

FAROS

A lighthouse on a rocky island at night, with its light shining brightly against a dark sky. The lighthouse is white with a dark top section and a glowing light. The background is a dark blue night sky with some light rays emanating from the lighthouse.

Art. 102 TFEU

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COMPETITION

DATA PROTECTION

COMPLIANCE

TODAY

1. Legal framework
2. Concepts
3. Why?
4. Dominance
5. Abuse
6. Digital markets
7. Before we finish: notable recent judgment



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Legal framework





Art. 102 TFEU

“Any **abuse** by one or more undertakings of a **dominant position** ... shall be **prohibited**.”

Such abuse **may**, in particular, **consist in**:

- a) ... imposing unfair ... prices or other unfair trading conditions
- b) limiting production, markets or technical development ...
- c) applying dissimilar conditions to equivalent transactions ...
- d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which ... have no connection with the subject of such contracts.”



Art. 3(2) Regulation 1/2003

2. *The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. **Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.***

Art. 3 and recital (8) Regulation 1/2003

→ °abuse of economic dependence

- **National legislation** in numerous member states
(e.g., Belgium, France, Germany, Italy, Greece, Austria, Portugal, Spain)
- Economic dependence **vs. dominance**
- **Case - by - case** approach

Tools



Art. 102 TFEU



**Enforcement priorities
of EC re:
exclusionary abuses**



Case law

Just arrived!



Brussels, XXX
[...] (2024) XXX draft

SENSITIVE*
UNTIL ADOPTION

COMMUNICATION FROM THE COMMISSION

Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings

ted or endorsed by the European Commission.
circumstances be regarded as such in an official position of the Commission.

Concepts





Dominance

The **dominant position** thus referred to 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**, its **customers** and ultimately of the **consumers**.

(United Brands, §65)

Draft Guidelines, §18



Dominance

Establishing dominance is **not precluded by the existence of a certain degree of competition on a particular market**, as long as the undertaking concerned is able to **act to an appreciable extent without having to take account of such competition** in its market strategy and without, for that reason, suffering detrimental effects from such behaviour.

(Hoffmann-La Roche, §70)

Draft Guidelines, §19



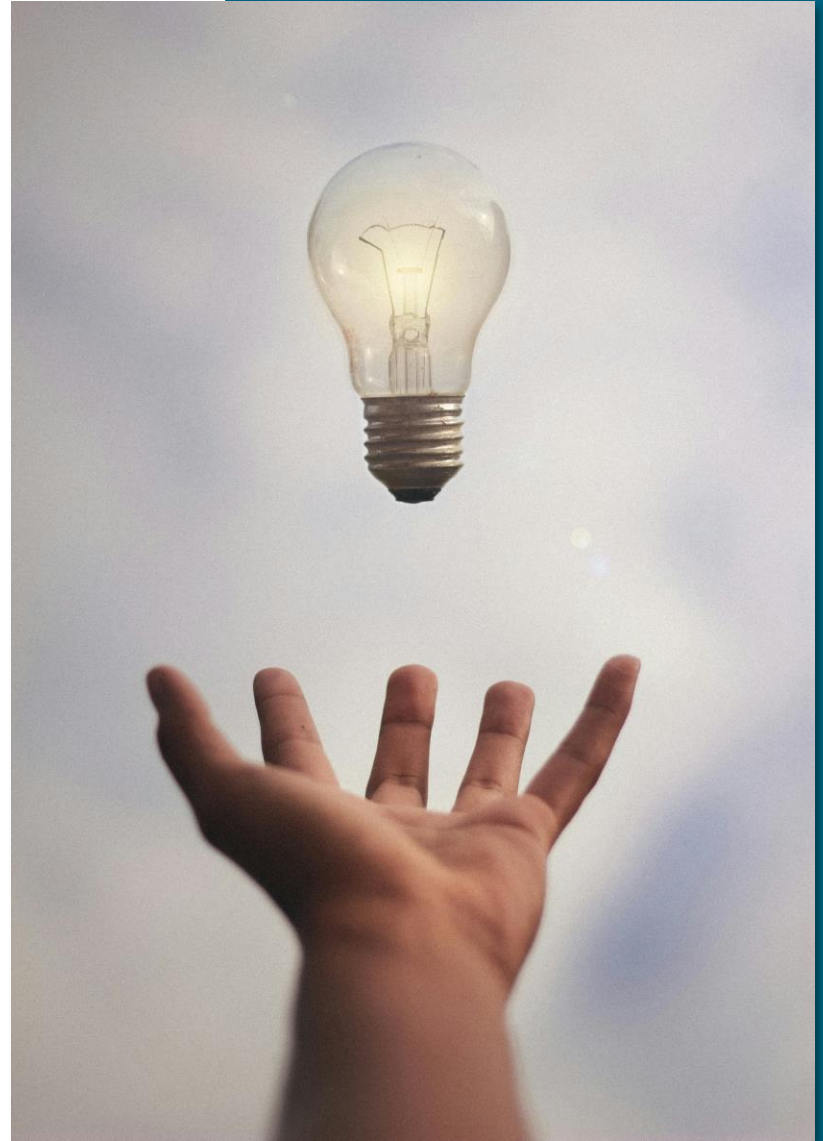
Abuse

The concept of abuse is an **objective concept** relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, **through recourse to methods different from those which condition normal competition** in products or services on the basis of the transactions of commercial operators, has the **effect of hindering** the maintenance of the degree of **competition** still existing in the market or the growth of that competition.

(Hoffmann-La Roche, §91)

Draft Guidelines, §6

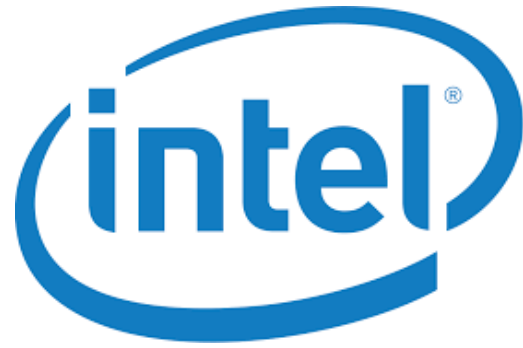
Why?



Policy questions



**Why not prohibit
dominance?**



These are dominant...

But these are too...

Aer Lingus 



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Why not prohibit dominance?

- Dominance often **reflects successful competition/innovation**
- **Markets correct** themselves
- **Intervention** is **costly** and **uncertain**

Policy questions



**What should
constitute abuse?**

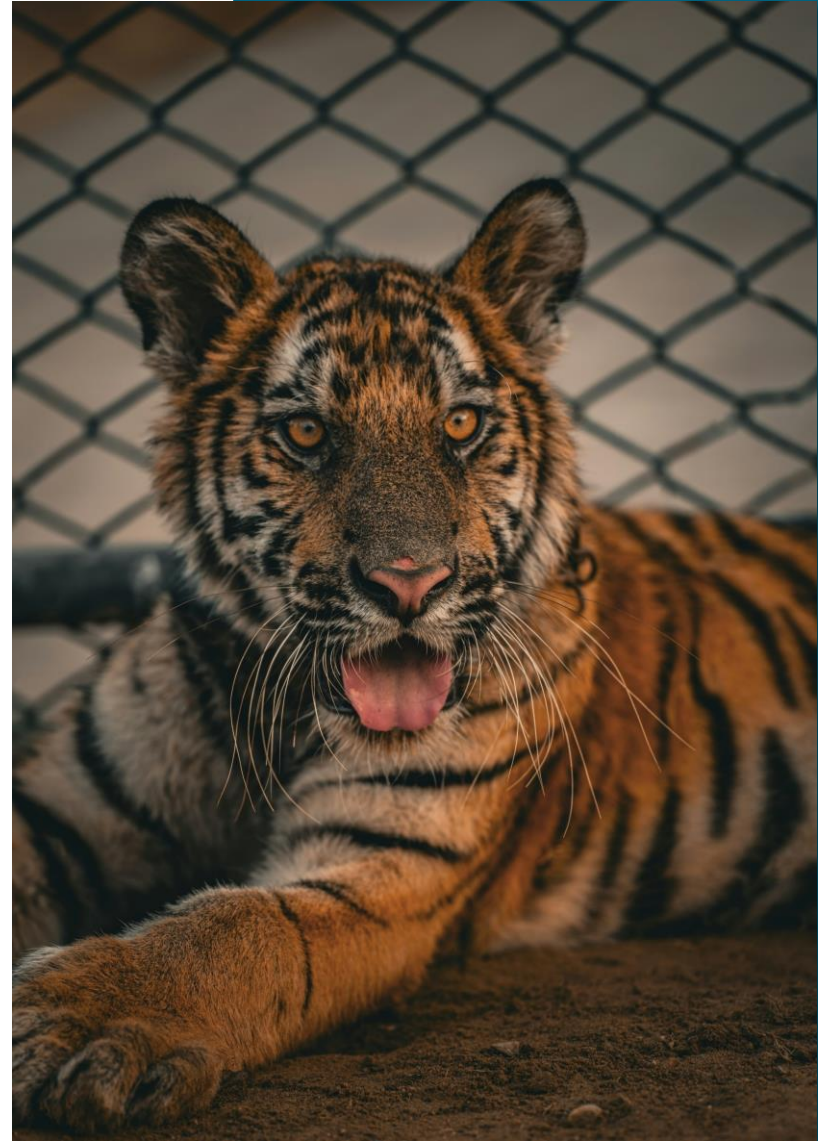
What should constitute abuse?

- Are you **penalising successful competition**?
- Are you **slowing down innovation**?

OR

- Are you **departing from competition on the merits?** (*Draft guidelines, §49 - §58*)
- Can you **produce exclusionary effects?** (*Draft guidelines, §59 - §75*)

Dominance



How to measure dominance?

- Assessing (collective) dominance depends on the **competitive constraints on the potentially dominant undertaking**
- **In particular:**
 - Market positions of the dominant undertaking and its competitors
 - Barriers to expansion or entry
 - Countervailing buyer power

Draft guidelines, §25 - §33

How to measure dominance?

- Market shares = inevitable **starting point**
- Requires the market to be **defined in terms of:**

Relevant
product market

Relevant
geographic
market

How to measure dominance?

- **Market shares** = inevitable starting point (see also *Draft Guidelines, §26*)

< 40%	Rebuttable presumption of absence of dominance
40-50%	Additional factors required
50% market share stable over 3+ years	Rebuttable presumption of dominance
> 70%	Strong presumption of the existence of a dominant position - market shares may be sufficient to establish dominance

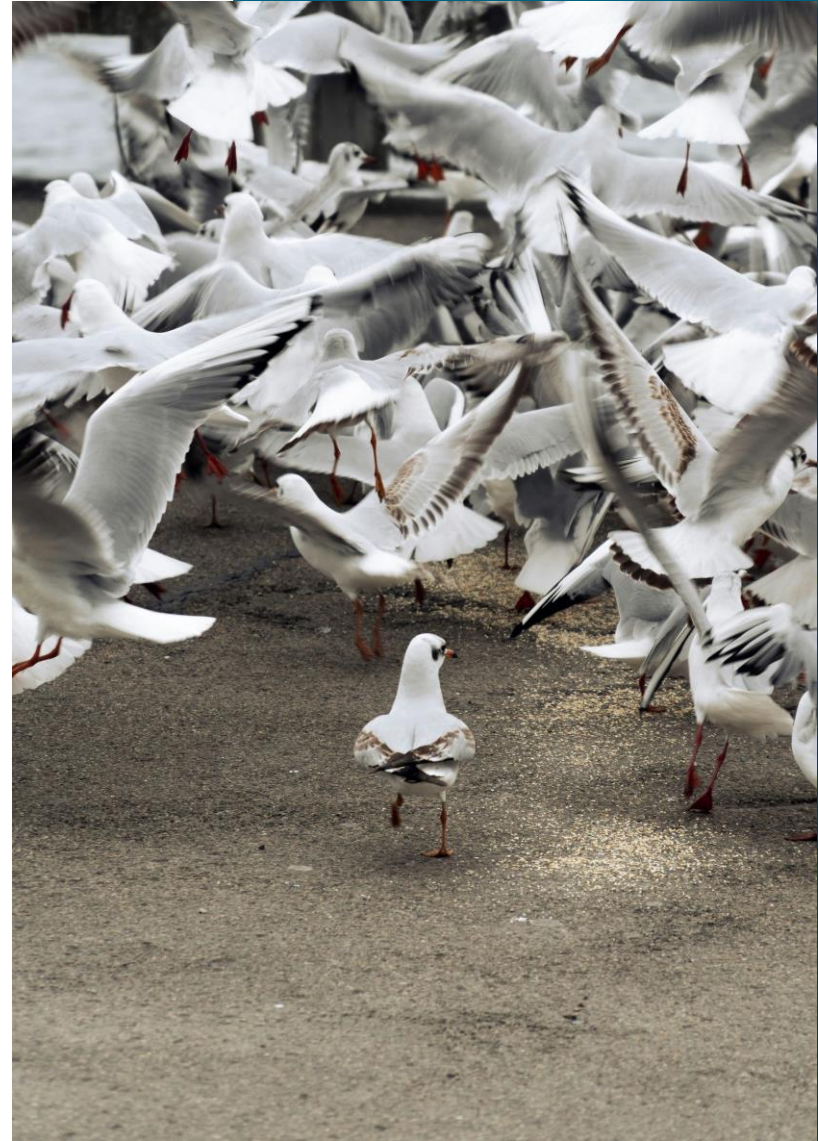
Draft guidelines, §28:

Market shares should be interpreted in light of the relevant market conditions, dynamics of the market and extent of differentiated products

How to measure dominance?



Abuse



Abuse?

Exploitative
abuse

vs.

Exclusionary
abuse

What can this be?

Exploitative abuse

**Excessive
pricing**

Discrimination

**Restrictions on
trade between
Member States**

Excessive pricing



Excessive pricing

- Charging prices that bear no reasonable relation to the economic value of a product = potentially abusive
- **Relevant factors** for abuse:
 - **(1) Excessive character:** Is the difference between costs incurred and prices actually charged (profit margin) excessive? (price-cost test)
 - **(2) Unfair character:** Is the price imposed unfair in itself or when compared to prices of competing products? (comparative market test)
 - + **non-cost factors** (e.g. demand for a product/service, intangible value)

Discrimination



Discrimination

- Discrimination by a dominant undertaking is abusive if:
 - **(1) dissimilar conditions** are applied
 - **(2) to equivalent transactions**
 - **(3) putting third parties/trading partners at a competitive disadvantage**
 - **(4) leading to consumer harm**
- **Two categories:**
 - Discrimination with effects on (downstream) competitors
 - Discrimination between customers (incl. based on nationality)

Restrictions on trade between Member States



Restrictions on trade between Member States

- **Hindering cheaper imports** from Member State 1 into Member State 2
= presumed abusive
- Abuse of **obstructing cross-border sales** to Belgium **by**:
 - intentionally altering packaging in France and the Netherlands:
 - removing French/Dutch text
 - adjusting can sizes
 - limiting supplies to French/Dutch customers that resold in Belgium
 - making marketing cooperation with customers conditional on not reselling into Belgium
 - tying sales of “must have” products in Belgium

Exclusionary abuse

Predatory pricing

Exclusive dealing

Conditional rebates

**Tying/
bundling**

Refusal to supply

Margin squeeze

Predatory pricing

AkzoNobel

Predatory pricing

- **Legal test**

- Prices below AVC (average variable cost) or AAC (average avoidable cost)
= presumed abusive
- Prices below ATC (fixed + variable costs) or LRAIC (long-run average incremental cost) but above AVC or AAC
= may be abusive if part of a plan to eliminate or reduce competition

- **No proof of recoupment required**

Draft Guidelines, §107-120

Exclusive dealing



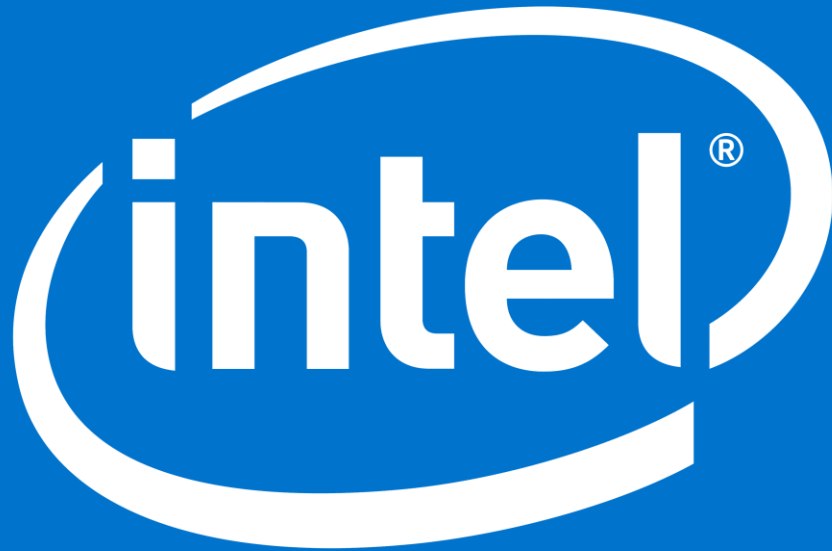
Exclusive dealing

- Obligation to purchase or sell **all or most requirements** from/to the dominant undertaking, or incentive schemes conditional upon such exclusive dealing = presumed abusive
- **Contractual requirements**
- **Indirect requirements:**
 - Loyalty rebates
 - Minimum quantity requirements/target rebates tailored to the customers total or near total demand
 - Stocking requirements
 - English clauses

Exclusive dealing

- **Relevant factors** for the assessment of exclusionary effects:
 - Extent of the dominant position
 - Position of competitors, customers or input suppliers on the market
 - Share of the market covered/affected
 - Conditions, arrangements, amount and duration of the (near-) exclusivity
 - Existence of a strategy to exclude

Conditional rebates



Conditional rebates

- **Categorisation possible based on, a.o.:**

1. Type of threshold to trigger the rebate	Volume, value, share requirement or growth
2. Products covered	Single product or multi-product
3. Purchases covered	Retroactive or incremental
4. Standardization	Individual or standardized

Conditional rebates

1. Standardised quantity rebates	Generally lawful
2. Exclusivity rebates	Presumed abusive*
3. Other rebates which may have a loyalty inducing effect	Necessary to consider all relevant circumstances

Conditional rebates

- **Relevant factors** for the assessment of exclusionary effects:
 - Extent of the dominant position
 - Share of the market covered
 - Conditions and arrangements for granting the rebate
 - Size/amount of the rebate as a percentage of the total price or the value
 - Threshold triggering the rebate
 - Transparency
 - Retroactivity of the rebates
 - Individualised nature of the rebate
 - Length of the reference period
 - Existence of a strategy to exclude competitors

See also: Draft guidelines, §145

Tying/bundling



Tying/bundling

- Obliging customers of one product (the dominant 'tying product') to buy a second separate product (the non-dominant 'tied product') = potentially abusive
- **How?**
 - Contractual obligations
 - Technical/physical integration
 - Pure bundling: only selling two products jointly
 - Mixed bundling: pricing/multi-product rebates

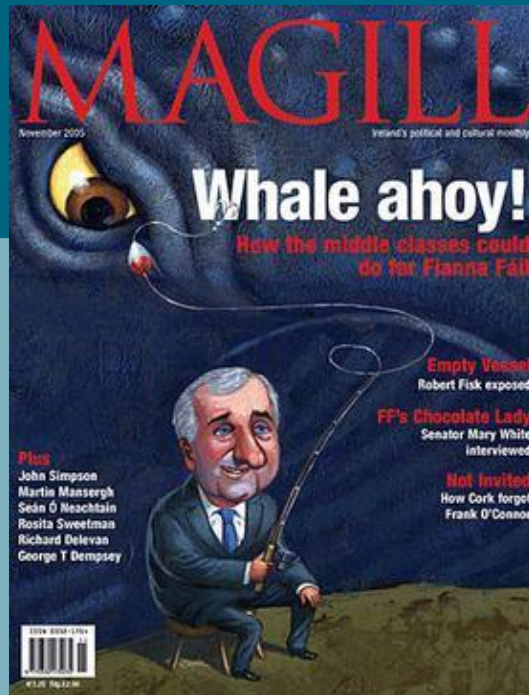
Draft guidelines, §84 - §87

Tying/bundling

- Tying/bundling is liable to be abusive if
 - **(1)** Tying/bundling and tied/bundling products are **separate products**
 - **(2)** A **dominant position** is held on **the tying/bundling market**
 - **(3)** Customers are not given a choice to obtain the tying/bundling product without the tied/bundled product ('**coercion**')
 - **(4)** Tying/bundling is **capable of having exclusionary effects**

Draft guidelines, §88 -§95

Refusal to supply



Refusal to supply

- **Refusal to sell** to a purchaser
= potentially abusive
- Copyright ownership is not an exception
- A dominant company **abuses its dominant position only** if it (i) refuses to supply competitors operating in a downstream (even potential or hypothetical) market, (ii) of an indispensable input, (iii) without an objective justification and (iv) eliminating all effective competition in a downstream market.
- In the case of a refusal to **licence intellectual property rights**, the additional condition is that (v) the refusal limits technical development on the market

Margin squeeze



Margin squeeze

- Leaving **downstream (as efficient) competitors no margin to compete profitably** while buying an upstream product from a dominant undertaking = potentially abusive
- Margin squeeze by a dominant undertaking is considered as liable to be abusive if:
 - **(1)** the dominant undertaking is **vertically integrated**
 - **(2)** the price charged by the dominant undertaking would render the **activities of an efficient competitor non-profitable**
 - **(3)** conduct is capable of producing exclusionary effects
- Application of **'as efficient competitor' test** (generally on the basis of LRAIC)

As Efficient Competitor (AEC) test

▪ Intel (GC)

- AEC test not generally legally required

▪ Intel (CJEU)

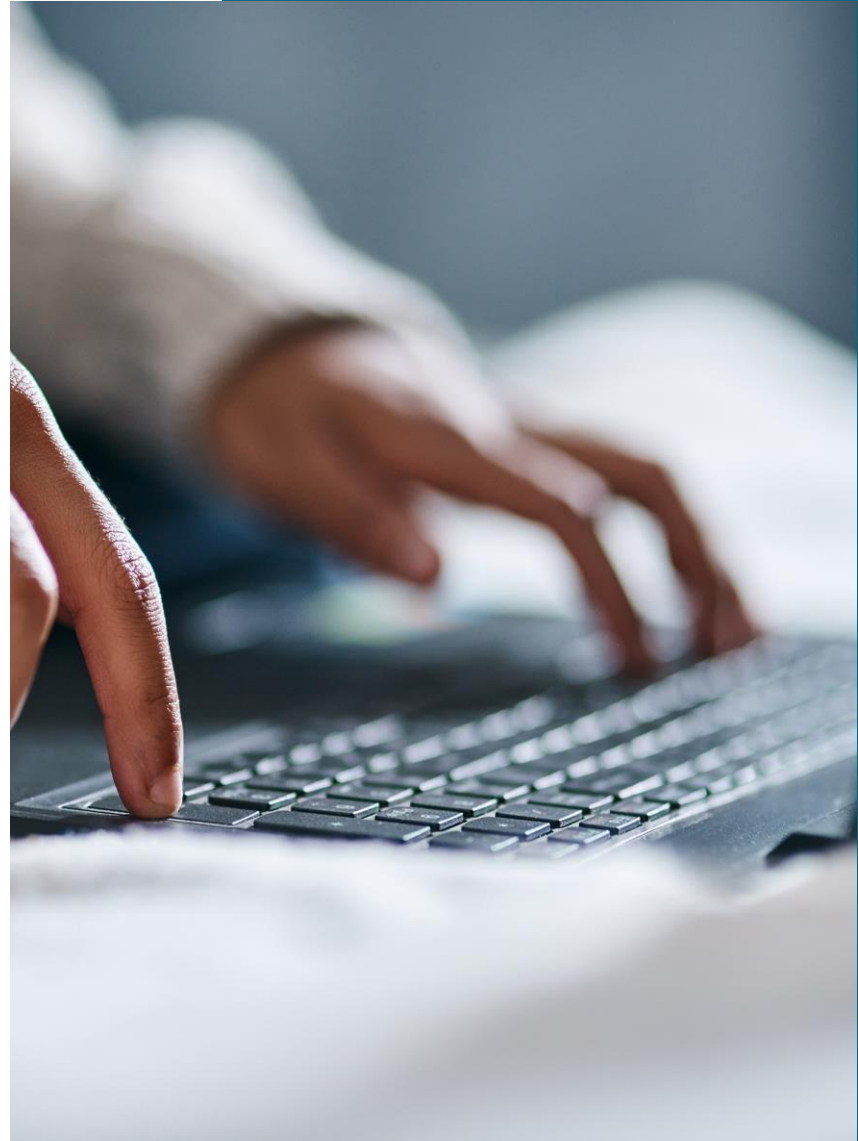
- Purpose of Art. 102 not to protect less efficient competitors
- AEC test may be relevant if used by EC

▪ Commission Guidance

- Focus on “anticompetitive foreclosure”
- AEC test = “optional”

- §73 Draft guidelines: *The assessment of whether a conduct is capable of having exclusionary effects also does not require showing the actual or potential competitors that are affected by the conduct are as efficient as the dominant undertaking.*

Digital markets



Abuse of dominance in digital markets

- **Challenges**

- Market definition (non-price dimensions of competition, multisided character, ...)
- Theories of harm
 - Why? Unique market conditions and types of conduct

- **Types of abuse / theories of harm**

- Well-established: refusal to deal, predatory pricing, margin squeeze, tying & bundling, ...
- New:
 - Forced free riding (content scraping, use of data from platform buyers/sellers to introduce own products on the platform, ...)
 - Self-preferencing (*Google Shopping*)
 - Privacy policy tying
 - Access restrictions (=refusal to supply)

Practical example: Amazon Buy Box - Prime

- **Activities of Amazon**

- Selling own and third-party products
 - Amazon Prime: premium services to customers - includes fast and free delivery to Amazon Prime customers
 - Amazon Buy Box: ensures prominent visibility of offers on the Amazon marketplace
- Fulfilment services (storage, packaging and shipping) for third-party sellers (subscribed sellers = "AFN sellers")

- **Access to Amazon Prime and Buy Box:** traditional third-party sellers vs. AFN sellers

**Before we
finish:
notable recent
judgments**



Towercast judgment



- **National competition authorities** and **courts** can **review acquisitions** by dominant entities **under abuse of dominance** rules
- If **acquisitions are not notifiable** under EU or national merger control legislation

Super League



- Common rules intended to guarantee equal opportunities in sporting competition need to be set within a framework of **substantive criteria** which are **transparent, objective, non-discriminatory, proportionate and subject to review**

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