

Award in Principles of Competition Law

Lecture Title: Article 102 TFEU

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Introduction



Article 102 TFEU: The Prohibition

The Text Reads:

“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 ... in so far as it may affect trade between Member States (MS).”

In plain English: if your company is very powerful in a market, you must not use that power unfairly.

- i. Unilateral market behaviour (*by an undertaking (or more)*)
- ii. Abuse (*see indicative list under Art. 102*) of a
- iii. Of a Dominant position (*this has to do with market power*)
- iv. Within the internal market (*there must be a “relevant market” in respect of which a company is a dominant operator*)
- v. Having an effect on trade between MS (*jurisdictional element for application of TFEU*)

Article 102 v Article 101 TFEU

- The prohibition in Article 102 is fundamentally different from Article 101 of the TFEU in that there is **no requirement for there to be an agreement or concerted practice**.
- Conduct by a single company will suffice (although 2 companies may be “collectively” dominant).
- Another major difference is that, Article 102 does not apply to all companies. Only companies that are **dominant** in a relevant market are subject to the higher standards of competitive behaviour. Dominant companies must not abuse their dominant position.

Example: If a major bank and a smaller bank secretly agree to fix the interest rates they charge — that is an Article 101 issue (an agreement). But if the largest bank in Malta unilaterally decides to impose unfair charges on customers — that is an Article 102 issue.

Article 102 TFEU: Indicative List of Abuse

Article 102 TFEU does not define the concept of “abuse”. Instead, it lists four categories of abusive behaviour (non-exhaustive):

- i. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions (e.g., a co dominant in the supply of management information systems software moves its customers from a one-year to three-year contracts without giving customers adequate opportunity to avoid the change by switching to a competitor);
- ii. limiting production, markets or technical development to the prejudice of consumers (e.g., refusal by state-owned transport incumbent operator to access the database of real transport time information to a provider of online ticketing services);
- iii. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage (e.g., a dominant fuel supplier applies different credit terms to its customers without objective justification);
- iv. 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 (e.g., Microsoft tying TEAMS with its Windows software)

Article 102 TFEU: Indicative List of Abuse

- The EU Courts have said that it is impossible to set out an exhaustive list of conduct that might violate Article 102
- Many cases finding an abuse involve conduct of more than one kind or that can be classified under more than one heading. (EG., Refusal to supply access to my storage facility may be excessive pricing or a margin squeeze, it may even be an illegal agreement of excessive duration!)
- It is inappropriate to seek to 'pigeon-hole' conduct as one type of abuse. Reference to earlier decisions is only an imperfect guide as to how the principles underlying Art. 102 should be applied to the facts of an individual case.
- In each case it will be important to consider, among other matters:
 - i. the theory of harm arising from the conduct in question;
 - ii. the actual and likely effects of the conduct on competition;
 - iii. the objective justifications and efficiency gains, if any, associated with the conduct.

Article 102 TFEU: Non-Exhaustive List

Over the past decade, a new form of abusive conduct has been pursued by different NCAs, namely the practice of dominant companies excluding or reducing competition by instituting strategic campaigns to influence the purchasing behaviour of customers, typically by portraying competing products or services as unsafe and/or inefficient or of significantly lower quality - “**Denigration**”

By way of illustration, in 2019 the Danish CA found Falck (the incumbent supplier of ambulance services) had implemented a non price exclusionary strategy to exclude BIOS from the market by creating uncertainty and concern about BIOS as a supplier of ambulance services

“Falck's strategy targeted BIOS and consisted, among other things, of - secretly - conveying negative stories about BIOS to the press and to Falck's employees, and purposefully influencing those paramedics who considered jobs at BIOS, in order to prevent them from applying for jobs at BIOS. Overall, Falck's behaviour made it difficult for BIOS to recruit paramedics, and ultimately BIOS had to leave the market”



Article 102 TFEU: Non-Exhaustive List

- Similarly, **Self-preferencing** is a relatively new type of abusive conduct often associated to the market power held by digital platforms and to risks deriving from their vertical and conglomerate integration.
- It was first assessed in the Google Search (Shopping) Decision (2017), in which the Commission held that Google had abused its dominant position in 13 national markets for general search services, by positioning and displaying more favourably, in its general search results pages, its own comparison shopping service compared to competing comparison shopping services.
- The General Court agreeing with the Commission noted that leveraging is a generic term in relation to the impact which an abusive practice identified on one market may have on another market, and by this term can be addressed several different practices that are capable of being abusive, such as tying and refusal to deal



Article 102 v Article 101 TFEU

- An Article 102 case, on the other hand, will routinely involve substantial disputes (and more analytical assessments) regarding the following questions:
 - i. What is the **relevant market**? In order to ascertain whether a firm is dominant for the purpose of Article 102, complex questions about whether one product is in the same market as another will usually need to be examined in detail
 - ii. Is the undertaking **dominant**? Once the relevant market has been defined, market shares (among others) must be determined which, again, may be far from easy, depending on the availability of data
 - iii. Is the conduct complained of an **abuse**? Dominant players are permitted to compete actively. The line between permissible and undesirable competition is uncertain - for example, a price reduction following production economies, on the one hand, and unlawful predatory pricing, on the other, may well be unclear.

Article 102 – What is the Relevant Product Market?

a) The Relevant Product Market

- The relevant product market "comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. **In other words what product are we talking about? (product market)**
- The key tool: the SSNIP Test (Small but Significant Non-transitory Increase in Price). The test involves looking at the narrowest set of products which might plausibly form a market and asking what would happen if a hypothetical monopolist of that set of products sought to increase the price by a small but significant, permanent amount of, say, 5–10%. Would customers switch to the closest available substitute? If not, that set of products forms the relevant product market. If customers would switch, those other products are included in the market. The process is continued until no further products are added.
- **Example: Suppose The Grand, the only five-star hotel in Valletta, Malta, wants to raise its conference room rates by 10%. Would corporate guests — who have booked The Grand specifically for a large international conference — switch to a four-star hotel instead?**
 - **If yes — guests are willing to trade down — then four-star and five-star hotels are likely in the same product market: “conference hotels”.**
 - **If no — guests cannot trade down because they need the grand ballroom, the dedicated facilities, and the prestige of a five-star address to impress international clients — then luxury five-star conference hotels may form their own, narrower product market.**

Article 102 – What is the Relevant Geographic Market?

b) The Relevant Geographic Market

- The relevant geographic market "comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas. **In other words: where do customers look for substitutes, and how far are they willing to travel?**
- Same Example : Now that we have defined the product market as five-star hotel conference services, we need to ask: what is the geographic scope of that market? The relevant geographic market is likely to be the city centre — or at most the wider Valletta area — for the following reasons:
 - Even if there are cheaper five-star conference hotels around Malta, the conditions of competition there are appreciably different — category of delegates, different transport links, different delegate travel costs, different local supplier networks.
 - The geographic market is therefore not the whole of Malta — it is limited to the area where customers genuinely look for alternatives.

Article 102 – What is Dominance?

- We have already established that the relevant market is the market for five-star hotel conference services in Valletta.
- Now we need to ask: is The Grand dominant in that market? The legal test from United Brands and Hoffmann-La Roche: dominance is a position of economic strength that enables a firm to behave to an *appreciable extent independently of its competitors, its customers, and ultimately consumers* = in plain terms: can The Grand ignore its rivals and its customers and still fill its conference rooms? If yes, it is probably dominant.

Pulling all the factors together:

Factor	Assessment for The Grand
Market share	100% in the relevant market — very strong indicator
Barriers to entry	Very high — capital, planning, brand, and time
Countervailing buyer power	Partial — large corporates have some power, but SMEs and public bodies do not
Competitive constraints from rivals	Minimal — four-star hotels are not genuine substitutes
Brand loyalty	High — repeat corporate clients are sticky

- Being dominant is not illegal. The Grand has done nothing wrong simply by being the only five-star conference hotel in Valletta. Article 102 only becomes relevant if The Grand then abuses that dominant position — for example, by charging excessive prices, refusing to supply rival event management companies, or tying access to its conference rooms to the purchase of its in-house catering service. That is Step 3.

Article 102 – Abuse

- A law firm wants to book The Grand's conference suite for a two-day client seminar. The Grand agrees — but only on the condition that the law firm also uses The Grand's in-house catering service. The law firm already has a preferred external caterer they use for all their events, but The Grand refuses to allow outside caterers onto the premises.
- Why this is an abuse? Using the four-part test from Microsoft:

Condition	The Grand Example
Two separate products?	Yes — conference room hire and catering are distinct services
Dominant in the tying product?	Yes — The Grand is dominant in five-star conference facilities
No choice to buy one without the other?	Correct — the law firm cannot access the conference suite without taking the catering
Forecloses competition?	Yes — external catering companies are shut out entirely

- The Grand is leveraging its dominance in the conference room market (the tying product) to gain an unfair advantage in the catering market (the tied product) — a market where it would not otherwise be able to compete on merit.
- The key takeaway: The Grand has done nothing unlawful by being the only five-star conference hotel in Valletta. But the moment it uses that position to exclude rivals (refusal to supply) or force customers into unwanted purchases (tying), it crosses the line into abuse under Article 102 TFEU.

Overview of the Article 102 TFEU Elements

Article 102 TFEU : Overview of its Criteria

- An Article 102 case will involve the assessment of the following criteria:
 - i. What is the **relevant market**? In order to ascertain whether a firm is dominant for the purpose of Article 102, a relevant product and geographic market must be defined.
 - ii. Is the undertaking **dominant**? Once the relevant market has been defined, the undertaking must be found to be dominant on the market through the assessment of market shares etc.
 - iii. Is the conduct complained of an **abuse**? What is the theory of harm - Dominant players are permitted to compete actively. The line between permissible and undesirable competition is uncertain.

The First Criterion: **Dominance**, Is Big Bad?

- Competitive pressure from rival firms usually 'keeps firms honest', preventing them from charging prices which are excessively above costs
- Markets on which a firm occupies a dominant position are presumed insufficiently competitive. No further restrictions of competition are tolerated
- Without competitive pressure a dominant firm has market power and so is able to profitably raise prices and restrict output

- The European Court also held that:

“such a position does not preclude some competition...but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence under which competition will develop, and in any case to act largely in disregard of it so long as such conduct does not act to its detriment” Case 85/76 Hoffman La Roche

It is perfectly legitimate for a firm to hold a dominant position under Article 102 TFEU: the Article prohibits abuse of a dominant position, not the mere holding of that position.

- The CJEU has established very consistently in the case law that, regardless of the reasons why a firm holds a dominant position, it *'has a special responsibility [owed to the market and consumers] not to allow its conduct to impair genuine undistorted competition on the common market'* (see Case 322/81 *Michelin NV v Commission*)
- The “dominant position” under Article 102 TFEU does not necessarily refer to a monopoly but also to undertakings with certain degree of market power.

Illustration: Gozo Channel

This service provider may enjoy a 100% market share on the transport of passengers and cargo by ferry between Malta and Gozo. However, (depending on how the market is defined) its market power would be constrained if a helicopter service on the same route or if a fast ferry passenger service enters the market and drastically increases the level of competition

The First Criterion: What is Dominance?

The legal definition of a dominant position in EU law was given by the ECJ in United Brands and Hoffmann-La Roche: "*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, its customers and ultimately of its consumers*" Case 85/76 Hoffmann-La Roche & Co AG, para. 38-39, Case 2/76 United Brands para. 65.

- This has been repeated and applied by the Court ever since ...
- In the Guidance Paper on Article 102 the European Commission starts with the UB/HLR definition, but explains it as "*substantial market power*" and links it to the economic definition of substantial market power as the capability of profitably increasing prices above the competitive level for a significant period of time rather than identifying dominance with the ability to prevent effective competition See Guidance Paper, paras 10-11
- Therefore, **the acid test is = market power** and the ability to act independently on the market exists, rather than whether a particular size of market share exist

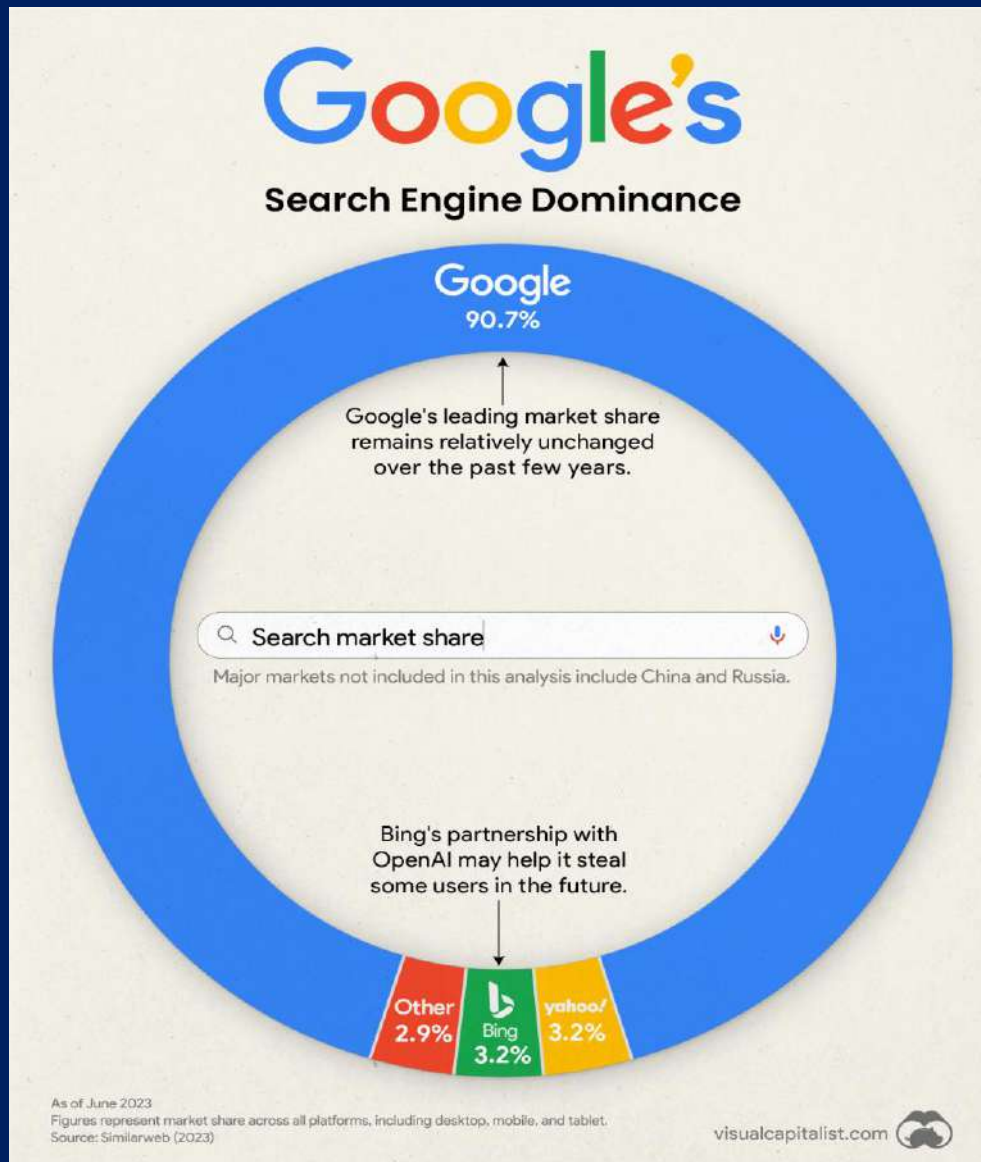
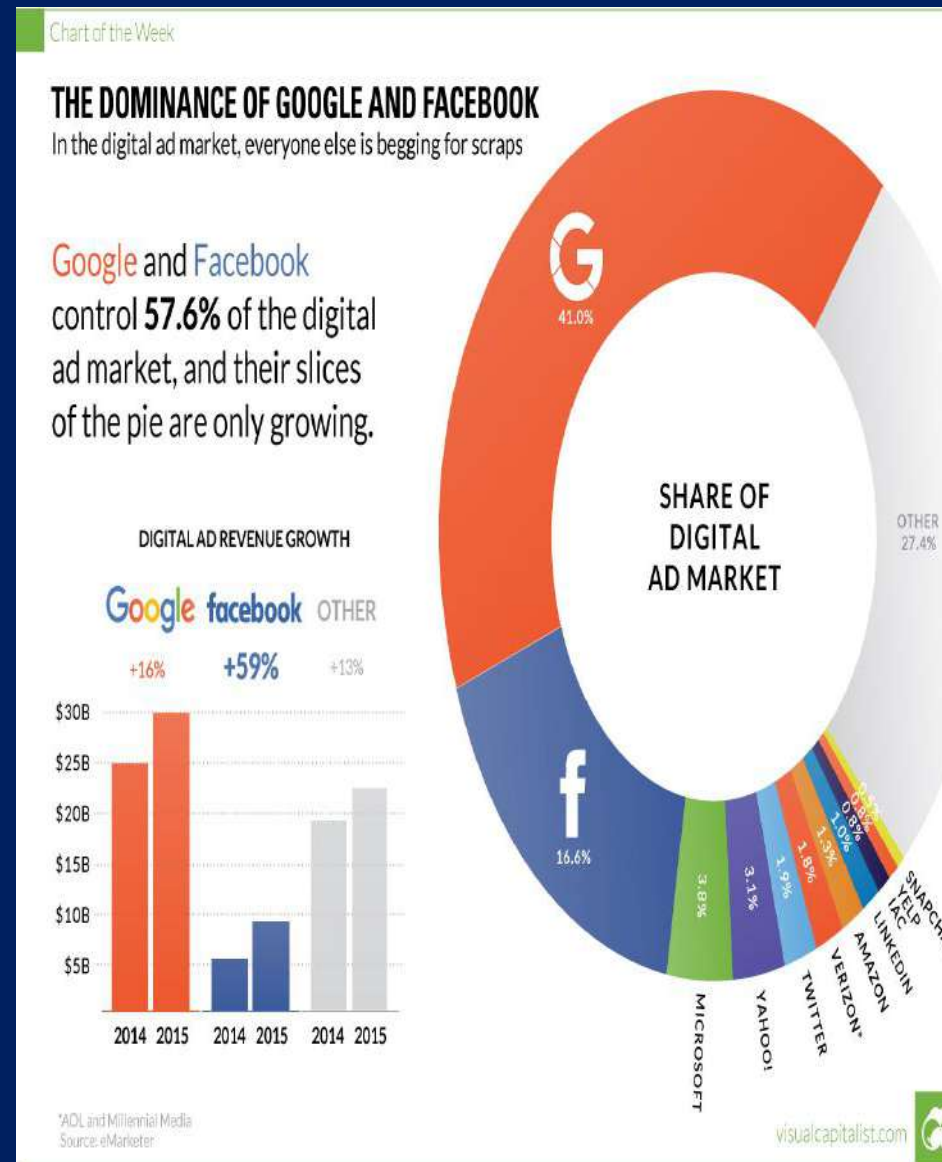
Establishing Dominance

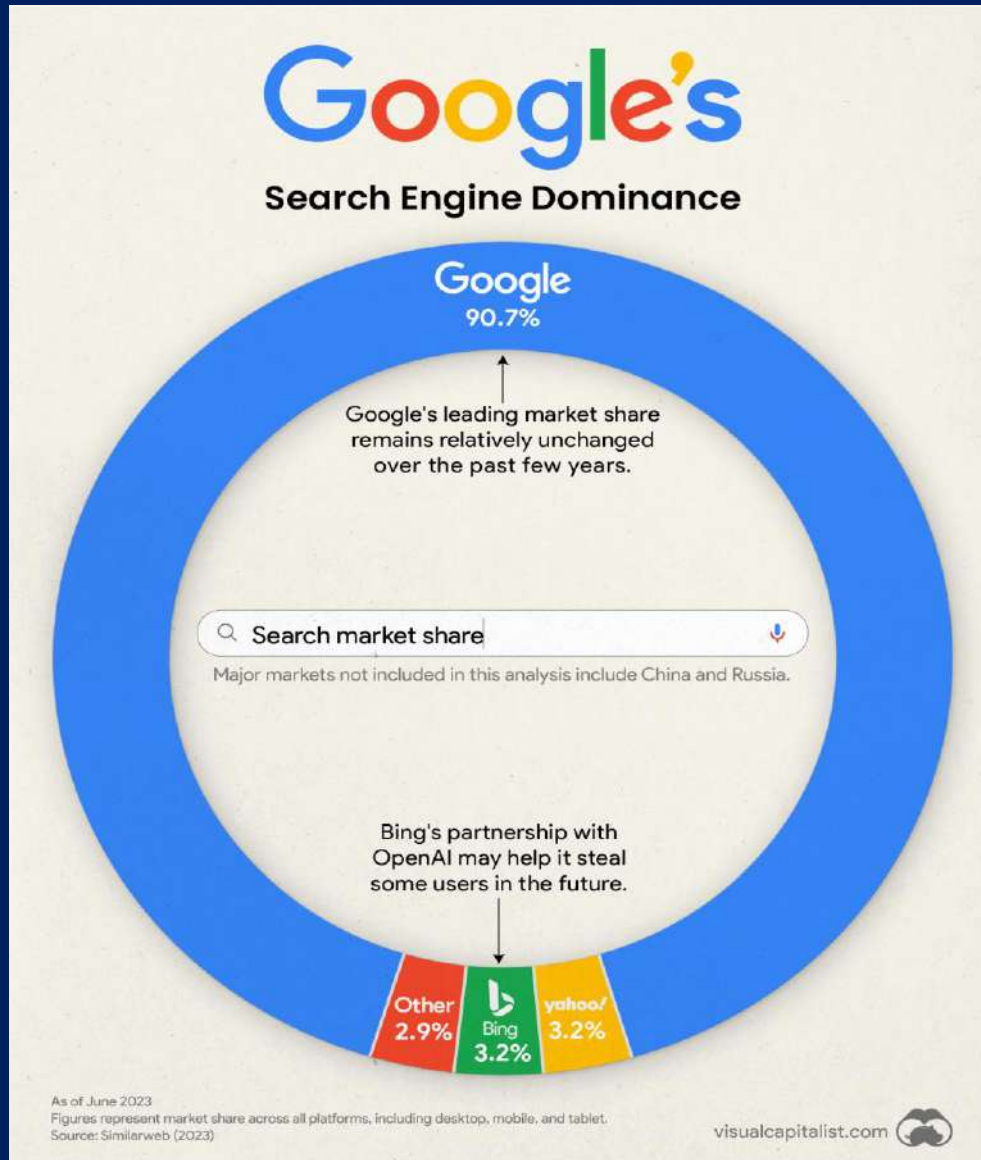
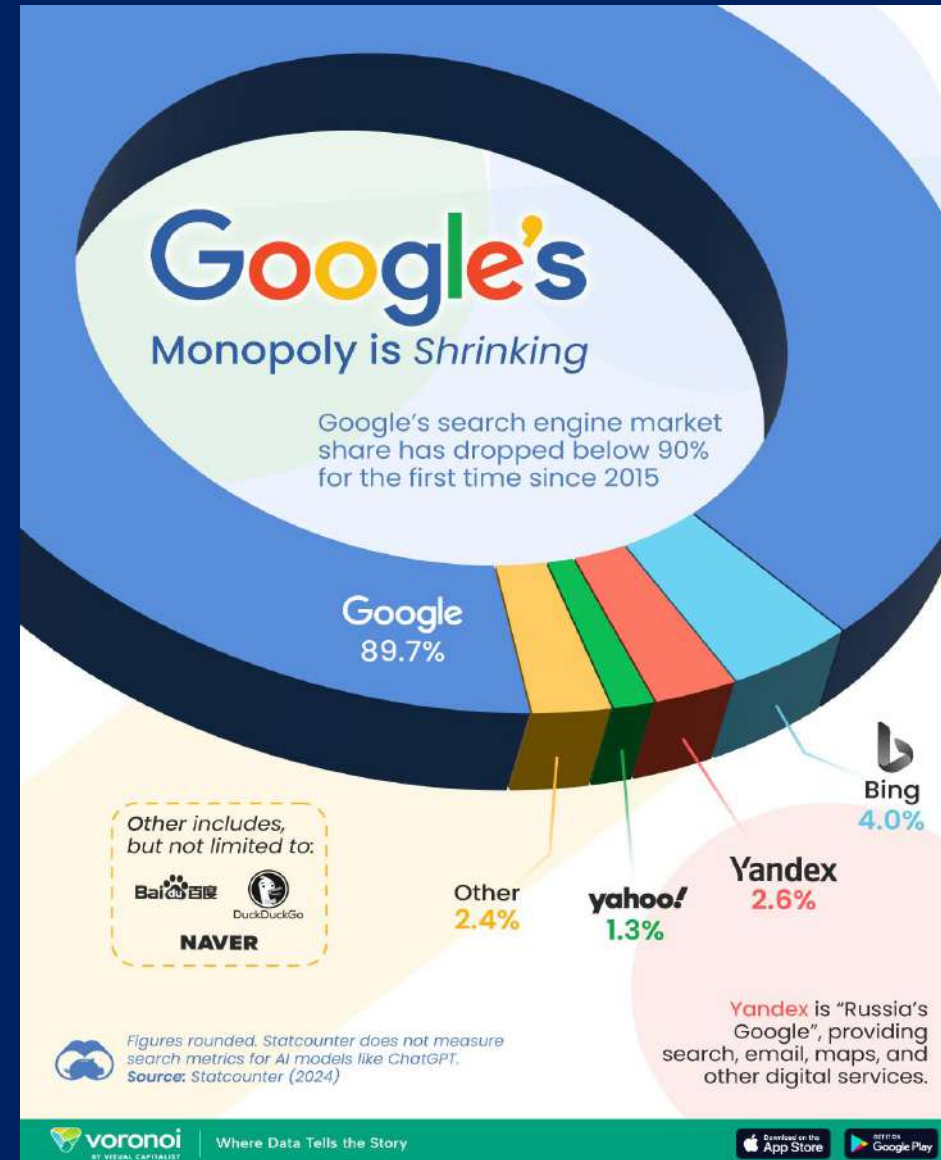
“The existence of a dominant position may derive from several factors which taken separately are not necessarily determinative (...)” (Hoffman/La Roche para 39):

- Markets shares
- Competitive constraints imposed by existing competitors
- Countervailing buyer power
- Barriers to Entry or expansion

- Neither the law nor the case law refers to any threshold above which an undertaking must be considered to be dominant.
- While market shares are not in themselves determinative of dominance, they are very important Case 322/81 Michelin v Commission. The Commission makes it clear in the Article 102 Paper that market shares are merely a "useful first indication" of the market structure
- As a Rule of Thumb
 - Share > 70% = dominant
 - 70% > Share > 50% = presumed dominant
 - Share < 40% = dominance unlikely
- That said, even above the 50 % threshold, it is necessary to consider the nature and dynamics of a particular market. In markets subject to a high degree of innovation or where services are offered for free, shares (even above 90 %) may not be a good proxy for market power (case COMP/M.7217 Facebook/WhatsApp – fast growing, dynamic tech sector and multi-homing)
- Assess relative market shares - 3 firms each with a third of the market is more likely to be competitive than 1 firm with 30% and 7 firms each with 10%
- Look at how market shares change over time. If market shares are volatile it could be that firms are constantly innovating to get ahead (eg. IPR)

Market Shares – Depending on how the relevant Product market is defined





B. Other Factors for Assessment

Barriers to Entry: Barriers to entry or expansion could be legal (for example, patents, tariffs or quotas) or economic (for example, economies of scale, technologies and established distribution and sales networks). The dominant undertaking's own conduct could also create barriers to entry, for example, where long-term contracts between a supplier and its customers act as a barrier to new entrants.

Example: A new craft brewery enters the market with a genuinely better product at a competitive price, but finds that every major outlet is already tied up with the dominant brewery's network and is either unwilling or unable to take on a new supplier.

Countervailing Buyer Power: A firm may have a substantial market share and yet still not have a dominant position if its customers have sufficient power that the undertaking cannot behave to an appreciable extent independently of its competitors and its customers. However, buyer power may not be enough of a constraint if only a segment of customers are shielded from the market power of the dominant undertaking

Example (Hotel): If a dominant conference venue provider deals mainly with large multinational corporations who can credibly threaten to take their events to a different city or country, those customers may have countervailing buyer power that limits the venue's ability to act as a true monopolist. However, SMEs booking meeting rooms would not have the same negotiating power.

Brand Loyalty and Customer Stickiness: Brand or customer loyalty can be a powerful barrier. In some sectors, customers looking to purchase expensive equipment or services may be reluctant to switch to a new entrant rather than a long-established and reputable concern.

Example (HR): A large employer that has used the same HR software for 15 years, has trained all its HR staff on it, and has integrated it into its payroll systems, is highly unlikely to switch — even if a cheaper alternative exists. This "stickiness" reinforces the dominant firm's position.

Example (Banking): Consumer reluctance to switch current accounts — due to direct debit inertia, familiarity, and perceived hassle — is a well-documented phenomenon. This loyalty effect can entrench the dominance of established high-street banks even in the face of cheaper fintech alternatives.



B. Other Factors for Assessment

Network effects occur when a product or service becomes more valuable to each user as more people use it. In other words, the more users a platform or service attracts, the more attractive it becomes to even more users — creating a self-reinforcing cycle that makes it very difficult for a new entrant to compete, even with a better product

Example: Imagine StayHub, a hotel booking platform that has become the dominant online travel agent in Europe. It has millions of verified guest reviews, the widest inventory of hotels, and is the first place most travellers go when searching for accommodation.

Consider a small, independent boutique hotel in Florence — Hotel Belvedere. Even if StayHub takes a 20% commission on every booking, Hotel Belvedere feels it has no real choice but to list on StayHub, for the following reasons:

- Travellers go to StayHub first because it has the most reviews, the best price comparison tools, and the most properties. The more travellers use it, the more valuable it becomes — this is the demand-side network effect.
- Hotels list on StayHub because that is where the travellers are. The more hotels list, the more attractive it becomes to travellers. This is the supply-side network effect.

The two sides reinforce each other in a self-reinforcing cycle making it progressively harder for a new entrant to break in.

Why This Matters for Dominance

A competition authority assessing StayHub's position might conclude that it is dominant — or even indispensable — even if its raw market share figures do not reach the traditional 40–50% threshold, because:

- Hotel Belvedere cannot afford not to be on StayHub. Opting out means losing access to the vast majority of online bookers, which would be commercially devastating.
- A rival booking platform with, say, 15% market share does not exert a meaningful competitive constraint, because travellers do not habitually search there and the review base is too thin to be trusted.
- StayHub's accumulated data advantage — years of guest reviews, pricing data, and booking behaviour — cannot be replicated quickly by a new entrant, reinforcing its indispensability.

Article 102 TFEU : The Criteria

- An Article 102 case will involve the assessment of the following criteria:
 - i. What is the **relevant market**? In order to ascertain whether a firm is dominant for the purpose of Article 102, a relevant product and geographic market must be defined.
 - ii. Is the undertaking **dominant**? Once the relevant market has been defined, the undertaking must be found to be dominant on the market through the assessment of market shares etc.
 - iii. Is the conduct complained of an **abuse**? What is the theory of harm - Dominant players are permitted to compete actively. The line between permissible and undesirable competition is uncertain - for example, a price reduction following production economies, on the one hand, and unlawful predatory pricing, on the other, may well be unclear.

A Pre-Condition: **The Relevant Market**

- In practice, market power can only exist in relation to the supply or acquisition of a particular class of goods or services. Therefore, the inquiry under Article 102 begins with an assessment of the market share of the firm or firms concerned, which, in turn, requires the relevant market
- A necessary pre-Condition: “For the purposes of Article [102], the appropriate definition of the relevant market is a necessary precondition for any judgment concerning allegedly anti-competitive behaviour (...), since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market.” Case T-61/99 *Adriatica di Navigazione* para 27
- Purpose: “Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. ...and to identify in a systematic way the competitive constraints that the undertakings involved face.” see Commission Guidance on Defining the Relevant Market

- The relevant market is established by a combination of the market's two dimensions:
 - i. the relevant product market = “comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use.”
 - ii. the relevant geographic market = “comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.” (Commission Guidance on RM, para 7)
- The test involves looking at the narrowest set of products which might plausibly form a market, and asking what would happen if a hypothetical monopolist of that set of products sought to increase the price of the products by a small but significant, permanent (in other words, non-transitory) amount of, say, 5% to 10%.
- Would customers then switch to the closest available substitute products? If not, that set of products forms the relevant product market.
- If, on the other hand, customers would switch to other products in the event of such a price increase, the relevant product market includes those other products.
- The process is continued until no further products are added, as they are not effective substitutes, at which point the relevant product market is identified.

Basic Principles – A very simple example

A single operator runs the only legacy ferry service between Malta and Gozo, operating between Ċirkewwa in Malta and Mgarr in Gozo.

Product Market

- If the product market is defined as 'legacy ferry crossings between Malta and Gozo', then the answer is yes — the operator is dominant.
- But this market definition might be too narrow. One might query whether the legacy ferry service is really in a separate market from the fast ferry service, which carries passengers only (no vehicles) and operates between Valletta and Mgarr. From a consumer's perspective, if the legacy ferry raises its fares, would passengers — particularly those travelling without a vehicle — simply switch to the fast ferry instead? If so, both services may belong to the same product market.
- One might further query whether a helicopter service between Malta and Gozo should also be included in the same product market. While the helicopter is considerably more expensive, it is significantly faster and serves a similar point-to-point transport need. Consumers who are time-sensitive and price-insensitive may treat it as a genuine substitute.
- On the other hand, the legacy ferry carries vehicles as well as passengers, which neither the fast ferry nor the helicopter can do. A consumer needing to bring their car to Gozo has no substitute for the legacy ferry, which may justify treating it as a separate product market in its own right.

Geographic Market

The landing and departure points differ across the three services: The legacy ferry operates exclusively between Ċirkewwa (Malta) and Mgarr (Gozo). The fast ferry operates between Valletta (Malta) and Mgarr (Gozo), offering a very different departure point for passengers coming from the south of Malta. The helicopter operates between Malta International Airport (Luqa) and Gozo Heliport, serving yet another departure and arrival point.

- A consumer living in the south of Malta may find the fast ferry from Valletta far more convenient than travelling all the way to Ċirkewwa for the legacy ferry, meaning the two services may not be genuine substitutes for that consumer despite serving the same island-to-island route.
- Conversely, a consumer living in the north of Malta near Ċirkewwa may find the legacy ferry perfectly convenient and have little reason to consider the fast ferry or helicopter at all.
- The geographic market may therefore need to be assessed not just as 'Malta to Gozo' in the abstract, but by taking into account which departure and arrival points consumers realistically have access to.

Basic Principles – A very simple example

This example illustrates that three principal considerations inform the definition of the market:

- i. The first consists in identifying what the relevant product market is from the perspective of consumers (demand-side substitutability). This entails deciding whether the legacy ferry, fast ferry and helicopter are genuine substitutes from the consumer's perspective — or whether the ability to carry vehicles sets the legacy ferry apart as a distinct product market entirely.
- ii. The second requires determining what the relevant geographical market is — in this case, not simply 'Malta to Gozo' but potentially broken down further by reference to which departure and arrival points consumers can realistically access, given that the three services operate from entirely different locations.
- iii. The final consideration is an inquiry into whether there are any persons who might enter the relevant market in the future (supply-side substitutability) — for instance, whether a new operator could realistically launch a competing ferry or fast ferry service on the same route, subject to any licensing, infrastructure or regulatory constraints.

Clearly, under the narrowest market definition (legacy ferry crossings between Ċirkewwa and Mġarr only) the operator has 100% of that market and a dominant position, while under the widest definition (all passenger and vehicle transport services between Malta and Gozo regardless of departure or arrival point) it is far less clear that the operator holds a dominant position.

Article 102 TFEU : The Criteria

- An Article 102 case will involve the assessment of the following criteria:
 - i. What is the **relevant market**? In order to ascertain whether a firm is dominant for the purpose of Article 102, a relevant product and geographic market must be defined.
 - ii. Is the undertaking **dominant**? Once the relevant market has been defined, the undertaking must be found to be dominant on the market through the assessment of market shares etc.
 - iii. Is the conduct complained of an **abuse**? What is the theory of harm - Dominant players are permitted to compete actively. The line between permissible and undesirable competition is uncertain - for example, a price reduction following production economies, on the one hand, and unlawful predatory pricing, on the other, may well be unclear.

The Second Criterion: Abuse

- In plain terms: if a dominant firm uses methods that go beyond competing on quality, price, and innovation — and those methods harm competition — that is an abuse.
- The Commission has explained that such behaviour is prohibited under competition law because it:
 - damages true competition between firm
 - exploits consumers
 - makes it unnecessary for dominant firms to compete with other firms on the merits.
- Broadly, the categories of abuse can be grouped into
- (i) **exclusionary abuses** (where a dominant company strategically seeks to exclude its rivals and thereby restricts competition such as predatory pricing), and
- (ii) **exploitative abuses** (where a dominant firm uses its market power to extract rents from consumers such as excessive prices). Exclusionary abuses are by far the most common type of abuse (although the Commission and national authorities have recently begun to pursue more exploitative abuse cases).
- Dominance, abuse and effect can be in different markets.

The Second Criterion: Abuse

- When dealing with the concept of abuse, we must always start with the wording of Article 102 TFEU, which contains a non-exhaustive list of examples of abuse in paras. (a)–(e).
- The concept of abuse is objective and conduct may be abusive even in the absence of any intention to exploit customers or exclude competitors.
- A number of abuses have been based on what can be seen to be a per se approach, without a need to demonstrate their actual effect on competition (such as predatory pricing and margin squeezing).
- Although the concept of abuse has not been defined as such, we can get a good idea by considering how it has been applied by the EU Courts and the Commission.
- The Commission's own view on the meaning of the concept of abuse is that the concept refers to anti-competitive business behaviour of a dominant firm which is intended to maintain or increase its position.

In Hoffmann-La Roche v Commission the CJEU defined the concept of abuse as follows:

“...is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different..., has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.”

The Second Criterion: Abuse

- Case law qualifies certain categories of conduct as 'by nature' abuses. However according to Intel (Case T-286/09): by nature abuses remain presumptively unlawful, but if a dominant firm submits evidence that its conduct is not capable of restricting competition, the Commission must assess all the circumstances to decide whether the conduct is abusive.
- Outside the 'by nature' exceptions, the Commission has to perform a fully-fledged effects analysis. This will apply, for example, to tying, pricing abuses and refusals to supply. An effects analysis for exclusionary conduct requires proving at least the following four elements.
 - i. First, the dominant company's abusive conduct must hamper or eliminate rivals' access to supplies or markets (Guidance Paper, paragraph 19). In other words, the abusive conduct must create barriers to independent competition (case T-201/04 Microsoft para 1088)
 - ii. Second, the abusive conduct must cause the anticompetitive effects (case C-23/14 Post Danmark II para 47). Causation should be established by comparing prevailing competitive conditions with an appropriate counterfactual where the conduct does not occur (Guidance Paper, para 21).



The Second Criterion: Abuse

- iii. Third, the anticompetitive effects must be reasonably likely (Microsoft, para1089). If conduct has been ongoing for some time without observable anticompetitive effects, that suggests the conduct is not likely to cause anticompetitive effects in the first place (case T-70/15 Trajektna luka para 24).
- iv. Fourth, the anticompetitive effects must be sufficiently significant to create or reinforce market power (Guidance Paper, paragraph 11, 19). See (case T-691/14, Servier, EU:T:2018:922). While those findings relate to article 101 of the TFEU, the same reasoning should apply to article 102 of the TFEU because the concept of a restriction of competition is the same.

<https://www.simmons-simmons.com/en/publications/ck0aoac8gnhl40b33aunrcktm/03-streetmap-fails-in-private-abuse-of-dominance-action-against-google>

Basic Principles – A very simple example

PrintMaster, the dominant supplier of industrial printers in the EU (85% market share), also sells its own brand of ink cartridges. It quietly updates its printer software so that its printers only function with PrintMaster-branded cartridges, locking out independent cartridge suppliers.

Applying the Four Elements.

(I) Hampering or Eliminating Rivals' Access to Markets

The software update effectively forecloses independent cartridge manufacturers from the aftermarket. Customers who have already invested in PrintMaster printers — and cannot easily switch to a different printer brand — can no longer purchase third-party cartridges. Independent suppliers are shut out of a market they previously competed in. The conduct creates a barrier to independent competition by making rival products technically incompatible.

(II) Causation (with Counterfactual)

Before the software update, independent cartridge suppliers held a combined 35% share of the aftermarket and competed vigorously on price. After the update, their sales collapsed to near zero. The appropriate counterfactual — a market in which PrintMaster had not deployed the software lock — shows a functioning, competitive aftermarket. The causal link between the conduct and the foreclosure of rivals is therefore clearly established.

(III) Reasonable Likelihood of Anticompetitive Effects

The effects materialised almost immediately after the software update was deployed. Independent suppliers lost customers within weeks and several exited the market entirely within six months. There is nothing to suggest the market would have evolved in this direction absent PrintMaster's conduct. The anticompetitive effects are not merely theoretical — they are already observable and ongoing.

(IV) Sufficiently Significant Effects: Creating or Reinforcing Market Power

Prior to the update, competitive pressure from independent cartridge suppliers constrained PrintMaster's ability to raise cartridge prices. Following the foreclosure, PrintMaster raised cartridge prices by 30% with no customer switching — because there was nowhere left to switch to. The conduct has therefore materially reinforced PrintMaster's market power in the aftermarket, moving it from a position of dominance in printers to one of effective monopoly across both printers and consumables.



Case-Law

Pricing Abuse **Red Flags**

- Excessive Pricing - Charging prices which are unfairly high
- Predatory Pricing - Setting prices at unfairly low levels with the object of eliminating a competitor
- Discriminatory Pricing - dominant company applies different terms to different customers for equivalent transactions
- Fidelity Pricing - Making the prices of goods or services, or the availability of discounts, dependent on retaining all or part of a customer's business
- Margin Squeeze - Charging a price on the upstream market which, when compared to the price the dominant undertaking charges on the downstream market, does not allow an as-efficient competitor to trade profitably in the downstream market on a lasting basis



Non-Pricing Abuse **Red Flags**

- Tying/Bundling- Tying occurs when a supplier sells one product, the 'tying product', only together with another product, the 'tied product.'
- Predatory product design or a failure to disclose new technology - the design must be introduced solely to render rivals' products incompatible or to exclude rivals from the market
- Refusal to Supply - Refusing to supply goods or services (or refusing to supply them except on clearly unacceptable terms)
- Exclusive Dealing - an action by a dominant undertaking to foreclose its competitors by hindering them from selling to customers through use of exclusive purchasing obligations or rebates
- (NEW) Mergers and acquisitions as exclusionary practices – “killer acquisitions”
- Abusive use of litigation - aim behind any 'sham' litigation is to either subdue a competitor by increasing operational costs or to delay the entry of a competitor in the market

Article 102 TFEU: Indicative List of Abuse

Article 102 TFEU does not define the concept of “abuse”. Instead, it lists four categories of abusive behaviour:

- i. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- ii. limiting production, markets or technical development to the prejudice of consumers;
- iii. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage (Discrimination);
- iv. 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 (Tying)



An e.g., Article 102 TFEU (iv): Tying

According to Art 102 (d) TFEU, it may be deemed an abuse of market power when a dominant undertaking makes:

“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.”

- In 2004, the Commission found that Microsoft had tied Windows Media Player with its Windows operating system. In this decision, the Commission enunciated the test:
 - The tying and tied goods must be two separate products.
 - The undertaking concerned is dominant in the tying product market.
 - The undertaking concerned does not give customers a choice to obtain the tying product without the tied product.
 - Tying forecloses competition.

An e.g., Amazon Marketplace

Facts

- Amazon's website operates two sales channels simultaneously
 - it sells goods that it owns directly
 - it operates as a platform where 3rd party vendors can sell their goods (Amazon Marketplace, 'AM'), similar to other e-commerce platforms such as eBay.
- The conduct at issue concerns the relationship between Amazon.it, third-party sellers, and the logistics service providers operating on the AM.
- Currently, a 3rd party seller active on Amazon can manage the logistics of its products either by: (i) independently operate the storage, logistics, and delivery; or (ii) outsource it to an independent operator.
- If the seller decides to use Amazon's logistics network, they purchase a service called 'Fulfilled by Amazon' (FBA). If they entrust an independent logistics firm instead, Amazon defines the operation as a 'Merchant Fulfilment Network' (MFN).
- FBA is an integrated logistics service that includes: (i) warehousing and inventory management for retailers at Amazon's distribution centres; (ii) fulfilment of orders received on Amazon.it, including packaging and labelling; (iii) shipping, transportation, and delivery; (iv) returns management; and (v) customer service.

Amazon Marketplace – Facts (cont)

- third-party sellers using FBA are not subject to the stringent performance indicators that Amazon uses to monitor the performance of non-FBA sellers. Such strict performance indicators may also eventually lead to the suspension of non-compliant sellers' account on Amazon.it.
- Amazon prevented third-party sellers from associating the Prime label with offers that were not managed with FBA. According to the ICA findings, the Prime label is crucial to gain visibility and increase sales on Amazon.it. for the following reasons:
 - It makes it easier to sell to the above 7 million consumers members of Amazon's loyalty program;
 - It allows sellers to participate in the well-known special events promoted by Amazon (e.g.: Black Friday, Cyber Monday, Prime Day); and
 - It increases the likelihood of a seller's offer to be selected as the "Featured Offer" displayed in the "Buy Box".

According to the ICA, Amazon breached Article 102 TFEU by abusing its dominant position in the Italian market for intermediation services on marketplaces. The abusive conduct consisted in tying third-party sellers' access to a set of exclusive benefits to their adoption of Amazon own logistics service – FBA

Amazon Marketplace – The Relevant Market

Following the well-established case law on “tying” conduct, the AGCM identified two (2) relevant markets in the case at hand.

Product Market Definition (i) Marketplace services

- First, the NCA singled out the Italian market for e-commerce intermediation services.
- The NCA pointed out that the relevant market encompasses a set of intermediation services offered by an internet marketplace to third-party sellers to reach consumers with their own commercial offers and that allow transactions and ancillary services to be conducted.
- According to the NCA, the market for the supply of intermediation services on e-marketplaces is characterised by the absence of demand-side substitutability with other retail channels. Brick and mortar sales, sales through proprietary websites, and price comparison services are complementary to e-commerce sales rather than substitutes.

Geographic Market Definition

- Competition between marketplaces available in the local language and targeting national demand characteristics is considered national in nature, though a chain may be formed with relevant markets in neighbouring countries, as well as with EU-wide competition between international marketplaces.



Amazon Marketplace – The Relevant Market

Product Market Definition (ii) e-commerce logistics services

- The NCA defined the second relevant market as the market for *e-commerce logistics services* in Italy, which allegedly differs from the product market of *traditional logistics services* offered to retailers that operate offline. FBA, is a global network of warehouses and delivery services. This network of warehouses and delivery services may be used by vendors, in exchange for payment of “pay per use” fees, to store their products and fulfil orders made on the platform by their customers—while also managing the processing of returns and related customer service.
- The NCA argued that e-commerce logistics services differ from the traditional ones – which form a separate market – as the former are specifically designed for Business-to-Consumer commercial relationships, whereas the latter tailor their offerings for Business-to-Business transactions.
- Moreover, according to the NCA other factors differentiate e-commerce logistics services from traditional ones, namely vertical integration of the services with marketplace and direct sales; and the demand for specific logistics services for e-commerce by online retailers - which require one or more logistics “modules” depending on size and business model etc.

Amazon Marketplace - Dominance

The NCA concluded that Amazon occupied a position of super-dominance in the Italian e-commerce market. All market indicators showed that Amazon had increased its market shares in the e-commerce sector steadily (to about 80% in 2019), together with its popularity amongst third-party sellers, and that its main competitors were marginalized.

Marketplace	2016		2017		2018		2019	
	€	%	€	%	€	%	€	%
Amazon.it	[100-500] mln	[65-70]	[100-500] mln	[70-75]	[100-500] mln	[70-75]	[500-1.000] mln	[75-80]
eBay.it	[50-100] mln	[25-30]	[50-100] mln	[15-20]	[50-100] mln	[10-15]	[50-100] mln	[10-15]
Wish.com	-	-	[10-50] mln	[5-10]	[50-100] mln	[5-10]	[10-50] mln	[5-10]
Aliexpress.com	[1-10] mln	[1-5]	[1-10] mln	[1-5]	[1-10] mln	[1-5]	[10-50] mln	[1-5]
Zalando.it	[Inf. a 1] mln	[Inf. a 1]	[1-10] mln	[Inf. a 1]	[1-10] mln	[Inf. a 1]	[1-10] mln	[1-5]
ManoMano.it	[Inf. a 1] mln	[Inf. a 1]	[1-10] mln	[Inf. a 1]	[1-10] mln	[Inf. a 1]	[1-10] mln	[1-5]
aPrice.it	[1-10] mln	[Inf. a 1]	[1-10] mln	[Inf. a 1]	[1-10] mln	[Inf. a 1]	[1-10] mln	[Inf. a 1]
Bonanza.com	[1-10] mln	[Inf. a 1]	[1-10] mln	[Inf. a 1]	[1-10] mln	[Inf. a 1]	[1-10] mln	[Inf. a 1]
Totale complessivo	[100-500] mln	100,0	[100-500] mln	100,0	[500-1.000] mln	100,0	[500-1.000] mln	100,0

Moreover, the market is also characterized by high barriers to entry, due to “loyalty and stickiness of consumer preferences, variety and breadth of services offered, network effects, brand popularity and reputation all hinder the possibility of reaching a minimum size sufficient to exert a competitive constraint” (p. 167).

Source Italian NCA

Amazon Marketplace – The Abuse

Tying as an Abuse

- According to the NCA, Amazon violated Article 102 TFEU by unduly leveraging its dominant position in the market for *marketplace services* to strengthen its position in the adjacent market of *e-commerce logistics services*, where it offers FBA services.
- Specifically, the abusive conduct—according to the NCA—consists of Amazon’s unjustified tying of FBA to a set of exclusive advantages for sellers on Amazon.it, a strategy that Amazon—again, according to the NCA—carried out with an anticompetitive, exclusionary strategy toward competing marketplaces.
- The advantages at issue are strictly conditioned by the use of FBA and cannot be obtained otherwise. The most relevant advantage for sellers is the Prime label (the annual volume of purchases of Prime members is 100 to 200% higher than that of non-Prime members).

Amazon Marketplace – The Abuse

- According to the NCA the designation of the conduct as abusive does not depend on whether it falls within a particular classification, but on the identification of substantive features of the abusive conduct:

The conduct hinges more precisely on leveraging the company's dominance in the e-commerce sector (through special offers and treatment) in order to favour the purchase of its logistics services, which were neither better priced nor necessarily of better quality than competing logistics services.

- In other words, *“Amazon has artificially combined two distinct services: the presence on the platform at remunerative conditions (possibility of not being subject to the evaluation of one's own performance, of offering products with the Prime label, of selling during special events and of having a high chance of winning the BuyBox) and the FBA service for the fulfilment of orders – in order to create an illicit incentive to purchase FBA, in the absence of alternative ways of accessing the same advantages, apart from the use of FBA”*

Amazon Marketplace – The Assessment of Effects

According to the ICA:

- the conduct enabled Amazon to extend its power on the market for e-commerce logistics services by preventing the emergence of more efficient logistics operators. In this context, the ICA relied on the finding that Amazon had more than doubled its share of e-commerce package deliveries in three years and that FBA deliveries accounted for 60-70% of all such deliveries in 2019.
- that Amazon's tying practices would reinforce its dominant position on the market for intermediation services offered by marketplaces. This would be so because retailers would be disincentivised to sell through multiple platforms as multi-homing would de facto increase their logistics costs.



An e.g., Article 102 TFEU (ii): Limiting Markets/Refusal to Supply

What Happened?

- In 2015, **Google launched Android Auto**, a digital platform that enables Android smartphone users to access apps directly on the screen of their motor vehicles' infotainment system. Apps must be developed on the basis of specific programming tools (templates) exclusively defined and made available by Google — at the time, only templates for media and messaging apps existed.
- In May 2018, **Enel X launched JuicePass** — an app managing over 60% of Italy's electric vehicle ("EV") charging stations — enabling users to search for, book, and pay for EV charging sessions.
- Enel X asked Google to ensure interoperability between Android Auto and JuicePass, so that drivers could use the app safely on their vehicle's infotainment screen while driving. Google refused. Google initially stated that only multimedia and messaging apps had interoperability templates. When Enel X insisted, Google again refused, citing security grounds and the cost of allocating internal resources to develop a new template.
- Enel X brought the matter before the AGCM. In October 2020, Google published an experimental template for EV charging apps; however, the AGCM was uncertain whether it was sufficient for full JuicePass integration. The AGCM adopted a decision concluding that Google had abusively obstructed and delayed JuicePass's availability on Android Auto.

Enel X Italia v. Google (AGCM Case A529)

RELEVANT MARKETS (UPSTREAM)

Upstream Markets Identified by the AGCM

- In line with the European Commission's findings in Case AT.40099 – Google Android (2018), the AGCM identified two upstream relevant markets:

Market 1 — Smart Mobile Operating Systems - This market was relevant because Android Auto is an extension of the Android ecosystem, and access to it is controlled by Google as the dominant operator of the licensable mobile OS market

Market 2 — In-car connectivity platforms — specifically platforms that allow smartphone apps to be mirrored and used safely on a car's infotainment screen while driving. Android Auto and Apple CarPlay are the principal players in this space. This market was relevant because it was the platform through which Enel X needed to distribute JuicePass to drivers.

Enel X Italia v. Google (AGCM Case A529)

RELEVANT MARKETS (DOWNSTREAM)

The Downstream "Competitive Space"- The AGCM referred — at the downstream level — to a "competitive space" including both EV charging apps (such as JuicePass) and navigation apps (such as Google Maps), which, unlike JuicePass, was available on Android Auto

Three Dimensions of Competition Found	
Dimension	Description
Actual Competition	Both types of apps have search and navigation functions related to EV charging stations  The ICA Fines Google...
Potential Competition	Navigation apps could potentially expand their EV charging functions, with the possibility to completely replace EV charging apps; the AGCM held it was reasonable to assume Google would integrate booking and payment functions into Google Maps on Android Auto  The ICA Fines Google...
Competition for Users & Data	Both app types compete for the relationship with users of EV charging services and, ultimately, for the data generated by such interactions  The ICA Fines Google...

CJEU Clarification (Feb 2025)The Court of Justice clarified that a competition authority may limit its analysis to identifying the downstream market where a refusal is likely to produce anticompetitive effects — even if that market is only a potential one — and this does not necessarily require a precise definition of the relevant product and geographic market

Enel X Italia v. Google (AGCM Case A529)

DOMINANT POSITION

Upstream Dominance

- Google held a dominant position in the OS market, and that Android Auto constituted an extension of the Android system onto the car infotainment system.

The "Gatekeeper" Role

- Google holds a "gatekeeper" position, acting as a gateway for app developers to reach end users. In order to be published on Android Auto, an app must be developed using specific programming tools exclusively defined and made available by Google (i.e., templates). No alternative route exists.

Indispensability of Android Auto

- Access to Android Auto was considered necessary so that Enel X could offer end users apps that could be used easily and safely while driving. The AGCM held that the effective use of JuicePass depended on the possibility of using it easily and safely while driving, and that the success of the app depended on its availability on Android Auto, access to which could only be granted by Google

Enel X Italia v. Google (AGCM Case A529)

ABUSE OF DOMINANT POSITION

The Conduct: Refusal to Ensure Interoperability

- The AGCM found that Google abused its dominant position by failing to implement appropriate technical solutions to allow JuicePass to interoperate with Android Auto, despite Enel X's repeated requests.

What Google Should Have Done (AGCM's View)

- Developed a new template to accommodate Enel X's request (the only templates at the time were for media and messaging apps)
- Developed a custom app especially for Enel X

Exclusionary Intent

In light of the competitive relationship between JuicePass and Google Maps, the AGCM held that Google's refusal had an exclusionary intent, allegedly aimed at hindering and delaying JuicePass's availability on Android Auto to favour Google's own navigation app.

Enel X Italia v. Google (AGCM Case A529)

EXCLUSIONARY EFFECTS

Risk of Market Foreclosure

- Taking into account the presence of network effects and the risk of winner-takes-all phenomena, the AGCM held that Google's refusal could lead to the definitive exclusion of Enel X from the EV charging sector.

Critical Timing & Competitor Growth Does Not Excuse Abuse

- This was particularly so because the EV market in Italy was on the verge of significant growth — a crucial period for JuicePass to build its user base. The JuicePass app was excluded from the Android Auto platform for the whole of 2020 and the first few months of 2021, during a period of strong growth in sales of electric vehicles.
- The continued presence of Enel X and certain competitors in the market did not preclude the refusal from being capable of producing anticompetitive effects.

Broader Harm

- The effects of the abuse affect not only consumer welfare, but also market structure and may hinder innovation in e-mobility services, thereby affecting the development of an industry at a crucial start-up phase

THE BRONNER QUESTION & CJEU EVOLUTION

Was Android Auto "Indispensable"? — The Key Legal Debate

- Under Bronner (C-7/97), for a refusal to deal to be abusive, access to infrastructure must be indispensable — i.e., there must be no actual or potential substitute.

Google's Argument

- Access to Android Auto was not indispensable within the meaning of Bronner, because users of Android smartphones can always consult JuicePass on the screen of their phones — displaying it on the infotainment screen would merely make it more attractive (i.e., more convenient).

CJEU's Landmark Ruling (Feb 2025) — Departure from Bronner

- The CJEU clarified that refusing to ensure interoperability of a digital platform may constitute an abuse of a dominant position even if the platform is not essential for the commercial exploitation of the application, provided that it makes the app more appealing to consumers, and the platform was not developed solely for the dominant undertaking's own business purposes.
- The CJEU explained: where a dominant company has developed infrastructure with a view to allowing use by third parties, "the fact of requiring the undertaking in a dominant position to provide access to that infrastructure to a third-party undertaking does not fundamentally alter the economic model which applied to the development of that infrastructure."

1. The main elements of EU competition policy are:

- A. ensure that firms do not abuse a dominant position in the market.
- B. ensure that no firm attains a dominant position in the market
- C. ensure that firms do not engage in anticompetitive practices
- D. a) and c)

2. What does Article 102 TFEU prohibit?

- A. Anti-competitive agreements between undertakings.
- B. Agreements between undertakings operating at different levels of the production/distribution chain.
- C. Abuse of a dominant position within the internal market.
- D. Agreements between undertakings operating at the same level of the production/distribution chain.



3. A firm holds a dominant position if it:
 - A. enjoys a monopoly on a particular market
 - B. can operate without taking account of the reaction of its competitors or of intermediate or final consumers
 - C. enjoys a market share of 40%

4. A key difference between Arts 101 and 102 TFEU is that:
 - A. there is no requirement for there to be an agreement or concerted practice between participants in the market
 - B. there is no flexibility whatsoever in the application of art 102 TFEU, as the concept of abuse is very narrowly defined
 - C. art 102 TFEU may be applied to individuals, not just undertakings



MegaClean lowers the price of its household bleach product to a level where it is producing a loss. At the same time, it raises the price of its window-cleaning product, a market on which it is dominant. Two of MegaClean's competitors on the household bleach market are forced out of that market. MegaClean subsequently raises the price of bleach to above what it was originally charging. Which of the following red flags does MegaClean's conduct signal?

- A. Tying.
- B. English Clause.
- C. Predatory pricing.
- D. Exclusivity arrangement.
- E. Refusal to supply.

How might predatory pricing be characterised?

- A. As an exploitative abuse.
- B. As an exclusionary abuse.
- C. As an indicator of dominance.
- D. As a feature of the relevant product market.

Hypothetical Case Study

Case Study: OptiLens SA / LumiPro

Background Facts

OptiLens SA is a French company that manufactures premium professional camera lenses under the brand name LumiPro. LumiPro is widely regarded as one of the leading premium lens brands in Europe, and specialist photography retailers consider it an essential product to stock in order to attract professional photographers and serious enthusiasts.

OptiLens SA holds a market share consistently above 65% in the premium professional lens market across several EU Member States, including Germany and Belgium.

OptiLens SA sells exclusively through an approved distributor network. It has appointed:

- FotoHaus GmbH as its exclusive distributor for Germany
- LensWorld BV as its exclusive distributor for Belgium

Having discovered that ShutterDeal Ltd, Malta-based parallel importer, has been reselling LumiPro lenses outside the authorised network and below the minimum resale price, OptiLens SA has instructed LensWorld BV to cease supplying ShutterDeal Ltd and has warned all authorised distributors that supplying unauthorised retailers will result in immediate contract termination.