds could meet. Through this conduct, Paramount successfully excluded competing

suppliers. On top of that, Paramount decided winning bidders and bidding prices in tenders. It provided money to the other suppliers to ensure the desired outcomes of tenders.

The Chair next raised the question whether market share based presumptions should be based on the share of the relevant antitrust market or of the domestic market, where the two were not identical. Korea explained that it referred to domestic supplies to measure market shares and to determine whether a market share presumption was met.

Mexico responded that the relevant market had to be defined first before looking at market shares and proceeding with the analysis. It could be a worldwide market as well. In many cases, trade liberalization had changed the scope of the relevant market. The contestability of markets and potential entry had to been taken into account. This could mean that a firm with high shares may not be dominant.

Germany explained that its competition law provided for a presumption of dominance for firms with a share of more than 33%, although it emphasized that in many recent cases the market shares of firms found to be dominant had been much higher. 2005 amendments to the competition act clarified that the market share presumptions could be based on worldwide shares where the relevant markets were worldwide. But investigating international markets could be difficult, especially where information about third party activities had to be obtained. In those cases, if international market shares could not be assessed, national market shares could be used as proxy in the analysis of dominance.

BIAC explained that it considered the assessment of dominance an important first step in the analysis of single firm conduct that should not be skipped. Dominance analysis could function as a safeguard against type 1 errors. The cost of wrong findings of dominance could be substantial as they could hamper pro-competitive business conduct and investment. Market definition had become more difficult over time, as has establishing dominance, but today more economic tools existed for a proper analysis. It was important to assess dominance not in a snap shot, but in a dynamic perspective. BIAC pointed out that special problems existed in four types of markets: markets with differentiated products; innovation markets; bidding markets, and network industries. BIAC expressed concerns about the different approaches to the assessment of dominance/monopoly power that had been expressed by delegates.

The United Kingdom disagreed with BIAC's comment and stated that in its view there was a huge amount of convergence in the area of dominance and monopoly power. Divergence emerged primarily in the analysis of conduct. Further discussion was desirable as to whether in cases where market definition was relatively clear, market shares could be used to create safe harbours. The UK also noted that as regards the use of profitability and price discrimination, price discrimination was ubiquitous, and the most profitable companies would not necessarily be the ones that should be investigated for market power. Neither criterion could therefore be useful as an initial screen in dominance cases. While it was today generally accepted that competition authorities should not focus enforcement efforts on highly profitable companies, the same principle should become more widely accepted in the case of price discrimination.

The UK raised an additional point about profitability analysis related to x-inefficiency: It emphasized that low profitability should not be viewed as an indication of absence of market power. In cases of x-inefficiency and abuse of dominance the costs to welfare were much higher than in cases where there a dominate firms made excess profits and at least the shareholders get the benefits. Competition authorities should target markets where firms have x-inefficiencies, rather than markets where firms have high profitability.

The European Commission confirmed that price discrimination should be only one element in the analysis, as outlined by Canada. As to profitability, any direct measurement of market power would have to be accompanied by an analysis of market dynamics. Concerning BIAC's intervention, the Commission

agreed that it would be useful to look more closely at fast moving innovation markets. Sanctions and remedies that a competition authority sought to impose should be relevant to the problem that was initially identified and should not merely provide a historical precedent for future action. In the overall competitive assessment, the development of market shares would have to be taken into account. If the intervention was too slow, the market may have disappeared and a low market share could have developed into super dominance.

The Chair summarized the discussion by pointing out that there appeared to be a great deal of consensus on the basic concepts of dominance or market power. Competition authorities were trying to get at the same basic concept. There was also consensus that agencies were looking at an economic concept of market power, and that durability of market power played a key role in the assessment. There appeared to be less of a consensus with respect to the proxies that should be used to assess dominance or monopoly power, given that no direct measurement of monopoly power or dominance existed. But there was agreement that not just one single factor would provide sufficient evidence that a firm had substantial market power and that a range of factors should be taken into account.

COMPTE RENDU DE LA DISCUSSION

Le Président ouvre la table ronde. Il remercie les délégués pour leurs contributions écrites nombreuses et intéressantes. Il propose de s'intéresser à deux thèmes : les critères et définitions utilisés pour les notions de pouvoir de monopole ou de position dominante, et les différents types de preuve permettant d'établir l'existence de telles situations.

1. Pouvoir de monopole/position dominante : critères et définitions applicables

La Commission européenne commence par présenter plusieurs points importants préalablement abordés dans son document de réflexion de 2005 sur l'article 82. Elle explique que la législation européenne définit la position dominante comme une situation de puissance économique détenue par une entreprise qui lui donne le pouvoir de faire obstacle au maintien d'une concurrence effective sur le marché en cause en lui offrant la possibilité de comportements largement indépendants par rapport à ses concurrents et clients et par rapport aux consommateurs. Si la Commission reconnaît que cette définition ne jouit pas d'une grande considération chez les spécialistes de l'économie industrielle, elle explique qu'elle permet de mener une analyse économiquement pertinente des situations de domination, analyse qui cherche principalement à définir si l'entreprise est effectivement soumise à des contraintes de concurrence. Dans cette perspective, s'intéresser aux parts de marché ne serait pas suffisant, même si ceci peut constituer une première étape utile. Il faut se concentrer sur les contraintes concurrentielles que connaît l'entreprise et définir si son pouvoir de marché a un caractère durable. Pour évaluer ces contraintes, une des questions clés est de savoir s'il existe d'autres sources d'approvisionnement crédibles. Lorsque les barrières à l'entrée et à l'expansion sont peu importantes, on ne peut pas considérer qu'il s'agit d'une position dominante, même si les parts de marché sont élevées. Il convient, tout au long de l'analyse, d'examiner attentivement les barrières à l'entrée et à l'expansion. Par exemple, en cas de désaccord légitime sur le point de savoir si le marché pertinent n'a pas été défini trop étroitement, il faudrait examiner quelles barrières à l'entrée constitueraient des obstacles à l'expansion sur un marché défini plus largement. La question revient toujours à déterminer s'il existe des contraintes de concurrence effectives. L'analyse du contre-pouvoir de monopole devra également porter sur les barrières à l'entrée puisque l'acheteur doit disposer de solutions alternatives pour être à même d'exercer un pouvoir de négociation. Les fournisseurs, actuels ou futurs, devront constituer des possibilités crédibles.

En ce qui concerne les parts de marché, la Commission fait référence à la présomption établie dans l'affaire *AKZO*, en vertu de laquelle détenir durant une certaine période une part de marché de plus de 50 % suffirait à établir une position dominante. La Commission ne s'est cependant jamais fondée sur cette présomption au cours des dernières années. Les seuils des parts de marché sont davantage utilisés comme une première indication et d'autres facteurs supplémentaires sont ensuite examinés. Le document de réflexion confirme cette nouvelle approche.

Enfin, la question se pose de savoir s'il est utile d'établir la présence d'une position dominante lorsque l'on peut prouver directement les effets d'exclusion dus à certains comportements. Cette approche est proposée dans le récent document de réflexion du comité consultatif économique auprès de la Commission. La Commission n'est cependant pas convaincue de sa pertinence. Il semble qu'elle soit dans une certaine mesure trop « circulaire » ; on peut craindre également que le fait que l'autorité de concurrence ne soit plus tenue de prouver l'existence d'un pouvoir de marché durable dans les affaires de

position dominante porte atteinte à la sécurité juridique. Il convient d'examiner cette question plus attentivement.

Le Président demande ensuite aux autres pays quels sont les critères et définitions qu'ils utilisent pour les situations de position dominante ou de monopolisation. Il leur demande également s'ils constatent des différences entre leurs approches et celles proposées par les autres délégués.

Le Royaume-Uni souligne qu'il est attaché à la définition de la position dominante utilisée par la Cour de justice des Communautés européennes. Il considère néanmoins qu'elle est incomplète. La contribution du Royaume-Uni vise également la capacité d'une entreprise de fixer des prix largement supérieurs à ses coûts, qui constitue un critère de position dominante que l'on doit toutefois nuancer. Un autre facteur important est la capacité de l'entreprise de faire obstacle à une concurrence effective sur le marché. Il faut souligner en outre que sur les marchés oligopolistiques, les entreprises peuvent pratiquer des prix supraconcurrentiels durant une longue période, mais que cette situation ne constitue pas un problème de position dominante. Au Royaume-Uni, il est possible de mener des enquêtes sur les marchés, qui permettent de traiter plus efficacement les problèmes de position dominante dans des situations où la domination n'est pas exercée par une seule entreprise. Cet instrument permet d'éviter de dénaturer les règles de l'article 82 pour les appliquer à une situation ne relevant pas de son champ d'application. Les marchés de l'après-vente offrent un autre exemple de cas où l'entreprise peut au cours du temps relever ses prix par rapport aux coûts et qui ne tombe pas nécessairement sous le coup de l'article 82. Dans ces situations, il serait utile de rechercher les origines fondamentales de cette position dominante, plutôt que d'étudier la capacité de l'entreprise de pratiquer sur le marché de l'après-vente des prix supérieurs au coût. De tels cas peuvent poser des difficultés pour les autorités de la concurrence. Le Royaume-Uni évoque l'hypothèse d'un aéroport qui pratique des prix élevés pour les parcs de stationnement ou les restaurants franchisés, mais ne fait pas de bénéfices sur les redevances d'atterrissage. Sans une analyse approfondie, on pourrait considérer qu'il existe une position dominante sur des marchés secondaires étroitement définis alors qu'en fait les rentes monopolistiques dégagées sur ces marchés sont transférées à d'autres acteurs. Ces situations soulèvent des problèmes de redistribution et peuvent constituer un dilemme aux autorités de concurrence puisqu'il semble de prime abord que ces entreprises peuvent porter leurs prix à un niveau supérieur à leurs coûts.

Le critère concernant la capacité d'appliquer des prix supérieurs aux coûts est de nature plutôt conceptuelle et ne peut permettre une évaluation suffisamment précise. En pratique, le Royaume-Uni estime qu'il conviendrait d'examiner des facteurs plus spécifiques tels que les barrières à l'entrée, le pouvoir des acheteurs, la différenciation des produits, l'innovation et les réactions des consommateurs. Il serait également possible de procéder à une analyse de rentabilité, mais il faudrait alors faire preuve d'une grande prudence, en particulier lorsque la domination est exercée par une seule entreprise. Le rôle de l'analyse de rentabilité est plus important pour les enquêtes visant à évaluer si les marchés fonctionnent correctement. Dans certaines situations de ce type, la rentabilité des fournisseurs peut indiquer l'existence d'un pouvoir de marché collectif durable et significatif. La rentabilité ne revêt pas une aussi grande importance que les autres facteurs, mais elle peut être utile pour identifier l'existence d'un pouvoir de marché. Les résultats fondés sur une analyse de rentabilité devront être traités avec la plus grande précaution.

Les États-Unis approuvent en grande partie les précédentes interventions. Aux Etats-Unis, les tribunaux ont utilisé des termes très différents pour désigner un même phénomène : le « pouvoir de marché ». Les autorités de la concurrence doivent tenir compte de la jurisprudence et l'interpréter avec la plus grande cohérence possible. Les États-Unis soulignent par exemple que la Commission européenne, plutôt que se fonder largement sur les formulations de la Cour de Justice, s'est attachée à déterminer si l'entreprise est effectivement soumise à des contraintes de concurrence et si elle exerce un pouvoir sur les prix. Ces notions sont très proches de celles utilisées aux États-Unis.

Les États-Unis ajoutent que le « pouvoir de monopole » ne peut être défini objectivement et ne peut donc être évalué de manière scientifique. Les autorités de la concurrence ne doivent toutefois pas se contenter de savoir identifier les situations de domination / de pouvoir de monopole. Les États-Unis soulignent l'importance que revêtent l'exercice d'un contrôle sur les prix et son caractère durable. La délégation américaine revient également sur la distinction établie par le Royaume-Uni entre les cas où un contrôle transitoire sur les prix vient récompenser un investissement ou une innovation et ceux où il existe un pouvoir de marché durable, c'est-à-dire un pouvoir de monopole. Dans de nombreuses situations, le pouvoir de marché n'a pas un caractère durable et ne constitue donc pas un pouvoir de monopole.

Les États-Unis soulignent ensuite que la définition de la position dominante proposée par la Cour de justice des Communautés européennes peut poser problème, bien que cette formulation n'ait pas induit la Commission en erreur. C'est en particulier la référence faite à la capacité d'une entreprise en position dominante d'agir indépendamment des consommateurs qui prête à confusion. Le cas de Microsoft illustre bien le problème. On reconnaît des deux côtés de l'Atlantique que Microsoft occupe une position dominante. Mais l'exemple de cette société a toutefois montré que même un monopoleur est sujet aux préférences du consommateur et ne peut opérer indépendamment de ses clients. Il doit constamment s'efforcer de répondre aux exigences de la clientèle afin de vendre la plus grande quantité possible de produits.

Les États-Unis en concluent que de nombreux pays s'orientent vers une même définition et que les différents critères ne peuvent pas toujours être appliqués à la lettre. Le délégué souligne également qu'aux États-Unis, dans de nombreuses affaires de monopolisation, le fait que l'entreprise jouit effectivement d'un pouvoir de monopole ne fait l'objet d'aucune controverse ; le débat porte sur la question de savoir si ce comportement est illégal. Les États-Unis soulignent qu'il est important que les autorités de la concurrence utilisent, même s'il n'est pas toujours facilement applicable, un critère permettant d'évaluer le pouvoir de monopole ou la position dominante. En effet, les autorités de la concurrence envoient des signaux au marché. Si l'incertitude est excessive, ceci peut porter atteinte à la concurrence dynamique que le droit de la concurrence doit promouvoir. Les autorités de la concurrence doivent donc expliquer le plus clairement possible comment elles ont utilisé leurs critères respectifs pour déterminer le pouvoir de monopole ou la position dominante.

Les Pays-Bas approuvent eux aussi largement les précédentes interventions. Le délégué ajoute que, s'ils sont mal utilisés, les différents critères ou définitions pourraient se révéler insuffisants. Par exemple, bien que, sur divers marchés oligopolistiques, les entreprises puissent interagir et exercer ainsi une influence sur le marché, cette situation ne suffit pas pour conclure à l'existence d'un pouvoir de marché unilatéral constituant une position dominante. De même, démontrer que les prix sont supérieurs au coût marginal ne suffit pas pour établir l'existence d'une telle situation. Également, se référer au processus concurrentiel n'est pas toujours très utile. Le critère de détermination de la domination doit viser avant tout à établir si le comportement unilatéral de l'entreprise a un impact sur le marché.

Le Président indique pour résumer qu'il existe un certain consensus quant aux notions de pouvoir de monopole ou de position dominante. Il propose d'approfondir ces questions fondamentales en faisant appel à la notion de « surdomination ». La Commission européenne explique que cette notion a parfois été utilisée en droit européen, mais qu'il convient d'y recourir avec prudence. Il serait faux de penser qu'elle introduit un nouveau seuil dans l'analyse du pouvoir de marché. Il apparaît clairement qu'un plus grand pouvoir de marché favorise certaines pratiques abusives. En outre, plus ce pouvoir de marché est important, plus il y a lieu de démontrer que les clients bénéficient des gains d'efficience. Le degré de pouvoir de marché constitue donc un critère pertinent. La notion de « responsabilité spéciale » des entreprises dominantes est étroitement liée à l'idée de « surdomination ». Les entreprises s'efforcent généralement de ne pas être désignées comme dominantes, alors même que leur conduite ne constitue pas

une violation de la législation de la concurrence ; ceci pourrait en effet créer un précédent pour de futures affaires où elles devraient assumer la « responsabilité spéciale » qui incombe aux entreprises dominantes.

Le Royaume-Uni ajoute que les tribunaux du Royaume-Uni ont introduit en jurisprudence britannique la notion de « surdomination » et celle, qui lui est associée, de « responsabilité spéciale ». Un très fort pouvoir de marché, que l'on pourrait nommer « surdomination », est un critère pertinent pour évaluer si, et dans quelle mesure, un certain comportement est dommageable. La notion de surdomination peut être utile lorsqu'une autorité de concurrence doit mettre en balance les risques de « faux positifs » et de « faux négatifs » pour l'évaluation de la position dominante. Les faux positifs sont un problème moins important pour les entreprises en situation de « surdomination » : les sociétés concernées sont peu nombreuses et il semble moins probable que la situation de domination ait été mal évaluée. De plus, les risques de mauvaises décisions se traduisant par des faux négatifs sont moins élevés.

Le Président demande ensuite à la Suisse d'expliciter la notion de « domination relative ». La Suisse explique qu'elle a été introduite en 2002 et 2003 et qu'il s'agit donc d'une relative nouveauté en droit suisse de la concurrence, cette notion trouvant sa source dans le droit allemand. Elle a rarement été mise en pratique ; à ce jour, elle n'a été appliquée qu'à deux affaires. Toutes deux concernaient la distribution alimentaire, qui, comme dans les autres pays européens, est un secteur où prévaut une très forte concentration et où des conflits opposent souvent les fournisseurs aux grands distributeurs. La notion de domination relative comprend deux éléments cumulatifs. Tout d'abord, l'entreprise doit être relativement importante sur le marché. Dans les deux affaires évoquées, les sociétés étaient les deuxième et troisième plus gros acteurs du marché. Deuxièmement, l'entreprise doit être relativement importante pour le fournisseur. En pratique, une part de 30 % indiquerait qu'il existe une situation de dépendance économique. La principale différence entre la notion traditionnelle de position dominante et celle de domination relative est que, pour cette dernière, la place de l'entreprise par rapport à ses concurrents sur le marché n'est pas un élément pertinent. Seule est prise en compte la relation individuelle entre l'entreprise et ses fournisseurs. Cette notion pourrait donc s'appliquer à un plus grand nombre d'entreprises que celle de la domination fondée sur le pouvoir de marché.

L'Allemagne fait à son tour connaître ses vues sur la notion de domination relative. Le délégué fait remarquer que la notion a été fréquemment critiquée, y compris par l'OCDE. Cependant, elle est selon lui importante pour des raisons politiques, mais aussi pour l'acceptation des lois et politiques de la concurrence par le public. Les affaires de domination relative ne concernent pas le pouvoir de marché et la position des entreprises sur le marché, mais le pouvoir économique relatif exercé dans une relation bilatérale. La nature de cette relation peut engendrer une « responsabilité spéciale », tout comme la notion de domination fondée sur le pouvoir de marché.

Les États-Unis se demandent si l'idée de « caractère durable » s'applique à la notion de domination relative. Si tel n'est pas le cas, cette notion pourrait principalement concerner le pouvoir de négociation dans des négociations privées, et la partie qui est à même d'exercer ce pouvoir pourrait se retrouver dans la situation d'une entreprise dominante assumant une responsabilité spéciale. Les États-Unis demandent ensuite si cette notion ne pourrait pas être fondée sur le pouvoir de marché, en adoptant toutefois une conception plus restrictive du marché.

L'Allemagne répond que l'idée de « caractère durable » est utile pour identifier une situation de domination relative. En ce qui concerne le deuxième point, le délégué explique que la notion de domination relative ne s'applique que lorsqu'il n'existe pas de domination fondée sur le pouvoir de marché. Si un pouvoir de marché est exercé, la responsabilité spéciale de l'entreprise peut être directement établie, sans qu'il ne soit nécessaire de faire référence au pouvoir de marché relatif. Les tribunaux ont ainsi utilisé la notion de domination relative comme une solution de repli lorsqu'il était impossible de prouver l'existence d'une position dominante fondée sur un pouvoir de marché.

Le Brésil demande selon quelles modalités une autorité de concurrence peut intervenir dans des affaires de domination relative et quelles sont les mesures qu'elle peut prendre.

La Suisse explique que, dans le cas de fusions, il pourrait être demandé à l'entreprise en position dominante relative de poursuivre sa relation avec le fournisseur durant une période de transition, le temps que ce dernier puisse trouver un autre client.

L'Allemagne précise qu'en droit allemand la notion de domination relative ne s'applique que dans les affaires concernant une seule entreprise, et pas dans le cas de fusions. Lorsque l'autorité de concurrence intervient, elle peut infliger des amendes si elle conclut que l'entreprise ne se conforme pas à sa responsabilité spéciale. Dans la plupart des cas, toutefois, on se situe dans le cadre d'actions judiciaires privées. Environ 75 % des affaires judiciaires privées liées à la concurrence sont fondées sur la notion de domination relative.

La Commission européenne explique que cette question pose pour l'Europe des défis de convergence. Il existe un très large consensus sur la notion de domination fondée sur le pouvoir de marché, qui envisage la relation horizontale entre les entreprises, et sur l'abus de position dominante. La notion de domination relative s'intéresse cependant aux relations de domination entre des entreprises entretenant une relation verticale. Ce concept serait plus large que la notion de position dominante de l'article 82, qui est basée sur un pouvoir de marché durable. Il est de la responsabilité des pouvoirs publics de clarifier ces notions avant d'encourager davantage en Europe les actions judiciaires privées.

Le Royaume-Uni rejoint l'intervention de la Commission. De nombreuses affaires de domination découlent de situations où le pouvoir est exercé par l'acheteur ; ainsi les autorités de la concurrence devront-elles se montrer prudentes lorsqu'elles appliquent à cette catégorie le cadre élaboré en cas de pouvoir d'un fournisseur. Ces situations sont fréquentes dans le secteur agro-industriel et les industries alimentaires, où les grandes surfaces sont généralement d'une taille très supérieure à celle de leurs fournisseurs. Il n'est possible de déterminer s'il existe ou non un pouvoir de marché qu'en fonction de la taille du marché où les acheteurs effectuent leurs ventes. Une pression serait exercée sur les autorités de la concurrence pour identifier des situations de domination lorsqu'il s'agit d'acheteurs importants. Pour bien utiliser la notion de position dominante dans des affaires où le pouvoir est exercé par l'acheteur, il convient d'ajouter des étapes supplémentaires au cadre utilisé pour les marchés de fournisseurs.

Le Président demande si la notion de pouvoir de marché relatif peut s'appliquer lorsqu'une entreprise n'occupe pas une position dominante et que des solutions alternatives sont disponibles sur le marché.

En réponse à cette question, l'Allemagne explique que, dans les affaires de domination relative, il peut exister des alternatives sur le marché, mais qu'il n'y a aucune alternative à court terme pour une entreprise ayant conclu un contrat avec une grosse chaîne de vente de détail. L'Allemagne confirme également que la notion de domination relative peut s'appliquer à des relations horizontales. Elle peut par exemple être utilisée pour les affaires d'interdiction de la vente à perte, où elle protège les petites enseignes contre les grandes chaînes concurrentes.

Les États-Unis ajoutent que le pouvoir des acheteurs est une notion intéressante dans certaines circonstances, mais que c'est alors son impact sur les consommateurs qu'il faut examiner en dernière analyse. Les fournisseurs souffrent souvent du pouvoir de marché des acheteurs, qui les force à baisser leurs prix, ce qui est pourtant très bénéfique pour le consommateur. Dans ces situations, le pouvoir des acheteurs ne pose pas un problème de concurrence.

2. Preuve directe et indirecte de la position dominante/du pouvoir de monopole

Le Président oriente ensuite les débats sur l'utilisation des parts de marché pour prouver une situation de domination. La Russie explique qu'en vertu de son droit national, une part de marché de 65 % suffit pour établir l'existence d'une position dominante, à moins que l'entreprise puisse prouver que, bien qu'elle détienne une part de marché importante, elle n'est pas en position dominante. À l'autre extrémité, une entreprise dont la part de marché est inférieure à 35 % ne pourra être considérée comme détenant une position dominante. Des facteurs qualitatifs viennent compléter cette évaluation qualitative de la position dominante. En particulier, pour les parts de marché comprises entre 35 % et 65 %, l'autorité de concurrence devra prouver que l'entreprise exerce une position dominante. Les seuils définis pour les parts de marché pourront êtres utiles à l'autorité de concurrence et aux tribunaux. Il sera ainsi possible de prouver des situations de domination en se fondant sur les limites définies par le droit fédéral.

Selon la Corée, établir une présomption légale de position dominante lorsque la part de marché est égale ou supérieure à 50 % n'est pas une solution satisfaisante. Peu de mesures ont été prises lorsqu'une seule entreprise était en cause, mais depuis la restructuration de la KFTC, cet aspect juridique suscite un regain d'attention. Le seuil des 50 % est considéré comme trop élevé. Les entreprises dont la part de marché est inférieure ne font généralement pas l'objet d'un examen attentif, même si elles peuvent être considérées comme dominantes à la lumière d'autres facteurs tels que les barrières à l'entrée. Ces craintes portent principalement sur les cas où la part est immédiatement inférieure à 50 %, une sorte de présomption négative étant en effet couramment appliquée lorsque cette limite n'est pas atteinte. Les parts de marché devraient donc semble-t-il jouer un rôle moins important pour l'évaluation de la position dominante. La Corée explique qu'elle préférerait que cette présomption soit supprimée en droit national ou que le seuil soit abaissé à environ 35 %, ce qui correspondrait aux limites fixées par les autres pays.

La Pologne présente l'affaire *Rekopol*, qui montre qu'une position dominante peut exister alors que la part de marché de la partie défenderesse est inférieure à 40 %. Le délégué explique que Rekopol jouissait de droits de licence exclusifs sur l'utilisation du Point vert en Pologne et que la société opérait également sur le marché en aval avec ses services de recyclage, segment au sein duquel sa part de marché était inférieure à 40 %. L'utilisation du Point vert était une obligation pour toute entreprise travaillant dans le recyclage. Rekopol utilisait son monopole de licence de ce logo afin d'entraver la concurrence sur le marché du recyclage. Les sociétés refusant d'entrer en relations d'affaires avec Rekopol sur le marché en aval devaient payer le double des redevances correspondant habituellement à l'utilisation du Point vert. Dans cette affaire, une entreprise en position de monopole sur le marché en amont restreignait la concurrence sur le marché en aval. L'affaire Rekopol est cependant un cas exceptionnel. Il est généralement difficile de considérer qu'il existe une position dominante lorsque la part de marché de l'entreprise est inférieure à 40 %. L'autorité de concurrence ne s'est pas fondée outre mesure sur la présomption légale de position dominante basée sur une part de marché de 40 %, car les tribunaux exigent que d'autres facteurs soient pris en compte.

La Roumanie explique que la législation de la concurrence de son pays ne prévoit pas, pour les parts de marché, de seuil spécifique au-dessus duquel on considérerait que l'entreprise bénéficie d'une position dominante. Une part de marché de 40 à 45 % indiquerait simplement que l'entreprise pourrait se trouver dans une telle position. Toutefois, si elle dispose d'une part de marché très importante et qu'il apparaît au Conseil de la concurrence que la définition du marché est correcte, l'importance de sa part de marché tendrait à démontrer qu'elle occupe une position dominante. Le cas échéant, l'évaluation des autres facteurs viendrait simplement corroborer cette interprétation.

Le Taipei chinois explique qu'il utilise le seuil de 50 % de part de marché comme critère discriminant. La loi établit une présomption négative de pouvoir monopolistique pour les entreprises dont la part de marché est inférieure à 50 %. Les entreprises dépassant ce seuil sont considérées comme

exerçant un important pouvoir de marché leur permettant d'influer sur les prix. En pratique toutefois, les barrières à l'entrée constituent un critère plus important pour déterminer si une entreprise possède un pouvoir de marché significatif. Concernant la portée du seuil de 50 %, le Taipei chinois explique que si des éléments tendent à démontrer l'existence de pratiques abusives, le simple fait que la part de marché de l'entreprise est inférieure à cette limite ne suffit pas pour classer l'affaire. D'autres lois, en particulier relatives à la concurrence déloyale, peuvent être utilisées pour mener une enquête dans ce cas.

La République tchèque explique quelles ont été pour sa pratique décisionnelle les conséquences de la modification du droit de la concurrence a remplacé la présomption irréfragable de position dominante, fondée sur une part de marché de 30 %, par une présomption négative de position dominante pour les entreprises détenant une part de marché inférieure à 40 %. Lors de l'adoption de la première loi sur la concurrence, le seuil de 30 % a été fixé afin de faciliter sa mise en application par l'autorité de concurrence. Les entreprises dont la part était supérieure à 30 % devaient en aviser l'autorité de concurrence. Cette procédure a été jugée inutile à partir de 2001 et une nouvelle définition de la position dominante, conforme à la jurisprudence européenne, a été introduite. Le seuil de 40 % a institué une présomption réfragable d'absence de domination. Ces transformations juridiques ont affecté la pratique décisionnelle de l'autorité de concurrence. Par exemple, en vertu de la précédente loi, on pouvait identifier jusqu'à trois entreprises dominantes sur un même marché, même si les parties invoquaient le fait qu'il est impossible que deux entreprises ou plus occupent une position dominante. Il serait impossible aujourd'hui de prendre une telle décision.

Le Président demande comment utiliser les barrières à l'entrée pour évaluer le pouvoir de monopole ou la position dominante. Il évoque la contribution d'un pays selon laquelle l'absence de barrières à l'entrée devrait suffire pour conclure à l'absence du pouvoir de marché nécessaire.

Le Mexique lui répond que, selon lui, les barrières à l'entrée constituent un élément clé de l'analyse de la position dominante. L'autorité de concurrence préfère se concentrer sur les barrières à l'entrée plutôt que chercher à définir des marchés et à mesurer les parts de marché pour établir l'existence d'une position dominante. Au Mexique, la libéralisation des échanges a modifié la structure de nombreux marchés. Une plus grande concurrence a été introduite. Les entreprises peuvent toujours détenir des parts importantes sur les marchés nationaux, mais le marché national pourrait ne plus être le marché pertinent lorsque les barrières à l'entrée sont faibles pour les entreprises étrangères.

Les États-Unis expliquent que l'examen des barrières à l'entrée, bien que constituant un élément clé de l'analyse, ne suffit pas lorsqu'il s'agit de déterminer si une entreprise dispose d'un pouvoir de monopole. Les barrières à l'entrée peuvent soutenir le pouvoir de marché sur un marché oligopolistique où il existe des problèmes de concurrence, mais où aucune entreprise ne possède un pouvoir de marché unilatéral pouvant être défini en termes de position dominante. La domination est fonction de la position de l'entreprise sur le marché, que reflètent les parts de marché et le caractère durable de cette position.

La Commission européenne ajoute qu'il faut, pour analyser la position dominante, porter son attention sur les marchés et leur comportement. Les parts de marché ne font que refléter les résultats des processus de marché et ne préjugent nullement des dynamiques futures, à moins de pouvoir définir clairement le cadre dans lequel les parts de marché ont été obtenues, compte tenu par exemple des barrières à l'entrée. Certaines des techniques employées pour définir les marchés peuvent être utilisées pour analyser le comportement des entreprises, bien que ces méthodes ne soient pas encore suffisamment fiables.

Concernant la domination oligopolistique, la Commission européenne explique que la section consacrée à la domination collective dans le document de réflexion sur l'article 82 a été accueillie avec un certain scepticisme. Selon les commentateurs, lorsque des concurrents adoptent de façon concertée un

comportement d'exclusion sur un marché oligopolistique, cette coordination doit être considérée comme un accord restrictif et ne relève pas de l'article 82.

Le Royaume-Uni estime pour sa part qu'il peut être utile d'utiliser les parts de marché pour établir au départ si les problèmes posés par une affaire donnée relèvent d'une situation d'oligopole ou d'une position dominante d'une seule entreprise. Après cette première étape, il convient de passer rapidement à l'analyse des barrières à l'entrée. On pourrait utilement s'inspirer de l'analyse des fusions, qui s'éloigne aujourd'hui d'une analyse par séquences, où les barrières à l'entrée et les gains d'efficience étaient examinés lors des dernières étapes, pour privilégier une approche plus intégrée. Dans le cadre de l'approche actuellement utilisée pour les fusions, où celles-ci sont analysées en termes d'effets unilatéraux, les barrières à l'entrée sont prises en compte dès le début de l'analyse. Si les barrières à l'entrée sont faibles, l'autorité de concurrence peut alors souvent évaluer correctement la situation, même s'il faut également considérer d'autres facteurs. Dans le même ordre d'idées, une fois que l'analyse initiale des parts de marché a démontré l'existence de problèmes nés d'une position dominante d'une seule entreprise, il faut passer rapidement à l'examen des barrières à l'entrée.

En outre, l'analyse ne doit pas seulement porter sur les courbes négatives de la demande auxquelles l'entreprise doit faire face. Il faut également se demander si les barrières à l'entrée sont susceptibles d'inverser cette tendance sur le long terme. Les notions de contre-pouvoir d'acheteur et de coûts de changement de fournisseur peuvent, dans une large mesure, être envisagées en termes de barrières à l'entrée. On pourrait par exemple considérer qu'il existe des barrières à l'entrée si les consommateurs ne peuvent pas changer facilement de fournisseur. L'examen des barrières à l'entrée peut donc s'appliquer à d'autres facteurs lors de l'analyse de la position dominante.

La Nouvelle-Zélande rejoint la contribution du Canada selon laquelle des parts de marché élevées sont une condition nécessaire, mais non suffisante, pour démontrer l'existence d'une position dominante. En Nouvelle-Zélande, le plus souvent, des parts de marché élevées ne suffiraient pas pour établir l'existence d'une position dominante. Les barrières à l'entrée et à l'expansion sont des facteurs plus significatifs. Les barrières n'ont pas toutes une importance équivalente. Il faut envisager l'impact cumulé des différentes barrières à l'entrée et à l'expansion. Il ne suffit cependant pas d'identifier des barrières à l'entrée. L'étape critique de cette analyse est l'application du critère LET (« Likely, sufficient in Extent and Timely »), qui consiste à évaluer la probabilité d'entrée sur le marché ainsi que la portée et le moment de cette entrée.

Le Président oriente ensuite les débats sur les preuves directes du pouvoir de marché. Il invite plusieurs pays à commenter l'utilisation des preuves directes dans les affaires de position dominante, en se fondant sur des situations décrites dans leur contribution. Le Danemark indique tout d'abord que son exemple concerne le marché de gros de l'électricité. L'analyse a débuté par une étude des parts de marché et des facteurs traditionnels. Mais l'autorité de la concurrence a également utilisé une grande quantité de données sur les fonctions d'offre et de demande et sur les coûts des entreprises. Elle a donc cherché à développer un modèle permettant de définir le comportement optimal d'une entreprise dominante, en vue d'évaluer si le comportement effectif de l'entreprise lui correspondait. Le marché en question est caractérisé par l'existence de différents types de producteurs, par exemple les exploitants d'éoliennes qui ne peuvent produire de l'électricité que lorsque la vitesse du vent est suffisante. Dans cet exemple, l'entreprise dominante utilise des méthodes de production traditionnelles. On pourrait la désigner par le terme « monopoleur résiduel » : les autres méthodes de production ne suffisent presque jamais à satisfaire la demande totale et l'entreprise dominante peut réduire ou augmenter sa production en fonction de la demande du marché. Ceci lui permet de fixer des prix très élevés pour la demande résiduelle et d'affecter ainsi le prix d'équilibre. La capacité d'interconnexion entre les pays nordiques est limitée durant les pics de demande. Ainsi existe-t-il durant certaines périodes un véritable marché nordique, alors qu'à d'autres moments les marchés nationaux restent séparés. Durant les périodes de pointe, les prix fixés au Danemark

sont les plus élevés possible. Le reste du temps, ils correspondent à ceux pratiqués dans les autres pays nordiques.

La Hongrie présente une affaire similaire où les documents de tarification ont été utilisés comme une preuve directe de position dominante. Cette affaire concerne principalement la distribution et la fourniture d'électricité, pour lesquels il existe en Hongrie des monopoles régionaux ou locaux. Pourtant, certains marchés connexes sont concurrentiels. Par exemple, en ce qui concerne la fourniture d'électricité pour un usage temporaire et non résidentiel, il est possible d'acheter des appareils de mesure et d'autres équipements à des entreprises régionales et à d'autres fournisseurs qualifiés. Le fournisseur d'électricité régional avait développé une formule de tarification « interne » pour ces services complémentaires. Le Conseil de la concurrence a démontré l'existence de règles internes en vertu desquelles un prix relativement élevé pouvait être pratiqué pour le service en l'absence d'une offre concurrentielle, auquel cas l'on pouvait procéder à une baisse du tarif. Du point de vue du Conseil, les documents de tarification pouvaient ici être utilisés comme moyen de preuve d'une position dominante. Il convient toutefois de garder à l'esprit le contexte dans lequel s'inscrit cet exemple ; dans d'autres circonstances, des documents similaires pourraient bien ne pas constituer de telles preuves.

L'Irlande explique que dans l'affaire Eircell, les tribunaux ont estimé que des tarifs élevés ne suffisaient pas pour prouver l'existence d'une position dominante. Ils ont privilégié dans leur analyse le nombre de concurrents, les faibles barrières à l'entrée et la part de marché détenue par le deuxième plus gros acteur pour conclure qu'Eircell n'était pas en position dominante.

Les Pays-Bas abordent ensuite la question de l'utilisation des analyses de rentabilité comme preuve de position dominante. Dans certains cas, la présence d'une rentabilité élevée a permis d'établir l'existence de prix excessifs, mais ce critère pourrait également prouver l'existence d'une position dominante. Cette méthode pose toutefois d'importants problèmes d'ordre théorique et pratique. Par exemple, il est généralement admis qu'il faut distinguer le bénéfice comptable du bénéfice économique. Il est également difficile de déterminer si la faiblesse ou l'importance des bénéfices est due à la position dominante de l'entreprise. Il faut tenir compte de l'ensemble des circonstances pour déterminer si la rentabilité est le signe d'une position dominante. Toutefois, s'il faut prendre en compte tous les autres facteurs, on peut se demander si l'analyse de rentabilité apporte un élément utile à l'évaluation de la position dominante. Elle peut être utilisée lorsque des bénéfices élevés semblent en indiquer la présence. Ceci peut être le cas quand l'environnement de marché est stable sur le long terme, l'investissement et l'innovation sont faibles et l'investissement initial a été récupéré. La persistance d'un bénéfice comptable élevé sur plusieurs années pourrait alors indiquer l'existence d'une position dominante.

Le Canada explique que, dans certaines circonstances, la discrimination par les prix constitue un indicateur de pouvoir de marché. Les différences de marges conduisant à la fixation de prix différents dans différentes zones peuvent être utilisées comme preuve de la position dominante. Dans l'affaire *Canada Pipe*, par exemple, le Tribunal de la concurrence a jugé que le fait que les marges soient différentes selon les régions peut indiquer qu'une entreprise occupe une position dominante. Dans la plupart des cas, toutefois, la discrimination par les prix est utilisée parallèlement à d'autres facteurs, notamment les parts de marché et les barrières à l'entrée, et n'est pas en elle-même décisive.

Le Japon présente son approche de l'analyse de la position dominante. La législation antimonopole interdit la monopolisation privée, définie comme une activité par laquelle une entreprise contrôle les activités d'une autre entreprise, ce qui conduit à d'importantes restrictions à la concurrence. Pour examiner si des restrictions significatives ont été exercées, il faut procéder à un examen complet et intégré, tenant compte de l'ensemble des facteurs pertinents, tels que les parts de marché, la situation du secteur ainsi que les barrières à l'entrée et à l'expansion. L'affaire Paramount illustre cette approche globale. Dans cette affaire, seules trois entreprises japonaises fabriquaient des lits d'hôpital. Paramount était le plus gros acteur

du marché et fournissait environ 90 % des lits à l'administration métropolitaine de Tokyo. Le comportement de Paramount était à prendre en compte dans l'analyse. La société avait demandé aux responsables des achats de l'administration métropolitaine d'utiliser pour leurs appels d'offres des spécifications auxquelles seuls les lits fabriqués par Paramount pouvaient répondre. Elle avait pu ainsi exclure du marché les fournisseurs concurrents. En outre, Paramount décidait quels soumissionnaires remporteraient les marchés et fixait les prix des soumissions. Elle payait les autres fournisseurs pour s'assurer que du résultat des appels d'offres.

Le Président demande ensuite s'il faut, lorsque les présomptions sont fondées sur la part de marché, considérer la part du marché pertinent ou la part du marché national, lorsqu'ils sont différents. La Corée explique qu'elle utilise les approvisionnements sur le marché intérieur pour évaluer les parts de marché et déterminer si la présomption en termes de part de marché est établie.

Le Mexique répond qu'il faut définir le marché pertinent avant d'examiner les parts de marché et de poursuivre l'analyse. Ce marché peut également être d'envergure mondiale. Souvent, la libéralisation des échanges a influé sur la dimension du marché concerné. Il faut donc tenir compte de facteurs tels que le caractère contestable des marchés et l'entrée potentielle. Il est possible qu'une entreprise détenant une forte part de marché ne soit pas en position dominante.

L'Allemagne explique que son droit de la concurrence comporte une présomption de position dominante pour les entreprises dont la part de marché est supérieure à 33 %, soulignant toutefois que dans un grand nombre d'affaires récentes, les parts des entreprises réputées en position dominante étaient beaucoup plus élevées. Les modifications de 2005 de la loi sur la concurrence précisent que les présomptions basées sur la part de marché peuvent prendre en compte les parts mondiales lorsque les marchés en cause sont mondiaux. Toutefois, il peut être difficile d'enquêter sur des marchés internationaux, en particulier lorsqu'il faut obtenir des renseignements sur les activités des tiers. Dans ces circonstances, s'il est impossible d'évaluer les parts de marché internationales, les parts de marché nationales peuvent être utilisées comme des données indirectes pour analyser la situation de domination.

Selon le BIAC, l'évaluation de la position dominante est une première étape importante de l'analyse du comportement d'une entreprise unique et elle ne doit pas être ignorée. L'analyse de la position dominante permet de se prémunir contre les erreurs de type 1. Les constats erronés de position dominante peuvent avoir d'importantes conséquences, en entravant les comportements et investissements favorables à la concurrence. Il est de plus en plus difficile de définir les marchés et d'établir la preuve d'une position dominante. Toutefois, les outils économiques permettant de mener une analyse correcte sont aujourd'hui sont plus nombreux. Cette évaluation doit être menée, non pas de façon synchrone, mais plutôt dans une perspective dynamique. Le BIAC note que des problèmes spécifiques se posent pour quatre types de marchés : les marchés à produits différenciés ; les marchés d'innovation ; les marchés reposant sur des appels d'offres et les industries de réseau. Le BIAC fait part de ses craintes quant à la diversité des approches présentées par les délégués pour évaluer la position dominante/le pouvoir de monopole.

Le Royaume-Uni, en désaccord avec le BIAC, indique que, selon lui, il existe une forte convergence dans ces domaines. Les divergences apparaissent principalement dans l'analyse du comportement. Il faudrait de nouveaux débats pour établir si, lorsque le marché est délimité de façon relativement claire, les parts de marché peuvent être utilisées afin de créer un régime de présomption négative irréfragable. Concernant l'utilisation de la rentabilité et de la discrimination par les prix, le Royaume-Uni note également que, d'une part, de telles discriminations sont courantes et que, d'autre part, les sociétés les plus rentables ne sont pas nécessairement celles dont le pouvoir de marché doit être examiné de plus près. Aucun de ces facteurs ne peut donc être utilisé comme critère initial dans les affaires de position dominante. Bien qu'on reconnaisse aujourd'hui généralement que l'action des autorités de la concurrence

ne doive pas viser avant tout les sociétés les plus rentables, le même principe devrait s'appliquer plus largement pour la discrimination par les prix.

Le Royaume-Uni évoque en outre les liens entre l'analyse de rentabilité et l'inefficacité X. Le délégué souligne qu'une faible rentabilité ne présume nullement l'absence de pouvoir de marché. Pour les cas d'inefficacité X et d'abus de position dominante, le coût social est largement supérieur aux situations où les entreprises dominantes font des bénéfices excessifs, dont tirent au moins parti les actionnaires. Les autorités de la concurrence doivent s'intéresser surtout aux marchés où les entreprises sont en situation d'inefficacité X, plutôt que ceux où elles font preuve d'une forte rentabilité.

La Commission européenne confirme que, comme l'a souligné le Canada, la discrimination par les prix ne doit constituer qu'un des éléments de l'analyse. En ce qui concerne la rentabilité, un examen de la dynamique du marché devrait accompagner toute évaluation directe du pouvoir de marché. Revenant sur l'intervention du BIAC, la Commission reconnaît par ailleurs qu'il serait utile d'examiner plus attentivement les marchés d'innovation à évolution très rapide. Les sanctions et les mesures correctrices des autorités de la concurrence doivent répondre au problème initialement identifié et pas avoir valeur d'antécédent pour des actions futures. Il faut tenir compte de l'évolution des parts de marché lors de l'évaluation globale de la concurrence. Si l'intervention n'est pas assez rapide, le marché pourra avoir disparu et une faible part de marché avoir laissé place à une position de surdomination.

Le Président indique pour résumer qu'il existe déjà un large consensus quant aux notions de position dominante ou de pouvoir de marché. Les autorités de la concurrence cherchent à parvenir à une même définition de base. Il est également généralement admis que les autorités de la concurrence s'orientent vers une définition économique du pouvoir de marché et que le caractère durable de ce pouvoir joue un rôle clé dans l'évaluation. Le consensus est moins large sur le point de savoir quelles données indirectes doivent, en raison de l'absence de moyens d'évaluation directe, être utilisées pour évaluer la position dominante ou le pouvoir de monopole. On reconnaît toutefois qu'un seul facteur ne saurait constituer une preuve suffisante d'un important pouvoir de marché de l'entreprise et qu'il faut donc tenir compte de tout un ensemble de facteurs.