

Competition: Antitrust procedures in abuse of dominance

Article 102 TFEU cases

[Article 102](#) of the Treaty on the Functioning of the European Union (TFEU) prohibits abusive conduct by companies that have a dominant position on a particular market.

An Article 102 case dealt with by the European Commission or a national competition authority can originate either upon receipt of a complaint or through the opening of an own-initiative investigation.

Assessing dominance

The Commission's first step in an Article 102 investigation is to assess whether the undertaking concerned is dominant or not.

Defining the relevant market is essential for assessing dominance, because a dominant position can only exist on a particular market. Before assessing dominance, the Commission defines the product market and the geographic market.

- **Product market:** the relevant product market is made of all products/services which the consumer considers to be a substitute for each other due to their characteristics, their prices and their intended use.
- **Geographic market:** the relevant geographic market is an area in which the conditions of competition for a given product are homogenous.

Market shares are a useful first indication of the importance of each firm on the market in comparison to the others. The Commission's view is that the higher the market share, and the longer the period of time over which it is held, the more likely it is to be a preliminary indication of dominance. If a company has a market share of less than **40%**, it is unlikely to be dominant.

The Commission also takes other factors into account in its assessment of dominance, including the ease with which other companies can enter the market –

whether there are any barriers to this; the existence of countervailing buyer power; the overall size and strength of the company and its resources and the extent to which it is present at several levels of the supply chain (vertical integration).

What is an abuse?

To be in a dominant position is not in itself illegal. A dominant company is entitled to compete on the merits as any other company. However, a dominant company has a special responsibility to ensure that its conduct does not distort competition. Examples of behaviour that may amount to an abuse include: requiring that buyers purchase all units of a particular product only from the dominant company (exclusive purchasing); setting prices at a loss-making level (predation); refusing to supply input indispensable for competition in an ancillary market; charging excessive prices.

Investigation

The Commission's investigative powers

The Commission's investigative powers to enforce Article 102 are detailed in [Regulation 1/2003](#) (the Antitrust Regulation). The Commission is empowered, for example, to:

- Send information requests to companies;
- In the context of an inspection:
 - enter the premises of companies;
 - examine the records related to the business;
 - take copies of those records;
 - seal the business premises and records during an inspection;
 - ask members of staff or company representatives questions relating to the subject-matter and purpose of the inspection and record the answers.

At the end of the initial investigative phase, the Commission can take the decision to pursue the case

as a matter of priority and to conduct an in-depth investigation, or to close it.

Statement of objections and Article 7 prohibition decision

Following the investigation, the Commission may issue a statement of objections (SO). This document informs the parties of the Commission's objections raised against them. It gives the companies the possibility to exercise their rights of defence.

Rights of defence: To ensure an objective outcome, the parties are given certain rights of defence. They are entitled to have [access to the file](#) – this means they can see all non-confidential documents from the Commission's investigation. The parties may then reply to the SO in writing within a certain delay. They may also request an **oral hearing**, which is conducted by an independent [Hearing Officer](#).

After examining the parties' arguments, the Commission reviews and sometimes abandons (part of) its initial objections and may decide to close the case.

If the Commission's concerns are not – or only partly dispelled – it drafts a decision prohibiting the identified infringement (according to Article 7 of the Antitrust Regulation). The draft is then submitted to the **Advisory Committee** composed of representatives of the Member States' competition authorities. This provides a final check of the draft decision. If fines are proposed in the draft decision, the Advisory Committee meets a second time to specifically discuss them. Finally, it is submitted to the College of Commissioners which adopts the decision.

Article 9 commitment decisions

Alternatively, the Commission may take a commitment decision under Article 9 of Regulation 1/2003. This is a quick way of restoring effective competition to the market. Under commitment decisions, the Commission does not have to prove an infringement of the antitrust rules and imposes no fines. It voices its concerns and parties can come forward with commitments to address these concerns. If the Commission, after consulting market participants, finds these commitments sufficient, it takes a decision to make them legally binding.

The commitments are usually valid for a specific period of time but if the companies breach them they can be fined.

Fines

A firm that has engaged in anti-competitive behaviour and so infringed competition law may be subject to fines imposed by the Commission under Regulation 1/2003. The Commission's fining policy is aimed at **punishment and deterrence**. The fines reflect the gravity and duration of the infringement. They are calculated under the framework of a set of [Guidelines](#) last revised in 2006.

The starting point for the fine is the percentage of the company's annual sales of the product concerned in the infringement (up to 30%). This is then multiplied by the number of years and months the infringement lasted. The fine can be increased (e.g. repeat offender) or decreased (e.g. limited involvement). The **maximum** level of fine is capped at 10% of the overall annual turnover of the company.

See separate [factsheet on fines](#).

Right of appeal

The parties subject to a Commission decision have the right to appeal to the General Court for the decision to be annulled. The Court can cancel, increase or reduce the fine imposed by the Commission. Judgments of the General Court can be appealed before the Court of Justice by the unsuccessful party (so the Commission can also be an appellant). However, these appeals to the Court of Justice are limited to questions of law only.

Victims' claims for damages

Any citizen or business which suffers harm as a result of a breach of the EU competition rules should be entitled to claim compensation from the party who caused it. This means that the victims of competition law infringements can bring an action for damages before the national courts.

Joint/collective dominance

It should also be noted that groups of companies can also be held to be collectively dominant on a particular market, but this is less frequent in practice.

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