
The European Union legislation regarding abuses of market power by firms

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Abstract: This paper examines the European Union legislation in terms of protecting firms from market power abusers. To begin with, it describes what competition is and gives an idea of monopolistic situations. Then it describes various forms of market abuse and how they are tackled by the EU. It offers a complete examination of various competitive situations including real cases and how the EU confronted them. Finally, it sets a number of questions with regards to the motive behind the EU legislation. Is it formulated in order to help companies operate in a fair market, or is it done in order to shape the market resulting in a controlled economy?

Keywords: market power; monopolistic situations; Article 86; abuse; EU legislation; competition; company protection.

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1 Introduction

"The primary purpose of competition law is to remedy some of the situations in which the free market system breaks down." (Furse, 1999)

House of Lords debate

In his book *The Wealth of Nations*, written in 1776, Adam Smith was already talking about the 'invisible hand' of the economy. He argued that supply and demand are the forces that drive the world's economy and that firms must be given the chance to compete freely and set the standards of the economy. His famous 'laissez faire' is still used widely and finds many applications in today's economy 200 years later.

After the collapse of the East European planned economies, governments throughout the world became more sceptical towards intervening and changing the course of the economy. Therefore, firms had a chance to compete more freely and to set their own rules to the game.

But what is the result of that? It is often said, 'competition sows the seeds of its own destruction'. Firms are profit seekers. Their optimal goal is to maximise their profits. In order to do that, they have to maximise their revenues and minimise their costs. What is more, they try to acquire a dominant position in the market by eliminating competition and bringing themselves in a monopolistic advantageous situation. When firms that already have a dominant position do that, they damage the economic process of 'laissez faire – laissez passer' as a whole. Unless measures to deprive firms from anti-competitive behaviour are taken, businesses will stop operating in a fair and reasonable commercial environment. As a result, dominant firms will be able to manipulate consumers and set their own trading standards. Therefore, protection of competition by the state is sometimes needed.

In order to ensure competition and to protect the firms of its member states, in March 25, 1957, the European Union signed the EC Treaty's 'twin pillars' (Korah, 1996a), Articles 85 and 86, which had to do with the 'Rules on Competition'. These articles contained the main substantive principles of law applicable to undertakings (Goyder, 1992). According to the House of Lords debate during the passage of the Competition Act 1998: "Competition law provides the framework for competitive activity. It protects the process of competition. As such it is of vital importance" (Furse, 1999).

The problem is how much intervention should be allowed, when the state should intervene, who determines which firms are considered dominant or not and when actually do firms abuse their position. There is much debate on what extent the governments should intervene in the course of the market. According to the Chicago school, there is no need for regulators to consider anti-competitive conduct such as 'predation'. According to the Harvard school, it may be right for regulators to intervene in such situations. I will examine all these questions throughout my paper.

1.1 Why the European Union deals with abuses of market power?

Before analysing the specific topic of 'why the European Union deals with abuses of market power', I would like to examine why the European Union tries to protect competition in general. Why is competition so important and why does it have to be protected? In order to understand that, we first have to define what competition is and to outline its advantages. The Treaty of Rome itself refers to 'competition' as a concept but perhaps wisely offers no definition. According to Goyder (1992):

"Competition is the relationship that exists among any number of undertakings which find themselves selling goods or services of the same kind at the same time to an identifiable group of customers."

The advantages of competition are many. Goyder states the most important ones that necessitate its existence:

- competition allocates the resources in the direction which customers prefer, that is, it ensures allocative efficiency
- competition forces firms to adjust to the consumer preferences that take place continuously by investing into new technology and innovation
- competition keeps producers and sellers in the market under continuous pressure to keep costs and prices down.

The above advantages make the fact that competition is important and therefore should be protected evident. According to the neo-classical economic theory, which plays a crucial role in competition policy, society, in general, and consumer welfare, in particular, is better off when there exists a state of perfect competition in a market (Rodger and McCullah, 1999). Under perfect competition the producers are 'price-takers', that is, the price of the products is being determined by aggregate industry output and consumer demand through the law of supply and demand. Individual firms have a minimal effect on aggregate output and hence are price-takers.

Now let's examine what happens in a monopoly or in a monopolistic situation, which brings us to the discussion of why the European Union deals with abuses of market power in particular.

To the economist a monopoly is a market in which the industry is in the hands of one producer. Competition law, however, extends to situations which are monopolistic, which is a market in which there are many sellers, into which new firms may enter, but in which each firm has a degree of control over price by virtue of selling products that are not identical to those of its competitors (Furse, 1999). The allegations faced by monopolists more frequently are:

- the monopoly price is higher than the price would be in a competitive market
- output is lower and therefore potential demand that could be efficiently met is going unanswered – income that would have been spent in the monopolist's product is going elsewhere, distorting other prices in the economy
- predatory behaviour may directly damage the interests of other legitimate competitors and indirectly harm consumers
- the monopolist, in order to protect a profitable position, may erect barriers that prevent new entrants coming into the market to correct the monopolist's behaviour (Furse, 1999).

Coming back to the neo-classical theory, a monopolist who controls the output of the market and can decide on the appropriate output can therefore determine the price. The monopolist is a 'price-maker' (Rodger and McCullah, 1999).

So, what are the economic, social and political objectives of the competition policy? We can outline them as follows (Rodger and McCullah, 1999):

- prevention of the concentration of economic power
- regulation of excessive profits/fairer distribution of wealth
- protection of consumers
- regional policy
- creation of unified markets and prevention of artificial barriers to trade
- protection of small firms (Green et al., 1991).

Finally, I would like to refer to the problems that arise from these objectives. As I see it, there are two main problems concerning the justification of the Community to intervene and the uncertainty and unpredictability of such interventions. How does the Community justify its intervention to the course of business? Could it be that these objectives are used as an excuse for further intervention? Who draws the line between when it is or it is not appropriate for the community to intervene? And secondly, must not the Community provide certain guidelines to the businesses of when it is going to intervene? Many times we have uncertain and unpredictable intervention which results in protests by the firms.

1.2 How the European Union deals with abuses of market power? What are the difficulties involved in applying the relevant legislation?

The European Union deals with abuses of market power with Article 86 of the competition policy established under the Treaty of Rome. Article 86 states that:

“any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common 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 other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts (Furse, 1999).

1.3 What is an undertaking?

The Court of Justice and the Commission have interpreted the term very broadly, maximising the scope of the competition rules. All natural or legal entities carrying on some form of commercial activity, in the goods of services sector will be included (for instance, opera singers in Commission Decision 78/516/EEC). Commercial activities include those which are not registered to be profit making. Legally distinct companies may be considered as one undertaking for the purpose of the Community competition law when they are not independent from each other (Rodger and McCullah, 1999).

There is a thin line separating entities that can or cannot be characterised undertakings. It is up to the Community to define it and sometimes the definition can be ambiguous.

1.4 What is the meaning of a 'dominant position'?

In the case of *United Brands Co. v Commission*, the European Court of Justice has held that:

the dominant position referred to in Article 86 relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market giving it power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.

It is a very difficult task for the Commission to prove if a firm is in a dominant position since the definition of dominance is pretty vague. Most firms rely on this fact in order to argue that they are not actually dominant.

I will now examine the specific criteria that the Commission uses to prove a firm's dominance and I will demonstrate that there are times when the Commission takes advantage of the vague definition of dominance in order to intervene in the market process and to act as a protectionist claiming that all it tries to achieve is the 'interpenetration desired by the Treaty'.

There are four dimensions used to prove that a firm has a dominant position:

- the relevant product market within which dominance is alleged
- the relevant geographical market over which the alleged dominance extends
- the relevant time period
- the relevant strength of the alleged dominant undertaking (Furse, 1999).

1.4.1 The relevant product market

It is in the interest of the Commission to define the product market as narrowly as possible. This is evident since the narrower the market the greater the market share of a firm and thus, the greater the possibility of dominance. One of the most important factors in defining the relevant market share is that of cross elasticity of demand.

In the case of *United Brands Co. v Commission*, the Commission argued that bananas have distinct characteristics (appearance, taste, softness and seedlessness) which make them unsubstitutable by other fruits. What is more, the consumers of bananas are certain groups of people (very young, very old and sick people) who cannot substitute bananas with other fruits. On the other hand, *United Brands* argued that the relevant product market for bananas is the general fruit market. Although the Court decided that 'consequently the banana market is sufficiently distinct from the other fresh fruit market', it is understandable that there is room for debate. It seems as if parts that should have been examined more thoroughly by the Commission were just not investigated enough. According to Furse, "Market analysis should, if results are to be meaningful, focus on the group of consumers who can switch consumption at the margin, and not the group who cannot".

In the case of *Michelin*, the Commission defined heavy vehicle tyre markets as different from tyre markets, inflating the market share of Michelin. The argument was that 'there is no interchangeability between car and van tyres on the one hand and heavy vehicle tyres on the other'. I believe that it is very difficult to draw the limits within the tyre market and to be 100% accurate. That is the reason why almost every aspect of the market analysis in the *Michelin* decision has been heavily criticised. According to Korah:

“Users seem to have preferred Michelin tyres, and dealers were prepared to stock them, so they may have been more valuable to them than competing brands. There is so little economic analysis in the decision that the commentator is not satisfied that Michelin did in fact enjoy any market power.” (Korah, 1996b)

Another ambiguous definition of relevant market power comes in the market of spare parts and consumables. Is that a separate market where firms enjoy a dominant position or it should be considered a part of the primary product market? In the case of Hugin cash registers the Commission decided that a non-dominant supplier of cash machines held a dominant position in the market for spare parts of those machines. The Court agreed with the Commission based on the fact that the cash machines did not accept spare parts from other suppliers, making therefore the spare part market position of the firm dominant. I believe that this is also an ambiguous decision, since one can argue that consumers who purchase a certain brand consider the costs of the spare parts, the maintenance and after sales services as part of their decision. The same takes place in the market for consumables such as toner cartridges for printers. In its 25th Report on Competition policy the Commission accepted that this is a difficult area in which complaints can be resolved only on a case-by-case basis, with the Commission taking into account ‘all important factors such as the price and lifetime of the primary product, transparency of prices of secondary products, prices of secondary products as a proportion of the primary product value, information costs and other issues’.

1.4.2 The relevant geographical market

The relevant geographical market is another vaguely determined condition for proving a firm’s dominant position. Article 86 refers to dominance ‘within the Common Market or in a substantial part of it’. In the United Brands Co. case, the European Court of Justice limited the geographical market to “... an area where the objective conditions of competition applying to the product in question must be the same for all traders”.

As a rule of thumb the size of the market is in inverse proportion to the products transportation costs relative to the value of the product: a high value/low transportation product will have a large geographical market and vice versa (Furse, 1999).

The Commission many times manipulates the concept of a geographical market and especially that of ‘a substantial part’ in order to prove the dominance of a firm. Who defines what a substantial part of the Community is? A firm might enjoy a market share of 90% in one country but in the whole of Europe it might only possess 15% of the market. In the first case the firm is a definite market leader while in the second case the firm cannot be characterised as dominant. What is more, what happens when more countries enter the European Union? A firm, which was dominant when the Union had six Member States, may not be dominant now that the Commission has fifteen.

I will use two examples, that of United Brands and that of Michelin, to prove my point that the Commission manipulates the ambiguity of the relevant geographical market in order to prove a firm’s dominance. In the case of United Brands the Commission considered that the geographical market constituted German, Denmark, Ireland and the Benelux countries, but excluded the other three Member States (UK, Italy and France) on the grounds that legacy of history was such that there existed special circumstances relating to the import of bananas in those countries (Furse, 1999). In the case of Michelin, although it was recognised that tyre companies competed at the global level, the

Commission defined the relevant geographical market as the Netherlands. This has raised many questions about the objectivity of the Commission. I think that the Commission treated this point rather superficially. Korah argues that the possibility of consumers going outside the Netherlands for their tyres was not fully discussed. It is likely that the competitive conditions in the Netherlands were, at least, moderately affected by the availability of supplies from elsewhere in the Community (1996b).

1.4.3 The relevant time period

The relevant time period is examined in two ways:

- the period over which the dominance is alleged
- the period over which the alleged abuse may have been perpetrated (Furse, 1999).

Although it is rare for the Commission to rely only on temporal factors to reach a decision, relevant time period is a vague concept to base a decision on. It is a static measure and since firms are dynamic entities which go through changes every day, it is not very objective to jump into conclusions based on a fraction of time when a firm might have been dominant. Market shares change rapidly and firms which were market leaders in the past may even cease to exist today. What is more, a market may vary over time due to seasonal variations. This was one of the problems faced in the United Brands case.

1.4.4 The relative strength of the alleged dominant undertaking

Having established the relevant market, the next requirement of Article 86 to apply is that the dominance in that market be established. There is a number of factors taken into consideration by the Commission which I will now examine.

Market share. Market share is the most important of these factors although it is not the only one. In the Hoffmann- la Roche case, the Court stated:

“... The existence of a dominant position may derive from several factors which taken separately are not necessarily determinative but among these factors a highly important one is the existence of very large market shares.”

In the same case, the Court divided the market share of the firm by product. The company held the following shares within the Community:

- Vitamin A – 47%
- Vitamin B₂ – 86%
- Vitamin B₃ – 64%
- Vitamin B₆ – 95%
- Vitamin C – 68%
- Vitamin E – 70%
- Vitamin H – 95% (Goyder, 1992).

The Commissions approach is that a market share of 70% and above will almost certainly constitute a dominant position; a share of 50–70% will raise a presumption of dominance; a share of 40–50% may support a conclusion of dominance; and a share of below 40% is highly unlikely to permit the finding of dominance unless other evidence is overwhelming, although an undertaking could still be found to enjoy a dominant position with a market share as low as 20% (Furse, 1999). Sometimes the reasoning behind the Commissions decisions is not very easy to rasp. For example, in the case of Boosey and Hawkes, even though the firm had a market share of 80–90% it was not considered dominant.

Competitors' positions. The relative size of the competitors' market shares is another factor examined by the Commission in order to be used as evidence to the existence of a firm's dominance. In the case of Sabena, the market share held by the airline in Belgium was 40–50%. Although it is not a market share which justifies dominance, the Commission noted that the ratio of market shares held by the undertaking concerned to those held by its competitors was a reliable indicator of dominance (Furse, 1999).

Barriers to entry. There is great debate over what should be included within the term 'barrier to entry'. The debate exists both in law and economics. A commonly accepted view is that a barrier to entry is the cost which is higher for a new entrant to the market than for an existing market player (Rodger and McCullah, 1999). The Chicago school perceives many purported barriers to entry as natural, being related to efficiency. They argue that a true barrier to entry is a cost to new entrants which was not applicable to the existing market operators when they entered the market. For them, the only real barriers are legal provisions that restrict entry to the market. The Harvard school, which is more linked with the Commission approach, views barriers to entry as being much wider, including any factor which would tend to discourage new entrants from entering the market. I believe that this definition could include any attempt made by firms to protect their position in the market. This is not very fair to the firms who have invested time and money for years to attain this position. According to Rodger (1999):

"This view has been challenged on the basis that it penalises, through the increased likelihood of a finding of dominance, those undertakings which entered a market early and made large investments to become efficient."

A good case example of barriers to entry is that of Tetra Pak. The Commission considered that the "barriers to entry to produce aseptic packaging machines are particularly high, which severely limits the entry of new competitors".

Although this may be true, it was not adequately supported by detailed analysis found within the decision itself. According to Furse, in the absence of a sophisticated analysis the Commission has turned instead to a range of evidence which it considers to be indicative of dominance, and has not always made clear whether these secondary factors are considered also to be evidence of barriers to entry or of dominance per se.

The resources, size and commercial superiority of the undertaking. In the case of the British Plasterboard, the Commission found that the company's share in Great Britain was 96–98% for the relevant time period and thus claimed that the company had a dominant position. Other factors used as evidence of dominance were that the company enjoyed economies of scale, the extensive product range carried by BPB and the facts that architects were on occasion specific in requiring the use of BPB's products (Furse, 1999).

In this case one can see the inability of the Commission to come to an accurate and fair conclusion depending on a static, snapshot analysis. While on the above facts, gathered in 1989, it appears that the company held a dominant position, a Monopolies and Mergers Commission report in 1990 found that BPB's market share had fallen from 96–65%, following the entry of new competition in the market.

Technical superiority and the position of know-how and intellectual property. Finally, the Commission considers firms who have led over their competitors due to the fact that they are proprietors of patents, copyrights and technological advance. This was the Commission's line of argument in cases like Hoffmann-la Roche, Tetra Pak and Hilti. Again the argument that certain firms have invested lots of money and sacrificed substantial amounts of their profits in R&D and innovations can be used to defeat the Commission's position. Further, it can be argued that on the one hand patents and copyrights are granted to companies and on the other hand companies are accused for having them.

It is worth noting that the finding that a company is in a dominant position is not enough to justify an accusation from the Commission under Article 86. The ECJ explains:

“A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the Common Market.” (Michelin Case)

In order for an undertaking to be accused, it has to abuse this dominant position that it holds (Rodger and McCullah, 1999).

1.5 What is the meaning of abuse?

In Hoffmann-La Roche case, the European Court of Justice held that:

“the concept of abuse 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 competitions weakened and which, through resource to methods different from those which condition normal competition ... has the effect of hindering the maintenance of the degree of competition still existing in the market.” (Furse, 1999)

There are two main forms of abusive behaviour, although some types of behaviour contain elements of both. First, exploitative abuses, which take place when a monopolist is in a position to maximise profits by reducing output and increasing the price of his product above a competitive level. By ensuring such a price increase the monopolist will exploit his customers (Rodger and McCullah, 1999).

Although the Commission condemns this behaviour, economists many times characterise it as pro-competitive. This is because without the existence of barriers to entry it would encourage new entrants to enter and compete on the market. If there are barriers to entry the dominant undertaking may be in a position to charge a supra-competitive price to its customers in order to sustain its position.

The second form of abuse is exclusionary abuses. These are cases when a dominant undertaking adopts behaviour which would be considered legitimate if the undertaking

had no market power but may cause serious concerns when a position of dominance is held. The Court has said that an undertaking in a dominant position has “a special responsibility not to allow its conduct to impair undistorted competition on the Common Market”. Therefore, any form of conduct by a dominant undertaking which threatens the competitive structure of the market may well be abusive.

This point is open to discussion, since there is no exact definition of the exclusionary abuses that can take place by the Commission. Although I believe that firms should not be left unpunished when they indulge in anti-competitive behaviour, I feel that a more definite explanation must be provided by the Commission which will draw the limits between what is considered to be an abuse and what not.

So, how far can a dominant company go until it gets punished for abusive behaviour? I will now examine the different abuses that may take place.

2 Exploitative abuses

2.1 Excessive prices

This is a classic form of exploitative abuse. It takes place when an undertaking which is unconstrained by competitive pressures no longer takes a price from the market but can maximise profits by setting a higher monopolistic price (Rodger and McCullah, 1999). In the United Brands case, the Commission used various factors, such as comparisons of prices between Member States, between branded and unbranded bananas and between different brands of bananas, in order to support their finding of excessive pricing in continental Europe.

The problem with that as I see it, is how the Commission can decide exactly what price is excessive or unfair. In the above case the COJ quashed the Commission’s findings as they had failed to examine the company’s costs before coming to their decision. The Court came to the same conclusion in the case of Continental Can, where it refused to accept the Commission’s economic analysis on the basis that it lacked the depth and adequacy to substantiate the claims made (Goyder, 1992).

Many commentators consider direct intervention in market pricing decisions as a step too far for competition law, and that the operation of the market alone should control the prices. If high prices are charged, new entrants will be encouraged, and intervention is an inefficient tool ill-suited to perform the task.

2.2 Unfair conditions

One of the only cases in which unfair conditions have been considered as an abuse, in themselves, is *BRT v SABAM*. SABAM, a performing rights society, was abusing its dominant position by imposing on its members obligations which were not absolutely necessary for the attainment of its object. This unfairly restricted the members’ freedom to exercise their copyright as they wished.

2.3 *X-Inefficiency*

In the case of Porto di Genova, the Court held that the port dock workers' refusal to utilise modern technology in their unloading operations constituted an abuse because the use of other methods made the unloading of vessels a time consuming process and therefore more expensive (Rodger and McCullah, 1999).

As it can be observed from the cases mentioned above, the difficulty in proving exploitative abuses stems from the subjective decisions involved. How excessive, unfair or inefficient must a practice be before an abuse is proved?

3 **Exclusionary abuses**

3.1 *Export bans*

Any attempt by a firm in a dominant position to impose export bans on its purchasers is considered abusive. This way the Commission tries to enhance trade flows across the Community and intrabrand competition. When export bans take place, dominant firms are able to segregate national markets. In the United Brands case, the prohibition of the resale by distributors of green i.e. unripe bananas had the effect of an export ban. According to Goyder (1992) in a freer market the various distributors might well have exchanged supplies of bananas with each other in the face of the varying demands of different national markets. The limiting of such resales of unripened bananas meant that in practice the short period of ripeness and the subsequent onset of decay ensured that no exchange of supplies was possible.

3.2 *Price discrimination*

The most important cases of price discrimination are predatory pricing and discounting. Predatory pricing is characterised by a selective price reduction (usually below cost) with the intention of harming a competitor. Because of its economic strength the dominant firm will be able to sustain operating in losses for a certain time period. On the other hand, the weaker competitor will be driven out of the market. This is the case of AKZO, where its predatory pricing and use of threats to induce its competitor ECS to withdraw from the plastics market were indeed breaches of Article 86 (Rodger and McCullah, 1999).

The Commission however, refused to prescribe any pricing rules linked to costs, or to define the precise stage at which price cutting by a dominant firm may become abusive. This is I guess another window left open for the Commission to manipulate information as it wishes. What is more, as Green argues, a major problem for the Commission is to determine the motivation for a dominant firm to lower its prices. What happens if a firm just reacts to a lowering of prices by its competitors?

The use of discounts and rebates can also constitute a problem when an undertaking is in a dominant position. Discounts can be used to tie a customer to a particular supplier. The customer may be aware that if he takes supplies from a competitor he will lose his discount. The rebate given to a customer who takes a certain percentage of his total requirements from a specific supplier is known as 'loyalty rebate'. For example a customer may receive a 10% rebate if he purchases 75% of his requirements by a certain

supplier. Rebates can be also combined with exclusive purchasing agreements, by virtue of which a purchaser agrees not to buy the same product from any other source (Furse, 1999). Exclusive purchasing requirements as well as loyalty rebates were employed in Hoffman-La Roche case. Hoffman's strategy was to conclude exclusive agreements with customers wherever possible. The loyalty rebate was connected to an 'English clause' which allowed customers to obtain supplies from other undertakings where they were charging a lower price if the customer informed La Roche of the lower price. While this may appear pro-competitive, it means that La Roche was given full information about its competitors' pricing policies, allowing it to react and maintain its market share. Hoffman-La Roche also used 'across the board' rebates where it awarded discount when a customer purchased the whole of its product range. This tended to foreclose the market in that it would discourage customers from dealing with different suppliers for different products.

Although the court has challenged a number of different types of discounts, it does not mean that all discounts and rebates are abusive. If, for example, a manufacturer can achieve economies of scale, his savings can be reflected in discounted pricing. What can be considered wrong about that?

3.3 Tie-in sales

With tie-ins a dominant undertaking attempts to extend its market power from the market in which it is dominant to another market. This usually involves a requirement upon customers to obtain supplies of the tied product when purchasing the tying product, in relation to which the supplier has a dominant position. If the customer wants to buy the dominant product, they must also buy the tied one. Customers may have been able to obtain that product with better terms elsewhere, or they may not want it at all (Rodger and McCullah, 1999).

In the Hilti case, the company that held a dominant position in the market for nail guns, tied the sales of the two accessories, nails and cartridges, used by them. Hilti was protected from competition in the market for Hilti-compatible cartridge strips as it had registered design rights. The company had maintained a policy of only supplying the cartridge strips for use in its guns only when the purchaser also took the necessary number of nails. Suppliers of Hilti-compatible nails complained about the tie. As a result of these practices Hilti was fined ECU 6m (Furse, 1999).

I believe that tie-ins is one of the few cases where the abuse of a firm's dominant position is clear. Just because an undertaking is in position to impose its will to its customers, does not mean that it has the right to do it.

3.4 Refusal to supply

When a dominant undertaking refuses to supply goods or services to another undertaking, this may, under certain circumstances constitute an abuse. In normal situations, an undertaking will have the freedom to supply whoever it wishes, according to the principle of freedom of contract. There are three main categories in which Article 86 can be used to intervene:

- where a refusal to supply is used to damage or deter competition
- where there is a refusal to grant a license of intellectual property rights
- where there is a refusal to supply new competitors and 'essential facilities' (Rodger and McCullah, 1999).

To damage or deter competition. A clear example of an attempt to eliminate a competitor was that of Commercial Solvents. They were the dominant suppliers of a bulk chemical used in the production of pharmaceuticals. Another firm had purchased the chemical for manufacturing purposes. Commercial Solvents decided to expand into the market for the finished good and therefore decided to restrict further supplies to competition. By refusing to supply raw materials, Commercial Solvents had effectively removed its main competitor.

Intellectual property rights. The relationship between intellectual property (the grant of a legal monopoly as the reward for inventions) and competition law is very difficult. In the case of Flughafen Frankfurt, the ECJ stated that intellectual property, which may be a significant factor in establishing dominance, may not be used in an abusive fashion.

New competitors and essential facilities. The third controversial area of concern is refusal to supply new customers, especially when the supply of the goods or services would allow the new customer to compete with a dominant undertaking in a secondary market (Furse, 1999). An example case is that of Sabena, where the airline was refusing London-European access to their computerised reservation system.

As I stated above, the refusal to supply is a very controversial issue. Companies have the right to refuse supply in order to protect themselves. Protecting ones reputation, market position, and intellectual property can by no means considered illegal.

4 Conclusion

It is evident throughout this paper that the Commission's intentions are not that clear when applying Article 86. Is it because the Commission wants to protect competition and to ensure the well being of companies in all its Member States or is it an attempt to intervene in the natural course of the market?

In most cases, the Commission uses ambiguous definitions of dominance in order to prosecute undertakings and even when dominance is proved, even shallower analysis follows to prove abuse of the aforementioned dominance. Using the excuse of protecting the 'interpenetration desired by the Treaty' the Commission intervenes constantly to the European business relationships.

Who is the Commission protecting? Could it be that European firms operate in an overprotected environment which ensures their status by eliminating foreign competition? For example, in the banana case could the main reason of accusation after all be that United Brands is an American firm? And if this is true, is that protectionism an advantage or a disadvantage to European firms who have to compete in a global environment?

References

- Furse, M. (1999) *Competition Law of the UK and EC*, Blackstone Press Limited, London.
- Goyder, D.G. (1992) *E.C. Competition Law*, 2nd ed., Oxford University Press, Oxford.
- Green, N., Hartley, T.C. and Usher, J.A. (1991) *The Legal Foundations of the Single European Market*, Oxford University Press, Oxford.
- Korah, V. (1996a) *An Introduction to E.C. Competition Law and Practice*, Oxford University Press, Oxford.
- Korah, V. (1996b) *Cases and Materials on E.C. Competition Law*, Sweet & Maxwell Limited, London.
- Rodger, B.J. and McCullah, A. (1999) *Competition Law and Policy in the European Community and UK*, Gavendish Publishing LTD, UK.