



The Competition Authority

An tÚdarás Iomaíochta

Towards an Effects-Based Approach to Article 82

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Overview

- **Abuse of Dominance – The Irish Experience**
- **Policy Line of The Authority**
- **EU policy on Abuse of Dominance**
- **Why We Need an Effects-Based Approach**
- **Other Issues**



Abuse of Dominance – The Irish Experience



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Pre-2000

- **Pre-2000: mainly private enforcement**
- **Very few findings of abuse of dominance**
- ***Irish Independent/Irish Press***
- ***Masterfoods* - “The ice-cream wars”**
 - Concerned Freezer Exclusivity and refusal to supply
 - Heard in both Ireland and EU Commission – different results in same case



Pre-2000

Large number of cases decided on non-competition grounds

- ***Zockoll v Telecom Eireann***
 - Refusal to supply by incumbent telephone operator of over 250 free phone “vanity” numbers
 - Competition issues were not considered at all
- ***Deane v VHI***
 - Monopoly health insurance company was dominant but not abusing dominant position
 - Plaintiff succeeded on basis VHI actions were unreasonable and inequitable and exceeded statutory powers



Pre-2000

- ***Meridian v Eircell:***
 - Eircell refused to supply Meridian at corporate rate
 - Held: Eircell 58% not dominant
 - Main Competitor won 40% of the market in two year period
 - High barriers to entry but 3rd licence was on the way
 - Low barriers to expansion
 - Evidence of consumer switching costs
- **Conclusion on Abuse of Dominance Pre 2000**

Post-2000

- **Post-2000: mainly public enforcement**
 - Increase in statutory power and resources of the Authority
 - Negative outcome of private cases
 - Costs associated
 - Discovery process lengthy

- **The Authority is an enforcement agency in respect to Article 81&82**

ILCU

- **ILCU provided:**
 - Representative services
 - LP/LS insurance
 - Savings protection scheme (SPS)
- **Credit unions dissatisfied with pricing created CUDA as an alternative**
 - People who left ILCU faced losing all their contributions already paid into fund
 - Refusal to refund SPS deposits to new entrant
 - Case taken was not tying in respect of LP/LS membership rather RRC
- **Held:**
 - Dominance in market for representation services
 - Abuse of section 5 – Tying in respect of the SPS to membership of the ILCU
- **Under appeal to Supreme Court**



Drogheda Newspapers

- **Drogheda Newspapers:**
 - Issue of Predatory Pricing in Local Newspaper Advertising
- **Dominance**
 - Drogheda Independent Company (the DIC): 70% market share but was not dominant in market for advertising
 - Low barriers to entry & expansion in the market
 - Low buyer switching costs
 - Strength of rival (Drogheda Leader) was constraint on excess pricing- market share of DIC had decreased from 100%-69% in 2004
- **Abuse**
 - Even if DIC were considered dominant, would not have been an abuse



Post-2000

Aer Lingus

- Aer Lingus reduce commission paid to travel agents
- Complainants argued this would reduce number of travel agents
- Commissions paid not excessively low and abusive as claimed
- Decline in travel agents would not necessarily equate to reduction in competition and harm to competitive process
- Aer Lingus's strategy actually lowered prices to consumers
- A.L announced annual savings of €40million as a result of measures

Vodafone

- Vodafone decided to reduce wholesale margins on sales of pre-paid mobile phone top-up
- Retailers' association claimed this may lead to reduction in retailers' welfare
- Variety of alternative methods for purchasing top-up e.g. online, text message, bank ATM's
- Authority decided it could lead to reduction in retailers' welfare but was unlikely to result in consequent welfare losses to consumers.



ComReg

- **EU Communications Regulatory Framework**
- **Comreg :O2 and Vodafone joint dominant in mobile call origination market**
- **Steering group**
- **Authority agreed Comregs analysis highlighted market failures**
- **However the Authority reserves the right to re-examine any or all of the issues raised**



Insurance & Banking

- **Insurance:**
 - No demand substitutability
 - Very low supply substitutability
 - Narrow relevant markets- Markets where dominance “likely”
- **Banking:**
 - Market power
 - Entry barriers
 - Switching costs
 - Dominance not addressed



Summary

- **Private enforcement little success**
- **Public enforcement:**
 - One case involved Raising rivals costs
 - No predation, rebates, monopsony cases
 - Collective dominance by Telecoms regulator
 - Implications for dominance in market studies
- **Structured analysis**
 - Case screening system
 - Full rule of reason for difficult cases

Cont'd



Summary

- Sophisticated legal and economic analysis
- In- depth analysis takes time
- **Transparency and guidance**
 - Reasoned decisions in non-infringement cases
 - Speeches and articles
- **Actively contributing in EU modernisation of Article 82**



Policy Line of Authority



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Approach to Dominance

- **Dominance**
 - As a structure not abusive
 - Outcome of activity of dominant firm on the market is factor analysed
- **In determining dominance the Authority interprets ability to act independently of competitors as equivalent to sustained market power**
- **Determining market power:**
 - barriers to entry
 - market share
 - barriers to expansion
 - customer switching costs
 - countervailing buyer power



Approach to Abuse

- **Emphasis on changes in consumer welfare**
- **Any resulting efficiencies taken into account**
- **Careful analysis of EU precedent (ECJ,CFI & Irish court decisions)**
- **Tests Used**
 - 1) Profit-Sacrifice test
 - 2) As-efficient Competitor
 - 3) Consumer Harm Test

Aspects of all three-not just one
- **Think hard about remedies prior to investigation**



EU Policy on Abuse of Dominance



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EU Policy

- **Why consistency matters**
 - Sound economic policy
 - Jointly enforcing Article 82 since 1st May 2003
 - Forum shopping
 - Costs on international business
- **Effects based analysis**
 - Entry as key in dominance investigation
 - Consumer welfare is primary focus of any analysis
 - Decisions that promote efficiency



Effects based analysis

- **One step further than form-based approach**
 - Examines (1) likely effects on the market of the activity in question
 - Examines (2) likely effects on consumers as oppose to competitors
- **Does this mean more economics?**
 - Concerns which questions economics is used to answer
 - Economic tools can be incorporated into form-based approach
- **Consistent with CFI/ ECJ?**



Challenges going forward

- **How dominance was achieved**
 - *"A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry...the successful competitor, having been urged to compete, must not be turned upon when he wins"*
- Justice Learned Hand
- **Enforcement in presence of direct regulation**
 - Trinko
 - **Pressure on Authorities for quick results**
 - Resolving every complaint vs. picking cases that clarify market rules
 - **How far can we go with guidelines?**



Other issues

- **Remedies**

- Role of forward thinking remedies
- Difficult when dealing with cases where $P > C$
- What is the appropriate remedy?
- Our own experience: ILCU

- **Amicus Curiae**



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