Abuse below the Threshold of Dominance? Market Power, Market Dominance, and Abuse of Economic Dependence

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1 Introduction

The traditional approach to defining dominance gives an important role to market shares and market delineation. In that respect, market shares constitute an intervention threshold that may lead competition authorities to neglect certain types of market power, although this traditional approach contributes to increasing the level of legal certainty for undertakings. A number of European countries have passed laws to intervene in cases falling short of dominance, such as abuse of economic dependence. Briefly defined, economic dependence arises when a supplier is economically dependent on a buyer or vice versa. The interest in economic dependence grew when the concentration of some industries rose substantially and the firms engaged in practices that harmed small businesses.

Under Regulation 1/2003,[1] unlike the national provisions related to the prohibition of agreements, Member States are not precluded from "adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct

[1] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1.

engaged in by undertakings".[2] Such an "exemption" relates to "provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings."[3] One might infer from the wording of Regulation 1/2003 that existing national provisions pertaining to the abuse of economic dependence are stricter than Art 82 EC. However, this is not necessarily the case, and this article aims to explore the issue in more depth.

The answer to this question is not only of interest for Member States that have already enacted special provisions on the abuse of economic dependence. Other member or non-member states' competition laws have borrowed the definition of the dominant position as defined by the European Court of Justice in *United Brands*.[4] Answering the question of whether this definition is intended to be interpreted widely so as to include the concept of economic dependence will be another task of this article.

The study of economic dependence also presents an interest in the framework of Article 82's modernisation process. Reflections about the interpretation of Article 82 EC include the discussion of points such as: What is a dominant position? What is its relation to market power and market shares? Can an undertaking with low market share be held dominant? What is abusive behaviour? What is the appropriate test to determine anticompetitive effect? The discussion of these points is relevant to both Article 82 EC and the interpretation of economic dependence.

Before beginning, some observations are in order. Antitrust commentators can have legitimate disputes about the appropriateness of the economic-dependence concept, or more broadly, about whether intervention is too strict or too lenient. The purpose of this article is not to enter directly into those debates, but rather to present the concept of economic dependence as it has developed in the case law of different national competition laws and to answer the question of whether it is consistent with the concept of dominant position as defined in European competition law as well as with the concept of market power.

The economic definition of market power is discussed in Section 2. The relation to market shares is also developed. Section 3 follows with the concept of economic dependence in some national competition laws, and the application of similar concepts in Switzerland. Section 4 examines the definition of dominant position under European competition law, focusing on the relevant case law. Abusive conduct and remedies are briefly examined in Section 5.

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[2] Regulation 1/2003, Article 3(2).
[3] Regulation 1/2003, recital 8.
[4] Case 27/76 *United Brands Company and United Brands Continental BV v Commission* [1978] ECR 207, para. 65.

2 Market power

2.1 Economic definition of market power

Market power is the key issue in industrial economics and competition law. In particular, antitrust law is used to minimise the social cost of the exercise of market power.[5] The competition authorities are concerned with the situation where one or more undertakings have the power to influence price[6] and output, as well as other parameters of competition such as the level of innovation. The Commission defines market power as "the power to influence market prices, output, innovation, the variety or quality of goods and services, or other parameters of competition on the market for a significant period of time."[7] The modern industrial organisation emphasizes the importance of strategic behaviour that aims at sustaining monopoly profits.[8] This is also known as the power to exclude exiting or potential competitors in the long run.[9]

Market power is defined by using two benchmarks: the marginal cost, or the level of price in a competitive market, and the monopoly price. As a matter of fact, the whole theory of industrial organisation is constructed around two market structures: competition and monopoly. Contrasting both situations usually illustrates the superiority of one outcome over the other in terms of social welfare.

In the state of perfect competition no firm has market power, or the power to determine price.[10] The market price equals the marginal cost. A firm with market power has the ability to profitably raise the price above marginal cost.[11] The benchmark of perfect competition, or the reference to the short-run marginal cost, is usually used to determine a firm's market power. According to this approach, an undertaking possesses market power even though it has the ability to impose only small increases in price. Since large fixed costs cannot be recouped without pricing above marginal cost,[12] this is a common situation in the market: It follows that a large number of firms are capable of having some market power.[13] As a consequence, a more sophisticated definition of antitrust market power refers to the ability to raise prices above long-run average cost.[14]

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5 The exercise of market power is one type of market failure.

6 The price is not the only parameter of competition. A firm has market power if it is able to influence quantity, quality, innovation or other commercial conditions.

7 EUROPEAN COMMISSION, "DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses", (2005), available at http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf.

8 CHURCH/WARE, "Industrial Organisation. A Strategic Approach", 603 (2000).

9 *See* BISHOP/WALKER, "The economics of the EC Competition Law", 73 (2002); CHURCH/WARE, note 8, 603.

10 CARLTON/PERLOFF, "Modern Industrial Organisation", 57 *et seq.* (3rd ed. 2000).

11 CHURCH/WARE, note 8, 29. Marginal cost equals the price in perfect competition.

12 MOTTA, "Competition Policy. Theory and Practice", 41 (2004).

13 BISHOP/WALKER, note 9, 42.

14 CHURCH/WARE, note 8, 603.

Monopolist behaviour approaches extreme levels of market power. A monopolist acts as a price maker since it is the only supplier of a product on a market. It can impose a price equal with what the consumers are willing and able to pay: a monopolist facing a low elasticity of demand has absolute power over its customers and consumers. Often monopoly power is used as a synonym for market power.[15] Indeed, market power indicates a deviation from the effective or perfect competition benchmark,[16] and monopoly power fulfils this condition:

> "Whenever a firm can influence the price it receives for its product, the firm is said to have *monopoly power* or *market power*. The terms *monopoly power* or *market power* typically are used interchangeably to mean the ability to profitably set price above competitive levels (marginal cost); that is, the Lerner Index is positive."[17]

Industrial organisation theory analyses a variety of intermediate market structures different from perfect competition and monopoly. One of them is the existence of a *dominant firm* together with a *competitive fringe*. The dominant firm "has some market power"[18] or "still possesses considerable market power"[19] in the sense that it is a price setter – it can practically ignore the other firms operating in the market. These latter fringe firms act as price takers. To clearly delineate the meaning, and distinguish it from monopoly, a dominant firm is said to have a relatively large market share in comparison with the firms composing the fringe.[20] It is this concept that corresponds most closely with the *dominant position* in the legal sense, for it refers to a firm having a paramount market position.

Another form of competition relates to differentiation and lies between monopoly and perfect competition: *monopolistic competition*.[21] The expression seems to be an oxymoron at first sight, but it becomes clear once branded goods are considered. It consists in a situation where there are many producers on the market, each producing imperfect substitute products, in that they are similar but slightly differentiated.[22] Establishing a strong brand image, in particular through advertising, increases the consumer preferences for that brand by decreasing the products' sub-

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[15] It should be underlined that, in the United States, monopoly power is one of the conditions for the application of Section 2 of the Sherman Act. American law generally distinguishes market power from monopoly power, although market power is used to explain monopoly power. Also, monopoly power under Section 2 of the Sherman Act requires "something greater than market power under Section 1" (*Eastman Kodak Co. v Image Tech. Servs.* 504 U.S. 451 (1992), para. 481). Monopoly power refers both to the ability to increase prices and the power to exclude competition (*United States v E.I. du Pont de Nemours & Co.* 351 U.S. 377 (1956), paras 391, 392). *See also* PRICE, "Market Power and Monopoly Power in Antitrust Analysis", (1989) 75 Cornell Law Review 190.

[16] BISHOP/WALKER, note 9, 50.

[17] CARLTON/PERLOFF, note 10, 92. The Lerner Index of market power is the difference between price and marginal cost as a fraction of price.

[18] CARLTON/PERLOFF, note 10, 107 *et seq*.

[19] CHURCH/WARE, note 8, 124.

[20] CARLTON/PERLOFF, note 10, 108.

[21] CHAMBERLAIN, "The Theory of Monopolistic Competition", (1933).

[22] CABRAL, "Introduction to Industrial Organization", 92 (2000).

stitutability and making their residual demand less elastic.[23] Each producer can influence its price and quantity without affecting the decisions taken by its rivals. Each of them therefore has market power:[24] its level increases the greater the degree of product differentiation.[25] Customers' dependence on specific brands relates to this situation.

Oligopoly is another intermediate market structure between perfect competition and monopoly, where firms have a certain degree of market power without having a paramount market position. Price under duopoly (or oligopoly) is generally above marginal cost; quantity is lower than under perfect competition but greater than under monopoly.[26] Oligopolistic firms have market power even in the absence of collusion (non-cooperative oligopoly), even though they have low market shares.

Market power may also arise in the presence of information gaps, search or switching costs,[27] or the necessity to use specific assets.[28] Information gaps and high switching costs create the so-called "lock-in effect". Substitution between products or services in long-standing business relationships depends on switching costs[29] that customers, consumers or manufacturers face. When switching from one supplier to another is costly or technically difficult, or when the information on switching possibilities is lacking, the customers are locked in to a particular supplier or buyer, consumers of aftermarket products being one example of this.[30]

Specialised investment makes a manufacturer that produces specifically for a big buyer dependent on that buyer, for the latter may engage in opportunistic behaviour. Transaction-cost economics has studied bilateral relations and opportunism in detail, though emphasising the efficiency rationale of restrictive contractual clauses.[31] According to transaction-cost theorists, interpretation of these restrictive practices can reveal efficiency as well as anticompetitive purposes, the former being nevertheless more credible for them.[32] The guidelines on vertical restraints adopt a

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23 SCHERER/ROSS, "Industrial Market Structure and Economic Performance", 581 (3rd ed. 1990).

24 That producer faces a downward-sloping demand curve. It ought to be emphasised that high prices reflect more or less the consumers' subjective preferences for the brand and diversity.

25 CABRAL, note 22, 209 *et seq*.

26 CARLTON/PERLOFF, note 10, 160 *et seq*.

27 CABRAL, note 22, 217.

28 *See* WILLIAMSON, "Economic Organisation: Firms, Markets and Policy Control", 143 (1986).

29 Switching costs are "the real or perceived costs that are incurred when changing supplier but which are not incurred by remaining with the current supplier." *See* OFFICE OF FAIR TRADE, "Switching costs. Part one: Economic models and policy implications" 2003, para. 1.1, available at http://www.oft.gov.uk/NR/rdonlyres/CFD52220-7862-41A7-8F6F-53F3B4FE78FE/0/oft655.pdf.

30 BISHOP/WALKER, note 9, 205 *et seq*.

31 *See* WILLIAMSON, note 28.

32 WILLIAMSON, "Credible Commitments: Using Hostages to Support Exchange", (1983) American Economic Review 519, 534 *et seq*. Williamson observes that "[m]onopoly explanations are commonly advanced when economists, lawyers, or other interested observers come across contractual practices that they do not understand." He nevertheless adds that "[t]o be sure, exchanges might simultaneously service efficiency and anticompetitive purposes. Here as elsewhere, where tradeoffs are posed, they need to be evaluated."

similar approach: Article 81(3) EC exempts vertical restraints if they are necessary to reduce the risk of opportunism (the so-called hold-up problem) that could arise after the conclusion of the contract (*ex post*).[33] The rationale is to avoid under-investment. The analysis is carried out *ex ante* and relies on three conditions: the investment must be specific to the relationship; it must concern a long-term investment that cannot be recouped in the short-run; and it must be asymmetric. The same conditions are valid to identify a potential hold-up situation *ex post*. The rationale of the rules on economic dependence is to prevent opportunistic behaviour or hold-up problems *ex post*.

2.2 Market power and market shares

Market or monopoly power is associated with high market shares. Competition lawyers extensively use market shares to show the level of market power a firm possesses: low market shares indicate a low level of market power; conversely, high market shares signal a high level of market power. Market shares serve therefore as a *threshold* for the finding of market power and of dominance. The reliance on market shares is the expression of the traditional confidence in the static Structure-Conduct-Performance paradigm[34] and of the static approach that relates to the perfect-competition model.

The Lerner Index of market power is positively related to the level of market shares:[35] the higher the market share a firm possesses, the higher the Lerner's Index. This relationship suggests that it does make a sense to refer to market shares in order to indicate a certain level of market power. Other factors, however, are important for its determination. On the one hand, low market shares do not exclude all market power: most firms have some market power, certainly those that produce differentiated products. The importance of potential competition, on the other hand, shows that high market shares do not necessarily confer market power and allows us to emphasise the importance of entry barriers as a criterion for the assessment of market power.

In competition law, market concentration, market shares and barriers to entry constitute central elements of the analysis, while product differentiation, asymmetric information and client-specific investments deserve attention only occasionally and in addition to the former. The latter are nonetheless sources of market power. Although the reliance on market shares as an indicator of market power is appropriate, the use of market shares as an intervention threshold begs the question of whether this threshold is able to capture all forms of welfare-reducing behaviour while minimising the level of intervention error. The concept of economic dependence in some national laws answers precisely some of these concerns.

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[33] European Commission, Guidelines on Vertical Restraints, [2000] OJ C 291/1, para. 166(4).

[34] *See* CABRAL, note 22, 156.

[35] $L = (p-Cm)/p = -s_i/\varepsilon$, where p is the price, Cm the marginal cost, s_i the market share of the firm i and ε the price elasticity of demand. *See* CARLTON/PERLOFF, note 10, 268.

3 Economic dependence

In this section we briefly present the specific rules and the case law in Germany, France, Switzerland and Italy. We then present the general criteria of a situation of economic dependence, and contrast them with the concept of market power.

3.1 Concept of economic dependence in Germany, France, Switzerland, and Italy

3.1.1 Germany

Germany was the first European country to adopt specific rules on the abuse of economic dependence. It was the main objective of the second modification of 1973 of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, or GWB)[36]. The underlying rationale was to prevent big oil corporations from discriminating against small independent oil stations during the oil crisis; additionally, the rule aimed at protecting other retailers from dependence on strong brands and the dependence that resulted from long-standing business relations.[37]

Section 20(1) of the German Act against Restraints of Competition[38] proscribes any form of discrimination by dominant undertakings. Paragraph 2 extends this rule to other undertakings so far as they have contractual relationships with small and medium enterprises (SMEs):

> "Paragraph 1 shall also apply to undertakings and associations of undertakings insofar as small or medium-sized enterprises as suppliers or purchasers of certain kinds of goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of resorting to other undertakings do not exist. A supplier of a certain kind of goods or commercial services shall be presumed to depend on a purchaser within the meaning of sentence 1 if this purchaser regularly obtains from this supplier, in addition to discounts customary in the trade or other remuneration, special benefits which are not granted to similar purchasers."[39]

This is called "relative dominance" (*relative Marktmacht*), or dominance of a particular degree not reaching that of the classical dominant position. Market power is assessed referring to the bilateral relation between suppliers and buyers.[40] The provision expressly determines its scope of protection (*Schutzbereich*) by naming only small and medium undertakings as its beneficiaries.

German jurisprudence distinguishes between several types of economic dependence.[41] First, there is dependence relating to the product range or to a strong brand

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[36] Version of 15 July 2005 (BGBl. I 2114), modified by the Law of 1 September 2005 (BGBl. I 2676).

[37] TAUBE, "Das Diskriminierungs- und Behinderungsverbot für 'relativ marktstarke' Unternehmen", 31 (2006), with references to the discussions in the Bundestag (German parliament).

[38] Available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB_7_e.pdf.

[39] § 20 (2) of the GWB.

[40] MARKERT, in: IMMENGA/MESTMÄCKER (eds), "GWB Kommentar zum Kartellgesetz", § 20, para. 39 (4rd ed. 2007).

[41] *See* TAUBE, note 37, 37; GLOY/LOSCHELDER, "Handbuch des Wettbewerbsrechts", § 39 para. 17 (3rd ed. 2005); MARKERT, note 40, para. 61 *et seq*.

(*sortimentsbedingte Abhängigkeit*). Here a retailer is dependent on the producer of a branded or high-quality product, or on the producer of a range of products, because it cannot afford not to have and sell the items in its shops. The retailer can be dependent on a producer for one or a group of products. Second, there is business-related dependence (*unternehmensbedingte Abhängigkeit*), which is when two undertakings have long-standing relations and one of them does the larger part of its business with only the other business partner. Third, shortage dependence (*mangelbedingte Abhängigkeit*) is dependence related to the scarcity of a product. Fourth is buying dependence, that is, the dependence of a manufacturer on a buyer (*nachfragebedingte Abhängigkeit*). Lastly, there is technical dependence (*technisch bedingte Abhängigkeit*), or the dependence on specific technical products such as spare parts.

One of the first cases of dependence relating to branded products was *Rossignol*.[42] A leading specialised sport shop had long-standing business relations with the exclusive distributor of Rossignol skis in Germany. Rossignol skis represented (only) 3.3% of its turnover. In 1973, the distributor refused to deliver to the sport shop. The Federal Court assessed the case under the newly introduced provision on the abuse of economic dependence. It addressed the main criteria for identifying dependence, namely "insufficient and unacceptable means of switching to other undertakings."[43] The Court held that:

> "Sec. 26 II 2 GWB comes into play only insofar as an enterprise is exposed to considerable competition and does not hold a market-dominating position. The existence of considerable competition between suppliers is not the same as having sufficient possibilities to switch from an enterprise which discriminates between customers to another enterprise. The number of enterprises dealing in similar goods is likewise not decisive, at least not on its own. The overall decisive factor is the commercial value and market prestige of the goods in question. This factor determines whether or not sufficient possibilities exist to switch to other enterprises. Apart from their price, the actual value of particular goods is thus determined by their quality and the producer's advertising activities."[44]

The Federal Court clearly distinguishes between dominant position and economic dependence, observing that the latter does not preclude "considerable competition" in the market. The Court notes however that the existence of "considerable competition" in the market does not show that sufficient switching possibilities exist for the customers. Put in other terms, "considerable competition" – or using the terminology of the European Court of Justice: "lively competition"[45] – between the suppliers does not mean that the customers have *sufficient* switching possibilities and therefore are not dependent on the suppliers. Therefore, the Federal Court recog-

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[42] German Federal Court, *Rossignol* (1976) WuW/E 1391, 1393 *et seq*. Translation into English by the Institute of Global Law, available at http://www.ucl.ac.uk/laws/global_law/german-cases/cases_bundes.shtml?20nov1975.

[43] German Federal Court, *Rossignol* (1976) WuW/E 1391, 1393 *et seq*, para. A.I.2.

[44] German Federal Court, *Rossignol* (1976) WuW/E 1391, 1393 *et seq*), para. A.I.2(b)(cc).

[45] *See* the text accompanying note 91.

nises that the mere existence of other competitors does not necessarily make them sufficient switching alternatives for the customers. There the Federal Court originates the concept of brand dependence, concluding that the market prestige of a product can, on its own, make a customer dependent on a supplier.

German law and practice reflect a wide interpretation of economic dependence. Brand dependence constitutes a large part of cases decided under the particular provisions on economic dependence, which recognise that market power from product differentiation is clearly a basis for antitrust intervention. Market or bargaining power resulting from the presence of asset specificity is also a matter of concern. In sum, both the German judiciary and the competition authority make use of the specific provisions and interpret them widely.

3.1.2 France

The origin of the French rule on economic dependence is to be found in the development and the concentration of retail distribution. In 1985, the Competition Commission itself requested the enactment of rules that would empower it to control the discriminatory behaviour of undertakings that constitute obligatory trading partners (*partenaires obligés*) for the manufacturers, even if they do not hold a dominant position in the market.[46]

The ordinance of 1986 extended the scope of the dominant position by introducing specific rules on economic dependence (*abus de dépendance économique*). It was modified successively in 2001 and 2005.[47] Article L 420-2 of the Commercial Code, which concerned the abuse of a dominant position, reads as follows:

> "Also prohibited, whenever it is susceptible to affect the functioning or structure of competition, is the abusive exploitation, by a company or group of companies, of the condition of economic dependence in which a customer company or supplier finds itself vis-à-vis such company. These abuses may consist of the refusal of sale, tied sales or the discriminatory practices mentioned in article L 442-6."

The reference to the impact on the functioning or the structure of competition[48] suggests that the abuse of economic dependence condemns anticompetitive practices as such:[49] the practice is abusive if it has a certain impact on the market. Nevertheless, this additional condition gives rise to difficulties in the application of the economic-dependence provisions on bilateral or vertical dependence relationships. In general, it has restricted the scope of application of Article L 420-2 of the Commercial Code.

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[46] POESY, "Ordre concurrentiel et abus de dépendance économique", in ULLRICH/RAINELLI/BOY (eds): "L'ordre concurrentiel. Mélanges en l'honneur d'Antoine Pirovano", 620 (2003).

[47] Law No. 2001-420 of 15 May, [2001] Journal Officiel No. 113 of 16 May, 7776, Article 66. Modified by the law No. 2005-882 of 2 August, [2005] Journal Officiel of 3 August, Article 40.

[48] Introduced in 2001 (*see* Law No. 2001-420 of 15 May, [2001] Journal Officiel No. 113 of 16 May, 7776, Article 66. Modified by the law No. 2005-882 of 2 August, [2005] OJ of 3 August), Article 40.

[49] POESY, note 46, 631. *See also* DECOCQ/DECOCQ, "Droit de la concurrence interne et communautaire", 383 (2nd ed. 2004).

The French Competition Council has put forward several cumulative conditions for finding economic dependence: Firstly, the popularity of the supplier's brand as well as the importance of its market shares; secondly, the importance of the supplier's share on the retailer's turnover, unless this share does not result from a deliberate choice of the customer; and lastly, the difficulty for the retailer to find other equivalent products from other suppliers.[50] The analysis of economic dependence focuses on the bilateral relationship between the two undertakings, and should not concern the whole profession or the market.[51]

The French Supreme Court, in clarifying the condition pertaining to switching possibilities, held that for a distributor, the state of economic dependence consists in a situation where an undertaking has no comparable substitute for its current supplier.[52] It adds that the mere fact that the distributor makes a large part of its turnover with a particular supplier is not sufficient to conclude that a state of economic dependence exists.

It is useful to present some French cases, in order to apprehend the situations covered by the notion of economic dependence. The French Competition Council has found a situation of economic dependence in the following cases:

– In *Reims Bio*, the Competition Council held that Reims Bio was economically dependent on GIPCA, an undertaking active in the market for blood products for non-therapeutic use. GIPCA was a quasi-monopoly in the market. About 90% of Reims Bio's supply came from GIPCA and 10% from another undertaking due to capacity constraints. There were in that market no other alternatives and therefore Reims Bio could not diversify its sources for some time. The Council also held that GIPCA abused the situation of economic dependence by refusing to supply, interrupting the supply to Reims Bio and discriminating against it. The Council also found that GIPCA held a dominant position and abused it.[53]
– In *Filmdis*, the Competition Council found that the film distributor Filmdis in Antille had a quasi-monopoly in the market and therefore the independent cinemas were economically dependent on it. The Competition Council emphasised the fact that independent cinemas did not have alternative solutions. Filmdis abused this economic dependence by imposing on independent cinemas clauses of non-competition, by supplying them films late and after every other

[50] *See* French Competition Council, Decision 05-D-44 of 21 July 2005 *La Provence*, para. 23, available at http://www.conseil-concurrence.fr/user/index.php.

[51] French Competition Council, Decision 03-D-42 of 18 August 2003 *Suzuki*: "Cette dépendance doit s'apprécier dans le cadre de relations bilatérales entre deux entreprises et doivent être évaluées, au cas par cas, et non pas globalement pour l'ensemble de la profession."

[52] Court of Cassation, Decision of 3 March 2004, *Société Concurrence*, cited in French Competition Council, Decision 05-D-44 of 21 July 2005 *La Provence*, para. 24, available at http://www.conseil-concurrence.fr/user/index.php.

[53] French Competition Council, Decision 04-D-26 of 30 June 2004 *SARL Reims Bio*. Upheld by the Paris Court of Appeal, Decision of 25 January 2005, and the French Supreme Court, Decision of 28 February 2006.

cinema, therefore making their activity unprofitable.[54] The Competition Council observed that the same facts can be analysed under both dominant-position and economic-dependence provisions, even though for each of them the constitutive elements are distinct.[55] It found that Filmdis had also abused its dominant position.

– In *Cannes Palm Beach*, The Competition Council, without a detailed analysis, held, first, that the manager of a heliport was in a dominant position and, second, that the undertakings wishing to use this indispensable infrastructure are dependent on it. Nevertheless, it found no abuse.[56]

This brief overview of the recent decisions of the French Competition Council shows a strict application of the conditions related to economic dependence. In the three cases where the French Competition Council found a situation of economic dependence, the same market situation gave rise to a dominant position as well. The French Competition Council's analysis, however, makes a distinction between the two situations. Whereas for the finding of a dominant position it focuses on market shares of the defendant and those of its competitors, when analysing the situation of economic dependence it focuses on the existence of alternative solutions for the claimant and on the importance of the share of the claimant's turnover with the defendant. An analysis of the relevant market is not always present, although the Council never expressly held it unnecessary. The distinct approaches to the finding of a dominant position and of economic dependence resulted in an interesting case where the Council found no situation of economic dependence, but affirmed the existence of a dominant position.[57] In French competition law, therefore, a dominant position does not necessarily give rise to economically dependent customers.

3.1.3 Switzerland

The Swiss Competition Commission has recognised that specific circumstances can create a dependency relationship between two parties and that this may be of concern for competition law. Already in the seventies, the antecedent Swiss Cartel Commission carried out extensive research on the buyer power of retailers. It describes it as a "bilateral relation of dominance and dependence".[58] In fact, whereas the buyer can terminate the relationship without a loss, the termination amounts to substantial loss or economic damage for the manufacturer.

The Swiss Cartel Act of 1995, lacking a clear legal basis covering economic dependence, was modified in 2004 to cope with it. The new definition of the dominant position reads today as follows (the modifications are in italics):

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[54] French Competition Council, Decision 04-D-44 of 15 September 2004 *Filmdis-Ciné-Théatre du Lamentin*. *See also* Paris Court of Appeal, Decision of 29 March 2005.

[55] French Competition Council, Decision 04-D-44 of 15 September 2004 *Filmdis-Ciné-Théatre du Lamentin*, para. 79.

[56] French Competition Council, Decision 02-D-16 of 5 March 2002 *Hélistation Cannes Palm Beach*.

[57] French Competition Council, Decision 05-D-44 of 21 July 2005 *La Provence*.

[58] Publications of the Swiss Commission on Cartels (Publ. CCSPr) [1976] 95.

> "The term "enterprises having a dominant position in the market" means one or more enterprises being able, as regards supply or demand, to behave in a substantially independent manner with regard to the other participants (*competitors, suppliers or customers*) in the market."[59]

It is to be noted that an undertaking possesses a dominant position in the market if it is able to behave independently of its suppliers *or* customers; in this latter hypothesis the assessment of the relationship with its rivals is not necessary. The modification is therefore meant to cover the *vertical economically dependent relationships* between a supplier and its customer, respectively between a buyer and its customers.

The Swiss Competition Commission took the opportunity to present the new concept of economic dependence in *CoopForte*.[60] The case concerns a "bonus" scheme put into effect by Coop, the second-largest supermarket chain in Switzerland. Coop required from its manufacturers a sum that amounts to 0.5% of the billing value. The manufacturers complained to the Swiss authorities, which opened an investigation.

In its decision, the Swiss Competition Commission clearly distinguishes between economic dependence and the dominant position in the classical sense:[61] an undertaking having a dominant position behaves independently of its rivals, whereas economic dependence relates to a situation in which an undertaking is independent of its customers. For the Swiss Competition Commission, a dominant position does not relate exclusively to an independent undertaking *vis-à-vis* its rivals: this is not a necessary condition. Alternatively, an undertaking is also said to have a dominant position when it is able to behave independently solely of its customers. The Commission emphasises the necessity of investigating these dependence relationships in the market.[62]

The assessment of the conditions of competition in the procurement market for daily consumer goods showed a sufficient level of competition. In general, manufacturers have a certain bargaining power over prices, which had increased by more than 0.5% in the years after the implementation of the bonus scheme.[63] Nevertheless, the investigation could not exclude that *particular* manufacturers were in a position of economic dependence vis-à-vis Coop.[64] It is precisely the economic dependence of a number manufacturers that is of concern for the Swiss Authorities. According to the Swiss Commission, a particular manufacturer is dependent on a distributor when two conditions are met:

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[59] Article 4 II Swiss Cartel Act (Federal Act on Cartels and Other Restraints of Competition of 6 October 1995, Systematic Compilation of Federal Law (SR) 251), amended pursuant to Paragraph I of the Federal Act of 20 June 2003, in force from 1 April 2004 (AS 2004 1385, 1390; BBl 2002 2022).

[60] Swiss Competition Commission, Decision *CoopForte* [2005] RPW/DPC I 146. *See also* BOVET, "Recent developments in Swiss competition law", [2006] 2 SZW/RSDA 138, 142.

[61] Swiss Competition Commission, Decision *CoopForte* [2005] RPW/DPC I 146, para. 93.

[62] Swiss Competition Commission, Decision *CoopForte* [2005] RPW/DPC I 146, para. 92.

[63] Swiss Competition Commission, Decision *CoopForte* [2005] RPW/DPC I 146, paras 64-91, in particular para. 91.

[64] Swiss Competition Commission, Decision *CoopForte* [2005] RPW/DPC I 146, para. 94.

First, the manufacturer has no other comparable buyer and the marginal demand of other buyers does not allow it to cover its fixed costs. The first criterion is the share of the manufacturer's business with the buyer: a share of more than 30% indicates that the contract is essential for the manufacturer. Moreover, the manufacturer's alternatives to the buyer are of crucial importance: if the former can sell its products to other buyers or elsewhere, there is no dependence on the latter.

Second, the manufacturer is specialised in manufacturing the buyer's goods, so that it cannot switch to the production of other goods. The most important criterion is the estimation of the switching costs: the larger they are, the more dependent become the manufacturers on the buyer.

Two interrelated elements are of great importance in the assessment of the economic dependence of manufacturers: the existence of alternative sales channels as well as the magnitude of switching costs. The former is related to the substitutability of different sales channels: retail distribution, small local shops, *horeca*[65] market or export market. Other retail stores do not constitute real alternatives: Migros – the first retailer in Switzerland with 36% of the market share in the retail market – is vertically integrated in that it sells mainly its own products.[66] Although the other channels indicate possible markets for the manufacturers, they are only partial substitutes for Coop,[67] mainly due to the production-switching costs that manufacturers must incur to adapt the products to the requirements of these other markets.

The protection of particular manufacturers is not straightforward. The Swiss Competition Commission tries to delineate the boundaries of its intervention: the new dominant-position definition does not aim at protecting undertakings that are not able to survive in a competitive market.[68] Although not expressly mentioned in the decision, the Commission holds that the widening of the definition of dominant position cannot serve as a means to protect non efficient-undertakings, since that would be contrary to the objectives of competition law. In particular, concerning the specific investment requirement, the situation of a manufacturer's dependence on the retailer should not have been the result of its own behaviour: in a sense, the retailer must have been to some degree responsible for the specific investment or the supplementary costs borne by the manufacturer.[69]

Under the umbrella of the dominant-position concept, the Swiss Competition Commission announces in *CoopForte* strict conditions for the finding of a situation of economic dependence. A customer is economically dependent on a buyer only in

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[65] *Horeca* refers to Hotel – Restaurant – Café/Caterer/Canteen market.

[66] Because Migros is vertically integrated, the market shares in the retail market do not constitute relevant data for the procurement market. Coop has more than 30% in the procurement market, probably more than 50%. Indeed, a large part of the market share of Migros should not have been taken into account for the definition of the relevant market. Migros is simply not available for manufacturers as a business partner (Swiss Competition Commission, Decision *CoopForte* [2005] RPW/DPC I 146, para. 114). But a market share of more than 50% is tantamount to a "classical" dominant position, at least in European competition law.

[67] Swiss Competition Commission, Decision *CoopForte* [2005] RPW/DPC I 146, para. 117.

[68] Swiss Competition Commission, Decision *CoopForte* [2005] RPW/DPC I 146, para. 92.

[69] Swiss Competition Commission, Decision *CoopForte* [2005] RPW/DPC I 146, para. 99.

the presence of client-specific assets: in Switzerland, economic dependence therefore takes into account buyer power combined with market power derived from client-specific investment. Even though the Swiss authorities applied such a strict interpretation, the decision was criticised by the jurisprudence as over-intervening in the market.[70]

3.1.4 Italy

Italy has also introduced rules on the abuse of economic dependence (*abuso di dipendenza economica*), though not by the means of antitrust law.[71] Article 3 of the Italian Antitrust Act[72] prohibits the abuse of a dominant position in a language similar to Article 82 EC. A draft law of early 1995 on industrial subcontracting would have categorised as abuse of dominant position in the sense of Article 3 of the Italian Antitrust Act a range of practices undertaken by firms in a better position than the subcontractors, resulting in damage to the latter.

The Italian Antitrust Authority[73] opposed the extension of the scope of the dominant position by this special legislation. In an opinion of June 1995,[74] it held that the problems related to subcontracting cannot be resolved by "diluting in an unnatural way the notion of abuse of dominant position"; although the draft law certainly guaranteed the equity in the contractual relations, it did not constitute an element to be considered to assure an efficient market. On the other hand, the Italian Antitrust Authority emphasised that the concept of dominant position as provided for in the Italian Antitrust Act, first, encompasses the buyer power of retailers: the latter may be found to hold a dominant position in the procurement market even if it does not have a dominant position in the retail market; second, that the subcontracting relationships involving partners without alternative solutions can fall under the provision pertaining to abuse of dominant position through "an appropriate and contextualised delineation of the relevant market".

In a second opinion,[75] the Italian Antitrust Authority reiterated its position regarding the abuse of economic dependence, stating that the Italian law refers to Article 82 EC, which has no similar provision, and it would therefore be inappropriate to change it. It adds that the provision in the drafted law relating to abuse of economic dependence aims at disciplining the contractual relationships between the

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[70] *See* AMSTUTZ/REINERT, "Erfasst Art. 4 Abs. 2 KG auch die überragende Marktstellung und die relative Marktmacht?", (2005) sic! 537, 631 *et seq*.

[71] *See* FABBIO, "Der Missbrauch wirtschaftlicher Abhängigkeit nach italienischem Recht", (2001) 9 WuW 834.

[72] Italian Antitrust Act, Law No. 287 of 10 October 1990 (*Norme per la tutela della concorrenza e del mercato*) [1990] Official Gazette of 13 October, No. 240.

[73] Autorità Garante della Concorrenza e del Mercato (hereafter referred to as AGCM, http://www.agcm.it/).

[74] AGCM, Opinion of 20 June 1995 on Industrial Subcontracting (*Subfornitura Industriale*), available at http://www.agcm.it/agcm_ita/DSAP/SEGNALA.NSF/0/aca16f3c8d87effbc125645600527b55?OpenDocument.

[75] AGCM, Opinion of 10 February 1998 on Industrial Subcontracting (*Subfornitura Industriale*), available at http://www.agcm.it/agcm_ita/DSAP/SEGNALA.NSF/0/7b10628a45c2a97fc12565ae00552cc0?OpenDocument.

parties and should therefore find its place in the civil law legislation. It concludes that it would be inappropriate to introduce this provision to the antitrust law.

As a consequence, Article 9 of the Italian Law on Industrial Subcontracting[76] contains a provision relating to abuse of economic dependence. Nevertheless, there is no reference to the concept of dominant position, nor is the Antitrust Act changed. Economic dependence is defined mainly as a state of economic imbalance. The provision refers, however, to the lack of economic alternatives in the market, although it seems that this is not a necessary condition. Not surprisingly, the examples cited as abuse relate to refusal to deal, discrimination and exploitation.

The example of Italy shows that the concept of economic dependence is not absorbed without difficulties by national competition authorities. The position taken by the Italian Antitrust Authority reflects the risk of confusing the objectives of competition law – strictly speaking, relating to economic efficiency – with equity objectives related to the protection of the weaker party. Similarly to Swiss jurisprudence, the Italian Antitrust Authority raised objections in relation to European competition law: the extension of the dominant-position concept would deviate from that of Community law. On the other hand, in the opinion it is recognised that the retailers' buyer power falls under the concept of dominant position even if they possess market shares below the threshold of the classical dominance. More importantly, it is recognised that approaching the concept of dominant position in this way, with a careful and contextualised definition of the relevant market, can capture the lack of alternative solutions for the manufacturers.

3.2 General criteria

The main criterion for the finding of a situation of economic dependence consists in the absence, for the dependent undertaking, of alternative solutions to sell or to purchase its products in the market. The impossibility to find other sales outlets indicates that the undertaking is dependent on the buyer. The economic dependence in this case derives either from the high concentration of the market or from the special features of the bilateral relation between the undertaking and the buyer.

When the dependence results from a low level of competition on the market, the finding of a situation of economic dependence generally corresponds with the finding of a dominant position. It is consistent with the view that an undertaking being in a dominant position generally implies that its customers are dependent on it. Indeed, the other sales or buying possibilities are not sufficient to replace the current business relationships. For such an analysis, the relevant market delimitation and the finding of a significant market share is a prerequisite.

However, as showed by the French case *La Provence*,[77] it is possible that a dominant position does not necessarily result in a situation of economic dependence.

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[76] Law No. 192 of 18 July 1998 on Industrial Subcontracting (*Disciplina della subfornitura nelle attività produttive*) [1998] Official Gazette of 22 July, No. 143. Article 11 of the Law No. 57 of 5 March 2001 gives the competence to the Italian Competition Authority to apply the rules pertaining to abuse of economic dependence contained in the law on Industrial Subcontracting.

[77] French Competition Council, Decision 05-D-44 of 21 July 2005 *La Provence*.

Indeed, the crucial element for the latter is the absence of an alternative solution. But the existence of a dominant undertaking does not preclude other operators from being competitive and offering alternative solutions to the dominant undertaking's customers. In the absence of specific factors, be they contractual or technical, that impede the customer from switching, the former can replace the dominant firm as a business partner. It confirms the idea that economic dependence relates to a bilateral relationship between contractual parties.

Indeed, if the dependence results only from the specificities of the relationship between the contracting parties, its finding does not relate to the market structure, or to the level of competition within a relevant market. Other factors are responsible for the economic dependence, such as brand loyalty or the existence of specialised assets.

The condition of lessening of competition is present in French, and indirectly in Swiss, law. In classical antitrust law, it relates to the market structure and the horizontal market power, or the power of one undertaking to ignore the action of its direct competitors. Such a condition undermines the strength of economic dependence as a bilateral relationship, which is arguably the case in French law. But the competition can also be lessened in market stages different from where the undertaking under investigation operates. For instance, discrimination may distort competition in the market where the economically dependent undertakings are present.

Another important factor for assessing the absence of alternative solutions is the so-called *risk* or *threat rate*, meaning the proportion of the business with the dominant undertaking. In the case of buyer power, the risk rate constitutes the share of the supplier's turnover in the product categories accounted for by the new entity, above which there will be a threat to its existence. If this rate is high, the risk of being dependent and not having switching possibilities increases. It will be easier to replace a business partner that represents a small share of the business than one that represents a large one. First, the difficulty relates to the production capacity of other operators in the market. When there are capacity constraints, the latter cannot represent a source of supply. Second, the difficulty relates to the impossibility of a prompt replacement. New contractual relationships take time to concretise.

Although the risk rate is a new method that relates especially to the analysis of supermarket mergers or of economic dependence or more generally to bilateral relationships, there is a connection between the risk rate and the market share. Indeed, the importance of an undertaking in terms of market share is reflected in the part that the sales (purchase) of that undertaking will represent in the purchase (sales) of its customers. For instance, if an undertaking has 40% of the retail market, it purchases about 40% of the market production, and arguably it represents the same proportion of the sales of single producers. That is one method of calculating the market shares of supermarkets in the procurement market: the market share equals the average "threat rate" that one supermarket represents to manufacturers. Table 1 shows the market shares and the risk rates for a number of national cases on economic dependence.

Table 1 – Economic dependence, market shares and risk rate

Case	Market share in the relevant market	Part of the business with the dominant undertaking
Rossignol (DE)	8%	3%
ABG/Oil (EC)	26%	75%
CoopForte (CH)	40-50%	–
Rewe/Meinl (EC)	30-40%	22% (risk rate)
Carrefour/Promodes (EC)	25%	22% (risk rate)

In Germany, the beneficiaries of the special provision on economic dependence are the small and medium undertakings. It testifies to the regulatory nature of the German provision on economic dependence. Although the German jurisprudence denies a social role to Sec. 20(2) of the GWB,[78] similar to the labour or contract law, that provision clearly aims at protecting and favouring small undertakings. However, the rule has the advantage of precluding big undertakings from benefiting, which was one point of criticism toward the Robinson-Patman Act in the United States.

The absence, for the dependent undertaking, of alternative solutions to sell or to purchase its products in the market refers to market power that results from product differentiation or the existence of asset specificity. For instance, brand dependence or dependence on a range of products relates to market power of differentiated products. Business-related dependence and dependence on a buyer relate generally to asset specificity: in a long-standing relationship characterised by asymmetric investments the customer exposes itself to the buyer's opportunism.

Concerning enforcement, there is a trend for competition authorities not to (over)enforce particular provisions pertaining to economic dependence, except in cases related to supermarket buyer power, with Italian authorities resisting any statute change that includes provisions relating to economic dependence.

4 Dominant position under Article 82 EC

4.1 Legal definition of the dominant position

Under Article 82 EC, any abuse by one or more undertakings of a dominant position is prohibited. The Treaty gives no definition for the term dominant position. Since the 1978 case *United Brands*, the Court of Justice has defined it as follows:

> "The dominant position referred to in this Article relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."[79]

[78] MARKERT, note 40, paras 41, 54.

[79] Case 27/76 *United Brands Company and United Brands Continental BV v Commission* [1978] ECR 207, para. 65.

The Court of Justice added in *Hoffmann-LaRoche* that:

> "Such a position does not preclude some competition, which it does where there is a 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 operate to its detriment."[80]

Both passages from the seminal case law of the European judiciary deserve careful examination, not least because their interpretation defines the boundaries of intervention of European competition law. It will also help us answer the main question of this article, that is, whether the concept of economic dependence is covered by Article 82 EC.

The last part of the first sentence referred to in the case *United Brands* proved to be the central element: it served as the definition of the dominant position in European competition law, and was codified into law in a range of Member States and other European countries[81] less comfortable with the kind of common law developing at the European level. Through the whole of Europe, an undertaking in a dominant position is one that has the "power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers".

Two equally important questions follow on. First, what is independent behaviour or an independent undertaking? Second, who are the others of which the dominant undertaking is independent? Its competitors *and* its customers? Its competitors *or* its customers?

The definition given by the Court of Justice holds that the undertaking should be able to act independently to an "appreciable extent" to be said to be in a dominant position. This expression supports the view that, in terms of market power, the undertaking should possess *significant* market power.[82] According to the Commission, "[a]n undertaking that is capable of substantially increasing prices above the competitive level for a significant period of time holds substantial market power and possesses the requisite ability to act to an appreciable extent independently of competitors, customers and consumers."[83] Similarly, directive 2002/21 on electronic communications[84] treats "significant market power" as the equivalent for dominance.

But distinguishing between significant and insignificant market power is not an easy task and will necessarily produce intervention errors.[85] If this view becomes

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[80] Case 85/76 *Hoffman-La Roche & Co. AG v Commission* [1979] ECR 461, para. 39.

[81] *See* competition laws of Albania, Bosnia & Herzegovina, Croatia, Iceland, Macedonia, Serbia, and Switzerland.

[82] O'DONOGHUE/PADILLA, "The Law and Economics of Article 82 EC", 108 (2006); BISHOP/WALKER, note 9, 184.

[83] EUROPEAN COMMISSION, note 7, para. 24.

[84] *See* Directive 2002/21/CE of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), [2002] OJ L 108/33, Article 14.

[85] BISHOP/WALKER, note 9, 42.

predominant, it precludes from the scope of Article 82 EC the cases involving possession of non-structural market power, as this could be the case in the presence of differentiated products, aftermarket products or asset specificity.

Moreover, the legal concept of dominance is often associated with *monopoly power* at its highest levels. For O'Donoghue & Padilla, "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."[86] According to this approach, a dominant firm facing a competitive fringe cannot behave independently, although the dominant firm can be said to possess market power.[87] Also, the dominant position would not allow for any competition in the market. The authors express a view largely adopted by economists familiar with competition law.

Dominant position understood as monopoly power supports the view that the undertaking under investigation must behave independently both of its competitors *and* of its customers. Independent of its competitors means that the dominant undertaking is not constrained by the price and quantity decisions of its competitors, and behaves as if they do not exist. Independence *vis-à-vis* its competitors implies the ability also to act independently of its customers. As pointed out by the Court of Justice in *British Leyland*, it is the dominant position that "place[s] the dealers in a position of economic dependence which is characteristic of a dominant position."[88] The latter has no choice but to continue the contractual relationship with the dominant undertaking: it is in a position of economic dependence. As a matter of fact, the existence of an independent undertaking implies the existence of customers that are dependent on it: as pointed out by the Commission, "economic dependence [...] is characteristic of the existence of a dominant position."[89]

But the definition in *United Brands* gives only a strict view of the dominant position. One year latter, and after careful consideration, the Court of Justice clarified the definition by tempering its exigencies.[90] Contrary to monopoly and quasi-monopoly, which eliminate competition altogether, a dominant position does not preclude some competition. As put forward by the Court of Justice in the same deci-

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[86] O'DONOGHUE/PADILLA, note 82, 108.

[87] O'DONOGHUE/PADILLA, note 82, 108.

[88] Case 226/84 *British Leyland Public Limited Company v Commission* [1986] ECR 3263.

[89] European Commission, Decision 89/205/EEC *Magill TV Guide/ITP, BBC and RTE* [1989] OJ L 78/43, para. 22. Upheld by the Court of First Instance in case T-69/89 *Radio Telefis Eireann v Commission* [1991] ECR II-485, para. 63: "[T]he applicant clearly held at that time a dominant position both on the market represented by its weekly listings and on the market for the magazines in which they were published in Ireland and Northern Ireland. Third parties such as Magill who wished to publish a general television magazine were *in a position of economic dependence* on the applicant, which was thus in a position to hinder the emergence of any effective competition on the market for information on its weekly programmes." [emphasis added]. *See also* case T-139/98 *Amministrazione Autonoma dei Monopoli di Stato (AAMS)* [2001] ECR II-3413, where the Commission underlined the extreme dependence of foreign cigarette distributors on AAMS (para. 16). The latter was a monopolist in the market for the distribution of cigarettes in Italy (para. 51).

[90] *See* Case 85/76 *Hoffman-La Roche & Co. AG v Commission* [1979] ECR 461.

sion, “even the existence of lively competition on a particular market does not rule out the possibility that is a dominant position on this market”.[91] A dominant position arises even though the undertaking may not be able to determine the key parameters of competition: an “appreciable influence” – that is to say a large enough influence to have an important effect on competition – is sufficient.

We have considered so far independence *vis-à-vis* the competitors of a dominant undertaking. The question we should answer is, however, whether the dominant position arises when an undertaking behaves independently of its customers, even though it cannot act independently of its rivals. A positive answer would allow economic dependence to be covered by the definition of a dominant position. In *ABG/Oil*,[92] the Commission accepted that the sole bilateral dependence of customers on suppliers sufficed to find a dominant position. The Commission’s case involved a shortage dependence: the intervention was justified by the exceptional circumstances during the oil crisis of the beginning of the seventies. Although such a clear recognition of economic dependence is unique in European competition law, it nevertheless implies that there are situations where independence within the relationship with the customers shows a dominant position. As a consequence, under exceptional circumstances, un undertaking that behaves independently of its customers may be held to be in a dominant position.

4.2 Assessment of the dominant position

Legal analysis of the dominant position requires the examination of a number of factors,[93] whose careful consideration may imply that a dominant position exists. All these factors are also indicators of market power.

4.2.1 Market shares

In terms of market shares, a dominant position arises when one or more undertakings have a large share of the relevant market. In *Hoffmann-LaRoche*, the Court of Justice emphasised that the dominant position may derive from several factors among which very large market shares are “highly important”.[94] The Court notes that the importance of market shares “varies from market to market”,[95] suggesting that the economic context, the structure of the market and the specifics of the case count as much as market shares. The Court also, however, considers that the market specifics do not temper the importance of the existence of *large* market shares, holding them as evidence of dominance.[96] In *AKZO*, the Court of Justice quantified

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[91] Case 85/76 *Hoffman-La Roche & Co. AG v Commission* [1979] ECR 461, para. 70.

[92] European Commission, Decision 77/327/EEC *ABG/Oil companies operating in the Netherlands* [1977] OJ L 117/1.

[93] Even factors that are in themselves positive, like research and developing programs, are relevant. *See* Joint cases T-191/98 and T-212-214/98 *Atlantic Container Line v Commission* [2003] ECR II-3275, para. 981.

[94] Case 85/76 *Hoffman-La Roche & Co. AG v Commission* [1979] ECR 461, para. 39.

[95] Case 85/76 *Hoffman-La Roche & Co. AG v Commission* [1979] ECR 461, para. 40.

[96] Case 85/76 *Hoffman-La Roche & Co. AG v Commission* [1979] ECR 461, para. 41.

what was meant by large market shares by stating that an undertaking is deemed to be in a dominant position if its market share exceeds 50% of the relevant market.[97] This presumption is used as a threshold and plays an important role in the finding of a dominant position.[98]

An undertaking that has large market shares in comparison with its competitors is more often than not capable of behaving independently of them to a great extent. It explains the rationale of a second rule relating to the market shares: the shares of the competitors should be smaller than that of the undertaking under investigation. This confirms the idea of the dominant undertaking being a firm with a paramount market position and able to behave independently of its rivals.

Apart from the magnitude of the market share an undertaking possesses, the Court of Justice emphasises the fact that it is able to hold that share for some time, suggesting that large market shares are evidence of dominance only when they remain stable for a relatively long period.[99] As a matter of fact, the stability of market shares indicates that during that long period of time the competitors were not able to take customers from the principal undertaking in the market, be it because of lack of capacity or other factors, including strategic behaviour of the dominant undertaking. This, in turn, suggests that the customers and finally consumers do not have much choice: most of them will be supplied by the dominant undertaking simply because it is the one that offers the largest scale of production. Coupled with constraint capacities facing the rivals, high switching costs or the strategic behaviour of the dominant undertaking, a strong market position of one firm results in the foreclosure of the other undertakings.

Finally, the Court of Justice underlines one of the main factors that make the undertaking that has a large market share an *unavoidable trading partner*: the impossibility for those who would like to break away from it to change their trading partner, and that over a long period of time. It is precisely this lack of ability to switch that characterises the customers of aftermarket products or the relationship between specialised manufacturers and retailers. For this reason, the "unavoidable trading partner" approach is seen to some extent as the counterpart of that relating to economic dependence in some Member States.

While an undertaking possessing a market share of 50% is deemed to be dominant, there are cases where dominance was found below that threshold. Table 2 presents some of these cases.

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[97] Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359, para. 60.
[98] *See also* MOTTA, note 12, 118.
[99] Case 85/76 *Hoffman-La Roche & Co. AG v Commission* [1979] ECR 461, para. 41.

Table 2 – Dominant position in the EC and market shares

Case (EC)	Market shares	Comments
*Hugin**[100]	13%	Market for cash registers in the UK. Hugin is the fourth-largest producer, the largest being the National Cash Register Company with about 40% market share. (*see also* below)
Carrefour/Promodes[101]	25-26%	In the French procurement market. Buyer power.
ABG/Oil Companies	26%	Shortage. Oil crisis.
Rewe/Meinl[102]	25-40%	In the Austrian procurement market. Buyer power.
Virgin/British Airways[103]	39.7 %	Upheld by the Court of First Instance.
Coca-Cola[104]	40%	If the next-largest competitor of Coca-Cola has half its shares.
United Brands[105]	40-45%	Other factors were important for the finding of a dominant position.
Hoffmann-LaRoche[106]	47%	In the market for vitamin A, the next-largest competitor having 27%. Other factors were important for the finding of a dominant position.
AKZO[107]	50%	Presumption of dominant position.
*Hugin**	100%	Market for "Hugin" spare parts (aftermarket case). (*see also* above)

* The case is reported in relation with the market shares in two different markets.

4.2.2 Barriers to entry, potential competition and countervailing buyer power

The other factors to be taken into account are barriers to entry, potential competition and countervailing buyer power. Barriers to entry indicate the absence of potential competition: new competitors do not have access to the market, which results in lower competition constraints for the undertakings present in the market. The over-reliance on market shares as a factor to find dominance emphasises the necessity to

[100] European Commission, Decision 78/68/EEC *Hugin/Liptons* [1978] OJ L 22/23.
[101] European Commission, Decision 1999/C359/10 *Carrefour/Promodes* [2000] OJ C 164/5.
[102] European Commission, Decision 1999/674/EC *Rewe/Meinl* [1999] OJ L 274/1.
[103] European Commission, Decision IV/D-2/34.780 *Virgin/British Airways* [2000] OJ L 30/1. Upheld by the Court of First Instance, Case T-219/99 *British Airways v Commission* [2003] ECR II-5917.
[104] European Commission, Decision 2005/670/EC *Coca-Cola* [2005] OJ L 253/21.
[105] Case 27/76 *United Brands Company and United Brands Continental BV v Commission* [1978] ECR 207.
[106] Case 85/76 *Hoffman-La Roche & Co. AG v Commission* [1979] ECR 461.
[107] Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359.

consider barriers to entry together with potential competition. On the other hand, countervailing buyer power, or the market power of the customers, prevent the dominant undertaking from exercising its market power, since it would be countered by their own power.

4.2.3 Economic dependence

This section considers the importance of the concept of economic dependence in the case law.

The Commission, upheld by the European judiciary, after presenting a clear case of economic dependence in *ABG/Oil*, firmly rejected it in *Metro*. In the other cases presented in this section economic dependence was taken into account as a complementary factor in the finding of dominance.

The *ABG/Oil* case is of particular significance because it provides an example of a genuine economic-dependence case in European competition law. In *ABG Oil*,[108] the Commission held that each oil company found itself in a dominant position relative to its customers during the oil crisis of the early seventies and that BP abused this position against its customer ABG.[109]

While referring to suppliers having a substantial share of the market, it concluded that BP, which had about 26% of the market, was in a dominant position relative to ABG. The economic circumstances of the case proved to be more important than market share in itself: It is the shortage of oil products that put the customers in a situation of economic dependence on suppliers, which, in turn, led the latter to a dominant position. Contrary to its previous decisions and to the practice of the European judiciary, the Commission qualified this dominant position by adding that the undertaking was in a dominant position *relative to its customers*. *ABG/Oil* therefore constitutes a clear case of economic dependence, where independence *vis-à-vis* the competitors is not necessary.

In *Metro,*[110] the Court of Justice rejected the claim that SABA, a manufacturer of electronic equipments that had a market share of 5-10%, enjoyed a dominant position. Metro, a German distributor using the so-called "cash and carry" system, contested the exemption by the Commission of the selective distribution system applied by SABA, and claimed that the latter had abused its dominant position by refusing to recognise Metro as one of its distributors in Germany. Metro put forward that SABA products, because of their high quality, were demanded by consumers, so that all distributors must include these equipments in the range of products offered by them.[111] We have seen that such a claim could have been successful in German competition law.

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[108] European Commission, Decision 77/327/EEC *ABG/Oil companies operating in the Netherlands* [1977] OJ L 117/1.

[109] The Court of Justice quashed the decision, concluding that BP had not abused its dominant position, without analysing the appropriateness of the Commission's approach regarding dominant position. *See* Case 77/77 *Benzine en Petroleum Handelsmaatschappij BV and others v Commission* [1978] ECR 1513.

[110] Case 26-76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875.

[111] Case 26-76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875, para. 16.

In rejecting the claim made by Metro, the Court of Justice held, firstly, that SABA's market share was insignificant, secondly, that there was lively competition in the market and, lastly, that high quality on its own was not a factor permitting a conclusion of a dominant position under Article 82 EC.[112]

The Court of Justice firmly held that a market share of 10% cannot lead to a dominant position, although it recognised that *exceptional circumstances* can justify such a finding. Nevertheless, the Court of Justice ruled out the quality of the product being an exceptional circumstance, rejecting therefore the so-called brand or range dependence under German law being covered by Article 82 EC. While producers of branded products could possess market power, this is not sufficient for dominance to be found. In asserting its position, the Court of Justice observed that the factors that must be taken into account to assess a dominant position should enhance the undertaking's ability to behave independently of its competitors, casting doubts on the possibility of finding a dominant position when the customer is solely dependent upon its supplier because of the latter's reputation.

In *British Airways*,[113] the Court of First Instance upheld the Commission's finding of a dominant position. The Court of First Instance held that a market share of 39.7% must be considered as large enough for a dominant position. The other decisive point was the gap between British Airways' share and that of its rivals: the nearest rival held only marginal market shares (5-6%).[114] The large difference in market shares had as a result that even a decline in British Airways' market share was not sufficient to call into question the finding of a dominant position.[115]

The Court of First Instance added that other factors related to the dependence of the agent on British Airways were relevant for the finding of a dominant position. British Airways offered a larger choice of routes and more frequent flights, which generated a substantial part of the tickets sold by travel agents. As a result, the Court of First Instance held that travel agents "substantially depend on the income they receive from BA in consideration for their air travel agency services."[116] British Airways, therefore, could not deny being "an obligatory business partner of travel agents established in the United Kingdom".[117] Interestingly, the Court of First Instance also considered the share of British Airways tickets in the business of the main agencies in concluding that a modest size of such a share is not a factor capable of calling into question the dominant position of British Airways.[118] The Court

[112] Case 26-76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875, para. 17.
[113] European Commission, Decision IV/D-2/34.780 *Virgin/British Airways* [2000] OJ L 30/1.
[114] European Commission, Decision IV/D-2/34.780 *Virgin/British Airways* [2000] OJ L 30/1, para. 210.
[115] European Commission, Decision IV/D-2/34.780 *Virgin/British Airways* [2000] OJ L 30/1, para. 223.
[116] European Commission, Decision IV/D-2/34.780 *Virgin/British Airways* [2000] OJ L 30/1, para. 216.
[117] European Commission, Decision IV/D-2/34.780 *Virgin/British Airways* [2000] OJ L 30/1, para. 217.
[118] European Commission, Decision IV/D-2/34.780 *Virgin/British Airways* [2000] OJ L 30/1, para. 219.

of First Instance concluded that "the great dependence of United Kingdom travel agents upon BA" could not be denied.[119]

The analysis of the Court of First Instance shows that the assessment of the dependence relationship between the undertaking in question and its customers is relevant for the finding of a dominant position in a classical sense. On the one side, it can be observed that, although relatively new in the analysis of the Commission and the Court of First Instance, the examination of factors related to economic dependence of travel agents upon British Airways occupies an important place in the overall assessment. On the other side, it must be underlined that these factors complement the classical dominant-position analysis, in particular the assessment of the position of British Airways in the market: even though a market share of 39.7% is relatively low, the important gap between British Airways and its next-largest competitor shows that Court of First Instance does not deviate substantially from a classical approach to dominance.

The economic dependence of customers *vis-à-vis* suppliers was a factor that the Commission and the Court of First Instance have taken into account to determine whether a dominant undertaking in one market may be found to abuse its dominant position based on its effects on another market. In *Aéroports de Paris*,[120] Aéroport de Paris (hereafter referred to as ADP) was found dominant in the market for the management of airports. ADP charged fees for the right to provide ground handling and catering services in the Orly and Roissy-CDG airports. Since the fees applied were discriminatory, the distorting effect on competition was produced in the market for the provision of ground handling and catering services. Referring to the judgment of the Court of Justice in *Tetra Pak*,[121] ADP contended that Article 82 EC was not applicable, because it was not even active on the market where competition was affected and therefore there were no exceptional circumstances that could justify the application of the above-mentioned case law.[122]

In rejecting the ADP's arguments, the Court of First Instance recognised that an abuse of a dominant position in one market may be censured because of effects it produces on another, non-dominated, market and held that:

> "[…] where the undertaking in receipt of the service is on a separate market from that on which the person supplying the service is present, the conditions for the applicability of [former] Article 86 are satisfied provided that, owing to the dominant position occupied by the supplier, the *recipient is in a situation of economic dependence vis-à-vis the supplier*, without their necessarily having to be present on the same market. *It is sufficient if the service offered by the supplier is necessary to the exercise by the recipient of its own activity.*"[123]

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[119] European Commission, Decision IV/D-2/34.780 *Virgin/British Airways* [2000] OJ L 30/1, para. 220.

[120] Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929.

[121] Case C-333/94 P *Tetra Pak v Commission* [1996] ECR I-5951.

[122] Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929, para. 163. On the exceptional circumstances, *see also* Case C-333/94 P *Tetra Pak v Commission* [1996] ECR I-5951, para. 27.

[123] Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929, para. 165.

The particular state of economic dependence is used here to justify the application of Article 82 EC to abuses that do not take place on the same market where the undertaking occupies a dominant position. Since ADP is not present in the downstream market for ground handling services offered by its customer, and vice versa, there is no risk of horizontal negative effects. The distortion effect occurs only within the downstream market. The necessary link between the upstream market where ADP is present and the downstream market for ground handling and catering services is constituted by the relationship of economic dependence between ADP and its customers. This dependence relationship is created, firstly, by the dominant position of ADP and, secondly, because the service offered by ADP is necessary for the exercise of an economic activity in the downstream market.[124]

The Commission and the European judiciary simultaneously use the concept of the unavoidable trading partner and that of economic dependence. But whereas in *Aéroport de Paris* and *Deutsche Bahn* the undertaking under investigation had a statutory monopoly in one market that as a consequence made it an unavoidable trading partner, in *Michelin* and *TACA* the reasoning was different. In *TACA*,[125] the Commission, after observing that the liner conference had a market share of 60-70% and that it engaged in discriminatory pricing, considered the switching possibilities of the customers as another element for the finding of a dominant position. It added that "[t]he final elements in demonstrating TACA's dominant position is the limited ability of its customers to switch to alternative suppliers, thereby making the TACA an unavoidable trading partner even for its disaffected customers."[126] The argument relating to the limited switching possibilities is one of the central elements of the concept of economic dependence. Interestingly, the absence of switching possibilities results in TACA being considered an unavoidable trading partner, a concept which refers to French law on economic dependence (*partenaire obligatoire*). Unlike the *Aéroport de Paris* and *Deutsche Bahn*, where the statutory monopoly put the undertakings in a position of unavoidable trading partner, in *TACA* it is the absence of switching alternatives that created an unavoidable trading partner and consequently a dominant position. Similarly, in *Michelin*, we find several elements of brand dependence.[127] The brand name and

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[124] *See also* Case T-229/94 *Deutsche Bahn AG v Commission* [1997] ECR II-1689, para. 57: "Next, it is clear from the case-law that where, as in the present case, the services covered by the submarket 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 with other products [references omitted]."

[125] European Commission, Decision 99/243/EC *Trans-Atlantic Conference Agreement (TACA)* [1999] OJ L 95/1. Upheld with respect to 81 EC and the existence of collective dominance, but annulled with respect to the abuse of a dominant position (Joint Cases T-191/98 and T-212-214/98 *Atlantic Container Line v Commission* [2003] ECR II-3275).

[126] European Commission, Decision 99/243/EC *Trans-Atlantic Conference Agreement (TACA)* [1999] OJ L 95/1, para. 538.

[127] European Commission, Decision 02/405/EC *Michelin* [2002] OJ L 143/1, paras 202 and 204, referring to Case C-322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR 3461.

the reputation of Michelin's tyres put the specialised dealers in a position of economic dependence, and therefore made Michelin an unavoidable trading partner.[128] This suggests that, while brand and reputation alone cannot justify the finding of a dominant position, they can serve as additional elements to be taken into account.

The analysis of these cases shows that the absence of switching possibilities, the economic dependence of customers and the existence of an unavoidable trading partner are elements that *complete* the traditional analysis of the Commission. As pointed out by Ritter & Braun, the concept of the unavoidable trading partner is not used to extend the scope of Article 82 EC.[129] Originally, it was mentioned by the Court of Justice in relation to the importance of market shares. Nevertheless, the assessment of the switching possibilities and the economic dependence of customers shows that these elements can be taken into account and supplement the traditional analysis of dominance, especially where the undertaking under investigation has a small market share.

The situation of economic dependence is an important factor to be considered in merger control. The Commission has developed a consistent practice regarding concentrations in retailing distribution. One of the main factors for the finding of a dominant position in the procurement market has been the economic dependence of manufacturers *vis-à-vis* the retail distributors. In *Rewe/Meinl*[130] the Commission cleared the concentration only after substantial commitments by the parties. It undertook a full analysis of the economic relationship between retailers and manufacturers in the procurement market. In Carrefour/Promodes,[131] the Commission carried out an extensive analysis of the dependence relationships involved, due to the fact that the new entity would not exceed 25% of the procurement market.

The interest of the case resides precisely in the low level of market shares. The Commission referred to the merger between Promodes and Casino, observing that in that case, a market share of 25-26% did not give rise to competition concerns.[132] Nonetheless, the Commission qualified the finding in *Promodes/Casino* case[133] by adding that France was experiencing a concentration movement in the retail sector, which implies that the Commission would look carefully at the reinforcement of Carrefour's market position. It thus considered other factors capable of reinforcing the market power of the concerned undertakings.

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[128] Although the decision mentions market shares from 50% to 70%, Michelin held in the Community an overall market share of around 32%, and in the market for related tyres 47,2%.
[129] RITTER/BRAUN, "European Competition Law. A Practitioner's Guide" 404 (3rd ed. 2004).
[130] European Commission, Decision 1999/674/EC *Rewe/Meinl* [1999] OJ L 274/1.
[131] European Commission, Decision 1999/C359/10 *Carrefour/Promodes* [2000] OJ C 164/5.
[132] European Commission, Decision 1999/C359/10 *Carrefour/Promodes* [2000] OJ C 164/5, para. 51.
[133] European Commission, Case IV/M.991 *Promodes/Casino*.

One of these key factors was the so-called the risk or threat rate (*taux de "menace"*).[134] On average, the manufacturers gave a share of about 22%, which corresponds to what the Commission found in *Rewe/Meinl*. The Commission concluded that "a priori, it can be deduced that when a retailer exceeds such a share in the manufacturer's turnover, the latter finds itself de facto in a situation of economic dependence."[135] It then found that, first, the new entity would exceed significantly this risk rate and, second, that its competitors had not reached such a rate.[136] We find the same reasoning concerning market shares – namely the gap between the market shares of the incumbent and that of its rivals –, but here it concerns the risk or the threat rate. The Commission then completed the analysis with other factors giving an advantage to the new entity[137] before considering other classical factors such as the existence of barriers to entry and of potential competition.

As in *British Airways*,[138] the Commission did not limit its analysis to market shares, barriers to entry and potential competition. It considered instead additional factors capable of showing the overall economic strength of the new entity in relation to its competitors. But the central point was nevertheless the examination of the economic dependence of a number of suppliers, which affirms the importance of the analysis of the bilateral relationships between the new entity and its customers: in merger control, a dominant position can be found if the new entity will be capable of behaving independently of its customers, even if it cannot be held capable of ignoring its competitors but only enjoys a more comfortable position than they do. The Commission's approach, finally, shows that under "exceptional circumstances", – the most important of which is the presence of economically dependent customers – even (very) low market shares may indicate the existence of a dominant position.

4.3 Dominant position under EC competition law and economic dependence

From the analysis of the case law on Article 82 EC, we conclude that economic dependence of customers on the dominant undertaking constitutes one of the factors that can be taken into account for the assessment of the dominant position. In relation to market shares, economic dependence is a supplementary element that could complete the analysis of the dominant position. In the presence of low market

[134] European Commission, Decision 1999/C359/10 *Carrefour/Promodes* [2000] OJ C 164/5, para. 52.
[135] European Commission, Decision 1999/C359/10 *Carrefour/Promodes* [2000] OJ C 164/5, para. 52.
[136] European Commission, Decision 1999/C359/10 *Carrefour/Promodes* [2000] OJ C 164/5, para. 54.
[137] Firstly, both parties were present in every type of retail distribution (hyper-, supermarket, discounter and small retailers). Secondly, the new entity would be the number one in hypermarket segments. Thirdly, the new entity would have a strong position in the fidelity cards offered to consumers. Fourthly, the new entity would be more integrated than its competitors. Finally, the new entity would already have a financial strength not comparable with its competitors.
[138] European Commission, Decision 2000/74/EG *Virgin/British Airways* [2000] OJ L 30/1.

shares, the interpretation of the Court of Justice allows for economic dependence to be included in the analysis under *exceptional circumstances*. That was the case in *ABG/Oil*, where the shortage of oil was an important factor for the finding of a dominant position.

Concerning the different forms of economic dependence, we conclude that Article 82 EC covers three types of economic dependence: first, the shortage dependence; second, the dependence of manufacturers on strong buyers; and third, the "technical" dependence related to aftermarket products. For the finding of a situation of economic dependence, asset specificity, lock-in effects and other exceptional market conditions may be taken into account. Brand dependence and dependence related to a range of products is not covered by the concept of dominant position. As a consequence, market power that results from product differentiation is not in itself a basis for intervention under Article 82 EC, although it can be taken into account as an additional factor for the finding of a dominant position. Nonetheless, it is not clear whether Article 82 EC covers the so-called business-related dependence. Asset specificity and the existence of a long-standing relationship are not sufficient in themselves for the finding of a dominant position, although they can be considered if the other classical conditions are met.

In general, Article 82 EC requires a relatively large market share for the finding of a dominant position. Except in special circumstances, the Commission does not seem very keen to intervene in a situation of low market shares. Indeed, the concept of economic dependence as used in some European countries is independent of the relationship with other competitors: only the vertical relationship between the supplier and the buyer is decisive. As a result, there is a tendency towards intervention against undertakings that are short of having a significant market share.

The problems identified within a bilateral relationship are instead covered by the law pertaining to vertical agreements. Similar to vertical restraints, the rules related to economic dependence aim at eliminating competition restraints that occur within or because of the relationship between undertakings active in two different stages of the market. For instance, the Commission has underlined the situation of economic dependence existing between a motor vehicle manufacturer and its dealers, even though the manufacturer (Volkswagen) had a market share of only about 10% in Europe.[139] In this case, the Commission considered the use of economic dependence as an aggravating factor against Volkswagen.[140] These cases show that economic dependence is found even in low levels of market shares or market power.

Nevertheless, in contrast to the abuse of economic dependence, which relates to unilateral behaviour, the law on vertical restraints necessarily involves an agree-

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[139] European Commission, Decision 98/273/EC *VW* [1998] OJ L 124/60, paras 7 and 220.

[140] European Commission, Decision 98/273/EC *VW* [1998] OJ L 124/60, para. 220. Case T-176/95 *Accinauto SA v Commission* [1999] ECR II-1635, para. 124, where the Court of First Instance upheld the Commission in considering the abuse of economic dependence of dealers as an aggravating circumstance.

ment between two undertakings, a term unfortunately strictly defined by the Court of Justice.[141]

However, another reason might explain the non-intervention of the Commission in situations of economic dependence: the lack of community interest. In *Sodima*,[142] a case involving vehicle distribution, the Commission rejected a complaint because of lack of Community interest. The complainants unsuccessfully invoked the dealer's economic dependence:[143] the Commission,[144] upheld by the Court of First Instance,[145] observed that the applicant could obtain satisfaction from national courts. Indeed, the Commission might be reluctant to use its resources to combat abuse of economic dependence under Articles 81 or 82 EC. Firstly, the abuse of economic dependence may not affect trade between Member States. More often than not, the conduct's effects are confined to the territory of a single Member State.[146] Secondly, the Commission may have no interest in dealing with relatively small undertakings. Lastly, in application of the subsidiarity principle, in an area where the Commission does not have exclusive jurisdiction, cases of economic dependence might better be treated by the national competition authorities or the national jurisdictions.

5 Abusive practices

5.1 Types of abuse of economic dependence

The main cases of abuse of economic dependence are discrimination, refusal to supply or to buy, excessive pricing and the imposition of unfair commercial terms. For

[141] Joint cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG* [2004] ECR I-23.

[142] Case T-62/99 *Société de distribution de mécaniques et d'automobiles (Sodima) v Commission* [2001] ECR II-655.

[143] Case T-62/99 *Société de distribution de mécaniques et d'automobiles (Sodima) v Commission* [2001] ECR II-655, para. 83.

[144] Case T-62/99 *Société de distribution de mécaniques et d'automobiles (Sodima) v Commission* [2001] ECR II-655, para. 54.

[145] Case T-62/99 *Société de distribution de mécaniques et d'automobiles (Sodima) v Commission* [2001] ECR II-655, para. 90: "the applicant has not established that the Commission committed a manifest error of assessment in taking the view that a national court would be in a position to draw the legal conclusions from the fact that the economic dependency experienced by dealers is excessive and distorts the balance between manufacturers and dealers provided for in Regulation 123/85." *See also* Joint Cases T-185/96 and T-189-190/9 *Riviera Auto Service Etablissements Dalmasso SA, Garage des quatre vallées SA, Pierre Joseph Tosi, Palma SA (CIA – Groupe Palma), Christophe and Gérard Palma v Commission* [1999] ECR II-93.

[146] *See* Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission* [1979] ECR 1869, para. 17. The Commission's decision was annulled because Hugin's conduct did not affect trade between Member States. The Commission may intervene, for instance, in cases that concern market integration: prohibition of parallel imports, cross-border trade discrimination or discriminatory refusals to deal with nationals of other countries. On the contrary, when the alleged abusive practices have negative effects only within a country, which is normally the case with abuse of economic dependence, the national authorities have a greater interest in dealing with them.

instance, brand or range dependence involves the refusal to deliver a branded product to a distributor. Buying dependence and business-related dependence may express themselves in the form of a refusal to buy or the imposition of a low price coupled or not with other unfair commercial conditions. The manufacturers are excluded from the market or otherwise exploited. Shortage dependence may result in partial refusal to supply coupled with high prices. When they apply to particular customers, it simultaneously involves discrimination. All these practices mainly concern existing customers and occur because these costumers have no switching alternatives.

Anticompetitive effect is the key element of the law on abusive behaviour. Abusive practices are prohibited mainly because they lead to foreclosure in a vertically related or adjacent market as well as to the exploitation of direct or indirect customers. Since generally neither the dependent undertaking (customer) nor the undertaking under investigation are vertically integrated, horizontal foreclosure[147] or vertical foreclosure as understood in the Commission's Discussion Paper[148] are not a matter of concern for the abuse of economic dependence. The latter relates, instead, to exploitative practices. Nevertheless, the structure of the market can be affected by the exclusion of small undertakings.

5.2 Anticompetitive effect

The intervention dilemma is better understood once the behaviour in question is tested under some of the proposed anticompetitive tests. It seems to us interesting to see what different tests tell us about the harm to competition of these practices and about the intervention's appropriateness. It must nevertheless be borne in mind that these tests were developed to define exclusionary conduct, and are therefore not suited to exploitative abusive conduct. For instance, it is not appropriate to test the conduct under the so-called profit-sacrifice test, since this is more suited to predatory behaviour. This exercise is, rather, an attempt to underline the inherent risk in intervening in cases of abuse of economic dependence.

We will concentrate on the equally-efficient-competitor test as well as on the consumer-welfare test. The first one is especially relevant because competition law aims at enhancing economic efficiency,[149] the second, because the application of competition law serves the interests of consumers in general. While acknowledging the right of an undertaking in a dominant position to protect its commercial interests, the Court of First Instance held that:

> "[T]he protection of the commercial position of an undertaking in a dominant position with the characteristics of that of the applicant at the time in question must, at the very least, in order to be lawful, be based on criteria of *economic efficiency* and consistent with the *interests of consumers*."[150]

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[147] In other terms, foreclosure of competitors in the upstream or downstream market.

[148] EUROPEAN COMMISSION, note 7, paras 69 *et seq*.

[149] The Commission has clearly announced that economic efficiency will be the basis of its intervention for exclusionary practices. *See* EUROPEAN COMMISSION, note 7, paras 63 *et seq*.

[150] Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969, para. 189.

This double objective constitutes the foundation of European competition law and the competition law of other European countries.

The *equally efficient competitor test* tries to isolate exclusionary actions and qualify them as abusive only if they are capable of excluding an equally efficient (rival) undertaking. As explained by the Commission, "[t]he 'as efficient' competitor is a hypothetical competitor having the same costs as the dominant company. Foreclosure of an as efficient competitor can in general only result if the dominant company prices below its own costs."[151] Put in other words, the undertaking in a dominant position commits an abuse if, by its behaviour, it excludes from the market a competitor as efficient as it is.

Exclusion of inefficient firms does not have anticompetitive effects in a market and therefore does not amount to abuse. The rationale and the interest of the test lies in the importance it gives to economic efficiency: inefficient undertakings do not contribute to the enhancement of society's welfare and are not able to compete on the merits. In other terms, they are unimportant for the maintaining of the existent level of competition and unable to introduce more competition in the market. As a consequence, their disappearance does not result in an efficiency loss or otherwise in harm to competition.

In order to apply the test, the efficiency of the dominant firm is compared with the efficiency of the competitor that alleges competitive harm. But in situations of vertically related undertakings, which operate in different market stages, the efficiency of the seller cannot be compared with the efficiency of the buyer.

Although not suitable to the behaviour aimed toward direct customers, the test underlines an important basic rule of competition law: the overall effect of intervention must increase, rather than decrease, social welfare. Protecting inefficient producers or manufacturers could burden the undertaking in a dominant position and lead to an overall reduction of societal and consumer welfare. It amounts to a subsidy of small and inefficient undertakings by private ones (private aid).

The *consumer welfare test* focuses on consumer harm. It questions whether the relevant behaviour reduces consumer welfare: an abuse arises only if this is so. Conduct that produces harm to competitors, but not to consumers, would not lead to an abuse of dominant position. From this point of view, consumer harm is seen as a supplementary condition to competitor or customer harm. While emphasising the importance of consumer protection as a competition law objective, it strengthens the conditions for intervention.

The exclusion of a trader or a small manufacturer may not negatively affect consumers. For instance, the refusal of the producers of branded products to supply a trader does not affect consumers, in that they can purchase the item elsewhere. It is in the interest of the brand producer to broadly make available its products. By the same token, the refusal of a chain store to purchase from a small manufacturer may not negatively affect consumers if the chain proposes substitute products.

Both the equally-efficient-competitor and the consumer-welfare test aim at distinguishing between the protection of competition and the protection of competi-

[151] EUROPEAN COMMISSION, note 7, para. 63.

tors. Nevertheless, the majority of the abusive practices in the situation of economic dependence are directed towards vertically related customers, not competitors. Rather, the question is whether competition law aims at levelling the playing field for all undertakings in the market, by protecting *particular* undertakings, be they big or small. This is also linked with the risks related to the protection of inefficient undertakings and the inherent risk of over-regulating the market and inhibiting efficient behaviour and the growth of efficient firms.

5.3 Remedies available

The finding of an abuse of economic dependence requires the intervention of the authorities or judges not only to stop the abuse, but also to positively define what the undertaking under investigation should do. Whereas the finding of a dominant position increases the risk of over-intervention, there are additional risks inherent to the remedies themselves. Moreover, taking into account the type of abuse involved – refusal to supply, discrimination or excessive pricing – the risk of Type II errors increases because of the regulatory nature of remedies.

When the authorities issue an order to supply, the injunction should provide specific rules for the quantities supplied, for the price, the quality and the duration of the duty to supply. This remedy is highly regulatory in nature. When a new customer is given the right to be supplied with a product, the authority should also consider how many other undertakings might ask the same. Would it be wise to impose an unconditional duty to supply on the investigated undertaking?

Similarly, the prohibition of discrimination involves a price regulation. In fact, it is not a clear-cut task to determine equivalent transactions and require identical treatment. Moreover, the prohibition of discrimination may lead to the reduction of the quantity offered in the market. If the low prices were directed towards new customers, and the injunction order required applying the same prices to the newcomers, the quantity offered might fall and the price might rise.

The regulatory nature of remedies in cases of abuse of economic dependence must draw the attention of enforcers to the inherent risk of over-intervention in defining remedies. Therefore, while the use of market shares as a screening device highlights the risk of under-intervention, the definition of abusive practices and remedies emphasises the risk of over-intervention. Balancing both types of errors requires a rethinking of both the dominant position at the European level and the concept of abuse. While an extension of the concept of the dominant position would allow it to capture other types of market power short of the usual market-shares threshold, the careful definition of abusive behaviour would permit selective intervention in serious anticompetitive cases. As a consequence, this approach would result in the finding of more situations of dominance, which would be consistent with the concept of market power in economic literature, focusing meanwhile on inefficient behaviour that harms competition in a market.

6 Concluding remarks

The traditional definition of dominant position focuses on market shares and refers to a paramount market position. Unlike dominance, economic dependence relates to market power that does not result from a paramount market position. Other factors and forms of market power are responsible for the dependence of particular customers to their suppliers or buyers. Information gaps, searching costs and asset specificity are some of the sources of market power that can also cause a situation of economic dependence. Unfortunately, these aspects are currently underestimated. Another source of market power is product differentiation. The appropriateness of intervention in presence of this type of market power is controversial.

From the analysis of the case law on Article 82 EC, we conclude that economic dependence of customers on the dominant undertaking constitutes one of the factors that can be taken into account for the assessment of the dominant position. In relation to market shares, economic dependence is an additional element that could complete the analysis of the dominant position, in particular when the undertaking under investigation has low market shares. Indeed, the interpretation of the Court of Justice allows for economic dependence to be included in the analysis as an *exceptional circumstance*.

Concerning the different forms of economic dependence, we conclude that Article 82 EC covers three types of economic dependence: first, shortage dependence; second, the dependence of manufacturers on strong buyers; and third, the "technical" dependence related to aftermarket products. For the finding of a situation of economic dependence, asset specificity, lock-in effects and other exceptional market conditions may be taken into account. Brand dependence and dependence related to a range of products is not covered by the concept of dominant position. As a consequence, market power that results from product differentiation is not in itself a basis for intervention under Article 82 EC, although it can be taken into account as an additional factor for the finding of a dominant position. Nonetheless, it is not clear whether Article 82 EC covers so-called business-related dependence. Asset specificity and the existence of a long-standing relationship are not sufficient in themselves for the finding of a dominant position, but they can be considered if the other traditional conditions are met.

Abuse of economic dependence might not affect trade between Member States, which would suggest that the Commission has no jurisdiction or simply that there is no Community Interest in intervening in such cases. As a consequence, the application of national competition law is more appropriate. State intervention in these situations may nonetheless be a source of error. While the extension of the concept of the dominant position may allow for the covering of more types of market power and reducing in that way the importance of market shares, the wide interpretation of abuses and the regulatory nature of remedies increase the risk of over-intervention. The reduction of this latter risk requires a clear definition of the conditions as well as the methodology followed for the finding of anticompetitive effect through the exploitative abuse of a dominant position.