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Definition of dominance within the meaning of Article 82 EC

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1. INTRODUCTION

“Our fundamental aim is to ensure that the EU's powers to intervene against monopoly abuses are applied consistently and effectively, not only by the Commission but also by national competition agencies and courts throughout the EU which also now apply EU competition law.”

Commissioner Neelie Kroes

1.1 EC COMPETITION LAW

Competition law exists to ensure competition in a free market, and states adopt it because it is considered to bring great benefits to society. Competition is believed to bring efficiency, low prices and innovation.¹ The European Community acknowledges this in Article 2 EC²: “The community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4 to promote throughout the Community (...) a high degree of competitiveness and convergence of economic performance (...)” Article 82 EC promotes such competitiveness and is meant to prevent anti-competitive behaviour, more specific, to prevent dominant firms from engaging in such behaviour.

1.2 SCOPE OF THE STUDY

For Article 82 EC to be applicable the relevant market must be determined as well as there must be an abuse of a dominant position. A study of the Article as a whole would be too extensive for the purposes of this study, and therefore a delimitation must be made. When the relevant market is determined one must decide if the undertaking is in a dominant position. Establishing dominance is no easy task and there are no clear guidelines as how to make that assessment. This awoke an ambition to thoroughly examine what determines dominance and what the Community authorities considers when establishing dominance. Therefore, this

¹ Jones, Alison and Sufrin, Brenda, EC Competition Law-Text, cases and materials, Second edition, 2004, Great Britain, p. 1

² Consolidated version of the treaty establishing the European Community

study will mainly focus on answering what, within the meaning of Article 82 EC, qualifies as dominance.

1.3 METHOD AND MATERIAL

The legislation within the EC are divided in primary and secondary legislation, where the primary legislation consists of the treaties, and the secondary legislation consists of other acts such as regulations and directives. Other sources are case law as well as decisions made by the Community authorities. As already stated above there is little guidance as to what qualifies as dominance. Article 82 EC itself does not contain a definition, nor is any definition to be found elsewhere in the Treaty. The Commission has published a Commission notice³ on the definition of the relevant market. However there is no equivalence to the definition of dominance. Hence when assessing dominance one must rely on case law and doctrine, and therefore the focus in this study will be on those sources.

1.4 DISPOSITION

Starting with the actual legal text of Article 82 EC and a brief introduction of the Article, the study will move on to chapter three and the definition of dominance. At the end of chapter three other factors that may be taken into account when assessing dominance is presented and finally in chapter four the study will be concluded with a conclusion.

³ See European Commission Notice on the definition of the relevant market for the purposes of Community competition law [1997] OJ C 372

2. ARTICLE 82 EC

Article 82 EC states:

“Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:

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

For Article 82 EC to be applicable four requirements must be met. One or more undertakings must be in a dominant position, and such position must be held within the common market or a substantial part of it. Furthermore, there must be an abuse and this must have an effect on inter-State trade.⁴ The provision itself does not provide any definition as to what qualifies as dominance. Dominance is analysed in relation to three variables: the product market, the geographical market and the temporal factor.⁵ Independently the provision does not prohibit the existence of a dominant position, but only prohibit abusive exploitation of such position.⁶

At the moment the Commission is working on a review on Article 82 EC. The review “aims to set out in a clear and consistent manner theories of harm underlying the application of Article 82 EC based on sound economic assessment and to develop practical and workable

⁴ Jones, Alison and Sufrin, Brenda, *EC Competition Law-Text, cases and materials*, second edition, 2004, Great Britain, p. 255

⁵ Craig Paul, and De Burca, Gráinne, *EU law-text, cases and materials*, third edition, 2003, Great Britain, p. 993 pp

⁶ Korah, Valentine, *An introductory guide to EC competition law and practice*, fifth edition, 1994, Oxford, p. 83

rules, which take into account the reality on the market.” The Commission published in 2005 a staff discussion paper to discuss with the public the general framework of Article 82 EC. In a public hearing in June 2006 the most important comments received were discussed.⁷ Critique has been directed at the paper and the Commission’s attempt to blend two approaches together to seek a compromise that aims to satisfy those who advocate a more economics-based approach and those who favour a more formalistic approach. It has been suggested that the Commission should embrace a full economics-based approach, but the Commission can obviously not ignore existing jurisprudence. The paper appears torn between the two opposing positions, and fails to provide a clear and coherent set of principles.⁸ At the moment the Commission is reflecting on the comments received, to determine the best way to move forward with the review. Further steps should be announced in the beginning of 2007.⁹ Although the paper has no enforcement status it supports the fact that the definition of dominance is one of debate. It also shows that the Commission has noticed the criticism aimed at Article 82 EC and its arbitrariness. Jurisprudence cannot be overlooked but one might question the possibility that the review could initiate a development in case law, one that would be more in line with an economic definition of dominance.

⁷ Article 82 review, http://ec.europa.eu/comm/competition/antitrust/others/article_82_review.html, 2006-12-08

⁸ Dethmers, Frances and Doodoo, Ninette, The abuse of Hoffman-La Roche: The meaning of dominance under EC-competition law, ECLR, 2006, 27 (10), 537-549

⁹ Article 82 review, http://ec.europa.eu/comm/competition/antitrust/others/article_82_review.html, 2006-12-08

3. DEFINITION OF DOMINANCE

3.1 TEST LAID DOWN IN *UNITED BRANDS*

In a commercial context dominance refers to a position of substantial power for an undertaking or undertakings in relation to a specific product market within a relevant geographical market.¹⁰ Dominance is an essential pre-requisite under Article 82 EC, if dominance is not proven there can be no abuse.¹¹ Dominance was considered in detail by the European Court of Justice (ECJ) in one of the early cases concerning Article 82 EC, the *United Brands*¹² case. Shortly after, the ECJ extended the definition of the dominance concept, in the *Hoffman-La Roche*¹³ case.¹⁴

In the *United Brands* case the ECJ laid down the following test:

“The dominant position thus referred to by Article [82] 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 affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.”¹⁵

The ECJ reiterated the test in *Hoffman-La Roche* and added:

“Such a position does not preclude some competition, which it does where there is monopoly or a quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not

¹⁰ Goyder, D.G, EC Competition Law, fourth edition, 2003, Great Britain, p. 268

¹¹ O’Donoghue, Robert and Padilla, A Jorge, The Law and Economics of Article 82 EC, first edition, 2006, Great Britain, p. 107

¹² Case 27/76 *United Brands Company and United Brands Continental BV v. Commission of the European Communities* [1978] ECR 207

¹³ Case 85/76 *Hoffman-La Roche & Co. AG v. Commission of the European Communities* [1979] ECR 461

¹⁴ Goyder, D.G, EC Competition Law, fourth edition, 2003, Great Britain, p. 268 p

¹⁵ Case 27/76 *United Brands Company and United Brands Continental BV v. Commission of the European Communities* [1978] ECR 207 para 38

operate to its detriment.”¹⁶ In other words the ECJ extended the definition and said that *some* competition did not necessarily mean that the undertaking was not in a dominant position.

Article 82 EC also applies to market power on the buying as well as the selling side of the market. Though this cannot be read from the definition above, it was established in the *Virgin/British Airways* case.¹⁷ It is also possible for a purchaser to behave independently of its sellers.¹⁸ Importantly the concept of dominance is applicable to large-scale markets as well as narrow markets, where one undertaking has obtained a very strong position or a monopoly which completely or substantially reduces competition.¹⁹ The Community authorities have been criticised for defining the concept of dominance too broadly, and the fact that the concept is applicable to narrow markets might result in more firms falling within Article 82 EC. One might question the risks of non-dominant firms found dominant within the Article when it is applicable to narrow markets. The provision’s purpose is to prevent non-abusive behaviour of a dominant position, but if non-dominant firms are condemned under Article 82 EC this may endanger the consumer welfare. The firm in question would be disciplined in its competitive behaviour, and that might have an impact on the effective competition. For instance, efficiency and low prices are beneficial for consumers, and these benefits depend on firms’ competitive behaviour. As an example, if a firm disciplines its prices, the prices could go up, which would be a disadvantage for consumers. Naturally, Article 82 EC should also be applicable to narrow markets, to prevent abusive behaviour, but one must also realize that this increases the risks of punishing undertakings with no market power.

The definition of dominance contains two elements: (1) the ability to prevent competition and (2) the ability to behave independently. However, there is no explanation as to how these elements relate to each other. Do both need to be proven, or is one depending on the other? It is suggested that the possibility to act independently on the market is the essential issue.²⁰ This makes sense since the ability to behave independently can be presumed to result in an ability to prevent competition. If an undertaking can behave independently it can logically prevent competition through its behaviour. Therefore it can be concluded that the elements relate to each other.

¹⁶ Case 85/76 *Hoffman-La Roche & Co. AG v. Commission of the European Communities* [1979] ECR 461, para 39

¹⁷ Case T-219/99 *British Airways v. Commission* [2003] ECR II-05917 para 101

¹⁸ Whish, Richard, *Competition Law*, fifth edition, 2003, Great Britain, p. 179 footnote 33

¹⁹ Goyder, D.G, *EC Competition Law*, fourth edition, 2003, Great Britain, p. 270

²⁰ Whish, Richard, *Competition Law*, fifth edition, 2003, Great Britain, p. 178 p

This would be in accordance with economists' notion of market power. Market power is the possibility for a firm or firms to restrict output to increase price, and the ability to do so derives from independence.²¹ However, a firm may enjoy considerable market power, even if it cannot behave to a significant extent independently of its competitors, customers and ultimately consumers.²² In fact, economists argue that no firm can act to an appreciable extent independently of its consumers or customers. Each firm is constrained by the demand curve facing them, a firm can only charge a higher price if it is willing to make fewer sales. The firm cannot raise prices and still expect to sell the same quantity as before, and this is true for both dominant and a non-dominant firms. Furthermore, if a firm keeps increasing prices above the competitive level, the price increases will end up unprofitable. In this sense competitors constrain the behaviour of firms so that even a dominant firm cannot act independently of its competitors.²³ "Strictly speaking, only a monopolist operating in a market protected by insurmountable barriers to entry and facing a completely inelastic demand would be able to behave independently of its competitors, customers and consumers."²⁴ This makes sense, a firm can only behave independently so as to a certain extent, in the long run the consumers would protest. Logically it can be assumed that what the ECJ meant was that the undertaking should be able to behave independently within a reasonable extent.

Others have argued that the ECJ's definition of dominance in fact makes economic sense and is measurable by analysing the competitors' price elasticity, the competitors' quantity elasticity and the allegedly dominant firm's own-price elasticity. These three elements indicate how sensitive market shares are to price changes of the allegedly dominant firm. Furthermore, it has been stressed that the ECJ's requirement is not absolute; the firm in question should be able to behave independently to an *appreciable* extent.²⁵

Another response to the economic critique is that the ECJ's definition was referring to firms that can profitably raise prices higher than a non-dominant firm. This possibility though is

²¹ Whish, Richard, Competition Law, fifth edition, 2003, Great Britain, p. 178 p

²² O'Donoghue, Robert and Padilla, A Jorge, The Law and Economics of Article 82 EC, first edition, 2006, Great Britain, p. 107 p

²³ Bishop, Simon and Walker, Mike, The Economics of EC Competition Law: Concepts, Application and Measurement, second edition, 2002, Great Britain, p. 183

²⁴ O'Donoghue, Robert and Padilla, A Jorge, The Law and Economics of Article 82 EC, first edition, 2006, Great Britain, p. 107 p

²⁵ La Cour, Lisbeth F and Mollgard Peter H, Meaningful and measurable market domination, ECLR 2003, 24(3), 132-135

dependent on the existence and behaviour of competitors, and a measurement problem would follow such a definition, since the competitive price level is virtually impossible to calculate. The same authors, Walker and Azevedo, also concluded another possible definition of dominance, stating that “dominance is the ability to restrict output substantially in the marketplace”²⁶. If a firm can restrict output in the market it must also have power over price. This definition was explained to be consistent with the current jurisprudence, since it would be in accordance with most of the standard factors usually considered relevant when assessing dominance, though still having an economic foundation.²⁷ It can be questioned though, how this definition differs from the one established in *United Brands*. As already stated it appears that the essential issue in the Court’s definition is the ability to behave independently. If an undertaking can restrict output, does that not mean it can behave independently? Therefore, it can be questioned if Walker’s and Azevedo’s definition is not just a rewrite of the definition from *United Brands*.

From an economic point of view there is an important way in which a dominant firm can act to an appreciable extent independently of its competitors. Since a dominant firm is able to increase its price above the competitive level it is able to act independently of competitors at the competitive price. Therefore, Bishop and Walker argue that “the focus on the analysis ought to be on a firm’s ability to engage in business activities that prevent effective competition from being maintained”.²⁸ This definition however, appears to include abuse, since preventing effective competition could qualify as abuse. Hence one could argue it is not merely a definition of dominance, since it might have to be read in conjunction with what qualifies as abuse.

Bishop and Walker stresses the fact that the dominance analysis must take place within a consistent framework, the absence of such framework can lead to incorrect conclusions with significant adverse effects for the competitive process. An incorrect finding of dominance may lead to a reduction in competition, for example, if a firm as a result of being found

²⁶ Walker, Mike and Azevedo, Joao Pearce, Dominance: Meaning and measurement, ECLR 2002, 23(7), 363-367

²⁷ Walker, Mike and Azevedo, Joao Pearce, Dominance: Meaning and measurement, ECLR 2002, 23(7), 363-367

²⁸ Bishop, Simon and Walker, Mike, The Economics of EC Competition Law: Concepts, Application and Measurement, second edition, 2002, Great Britain, p. 183 p

dominant engage in less strong price competition, real consumer harm is likely to occur.²⁹ Obviously an absence of a consistent framework affects the conclusions of dominance, the less clear the concept is, the broader it can be found to be, and with that increases the risks of finding a non-dominant firm to be dominant.

The first and important element in the assessment of dominance is the market share data. The former Commissioner responsible for competition policy, Mario Monti, has stated that the Commission uses “market definition and market shares as an easily available proxy for the measurement of the market power enjoyed by firms.” Market share of the firm under investigation as well as the market share of its rivals on the same market must be examined. The market share measures the relative strength of the firm and this is the first step towards assessing dominance.³⁰

It would be quite wrong to suppose that only “industrial giants” fall within the prohibition of Article 82 EC. The important issue under the provision is market power and not the size of the undertaking in question. The relevant market can be drawn narrowly, hence small firms can be found guilty of an abuse of dominant position.³¹ As well as with the applicability to narrow markets, this broad interpretation of the provision comes with great risk. If a market is drawn too narrowly, small firms which are in fact non-dominant may be found to be dominant, and thus putting effective competition at risk. Furthermore, a finding of dominance can do much more damage to a small firm than to a large one. However, effective competition could also be jeopardised if the provision could not be applied to small firms. It is a delicate balance, which might have a negative impact on legal certainty.

Identifying dominance is never solely a quantitative task, a combination of several factors which is the qualitative nature of the relevant market must be taken into account.³² This is in accordance with the economic view point that the assessment of dominance should not rely

²⁹ Bishop, Simon and Walker, Mike, *The Economics of EC Competition Law: Concepts, Application and Measurement*, second edition, 2002, Great Britain, p. 185 p

³⁰ O'Donoghue, Robert and Padilla, A Jorge, *The Law and Economics of Article 82 EC*, first edition, 2006, Great Britain, p. 109

³¹ Whish, Richard, *Competition Law*, fifth edition, 2003, Great Britain, p. 192

³² Goyder, D.G, *EC Competition Law*, fourth edition, 2003, Great Britain, p. 273

solely on market shares. More relevant is the effect on the market of the exercise of this market power.³³

The ECJ held in *United Brands* that: “In general a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative. In order to find out whether (...) an undertaking in a dominant position on the relevant market it is necessary first of all to examine its structure and then the situation on the said market as far as competition is concerned.”³⁴ The examination referred to in the statement requires a “comprehensive survey”³⁵ of the competitive conditions on the relevant market before making any determination of dominance. Such a survey aims to assess the firm’s degree of market power and determine whether that amounts to dominance. This means taking all of the influences that strengthen or weaken the firm’s market position, the firm’s advantages and disadvantages, and constraint on the firm’s competitive behaviour in the relevant market, fully into account.³⁶

The lower the market share of the undertaking or undertakings in question, the greater the significance of other factors indicating dominance.³⁷ Criticism has been directed at the Commission for exclusively focusing on market shares with a finding of alleged unique competitive advantages. Such a mechanical approach towards dominance results in a policy that protects the rivals rather than competition and thus injures consumers. The Commission should not focus merely on market shares, an individual assessment should be performed in every single decision.³⁸ Such things as the number and strength of competitors will always be important, as will the fact if there is a wide gap between the market shares and resources of the largest firm and the second largest, as was the case in *United Brands*. Competitors’

³³ Bishop, Simon and Walker, Mike, *The Economics of EC Competition Law: Concepts, Application and Measurement*, second edition, 2002, Great Britain, p. 186

³⁴ Case 27/76 *United Brands Company and United Brands Continental BV v. Commission of the European Communities* [1978] ECR 207 para 66-67

³⁵ See Opinion of Advocate General Roemer in Case 6/72 *Europemballage Corporation and Continental Can Company Inc v. Commission* [1973] ECR 251, para 262

³⁶ O’Donoghue, Robert and Padilla, A Jorge, *The Law and Economics of Article 82 EC*, first edition, 2006, Great Britain, p. 109

³⁷ Jones, Alison and Sufrin, Brenda, *EC Competition Law-Text, cases and materials*, second edition, 2004, Great Britain, p. 347

³⁸ Dethmers, Frances and Dodoo, Ninette, *The abuse of Hoffman-La Roche: The meaning of dominance under EC-competition law*, ECLR, 2006, 27(10), 537-549

capability to respond to output changes or price increases by the market leader will also be relevant.³⁹

It should be noted that there is no mentioning in *United Brands* which those “several factors” are, and there does not appear to exist an exhaustive list of such factors. Therefore, one might question the impact the statement has on legal certainty. However, this read in conjunction with the definition of dominance, and its two elements established in the same case, suggests that the factors must in some way affect the undertakings ability to prevent competition and its ability to behave independently.

3.2 MARKET SHARES

It is very rare with true monopoly and therefore the majority of cases concerning Article 82 EC have had to deal with deciding at what point the degree of market power is sufficient to fall within the scope of the provision. Market shares are an important issue in assessing market power, though mere numbers cannot in themselves determine dominance and this must be kept in mind in the following discussion.⁴⁰

The larger the market share, the more likely it is that the undertaking in question is in a dominant position. As already stated above it is very rare with a market share of 100%, except in cases where monopoly has been conferred by the state.⁴¹ Furthermore, in some cases, companies have been found to have very large market shares. For example in *Tetra Pak I*⁴² the firm’s market share was found to be 91.8% in the market for machines capable of filling cartoons by an aseptic process, and in *BPB Industries plc*⁴³ the court found that BPB had, in the market of plasterboard, a market share of 96-98% in Great Britain and one of 92-100% in Ireland.⁴⁴

The ECJ stated in *Hoffman-La Roche*:

³⁹ Goyder, D.G, EC Competition Law, fourth edition, 2003, Great Britain, p. 273

⁴⁰ Whish, Richard, Competition Law, fifth edition, 2003, Great Britain, p. 180

⁴¹ Whish, Richard, Competition Law, fifth edition, 2003, Great Britain, p. 180

⁴² See Commission decision: *Tetra Pak I (BTG Licence)* OJ [1988] L 272/27

⁴³ See Commission decision: *BPB Industries plc* OJ [1989] L 10/50

⁴⁴ Whish, Richard, Competition Law, fifth edition, 2003, Great Britain, p. 180 p

“Furthermore although the importance of the market shares may vary from one market to another the view may legitimately be taken that very large 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...”⁴⁵

In other words large market shares may in themselves be evidence of dominance. However, in “exceptional circumstances” large market shares may not necessarily mean that an undertaking is in a dominant position. Furthermore, the large amount of market shares must exist “for some time”. An economist would argue that the exercise of market power over time is what is of particular importance when assessing market power. An undertaking was never in hold of market power if the large share of the market was held only briefly before new competition emerged. From this it can be interpreted that an undertaking could argue that the barriers to entry are low so that new competitors can emerge on the market, and therefore the firm is never really in a dominant position.⁴⁶ It would seem that economists tend to consider the time-frame the Community authorities consider when assessing dominance to be too short, they would prefer a larger time-frame. For the firm in question to be dominant it needs to hold on to the alleged market power for a sufficient amount of time.

The statement from *Hoffman-La Roche* contains no definition of what is to be concerned as “some time”. Thus, the lack of a consistent definition might result in an arbitrary interpretation, and it can be questioned why the Community authorities have failed to provide such a definition. This lack of a definition can be abused from both ways. The Community authorities can interpret it broadly and the firm in question could argue that it will not always hold on to its dominant position and is therefore not really dominant. Either way, it can be questioned.

⁴⁵ Case 85/76 *Hoffman-La Roche & Co. AG v. Commission of the European Communities* [1979] ECR 461 para 41

⁴⁶ Whish, Richard, *Competition Law*, fifth edition, 2003, Great Britain, p. 181

Usually the Commission and the Community Courts look to other factors indicating market power, and they do not settle merely with quantifying market shares. In principle this is correct, market shares cannot tell anything about potential entrants to the market in question.⁴⁷

The passage from *Hoffman-La Roche* was referred to by the ECJ in the *AKZO v. Commission* case and the ECJ continued stating, that in the absence of exceptional circumstances indicating lack of dominance, a 50% market share could be considered to presume dominance. Later, in *Hilti AG v. Commission* the Court of First Instance (CFI) applied this test.⁴⁸ Such a presumption may be essential for legal certainty, since the assessment would not be arbitrary, firms with high market shares will be presumed dominant. However, this has also been criticised for reversing the burden of proof to the alleged dominant firm in so far as the firm needs to prove it is not dominant despite its high market share.⁴⁹ Once again one could question the “some time” requisite in the test, if the Community authorities presume dominance will this requisite be over looked and found superfluous?

If a 50% market share could presume dominance, it is necessary to consider at what point a market share could not indicate dominance. In the *United Brands* case the court held that a firm with a market share in the 40-45% range was dominant. However other factors were found to be significant, and the market share itself was not enough to sustain a finding of dominance,⁵⁰ though it was almost twice as large as that of its nearest competitor.⁵¹ Later, in *Virgin/British Airways*, an undertaking was found to be in a dominant position with a market share of less than 40%. British Airways was held to be in a dominant position in the UK air travel agency services market with a market share of 39.7%, despite the fact that the court found, in *Hoffman-La Roche* that a 43% market share was not enough to establish dominance. The ECJ was not satisfied that there were sufficient additional factors indicating dominance. However, the Commission has said that a market share between 20-40% cannot rule out the possibility of dominance.⁵² Nevertheless, it is unlikely that a firm with below 25% market share will be found dominant. In the *Metro/SABA II*⁵³ case the Court found a dominant

⁴⁷ Whish, Richard, *Competition Law*, fifth edition, 2003, Great Britain, p. 181

⁴⁸ Whish, Richard, *Competition Law*, fifth edition, 2003, Great Britain, p. 181

⁴⁹ Dethmers, Frances and Dodoo, Ninette, *The abuse of Hoffman-La Roche: The meaning of dominance under EC-competition law*, ECLR, 2006, 27(10), 537-549

⁵⁰ Whish, Richard, *Competition Law*, fifth edition, 2003, Great Britain, p. 182

⁵¹ Jones, Alison and Sufrin, Brenda, *EC Competition Law-Text, cases and materials*, second edition, 2004, Great Britain, p. 342

⁵² Whish, Richard, *Competition Law*, fifth edition, 2003, Great Britain, p. 182

⁵³ See Case 75/84 *Metro-SB-Grossmaerkte GmbH & Co. KG v. Commission* [1986] ECR 3021 para 85

position to be nearly impossible with a market share of 10%.⁵⁴ Nonetheless, it can be questioned why it was not stated to be impossible. The Court did keep its options open and found it to be unlikely respectively nearly impossible that a firm with a market share between 10-25% can be found dominant, but that would mean it is still possible.

3.3 OTHER FACTORS

Of relevance is also the likelihood of new entry, which will depend on the barriers that exists on the market which might discourage new competitors to enter the market and can indicate the incumbent's dominant position. Such barriers could be such brought about by the actions of the dominant firm or regulations imposed by the Member State or the Community. Regulations imposed could be regulations dealing with health and safety or economies of scale and scope. Barriers caused by the dominant firm itself might be the use of intellectual property rights such as patents and copyrights etc.⁵⁵ Among economists, what constitutes a barrier to entry is controversial. Some argue, for example Stigler, that a barrier to entry is “a cost of producing (at some or every rate of output) which must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry”. In other words barriers to entry exist only where a new entrant will face higher costs than those already in the industry, provided that supplies of raw materials are available and there is an absence of statutory regulation.⁵⁶

Neither the Community Courts nor the Commission have made an attempt to lay down a general definition of a barrier to entry. Their judgements and decisions have adopted a wide approach, which has been criticised to result in an exaggerated market power for some undertakings. Some barriers to entry and other matters have been considered by the Courts and the Commission to amount to “factors indicating dominance”.⁵⁷ There are many difficulties in identifying and even defining a barrier to entry and one should bear in mind the imprecise nature of the concept when applying competition rules.⁵⁸ It would seem that the

⁵⁴ Hildebrand, Doris, *The Role of Economic Analysis in the EC Competition Rules*, second edition, 2002, The Netherlands, p. 47 p

⁵⁵ Goyder, D.G, *EC Competition Law*, fourth edition, 2003, Great Britain, p. 273

⁵⁶ Whish, Richard, *Competition Law*, fifth edition, 2003, Great Britain, p. 183

⁵⁷ Whish, Richard, *Competition Law*, fifth edition, 2003, Great Britain, p. 183

⁵⁸ Jones, Alison and Sufirin, Brenda, *EC Competition Law-Text, cases and materials*, second edition, 2004, Great Britain, p. 78

Community authorities' practice is to look at all the relevant factors that might limit entry or expansion and so delay, deter, or prevent actual and potential competitors from effectively competing with the incumbent firm and hence may result in a loss of consumer interests.⁵⁹ This is highly controversial and one might question how all such factors could comply with the definition in *United Brands*. For the firm to be in a dominant position it must have the ability to prevent competition and the ability to behave independently and the ECJ has been criticised for failing to provide arguments supporting their findings of relevant factors indicating dominance. The Court did extend the definition in *Hoffman-La Roche* stating that some competition does not necessarily mean that the undertaking is not dominant. There is no mentioning of what constitutes some competition though, but maybe the statement could justify some of the other factors considered by the Community authorities?

3.3.1 LEGAL PROVISIONS

Governmental restrictions may operate as a barrier to entry, because they can restrict competition and this is acknowledged even by economists of the Chicago school⁶⁰. Obvious provisions that constitute barriers to entry are such which grant to a particular undertaking a statutory monopoly, an exclusive concession or exclusive access to finites resources (for example, airport slots or radio frequencies). Such provisions provide the incumbent with cost advantages and thus constitute barriers to entry. The ECJ and the Commission have repeatedly held governmental restrictions to be factors indicating dominance and several cases under Article 82 EC concerns statutory monopolists. Furthermore, intellectual property rights are a particular type of legal right granted by national laws. The ECJ has consistently held that ownership of intellectual property rights does not necessarily mean that the owner has a dominant position. However, intellectual property rights may be counted factors indicating dominance, as it was found in the *Hugin*⁶¹ case. The Court accepted the Commission's argument that the spare parts were protected by the UK's Design Copyright Act 1968, and

⁵⁹ O'Donoghue, Robert and Padilla, A Jorge, *The Law and Economics of Article 82 EC*, first edition, 2006, Great Britain, p. 118 p

⁶⁰ Lawyers and economists of the Chicago school are of the belief that one should put greater trust in the ability of the market itself to achieve economic efficiency; the market can achieve efficiency itself without interference from governments or antitrust laws. The fundamental Chicago view is that the sole goal of antitrust should be the pursuit of efficiency and there are very few barriers to entry. (Jones, Alison and Sufrin, Brenda, *EC Competition Law-Text, cases and materials*, second edition, 2004, Great Britain, p. 22 p)

⁶¹ See Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd. v. Commission* [1979] ECR 1869

found the firm to be in a dominant position. Other cases where the Court found intellectual property rights to indicate dominance are the *Hilti*⁶² and *Tetra Pak II*⁶³ cases.⁶⁴ An undertaking which owns intellectual property rights or enjoying statutory monopoly has an advantage over possible new entrants and its competitors, hence it can to an appreciable extent behave independently and prevent competition, which would indicate dominance. For example: the intellectual property rights would limit the use of the product for the competitors, and the cost of usage of the protected product could discourage new entrants.

3.3.2 SUPERIOR TECHNOLOGY AND EFFICIENCY

Another factor indicating dominance is undertaking's superiority in technology and this can be read from the *United Brands*, the *Hoffman-La Roche*, the *Michelin*⁶⁵, the *Hilti* and the *Tetra Pak II* cases. From an economic point of view though, it is questionable to hold that an undertaking's technological superiority operates as barriers per se. "It is true that expenditure on technological development can be a sunk cost of entry but it is also true that a new entrant on to the market may not have to spend the same resources and development as the incumbent on the market: there is no need to reinvent the wheel."⁶⁶ The ECJ has provided no clear definition as to what could constitute superiority in technology. Nevertheless, it is clearly a factor that may be taken into account and all barriers to entry could discourage new entrants, thus giving the dominant undertaking the possibility to prevent competition. The ability to behave independently would depend on the nature of the technology. It is obvious that the ECJ believes that superior technology can possibly confer a firm a strategic advantage, which could lead to an ability to behave independently. Economists would nonetheless disagree, since they stress the fact that the ability to behave independently is the essential element in assessing dominance, and as already stated it would be nearly impossible to prove such independence.

⁶² See Case T-30/89 *Hilti AG v. Commission* [1991] ECR II-1439

⁶³ See Case C-333/94 P *Tetra Pak International SA v. Commission* [1996] ECR I-5951

⁶⁴ Jones, Alison and Sufirin, Brenda, *EC Competition Law-Text, cases and materials*, second edition, 2004, Great Britain, p. 356

⁶⁵ Case 322/81 *Nederlandsche Banden-Industrie Michelin v. Commission* [1983] ECR 3461

⁶⁶ Jones, Alison and Sufirin, Brenda, *EC Competition Law-Text, cases and materials*, second edition, 2004, Great Britain, p. 356

Furthermore, the ECJ and the Commission have held in several cases that the overall efficiency of the undertaking's commercial arrangements contributes to and enhances its dominant position. This was particularly noticeable in the *United Brands*, the *Michelin* and the *Hilti* cases, where the Court took into account the effectiveness of the undertakings' distribution network. The Court however, did not explain why a new entrant could not replicate those arrangements and criticism can therefore be directed to the Court, since it appears as if the authorities simply are penalising the undertaking in respect of its efficiency.⁶⁷ Just as with the superiority in technology this is clearly a factor used by the Community authorities to indicate dominance. A well developed distribution network could also make it possible for the firm to behave independently since it may not face the same distribution problems as their competitors and new entrants. Certainly new entrants and competitors could replicate the firm's arrangement, but maybe the Court reasons that the mere fact that they would have to replicate the system to have the same advantage indicates dominance.

3.3.3 VERTICAL INTEGRATION

Vertical agreements are such where the relationships of the parties are complementary, for example between a supplier and a dealer.⁶⁸ When a firm is vertically integrated these sorts of arrangements are kept within the firm. Vertical integration, which may give incumbent undertakings a strategic advantage over new entrants, has been found by the ECJ and the Commission to be a factor indicating dominance.⁶⁹ However, once again, this appears to penalise an undertaking in respect of its efficiency.⁷⁰ Benefits of vertical integration include lower transaction costs in such a way that there is no or less need to sign contracts since the transaction are handled by the firm itself, secure supply of inputs, correcting market failure since the firm can ensure uniform quality, and avoiding government rules since many government rules do only apply to bilateral or multilateral relations between independent firms. However, it is not clear that vertical integration is in fact advantageous, it may actually increase costs when the market is more efficient than the firm's own operations, and it is

⁶⁷ Jones, Alison and Sufrin, Brenda, *EC Competition Law-Text, cases and materials*, second edition, 2004, Great Britain, p. 356 p

⁶⁸ Goyder, D.G, *EC Competition Law*, fourth edition, 2003, Great Britain, p. 12

⁶⁹ Whish, Richard, *Competition Law*, fifth edition, 2003, Great Britain, p. 185 p

⁷⁰ Jones, Alison and Sufrin, Brenda, *EC Competition Law-Text, cases and materials*, second edition, 2004, Great Britain, p. 357

definitely not clear that it constitutes barrier to entry.⁷¹ Vertical integration was an important factor for the finding of dominance in the *United Brands* case, since it played an important role in the firm's ability to get its bananas across the world and into the hands of the European distributors, without involving other firms. The firm owned banana plantations and transport boats and it marketed its bananas itself, and the Court said this provided the firm with commercial stability which was a significant advantage over its competitors.⁷² Nevertheless, the Court did not provide an explanation as to why the vertical integration was to be regarded as a barrier to entry.⁷³ One could argue that vertical integration could be replicated by competitors and new entrants, however, a smaller firm would probably encounter serious problems in doing so, hence this could discourage new entrants. Furthermore, as mentioned above, vertical integration could save the firm a substantial amount of money, which obviously is an advantage. The advantage of being able to minimise some costs could make a big difference in the capability on keeping their product prices down, hence the firm could possibly to some extent behave independently of its competitors.

3.3.4 ECONOMIES OF SCALE

Economies of scale are enjoyed by a firm when the average costs of the production or distribution of a product fall as output increases. When a market display considerable positive returns to scale, the largest firm will have a significant advantage over firms who have not yet reached the same level of production or distribution, and that may give rise to barriers to entry.⁷⁴ It was recognised by the ECJ in the *United Brands* that economies of scale operate as a barrier to entry, and this was confirmed by the Commission in *BPB Industries plc*.⁷⁵ This does not go well with Stiglers definition of barriers however, according to his definition

⁷¹ O'Donoghue, Robert and Padilla, A Jorge, *The Law and Economics of Article 82 EC*, first edition, 2006, Great Britain, p. 125

⁷² Whish, Richard, *Competition Law*, fifth edition, 2003, Great Britain, p. 185 p

⁷³ Jones, Alison and Sufirin, Brenda, *EC Competition Law-Text, cases and materials*, second edition, 2004, Great Britain, p. 357

⁷⁴ O'Donoghue, Robert and Padilla, A Jorge, *The Law and Economics of Article 82 EC*, first edition, 2006, Great Britain, p. 122

⁷⁵ Case 27/76 *United Brands Company and United Brands Continental BV v. Commission of the European Communities* [1978] ECR 207 para. 122 and Commission decision: *BPB Industries plc*, OJ [1989] L10/50 para 116

economies of scale do not operate as barriers to entry, since both incumbents and new competitors have to face them at the time they enter the market.⁷⁶

However, it has been explained in an OFT report (Office of Fair Trading)⁷⁷ that under modern industrial organization theory, economies of scale can operate as strategic entry barriers. According to this theory, a combination of economies of scale and large sunk costs can be a grave deterrent to market entry. Furthermore, it is also argued in the report that it is possible that economies of scale could deter entry if they cause tougher price competition. It would seem that sometimes economies of scale will create a barrier to entry.

The two cases, *United Brands* and *BPB Industries plc* have mainly been criticised for the fact that it was not explained why economies of scale are considered to be a barrier to entry in the particular situation in question.⁷⁸ For example, in *BPB Industries* it was merely stated that: “BPB enjoys substantial economies in producing on a large scale in integrated industrial complexes, extracting gypsum and producing plaster then plasterboard”.⁷⁹ Just like with vertical integration it seems as if the Court is punishing firms for being efficient, more specifically, for their production capabilities.

3.3.5 ACCESS TO CAPITAL

The Commission appeared to have considered in the case *Continental Can*⁸⁰ that an undertaking’s access to international capital markets was an indicator of dominance. This was stressed later by the ECJ in *United Brands* and *Hoffman-La Roche*, where it was stated that the need for large-scale capital investment constituted a barrier to entry.⁸¹ It has been argued by some economists that capital requirements could give rise to barriers to entry since a new entrant would need a large amount of capital to enter the market at an efficient scale. Whether

⁷⁶ Jones, Alison and Sufrin, Brenda, *EC Competition Law-Text, cases and materials*, second edition, 2004, Great Britain, p. 72 and 357

⁷⁷ See *Barriers to Entry and Exit in Competition Policy*, OFT Research Paper 2, p. 57-59, Office of Fair Trading from London Economics. The OFT is responsible for protecting consumers interest in the UK.

⁷⁸ Jones, Alison and Sufrin, Brenda, *EC Competition Law-Text, cases and materials*, second edition, 2004, Great Britain, p. 357 p

⁷⁹ Commission decision: *BPB Industries plc*, OJ [1989] L10/50 para. 116

⁸⁰ See Commission decision: *Continental Can Co Inc, Re*, OJ [1972] L7/25

⁸¹ Jones, Alison and Sufrin, Brenda, *EC Competition Law-Text, cases and materials*, second edition, 2004, Great Britain, p. 358

this is correct or not is extremely controversial.⁸² Others have argued the opposite, either because they think that the capital markets are not inefficient or because they believe that any problem of inefficiency should be dealt with by restructuring the market for financial services.⁸³ The ECJ has taken the course that access to capital can indicate dominance, and some economists have argued the same. It is nonetheless, difficult to understand why. It might seem a bit discriminatory since mostly large firms have access to large capitals, smaller firms would find it very hard and new entrants would logically find it harder. Would this not be an indication that the size of the firm does matter? Once again the ECJ did not provide arguments for its findings. Access to large capital could deter entry, but does it provide firms with the ability to behave independently?

3.3.6 ACCESS TO KEY INPUT

The inability for new entrants to enter the market because of lack of access to key inputs can indicate dominance, since the incumbent firm would be in an advantage already having access to such. Airport slots or things that are covered by intellectual property rights are items of key input nature. Lack of access to key inputs can also be non-access to raw materials.⁸⁴ In *Commercial Solvents*⁸⁵ the firm controlled the supplies of aminobutanol and nitro propane, the essential raw materials for the production of ethambutol in Europe, which gave the firm an advantage.⁸⁶ Furthermore, in the Commission's decision in *BPB Industries plc*, a new entrant would have had to require the raw material gypsum. Since there was no access to this in the UK without opening new mines, a new entrant would have been forced to import the material. Import would have required cost and risk and therefore would have related to access to financial resources, discussed above.⁸⁷ A firm in possession of key inputs would obviously be at an advantage, which would probably lead to a capability to prevent competition. Further, if the firm is the only one with access to such inputs it would to some extent be able to behave

⁸² Jones, Alison and Sufirin, Brenda, EC Competition Law-Text, cases and materials, second edition, 2004, Great Britain, p. 358

⁸³ Whish, Richard, Competition Law, fifth edition, 2003, Great Britain, p. 185

⁸⁴ Jones, Alison and Sufirin, Brenda, EC Competition Law-Text, cases and materials, second edition, 2004, Great Britain, p. 359

⁸⁵ See Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v. Commission* [1974] ECR 223

⁸⁶ O'Donoghue, Robert and Padilla, A Jorge, The Law and Economics of Article 82 EC, first edition, 2006, Great Britain, p. 124

⁸⁷ Jones, Alison and Sufirin, Brenda, EC Competition Law-Text, cases and materials, second edition, 2004, Great Britain, p. 359

independently. Unlike with some of the other factors found by the Community authorities economists have not reacted with criticism and it is possible that access to key inputs could constitute barriers to entry even according to Stigler's definition.

3.3.7 ADVERTISING, REPUTATION AND PRODUCT DIFFERENTIATION

Economists have provided a large body of literature about the extent to which advertising, reputation and goodwill may be barriers to entry, and some, as e.g. Bain considered advertising to be a barrier.⁸⁸ The first brand in the market may enjoy a classic first-mover advantage, since advertising builds up goodwill and reputation.⁸⁹

In the early Article 82 EC case *United Brands*, the ECJ considered that significant factors indicating dominance was United Brands advertising campaign and brand image. The firm had spent considerable resources establishing the Chiquita brand name, and the name was well protected by trade marks.⁹⁰ Furthermore, the ECJ considered that United Brands had made their product distinctive by large scale advertising and promotion which had “induced the consumer to show a preference for it in spite of the difference between the price of labelled and unlabelled bananas (...) and also of Chiquita bananas and those which have been labelled with another brand name” and thus “attained a privileged position by making Chiquita the premier banana brand name”. The Court concluded that new entrants on the market would be faced with “the mounting of very large-scale advertising campaigns” and therefore this was a barrier to entry.⁹¹ The Commission came to a similar conclusion in its *Nestlé/Perrier*⁹² decision, where it was considered to be relevant to the existence of a dominant position that new entrants to the market would face formidable advertising and promotion requirements. The Commission did consider the difficulty of access to distribution

⁸⁸ Jones, Alison and Sufirin, Brenda, *EC Competition Law-Text, cases and materials*, second edition, 2004, Great Britain, p. 359 referring to J.S. Bain, *Barriers to New Competition*, 1956

⁸⁹ Jones, Alison and Sufirin, Brenda, *EC Competition Law-Text, cases and materials*, second edition, 2004, Great Britain, p. 359

⁹⁰ Whish, Richard, *Competition Law*, fifth edition, 2003, Great Britain, p. 186

⁹¹ Case 27/76 *United Brands Company and United Brands Continental BV v. Commission of the European Communities* [1978] ECR 207 para 91, 93 and 122-124

⁹² See Commission decision: *Nestlé/Perrier* [1992] OJ L 356/1

outlets in a brand-crowded market, more precisely the problem of getting place in the shelves of retail stores.⁹³

Besides in *United Brands*, these barriers have not been much discussed in case law.⁹⁴ Nonetheless, the Commission has often noted that advertising expenditure could make it difficult for new entrants in the market for fast-moving consumer goods, for example in the market of soft drinks⁹⁵, sanitary protection⁹⁶ and toilet tissue^{97, 98}.

In its decision *BBI/Boosey and Hawkes*⁹⁹ the Commission referred to the goodwill and reputation of the firm and listed “the strong buyer preference for B&H instruments” as “other factors which tend (...) to support a preliminary finding of dominance”.¹⁰⁰ Goodwill takes time to establish, as well as reputation, and it is quite logical that the Community authorities could take this into account when assessing dominance. It would be very hard for a new entrant on the market to change consumer preferences, hence the incumbent firm could probably behave independently to an appreciable extent. Furthermore, the difficulties a new entrant would face when trying to establish itself on the market could be more than enough to discourage it of entering the market.

There is also considerable literature on brand proliferation and product differentiation as barriers to entry, however, this has not been thoroughly discussed by the Court.¹⁰¹

⁹³ Jones, Alison and Sufrin, Brenda, *EC Competition Law-Text, cases and materials*, second edition, 2004, Great Britain, p. 359 f

⁹⁴ Jones, Alison and Sufrin, Brenda, *EC Competition Law-Text, cases and materials*, second edition, 2004, Great Britain, p. 359

⁹⁵ See Commission decision: *Nestlé/Perrier* [1992] OJ L 356/1

⁹⁶ See Commission decision: *Procter & Gamble/VP Schickendanz* [1994] OJ L352/32

⁹⁷ See Commission decision: *Kimberly-Clark/Scott Paper* [1996] OJ L 183/1

⁹⁸ Whish, Richard, *Competition Law*, fifth edition, 2003, Great Britain, p. 186

⁹⁹ See Commission decision: *BBI/Boosey & Hawkes* [1987] OJ L286/36, which concerned brass band instruments.

¹⁰⁰ Jones, Alison and Sufrin, Brenda, *EC Competition Law-Text, cases and materials*, second edition, 2004, Great Britain, p. 360

¹⁰¹ Jones, Alison and Sufrin, Brenda, *EC Competition Law-Text, cases and materials*, second edition, 2004, Great Britain, p. 360

3.3.8 OVERALL SIZE AND STRENGTH

Such factors as the variety of products and the spread over a wide geographic area can indicate dominance. The Commission argued in *Hoffman-La Roche* that the fact that the firm produced a wider range of products than its rivals and that the firm was the largest producer of vitamins in the world were relevant for establishing dominance. The ECJ however, rejected the argument, saying that the mere fact that a firm is large does not in itself mean that it is in a dominant position of any particular product market.¹⁰² Nevertheless, size and strength within a market could be relevant when establishing dominance, which was stated in the *Michelin* case¹⁰³. The ECJ took into account the advantages the firm derived from belonging to a group of undertakings operating throughout Europe and the world: “to assess the relative economic strength of Michelin NV and its competitors on the Netherlands market the advantages which those undertakings may derive from belonging to groups of undertakings operating throughout Europe or even the world must be taken into consideration.”¹⁰⁴ The Commission considered in *Soda ash-Solvay* that Solvay’s manufacturing strength with plant in six other Member States was part of the “relevant economic evidence” and therefore significant when assessing dominance.¹⁰⁵ Community authorities have held the geographical spread of an undertaking’s operations to be an advantage where it makes it less vulnerable to natural disasters and/or other fluctuations.¹⁰⁶ For example; in *United Brands*, the Court found United Brands to have an advantage with its banana plantations being “spread over a wide geographic area”¹⁰⁷. Furthermore, in *Elopak Italia/Tetra Pak* the Commission explained that an other factor indicating dominance was “the diversity of (...) geographical locations, which makes it less dependent on various fluctuations and allows it, if necessary, to make financial sacrifices on one or other of its products without affecting the overall profitability of its operations”.¹⁰⁸

¹⁰² Whish, Richard, Competition Law, fifth edition, 2003, Great Britain, p. 186

¹⁰³ Jones, Alison and Sufrin, Brenda, EC Competition Law-Text, cases and materials, second edition, 2004, Great Britain, p. 361

¹⁰⁴ Case 322/81 *Nederlandsche Banden-Industrie Michelin v. Commission* [1983] ECR 3461 para. 55

¹⁰⁵ Commission decision: *Soda ash-Solvay* OJ [2003] L 10/10, para 138

¹⁰⁶ Jones, Alison and Sufrin, Brenda, EC Competition Law-Text, cases and materials, second edition, 2004, Great Britain, p. 361

¹⁰⁷ Case 27/76 *United Brands Company and United Brands Continental BV v. Commission of the European Communities* [1978] ECR 207 para. 75

¹⁰⁸ Commission decision: *Elopak Italia/Tetra Pak* OJ [1992] OJ L 72/1 para 101

3.3.9 PROFITS

A monopolist can collect the benefits of its market power by earning monopoly profits, and it is possible that such profits can be used as a means of identifying market power. However, determining whether or not an undertaking is earning monopoly profits may be difficult, and maybe this is why assessment of profits is not much used as an indicator of dominance.¹⁰⁹

The ECJ has held in *United Brands* as well as in *Michelin* that an undertaking's economic strength is not measured by profits alone, losses may also demonstrate the economic strength of an undertaking which has the ability to absorb them. Furthermore, it has been held that even losses do not have to mean that the undertaking in question is not dominant.¹¹⁰ It is questionable if profits as a factor indicating dominance can be applied in theory and once again it seems as if the Community authorities are punishing firms for their efficiency. Nevertheless, the possibility of the firm to absorb losses might be an indication of dominance. The capability to stay afloat during a tough year when other firms go bankrupt could possibly indicate that the firm can behave independently to an appreciable extent.

It was stated in *United Brands* that “a reduced profit or even losses for a time are not incompatible with a dominant position”¹¹¹. Thus the temporal factor is of importance. Further, one could question the meaning of the wording, “for a time”, logically it indicates that profits as a factor indicating dominance are profits as they are over a certain amount of time. The Court gives however, no guidance as to how long a time.

3.3.10 CONDUCT

In *United Brands* the ECJ agreed with the fact that the conduct of a firm could be taken into account when establishing dominance. It was stated that *United Brands* economic strength had

¹⁰⁹ Jones, Alison and Sufrin, Brenda, *EC Competition Law-Text, cases and materials*, second edition, 2004, Great Britain, p. 361

¹¹⁰ Jones, Alison and Sufrin, Brenda, *EC Competition Law-Text, cases and materials*, second edition, 2004, Great Britain, p. 361 p

¹¹¹ Case 27/76 *United Brands Company and United Brands Continental BV v. Commission of the European Communities* [1978] ECR 207 para 126

“enabled it to adopt a flexible overall strategy directed against new competitors”.¹¹² The statement means for example that, taking into account the fact that a firm has offered discriminatory rebates to certain customers may be legitimate, the rebates may themselves constitute a barrier to entry since the rebates may prevent competitors from entering the market. In the *Michelin* case the Commission relied on the price discrimination, and argued that that sort of conduct was an indicator of dominance. Michelin argued before the Court that this approach was circular, meaning that the Commission was saying that because the firm had offered discriminatory pricing it was dominant, and because of that the discriminatory prices constituted abuse. The ECJ affirmed the Commission’s decision, however, it did not deal with this issue, but the affirmation itself is at least an unspoken approval of considering conduct as a factor indicating dominance. The Commission has continued to regard conduct as a factor indicating dominance, despite criticism of the circularity of this approach. It is nonetheless possible that the objection to this argument may be met if the Commission uses conduct as an indicator only in clear cases and not as an exclusive support of dominance.¹¹³

In the *Eurofix-Bauco v. Hilti*¹¹⁴ case the Commission regarded the firm’s behaviour as “witness to its ability to act independently of, and without due regard to, either competitors or customers on the relevant markets in question”. Further, in *AKZO*¹¹⁵ it found that the undertaking’s ability to weaken or eliminate troublesome competitors was an indicator of dominance, which was upheld by the ECJ in the appeal. Lately it has repeatedly been recognised that there are types of behaviour that may discourage entry, and it would be wrong to discount such conduct from the consideration of whether an undertaking is in a dominant position.¹¹⁶ It is questionable if taking conduct into consideration does not mean that the Court already at this stage is considering possible abuse and uses it to establish dominance. Nevertheless, it is highly unlikely that the economists will protest, clearly, abusive conduct would constitute a barrier to entry, since the ones facing them are new entrants as well as competitors.

¹¹² Case 27/76 *United Brands Company and United Brands Continental BV v. Commission of the European Communities* [1978] ECR 207 para 121

¹¹³ Whish, Richard, *Competition Law*, fifth edition, 2003, Great Britain, p. 187

¹¹⁴ Commission Decision: *Eurofix-Bauco v. Hilti* OJ [1988] L 65/19

¹¹⁵ Commission decision: *ECS/AKZO* OJ [1985] L 374/1 and Case 62/86 *AKZO Chemie BV v. Commission* [1991] ECR I-3359

¹¹⁶ Whish, Richard, *Competition Law*, fifth edition, 2003, Great Britain, p. 187

3.3.11 PERFORMANCE INDICATORS

As well as an undertaking's conduct, the economic performance may be a factor indicating dominance, for example, manufacturing possibilities.¹¹⁷ In *Hoffman-La Roche* the Court took into account spare manufacturing capacity, and stated that: "the existence of considerable unused manufacturing capacity creates potential competition between established manufactures"¹¹⁸, although the Court did not distinguish between idle and excess capacity. When capacity is idle it means its use would not be profitable because the market price is less than the cost of its use, and excess capacity means that the undertaking is producing less output than the optimal output the plant is designed to produce, hence the plant can increase its output without its unit costs increasing.¹¹⁹ Further, in *Napier Brown-British Sugar*¹²⁰ a firm's ability to increase its prices, which the market followed, was found to be a factor indicating dominance.¹²¹

3.3.12 THE UNDERTAKING'S OWN ASSESSMENT OF ITS POSITION

In the Commission decision *BBI/Boosey and Hawkes*¹²² internal documents were regarded as significant in the finding of dominance. Boosey and Hawkes had described its instruments as "automatically first choice" of all the top brass bands and this was of important since the firm itself found it to be dominant. This would seem to present a warning to firms to take care over the preparation and record of internal memoranda. Whilst shareholders of firms might like to hear such things as, the firm being a dominant player or the largest, firms may need to restraint their written memoranda, since it is not always easy to convince the Commission officials that one's market share is smaller than what one has said.¹²³ This is not a barrier to entry, but merely a factor taking into consideration when assessing dominance. One could question its legitimacy considering that such factor has no relation to the definition in *United Brands*.

¹¹⁷ Whish, Richard, *Competition Law*, fifth edition, 2003, Great Britain, p. 187

¹¹⁸ Case 85/76 *Hoffman-La Roche & Co. AG v. Commission of the European Communities* [1979] ECR 461 para 48

¹¹⁹ Jones, Alison and Sufrin, Brenda, *EC Competition Law-Text, cases and materials*, second edition, 2004, Great Britain, p. 362

¹²⁰ See Commission Decision: *Napier Brown - British Sugar* OJ [1988] L 284/41

¹²¹ Whish, Richard, *Competition Law*, fifth edition, 2003, Great Britain, p. 188

¹²² See Commission decision: *BBI/Boosey and Hawkes: Interim measures* OJ [1988] L-286/36

¹²³ Whish, Richard, *Competition Law*, fifth edition, 2003, Great Britain, p. 188

3.3.13 OPPORTUNITY COSTS

The value of something that has to be sacrificed in order to achieve something else is known as opportunity costs and the Commission has considered that such could act as a deterrent to potential entrants to the market. This was established in the decision *British Midland/AerLingus*¹²⁴ where the Commission looked at the air-route from Heathrow to Dublin. An airline operating from Heathrow is allowed a certain number of so called slots for taking off and landing and if the firm was to compete on the route between London and Dublin it would have to sacrifice slots used for other destinations. The Commission considered the opportunity costs involved in switching to the route from other more lucrative ones were high and acted as a deterrent, as the Dublin route was not particularly profitable. As mentioned above, economists, for example Stigler have argued that the relevant question should be if the costs for a new entrant would be higher than for those already on the market, however, the Commission did no such reflection in this case.¹²⁵

3.3.14 AN UNAVOIDABLE TRADING PARTNER

There are firms that customers are dependent on for the supply of goods or services and in some findings under Article 82 EC the Commission and the Courts have been influenced by this relationship when reaching a conclusion of dominance. In *Deutsche Bahn v. Commission*¹²⁶ the CFI, in upholding the Commission's findings, noted the economic dependence of railway operators on the statutory monopolist in the provision of railway services within Germany.¹²⁷ The Court stated: "it is clear from the case-law that where, as in the present case, the services covered by the sub-market are the subject of a statutory monopoly, placing those seeking the services in a position of economic dependence on the supplier, the existence of a dominant position on a distinct market cannot be denied, even if the services provided under a monopoly are linked to a product which is itself in competition

¹²⁴ See Commission decision: *British Midland-Aer Lingus* OJ [1987] L 96/34

¹²⁵ Whish, Richard, *Competition Law*, fifth edition, 2003, Great Britain, p. 186

¹²⁶ Case T-229/94 *Deutsche Bahn v. Commission* [1997] ECR II-1689

¹²⁷ Whish, Richard, *Competition Law*, fifth edition, 2003, Great Britain, p. 186 p

with other products”.¹²⁸ Further, in the *Virgin/British Airways* the Commission noted that British Airways’ position on the markets for air transport made it an unavoidable trading partner for travel agents.¹²⁹ Clearly this must qualify as a factor indicating dominance, read in conjunction with the element of the ability to behave independently. The firm, as an obligatory trading partner, will have little competition and will be able to behave independently to an appreciable extent. It can be questioned though whether it would be able to prevent competition, since it would appear that what are keeping new entrants from entering the market are statutory monopolies. Furthermore, if there is no statutory monopoly there is no barrier to entry. It is difficult to understand how the Court reasoned in the *Virgin/British Airways* case. Obviously it would be difficult for new entrants to enter the market, but not impossible and the temporal factor must be kept in mind. If a new firm entered the market, how long could British Airways hold on to their dominant position?

¹²⁸ Case T-229/94 *Deutsche Bahn v. Commission* [1997] ECR II-1689 para. 57

¹²⁹ Whish, Richard, *Competition Law*, fifth edition, 2003, Great Britain, p. 187

4. CONCLUSION

It was stated in *United Brands* that a firm is in a dominant position when it is able to prevent effective competition from being maintained on the relevant market and when it has the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. The main element of the definition appears to be that the firm should be able to behave independently within a reasonable extent for it to be dominant. If a firm can behave independently it should logically be able to prevent competition, hence the two elements relate to each other. The definition has been criticised harshly by economists, who has stated that it would be impossible to behave independently on the market. The ECJ extended the definition in *Hoffman-La Roche* stating that some competition does not rule out the possibility of the firm being dominant, which could possibly justify some of the rulings the Community authorities have been criticised for.

The market share data is the first and most important element in the assessment of dominance, and this has been questioned by many. The Commission uses the market shares as a measurement for estimating the relative strength in question. Repeatedly it has been stated by the Court that dominance can be presumed when the undertaking has a market share above 50%, and this has been criticised for reversing the burden of proof to the firm. Naturally, the larger the market share the more likely it is to establish dominance. The Commission has stated that a market share between 20-40% cannot rule out dominance, which could make sense if there are sufficient other factors indicating dominance. One could nonetheless question how the Court could state that it is not impossible for a firm with a market share between 10-25% to be found dominant, it was simply stated to be *nearly* impossible. Such a statement could in fact increase the possibility for firms to be found dominant, and if non-dominant firms are found dominant it might actually damage the consumer protection more than ensuring it. Therefore, one has reason to question the Court's statement. In *Hoffman-La Roche* the Court stated that the market share must be held for some time, but there was no reference as to what could qualify as some time. It appears though as if the Community authorities tend to look at a smaller time-scale than what economists would prefer. Hence one could question how much attention the Court pays to the temporal factor, once again there is a risk that non-dominant firms are found to be dominant. However,

dominance can never be assessed merely by looking at numbers, other factors must be taken into account.

The significance of other factors increases the lower the market shares are. Nevertheless, there is no exhaustive list of other factors, all influences that could strengthen or weaken the firm's market position could be taken into account, particularly barriers to entry. Barriers to entry are however a subject of controversy, and the many difficulties with identifying and defining barriers to entry complicates the application of the dominance concept. The Community authorities seem to have adopted a wide approach of barriers to entry, which can be questioned. Presumably, such a wide approach could overestimate an undertaking's market power, and thus a non-dominant firm can be found dominant.

Bishop and Walker have argued that the assessment of dominance must be considered within a consistent framework, so far one could not say that the Community authorities apply such a consistent framework. There are no clear guidelines on how to assess dominance. There are factors that have been considered by the Community authorities to indicate dominance, though there has been little arguments presented as to why such factors could be taken into consideration. Presumably the factors should be in conjunction with the definition of dominance in *United Brands*. Hence the factors should affect the firm's possibility to prevent competition and its ability to behave independently. To some extent it appears as if the Community authorities have neglected this altogether, since they have not supported their findings with argumentation as to why certain factors could be taken into account. Furthermore, all factors might not be considered in an assessment, merely the ones the authorities considers relevant. Thus the legal certainty of the concept dominance could be questioned, as the concept is clearly arbitrary.

It is impossible to make an assessment of dominance without involving economics, one must perform an economic analysis. The definition as it is now is neither formalistic nor in accordance with the economic point of view. From the wording of the Commission's staff paper of Article 82 EC it appears as if it is trying to combine two approaches, the more formalistic approach and the economic approach, which is rather questionable since they cannot ignore existing jurisprudence. It will nonetheless be interesting to see what the Commission concludes, maybe their findings will encourage the Courts to develop existing case law.

5. LIST OF REFERENCE

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