Economics based dominance – has the tide turned? *

Introduction

There are many possible reasons for controlling market power. While in the United States the efficiency argument appears to have prevailed \(^1\), in the EU Treaty motivations such as political freedom are seen side by side with consumer welfare. Whatever the objective being pursued, it is undeniable that the laws of most industrialised jurisdictions seek, if not to constrain market power, to prohibit abuse or exploitation thereof. This article analyses, in particular, the EU approach to market power, the evolution of the assessment of market power and the levels thereof which cause the authorities to analyse the effects of a firm’s behaviour. Measurement of market power has been undergoing some changes in the EU and these are reviewed. \(^2\) The measurement of market power by the US authorities is also considered and compared to the approaches taken by the EU authorities.

In the US, Section 2 of the US Sherman Act, 1890 condemns unilateral conduct which monopolises or attempts to monopolise. \(^3\) Every person who shall monopolize, attempt to monopolise or combine or conspire with any other person or persons to monopolise any part of the trade or commerce among the several States shall be deemed guilty of a felony. The US courts have interpreted this section as condemning inter alia having “monopoly power in the relevant market and the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident”. \(^4\)

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\(^1\) The Court’s concern was "the ability of a single seller to raise price and restrict output." in the case of *Fortner Entreprises Inc. v. United States Steel Corp.,* 394 U.S., 495 (1969)

\(^2\) Market definition is a closely related topic and important to the assessment of dominance. However, the method of defining the relevant market is not the focus of this paper. Furthermore, collective dominance is not reviewed and the measurement of single firm dominance is the only aspect considered within this article.

\(^3\) Section 2 of the Sherman Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

By contrast, in the EU, Article 102 TFEU (formerly Article 82 EC) prohibits the abuse by an undertaking, or undertakings, of a dominant position in a substantial part of the common market that affects inter-State trade.\footnote{Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.}

Damien Geradin made the point at the Global Competition Law Centre in July 2005 that more emphasis seems to be placed on the concept of abuse than on the first prong of Article 82 – the requirement that the firm under scrutiny enjoys a dominant position. This is not to say that the law on dominance is clear, rather he asserts that there are many questions to be asked when considering dominance.\footnote{Elhauge & Geradin, Global Competition Law and Economics, (Hart Publishing, Oxford and Portland, Oregon, 2007) page 233}

While both the US and EU provisions cover unilateral conduct by firms holding significant market power, it is not clear whether the degrees of market power required are the same. The differing terms of “monopoly power”(US) and “dominant position” (EU) may not hold the key to any substantive difference.\footnote{Elhauge & Geradin, op. cit.} The term “monopoly power” may be inaccurate however and that can be seen when the courts in the US apply the term to firms which do have competitors in the relevant market.\footnote{\textsuperscript{8}} They might be better described as dominant in the market in question.

Another important difference is that in the US unilateral conduct which “monopolises” is a breach of law – conduct which creates the monopoly power is thus captured. Whereas, in the EU what is prohibited is the abuse of an existing dominant position.

**Establishing Market Power**

Why is market power relevant? Establishing the anticompetitive effect of commercial conduct is a costly business, and the defence of those allegations is also costly. A firm with market power – or firms in Article 101 TFEU (formerly Article 81) cartel situations – are far more likely to create anti-competitive effects.

To have businesses constantly taking cautious approaches to commerce for fear of producing (allegations of) anticompetitive effects might have very negative results. So
the requirement of market power applies, and applies in particular to unilateral conduct. Because direct proof of anticompetitive effects is so hard to achieve, courts often rely on the combination of market power with conduct likely to have anticompetitive effects, and thereby infer anticompetitive effect from that combination.  

A problem with the over-emphasis on market power is that firms can have acquired market power due to efficiencies, product innovation or good servicing standards - for example, by producing cheaper equivalent products which drive others out of the market.

Economists have many tests of market power. These often relate to pricing freedom; whether the firm can charge higher prices than the marginal cost; whether the firm can price discriminate; whether the firm can price above competitive levels; or whether the firm has the power to constrain output in order to raise market prices and profits.

So far as courts are concerned, the US Supreme Court has defined “monopoly power” as the power to control prices or exclude competition. In the EU the term “dominance” is a legal one, but more recently economic considerations have become important to its interpretation. For example, in the case of France Telecom, the Court of First Instance did not rely on presumptions of dominance where large market shares existed, rather the Court took account of additional factors too. As described below, in assessing the dominance of an entity with 70%-80% market share, the Court nonetheless analysed the characteristics of the market in greater detail. This represents a shift from a previous position of “rebuttable presumption” of dominance, as described below.

**Degrees of Market Power**

When market power has been shown to exist, the degree of the firm’s market power will usually be analysed by reference to demand elasticity. In other words, if the price is raised, does demand fall and do consumers choose another product. In United Brands v Commission the Court of Justice defined dominance as “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”.

Some commentators argue that all firms, including dominant firms, are subject to commercial constraints and, whether as a result of competitors or the behaviour of

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9 Elhauge & Geradin, op. cit., at page 237
customers, cannot act independently in the sense used in United Brands. In other words, a higher price will usually result in fewer sales, for whatever reason. For those reasons, the commentators regard the firm’s ability to “prevent effective competition from being maintained” as a better test of dominance. From an economic point of view, competition is effective when no firm can exercise substantial market power and the usual definition of market power is the ability to profitably raise price above the level which would prevail if there was competition in the market.

Others argue that there are two separate tests here, namely (i) the power to behave independently of competitors, customers and consumers, and (ii) the ability to prevent effective competition being maintained on the relevant market. However, the courts have never drawn this distinction and the use of the term “by affording” suggests that two separate elements are not intended, rather that one is the means and the other the end.

However, the test is not an absolute one. Many firms possess some market power and a change to their commercial practices will likely elicit a “response” by a competitor. What is worthy of scrutiny is the firm which possesses substantial market power. This is captured by the Court of Justice of the European Union’s reference to a firm being able to behave “to an appreciable extent” independently of others. In the Commission’s Communication giving “guidance on its enforcement priorities in applying Article 82”, published in December 2008, (“the 2008 Guidance”) it confirmed that it would investigate whether a firm had substantial market power over a significant period of time.

Competition law commentators and enforcement agencies use two indicators of substantial market power – power over price and the power to exclude. While the EU cases have focussed on ability to behave independently, i.e., the ability to set prices without losing customers and to exercise pricing discretion, yet often the reliance is on issues related to size of market share. While the economists’ sensitivity to price discretion is cited by courts, often the market power is inferred, according to Landes and Posner, from the size of market shares. This, they assert, can be misleading.

In addition, it has been noted that where the definition of the product market is unrealistic, market share can be very misleading and can vary significantly, as happened in the Alcoa case.

Other commentators assert that market power should be assessed using competitive benchmark prices. Hausman and Sidak observe that the tendency of regulators to

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19 ibid Landes & Posner at p. 947 where they say it can be misleading because of the possibility of entry of new competitors into the market, for example.
21 Aluminium Co. of America, United States v. Alcoa-Rome 377 U.S. 271 (1964) In that case two differing definitions of the relevant product market caused the market share of the firm in question to alter from 33% to 90%.
calculate market shares and assess market concentration when ascertaining whether market power exists, is widespread. 22 They assert that if substantial market power exists, consumers will pay supracompetitive\textsuperscript{23} prices, and that drawing market power inferences from the structure of the relevant market leads to flawed conclusions on the existence of substantial market power. A price-based economic analysis would, they argue, lead to a more accurate test of substantial market power.

Interestingly Advocate General Fennelly in \textit{Compagnie Maritime Belge}\textsuperscript{24} focussed on degrees of dominance and expressed the view that a firm which had a quasi-monopoly possessed “superdominance” and therefore had an “onerous special obligation” not to harm the structure of whatever weak competition they face. The term and concept were not adopted by the Court of Justice expressly but in the \textit{Tetra Pak II}\textsuperscript{25} and \textit{Microsoft}\textsuperscript{26} cases, the Courts (i.e., the General Court (CFI as it then was), and the Court of Justice) and the Commission respectively, implied that a dominant position could easily be identified when the firm in question had a quasi-monopoly or approached a position of complete monopoly, with market share being a key determinant of very substantial market power in this context.

\textbf{Measuring Market Power}

\textbf{(i) Market Shares in the EU as an indicator of market power (dominance)}

\textbf{Prior to 2005}

In general, in EU jurisprudence, the level of market share that had been held to confirm the existence of a dominant position has been lower than what would be deemed necessary to prove monopoly power in US jurisprudence.

The definition of dominance given by the Court of Justice in the \textit{United Brands} judgment, described above, was accepted and expanded upon soon thereafter a series of judgments, most notably \textit{Hoffman La Roche and Akzo}. In \textit{Hoffman La Roche} the Court of Justice repeated the definition and acknowledged that the existence of a dominant position could be derived from a number of factors, but that amongst those, “a highly important one is the existence of large market shares”. The Court stated that “very large market shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position”.\textsuperscript{27} In that case a dominant position was established, for all bar one of the vitamins, largely by reliance on the market shares of between 64\% - 95\%.

However, in the \textit{AKZO} case market shares of 50\% (or above) were held by the court to be sufficient to justify the rebuttable presumption that, save in exceptional circumstances, that the firm in question held a dominant position in the relevant

\footnotesize{23} Supracompetitive prices are those which are extreme and thought not to be objectively defensible. The suggestion is that they are so competitive as to be predatory.
\footnotesize{24} Case C-395/96 P Compagnie Maritime Belge Transports SA v Commission [2000] ECR I 1365
\footnotesize{26} Case COMP-C-3/37.792 Microsoft [1994] ECR II 755
\footnotesize{27} Case 85/76, \textit{Hoffman La Roche & Co AG v Commission} [1979] ECR 461 at para….
The Court of First Instance reiterated the Hoffman La Roche approach by stating that “according to the case-law, very large market shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position. That is the situation when there is a market share of 50%.”

Monti makes the point that, in most cases, the Commission had found dominance with market shares over the 50% mark. The use of market share as the determinant of dominance by the Commission, the institution responsible for the administrative decision, was deeply rooted. One side effect of this approach which seemed to create a presumption of dominance where market shares were over 50%, was to shift the burden of proof onto the defendant.

Market shares in the 40-50% range could also be major indicators of dominance, but only where other circumstances, such as barriers to entry, the possession of superior technology, or the control of essential assets, when allied to market share, gave the accused firm an undeniable advantage in the market place. Market share at these levels, on its own, would not be sufficient to confer dominance.

In Virgin/British Airways a market share of less than 40% (39.7%) held by British Airways was found to confer a dominant position in the market for UK air travel agency services. That was the first instance where a market share of less than 40%, albeit in conjunction with other factors, resulted in a finding of dominance. The General Court (CFI as it then was) in its judgment of 17th December 2003 took account too of the range of transport services and hub network operated by British Airways. The Court went on to describe the airline as “an obligatory business partner of travel agents”. That finding was not one of the five pleas in law raised before the Court of Justice of the European Union.

In Saba II the ECJ held that a market share of 10% is virtually certain not to amount to a dominant position. And a firm with a market share below 25% was always seen as unlikely to have inferred against it that it occupied a dominant position.

In the US the authorities have been less inclined to provide such guidance on monopoly power by reference to market shares. Where guidance on market share percentages have been given by US authorities, the percentages triggering closer scrutiny of the effect of the firm’s conduct have been higher. For example in the first Alcoa case Judge Learned Hand referred to the fact that a market share of 60% rendered a monopoly position doubtful.
The 2005 to 2008 Commission Review

The policy of DG Competition on Article 102 (formerly Article 82) was under review by the last quarter of 2005 when it published a Discussion Paper on Exclusionary Abuse \textsuperscript{38}, illustrating an intention to shift towards a more economics-based analysis. There were cases around this time in which some shift was visible, in the sense that dominance was being measured using more economic theory than before. In \textit{British Airways}\textsuperscript{39}, the emphasis of the General Court (then the Court of First Instance) was on relative market share. That Court had referred to the increased anti-competitive effects of conduct where the dominant firm held a “very much larger market share than its competitors” and the CJEU (then the ECJ) did not contradict this approach in any way.\textsuperscript{40} The Court of First Instance had also focussed on the market share of the closest rival and the cumulative shares of the five main competitors in comparison to that of the largest player. While the analysis of relative market share showed a commercial approach, the taking account of relative market share was not innovative.

In the Summary of the Commission Decision in \textit{Tomra} the Commission stressed not just the very high market shares of the undertakings, which exceeded 70%, and the fact that the shares were a multiple of the market shares of its competitors but also Tomra’s “ability and determination to acquire its most serious competitors and/or competitors with potential to become such in the future”.\textsuperscript{41}

In \textit{France Telecom} too the relative market shares were held to be key to the finding of dominance and the Court of First Instance referred to “a market share much greater than that of its number one competitor”.\textsuperscript{42} The Court also stressed the “considerable advantages over its competitors” enjoyed by the undertaking through a link-up with a group and so took account of barriers to entry too. This approach was taken in spite of the Court first stating that “very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. This is so, for example, in the case of a 50% market share.”\textsuperscript{43} In spite of that statement and the fact that France Telecom had market shares of 70% to 80%, the court took stock of other factors pertaining to the market and thus appeared to be taking a new approach as regards the assessment of dominance. Interestingly, the decision of the Court has been criticised for failing to extend the new approach to the question of whether there was an abuse.\textsuperscript{44}

Since December 2008

The Discussion Paper resulted in the publication by DG Competition of the 2008 Guidance (on the application of Article 82 EC (now Article 102 TFEU) to

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\textsuperscript{39} Case T-219/99 British Airways Plc v. Commission

\textsuperscript{40} Case C-95/04 P British Airways Plc v Commission [2007] ECR - I p. 2331


\textsuperscript{43} ibid.

\textsuperscript{44} Faella “The antitrust assessment of loyalty discounts and rebates” Journal of Competition Law &Economics 2008, 4(2), p. 375. See also Ezrachi A. \textit{Article 82 EC: Reflections on its Recent Evolution}, Chapter 1 by Kavanagh, Marshall and Niels at p. 17
exclusionary abuses). The 2008 Guidance acknowledges that the first step in the application of Article 82 is to assess whether an undertaking is dominant and the document provides guidance on that aspect. Confirming that dominance is established following an investigation of whether the firm in question held substantial market power over a protracted period of time, the Commission acknowledged that it must also assess as part of this analysis whether there are other constraints on the firm’s conduct. This represents a shift in the Commission’s approach to the determination of dominance.

Usefully for national competition authorities, business managers and their legal advisers, the Commission went as far as to give a certain amount of comfort to the effect that market shares of less than 40% are unlikely to amount to dominance, though this was hardly new as the existing jurisprudence already followed that line. However, the 2008 Guidance acknowledges that there may be, even in cases below that 40% threshold, situations where competitors cannot constrain the conduct of a dominant undertaking, and so does not close off the possibility that dominant market power may be established even in sub-40% market share context in extreme cases.

The 2008 Guidance continues to the effect that, even in cases of high market shares, the Commission will not generally conclude on whether to pursue a case without examining all factors which might constrain the behaviour of the undertaking – and so prevent them being able to act independently. This represents a shift from the AKZO position (whereby exceptional circumstances were required to disprove dominance when a firm’s market share was over 50%). This policy is one which gives greater comfort to efficient firms which perform well in any given sector. The statement is a very definitive move from a form-based approach and indicates a willingness to take account of commercial constraints which apply even to firms with significant market share.

Since publication of the 2008 Guidance, the Commission’s decision in the Intel case has been published. It is interesting to compare how the Commission presented its Decision first, by way of Press Release, and then later by way of the actual published Decision itself. They are not always consistent.

In the Press Release, the Commission confirmed that it was acting in the interests of consumers and that its focus was on safeguarding competition on the merits. The Commission noted that the proceedings began before the 2008 Guidance was issued, therefore the 2008 Guidance did not formally apply. However, the Commission asserted that the Decision was in line with the orientations of the 2008 Guidance and that it included an effects-based analysis of Intel’s conduct.

In the Summary of the Commission Decision, the market share of Intel over a ten year period was noted to be very high, having been “in excess of or around 70%” but it was “[O]n the basis of Intel’s market shares and the barriers to entry and expansion” that the Commission concluded that Intel held a dominant position in the market.\footnote{O.J.E.U. [2009] C 227/14 22.9.2009.} In the DG Competition Newsletter, commentators note that the 2008 Guidance confirms the Commission’s recent practice of not relying only, or primarily, on
market shares when assessing dominance but rather of making a comprehensive analysis of whether the allegedly dominant firm is constrained in some way.\footnote{Peeperkorn & Viertio, “Implementing an effects-based approach to Article 82 ” Competition Policy Newsletter 2009-1 at http://ec.europa.eu/competition/publications/cpn/cpn_2009_1.html}

The point is interesting because in the Intel Decision itself, published on May 13, 2009 the Commission refers to the “notion of independence which is the special feature of dominance” and confirms that a dominant undertaking is one with “substantial market power”.\footnote{At paragraph 839 of the Decision} The Decision proceeds to state that market shares “provide a useful first indication for the Commission of the market structure”. In the conclusion, having established the existence of consistent market shares in excess of or around 70% and 80% over a six year period, the formula expressed in Akzo is repeated. The Decision then cites Hilti and states that market shares of 70% and 80% have been held to be in themselves a clear indication of the existence of a dominant position.\footnote{Case C-53/92 P Hilti v Commission [1994] ECR I-667.} However, in a manner prescient of the 2008 Guidance, the Commission states at paragraph (852) of it’s Decision that this insight is subject to further verification by reference to contextual factors such as barriers to entry and expansion and buyer power. Having cited case law in support of other statements, this position is stated de novo and without any reference to traditional form-based authorities. The tide appears to be shifting as regards the assessment of dominance from rebuttable presumption to closer scrutiny.

\textbf{(ii) Treatment of Other Factors indicating Dominance in the EU}

Prior to December 2008

While the Commission’s Decision in Continental Can\footnote{Decision 6/72 O.J. [1972] L.7/25.} was very focussed on the power of the monopolist to set prices and make other market decisions without the constraints of competitive pressures, and was approved by the Court of Justice\footnote{Case 6/72, Europemballage Corporation and Continental Can Co. Inc. v. Commission,(1973) ECR 215}, in United Brands the indicators of dominance appeared greater in number.

In its Judgment in United Brands the Court of Justice referred to a position of “economic strength enjoyed by an undertaking which enables it to prevent effective competition”\footnote{[1978] ECR 207 at para 65.}. As Korah\footnote{Korah “An Introductory Guide to EC Competition Law and Practice” (Oxford and Portland, Oregon) 2007 9\textsuperscript{th} ed. P. 106} notes, that is a broader phrase which could be said to cover a situation where there is no power over price but there is an ability to keep others out of a market.\footnote{For example, in United Brands the Commission found, and the Court of Justice confirmed, that United Brands was dominant in a market where it engaged in a price war with its main competitor and had made significant losses over the previous five years’ trading. The power of the company to prevent independent dealers buying bananas at the ports of entry and selling them on was one factor which was critical to the finding of dominance.}
Another concept which emerged as an indicator of dominance was that of “unavoidable trading partner”. The concept can be equated with monopoly and frequently the position is reached by virtue of the possession or control of an essential facility. In *Radio Telefis Eireann v Commission* the Court of Justice used the expression to describe the firm which exclusively had television broadcasting schedules, capable of being used to generate a for-profit consumer magazine.

Many agree that market share is a flawed tool for the assessment of dominance. Market share gives no information about potential competition, and in the absence of entry and exit barriers, even a monopolist may be prevented from raising prices above the competitive level. The threat, or possibility, of a market entry would prevent independent behaviour and ensure that the monopolist could not prevent effective competition. So, additional factors must be identified to substantiate the substantial market power claim.

Interestingly, in its *Microsoft* decision the Commission did not rest its case exclusively on the 93% market share of the firm but referred also to certain barriers to entry. The Commission was criticised for failing to move to an economics-based analysis in that decision, but in its assessment of dominance it appears to be taking a broader approach, even if the analysis of abuse was still form-based rather than economics-based.

Since December 2008

In the 2008 Guidance the Commission acknowledges that, in general, a dominant position derives from a combination of several factors, which, taken separately, are not necessarily determinative. The Commission states that it will assess dominance by taking into account the competitive structure of the market and, in particular;

- Constraints imposed on the accused firm by existing supplies from, and the position on the market of, actual competitors
- Constraints imposed on the accused firm by the credible threat of future expansion by actual competitors or entry by potential competitors
- Constraints imposed on the accused firm by the bargaining strength of the firm’s customers

The Commission “will interpret market shares in the light of the relevant market conditions” and view market shares only as “a useful first indication … of the market structure”.

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54 Hoffman La-Roche & Co AG v Commission (85/76) [1979] ECR 461, para 41.
57 Potential competition refers to the possibility of a new entry into the relevant market.
58 Elhauge & Geradin, *op. cit.*
The 2008 Guidance refers to the investigation by the Commission into whether or not there are sufficient constraints on the firm’s conduct by existing competitors and their output, by expansion or entry of rivals and/or by countervailing buying power.

(a) Expansion or Entry

The 2008 Guidance takes account of the commercial reality that competition cannot be assessed solely at a point in time, but rather that the competitive constraints applicable to any firm can change easily and quickly. The potential for competition should a competitor expand, or a new firm enter the market, must also be taken into account according to the 2008 Guidance. Such potential competition can curtail a firm from raising prices and the easier entry to the market is, the more likely a firm will be mindful of its threat. The Commission clarifies that it will take this into account where expansion or entry is “likely, timely and sufficient”. To be considered likely the Commission must be convinced that expansion or entry would be profitable for the other firm – taking account, inter alia, of entry or expansion barriers and the likely commercial response of the allegedly dominant firm. For expansion or entry to be considered timely, it must be fast enough to interfere with substantial market power. Finally, to be considered sufficient the expansion or entry must be on a large enough scale to inhibit any attempts by the allegedly dominant firm to raise prices.

Barriers to expansion or entry can be legal barriers, economies of scale enjoyed by the allegedly dominant firm, privileged access to natural resources, important technologies or an established sales and distribution network. The Commission also acknowledges that the firm itself may have created the barrier by, for example, entering into long-term contracts with customers which have foreclosing effects.

Geradin had correctly made the point that barriers to expansion can be low even where barriers to entry are high. So an apparently dominant firm with a high market share may have little market power (this it is submitted is the weakness of the form-based approach where high market shares automatically inferred large market power). Sunk costs are costs which have to be incurred to compete in a market but which are not recoverable and they are key to assessing the height of barriers to entry and barriers to expansion. The interplay between them is interesting – if, in fast moving consumer goods for example, the question of branding is very important, then the high costs of advertising and “building a brand” may operate as a barrier to entry. However, once the brand is established by the firm in a market, the addition of another product and thus the expansion by the firm may face only low barriers to entry.

In its Decision in Intel the Commission appears to be informally applying the criteria set in the 2008 Guidance, referring, as it does, inter alia, to the nature and size of sunk costs as a barrier to entry and expansion. And in the Court of First Instance’s decision in Clearstream the Court held, irrespective of high market share, that the net question

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62 Ibid. at p. 22
was whether the undertaking had an “ability to influence appreciably the conditions in which” any remaining competition might be exerted.63

(b) Countervailing buyer power

The Commission also acknowledged that a firm with a high market share might not be able to act independently of customers who had strong bargaining power. The power may flow from the customers’ size or their commercial significance for the allegedly dominant firm and their ability to switch quickly to another competing supplier. If there is adequate countervailing buyer power, it might inhibit an attempt by the firm to profitably increase prices.

(iii) Market Shares in the U.S.

Some commentators make the point that the US courts seem to be confused about whether “market power” and “monopoly power” are the same thing.64 Those commentators assert that the terms refer to the same thing and that the terms themselves are not important, rather the focus should be on anticompetitive economic power which harms, or can harm, consumer welfare.

The tendency to infer monopoly, or market, power from market share is also evident in US decisions. Muris explains that US courts have also inferred market power from market share and entry conditions, describing market share as “a proxy for actual proof of anticompetitive effects.”65 Judge Learned Hand stated that a market share of ninety percent “is enough to constitute a monopoly; it is doubtful whether sixty … percent would be enough; and certainly thirty-three percent is not”.66 As in the EU decisions, no ‘brightline’ boundaries are drawn but the Supreme Court had indicated that market shares in excess of 66% suggest monopoly power.67 However, no lower threshold was ever stated expressly.

In the U.S. courts too, an evolution as regards the use of market share to measure market power, can be seen. In the Grinnell case of 1966, the idea that monopoly power “ordinarily may be inferred from the predominant share of the market” was acceptable. It has been noted that, in the early cases courts often moved from finding a large market share to examining conduct, without establishing actual market power.68 However, when the case of Hunt-Wesson Foods was decided in 1980, the court held that “blind reliance upon market share, divorced form commercial reality, could give a misleading picture of a firm’s actual ability to control prices or exclude competition”.69

64 Krattenmaker, Lande and Salop “Monopoly power and market power in antitrust law”, (1987) 76 Geo LJ p. 241
66 United States v Aluminium Co of America, 148 F.2d 416, 424 (2d Cir., 1945) at page 420.
69 Hunt-Wesson Foods, Inc. v. Ragu Foods Inc. 627 F.2d 919
In the face of criticism of overreliance on market share as an indicator of market power, the courts extended their scrutiny and in *Kodak* the court focussed on market share and the high barriers to entry into that market.\(^{70}\) The point made is that in some markets where a firm held as much as a one hundred percent market share, that firm may have no ability to raise prices or achieve monopoly profits if, for example, barriers to entry were very low.\(^{71}\) However, in the *Kodak* decision the Supreme Court analysed the way in which switching costs and information costs insulated Kodak in the aftermarket and contributed significantly to that company’s substantial market power. By definition, aftermarkets are ones in which a lesser focus on market share and a greater focus on consumer mobility seem appropriate. While there has been criticism of the application of the *Kodak* decision by lower courts, such as to render the *Kodak* doctrine toothless, the case illustrates an awareness of the role of switching and information costs.\(^{72}\)

A distinguishing feature has however always been that the U.S. decisions did not elevate certain percentage market shares to the status of presumptions and, as Muris noted, entry conditions were also taken into account.

Another aspect of the U.S. approach is the Department of Justice / Federal Trade Commission Guidelines. These take a more economics based approach to questions of market share and market power. One illustration of this is the analysis of the effects of other market participants on the freedom to act of the firm charged with monopoly and holding the large market share. While the guidelines were drafted with mergers and horizontal agreements in mind, they have been a reference point in Section 2 cases too.

Reasons for the differing treatment can be attributed to the ordoliberal influence on E.C. competition law and policy. The ordoliberal movement was very focussed on market structure and inherently suspicious of concentrated markets. Ahlborn and Evans identify a number of manifestations of the ordoliberal influence when Article 82 is concerned. On the dominance side, they include a low threshold of dominance in market share terms and a presumption of dominance where the threshold is reached.\(^{73}\) Those authors make the point that many of the economic theories on which those views are based have been disproved by modern economic theory, for example the view that concentrated markets were anathema to competition on the merits.

***(iv) Other factors indicating monopoly power in the U.S.***

There are a number of means to illustrate that other factors can indicate monopoly power in the US, as described above. One very significant example of other factors being taken into account to assess market or monopoly power is the doctrine of

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\(^{70}\) *Eastman Kodak Co v Image Technical Services Inc.* 504 US 451


essential facilities. The doctrine of essential facilities is attributed to the US Supreme Court in the case of *United States v Terminal Railroad Association of St. Louis.*

In analysing the decision of the Supreme Court in the *Grinnell* case, Elhauge notes that it is difficult to distinguish between “wilful acquisition or maintenance of [monopoly] power” and “growth or development as a consequence of a superior product”. However, in ordering the sharing of facilities in *Aspen* and the reversal of a refusal to supply in *Eastman Kodak*, the Supreme Court clearly took account of factors other than market share. The essential facilities concept epitomises the barrier to entry argument.

The “applications barrier to entry” played a key role in the *Microsoft* cases, at Department of Justice and court levels. The term refers to the fact that developing and launching a competing operating system will only be commercially viable if consumers can find sufficient applications to run on that new operating system. The corollary is that developers will only develop applications to run on operating systems already used by many. So an operating system entrant faces a significant barrier to entry. The plaintiffs alleged that this applications barrier to entry allowed Microsoft to enjoy substantial and enduring market power in the market for personal computers. Ultimately that view was upheld.

It is interesting to note the reliance on other factors, such as the applications barrier to entry, in spite of the market share in excess of 90%.

**The Effects of the Modernisation Regulation**

While the 2008 Guidance gave insights into the Commission’s work plan and priorities as regards Article 82 for the future, it’s status for, and influence on, national competition authorities and courts in the member states is relatively untested.

In the application of national competition laws, where no Article 102 jurisdiction is established, the commercial and judicial certainty of market share tools for assessing dominance may still prove popular.

**Conclusion**

Market share cannot be discounted entirely as a tool for measuring market power and it provides indicators as to the effects of abusive conduct. However, the balance evident now in the Commission’s assessment of dominance - the account taken of other constraints, of potential competition, as well as of market share - is to be

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74 No. 386 Supreme Court of the United States, 224 U.S. 38332 S.Ct. 507, 1912 U.S. Lexis 2310.
75 *United States v Grinnell Corp.*, 384 U.S. 563, (1966)
79 *New York v Microsoft Corp.*, 531 F. Supp. 2d 141
welcomed. It would appear that dominance itself is being assessed by a greater use of economic analysis.

For the shift to be meaningful however, it will require consistent application by the Commission and also have to find support within the Courts, the institutions of appeal and ultimate decision makers on dominance. To complete the move to an effects-based approach to abuse of dominant position, the question of what constitutes an abuse will also require a new approach.

* This article is a more developed paper based on an initial paper delivered at an interdisciplinary seminar on Article 82 (as it then was), hosted by the International Commercial and Economic Law Group at University of Limerick in September 2009.