



MARKET ABUSE – A TOPIC NOT JUST FOR THE MAJOR PLAYERS

For several years now, the European Commission (“EC”) has been taking a strict course at EU level, whereby primarily the major tech corporations are being kept in check with the help of the tools of competition law.

The example of Google currently shows how serious the EC and the court of first instance are when it comes to achieving fair competition at the EU level. As recently as November 2021, the court of first instance confirmed a fine of EUR 2.42 billion imposed by the EC. In the specific case, the corporation is accused of having given preferential treatment to its own “Google Shopping” product comparison portal over other comparison portals. According to this, during a product search the corporation’s own comparison portal was shown much more prominently than those of competitors. According to the EC, this constituted an abuse of Google’s market power.

Nor was this Google’s first unpleasant and expensive encounter with the EU’s highest competition regulators. Google already received a fine of EUR 4.3 billion in 2018 due to requiring pre-installations on the corporation’s own “Android” operating system. One year later, it was fined EUR 1.49. This time the Google corporation was accused of using restrictive clauses in contracts with third-party websites to prevent competitors from being able to place advertisements on these websites. Google is not the only company on the EC’s radar, however; other tech companies of a

similar size, namely Apple and Facebook, also find themselves subjected to various investigations by the EC and other competition authorities.

While the public focus is mostly on the market abuse of large multinational corporations, this newsletter aims to shed light on the actions of “small players”, that is, those companies that only have relative market power.

I. WHAT IS MARKET DOMINANCE?

According to case-law, market dominance exists if a company is able to prevent the maintenance of effective competition in the relevant market. In this respect, it has the capability to behave to an appreciable extent independently of its competitors, its customers, and ultimately consumers.

II. WHAT IS RELATIVE MARKET POWER?

For the definition of relative market power, the provisions of the Austrian Cartel Act (KartG) and the German Act against Restraints of Competition (GWB) presupposes a vertical relationship, in a similar way to market dominance. This means that action must be taken at different economic levels, that is to say, producer/manufacturer on the higher level side and buyers (but not necessarily consumers) on the lower level. In order to assume relative market power, there must be a relationship of



economic dependency and the customer must be dependent on maintaining the business relationship. In other words: Any enterprise that holds a paramount position in relation to its customers (or suppliers) is deemed to have market dominance.

III. FACTUAL CIRCUMSTANCE OF DOMINANCE

This factual circumstance of dominance is based on an extraordinary weight distribution in vertical business relationships. The question of whether a dominant position exists is not answered by a comparison with competitors, but by the analysis of the business relationship with certain enterprises on the opposite market side.

IV. THE RELEVANCE OF MAINTAINING A BUSINESS RELATIONSHIP

It is therefore a matter of maintaining the business relationship. This is the case if the customers are dependent on maintaining the business relationship in order to avoid serious economic disadvantages. This may be due to the fact that a company depends on the supply of a certain range of goods. The decisive factor is whether there are alternative sales or procurement options at economically tenable conditions. If this requirement is not met then relative market power exists, regardless of any general market power of the enterprise.

V. MARKET DELIMITATION

In order to establish a possible factual circumstance of dominance, the relevant market must be delimited from the perspective of antitrust law: This must generally be determined according to geographical, temporal, and substantive criteria. Breaking it down, when defining the relevant market the objective can

be to include all products or services that have sufficient interchangeability or substitutability.

VI. PRACTICAL EXAMPLES OF THE EXPLOITATION OF RELATIVE MARKET POWER

In a decision that had to do with the sole import of vehicles of a certain brand, the following was decided: If the car dealerships can only meet their needs with the brand importer because a change of brand is associated with serious economic disadvantages for them, then from their perspective the relevant market is limited to the vehicles of the respective brand. The characteristics of the customer base, which is bound to the brand to a certain degree, were also taken into account. Then the sole authorised distributor is not subject to competition in this market and dominates the dealer.

In another decision, this time from the film rental industry, dominance by relative market power was tied to serious economic disadvantages. Accordingly, the existence of the enterprise does not necessarily have to be threatened, but it is sufficient if there is a massive decline in sales or the loss of a considerable part of the customer base. This can happen if a company is dependent on the delivery of a certain product range (brand items). What matters in this case is whether there are alternative sources of supply open to customers in the relevant market.

Only recently, relative market power was deemed to exist in another decision: Airlines are in a superior position compared to travel agencies, as travel agencies for the most part have no opportunity switch to a market outside the borders. Ultimately the travel agency is economically dependent on the airline because the latter constitutes a business partner that cannot be bypassed.



VII. CONCLUSION

The instrument of relative market power makes it possible for companies to free themselves from the coercions of their business partners. Often, this does not require proceedings before a competition authority or a court, but a simple and professionally sound letter can be sufficient to put the business partner in their place. In order to prevent this, companies with relative market power should have their business practices reviewed in terms of antitrust law.

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