







Data access: competition law and beyond

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Overview

-  Introduction to abuse of dominance
-  Refusals to deal
-  Application to data
-  Data Economy initiative of the European Commission



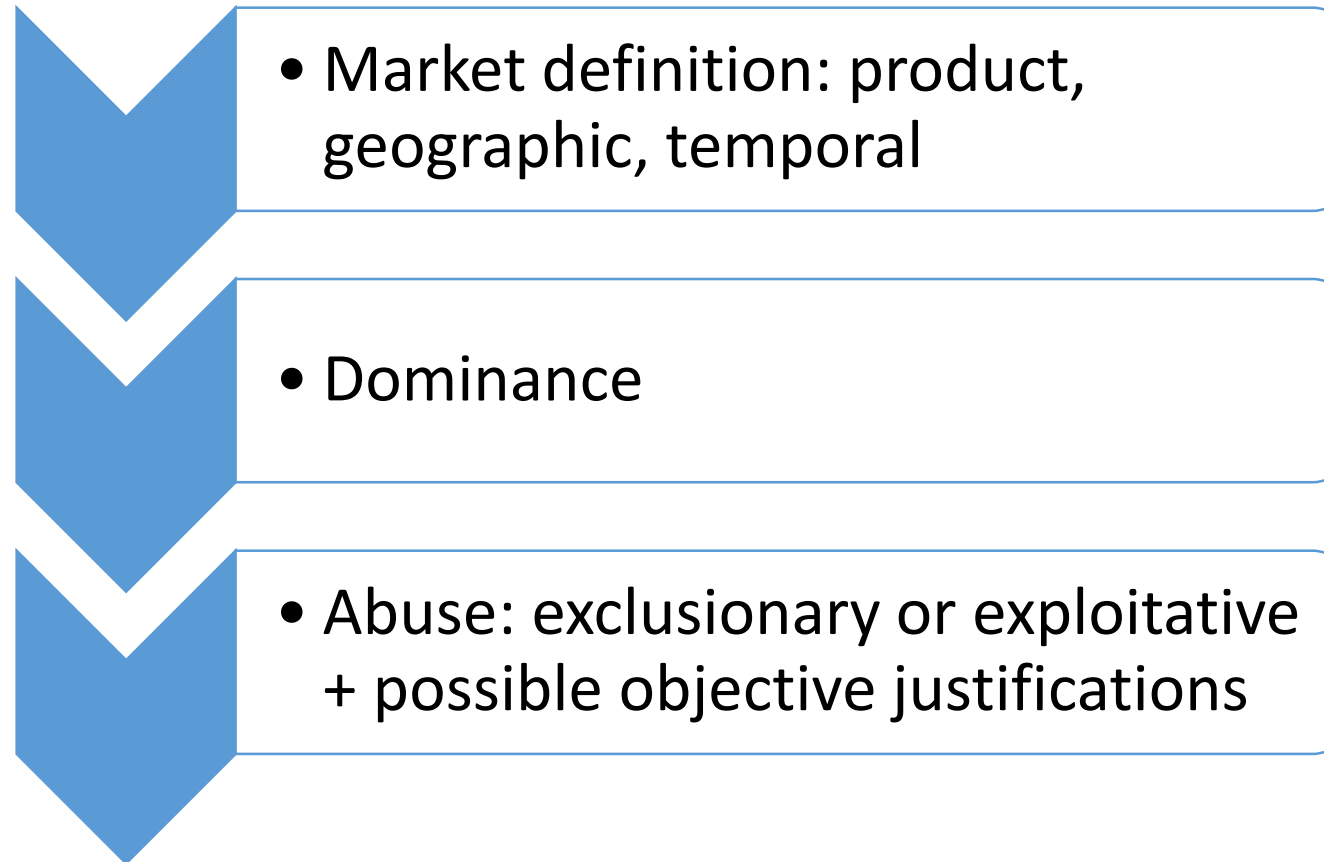
Introduction to abuse of dominance



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



Steps in an Article 102 TFEU analysis



Exclusionary versus exploitative abuse

- **Exploitative conduct** impacting consumers directly
 - Excessive pricing
 - Unfair terms
- **Exclusionary conduct** impacting consumer through effect on rivals
 - Exclusive dealing
 - Tying and bundling
 - Refusal to supply
 - Predatory pricing
- **Price discrimination** which can be both exploitative and exclusionary



Exclusionary practices

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- Especially non-pricing practices cut to heart of business strategy of firms:
 - Effects harder to measure
 - Remedies not so simple
 - Trade-offs between short and long term:
 - Short-term perspective: more competition, more choice, lower prices
 - Longer-term perspective: incentives of firms and innovation
 - Variety of business models and innovation
 - Incentives of dominant firm
 - Incentives of competitors



Exploitative abuse

- Article 102(a) TFEU:
'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions'

- **Rather rare** in the enforcement work:
 - Competition is regarded as the best driver of consumer choice
 - Hard to prove: at what point does a certain type of exploitative behaviour become anticompetitive?
 - Prevalence of other regimes such as consumer protection, contract and tort law



Refusals to deal



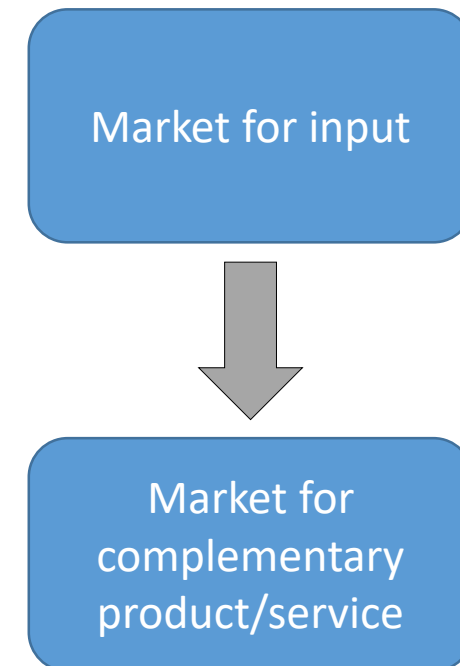
Refusal to deal

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- Refuse to supply products/services or to give access to facilities
 - Establishment of abuse in fact results into duty to supply
 - Is at odds with freedom to contract and right to property
 - No absolute duty to supply...
 - ... but instead highest standard for intervention under EU competition law



Refusal to deal

- Example of Article 102(b) TFEU: *'limiting production, markets or technical development to the prejudice of consumers'*
- **'Essential facilities doctrine'**
- **'Leveraging'**
- Bridges, harbours, tunnels, ...



■ Long line of cases:

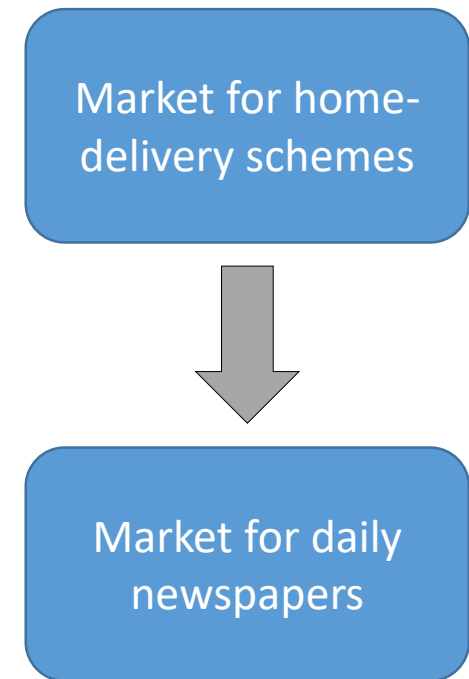
- General Court and Court of Justice: *Commercial Solvents* (1974), *United Brands*, *Magill*, *Bronner*, *IMS Health*, *Microsoft* (2007)
- Commission decisions
- Now cases at Member State level as well

■ How to articulate them?

- Existing relationship versus new relationship
- Physical property versus intellectual property
- Vertical integration or not



- Mediaprint has its own national home delivery system for the distribution of its daily newspapers
- Bronner requests Mediaprint to include its daily newspaper in this system



Court of Justice, par. 41:

abuse requires *‘not only that the refusal of the service comprised in home delivery be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service*

and that such refusal be incapable of being objectively justified,

but also that the service in itself be indispensable to carrying on that person's business,

inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme’



Court of Justice, par. 43 and 44:

‘In the first place, it is undisputed that other methods of distributing daily newspapers, such as by post and through sale in shops and at kiosks, even though they may be less advantageous for the distribution of certain newspapers, exist’

‘Moreover, it does not appear that there are any technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult, for any other publisher of daily newspapers to establish, alone or in cooperation with other publishers, its own nationwide home-delivery scheme’



■ Court of Justice, par. 45 and 46:

*‘it is not enough to argue that it is **not economically viable by reason of the small circulation of the daily newspaper or newspapers to be distributed**’*

*‘it would be necessary at the very least to establish [...] that it is not economically viable to create a second home-delivery scheme for the distribution of daily newspapers **with a circulation comparable to that of the daily newspapers distributed by the existing scheme**’*



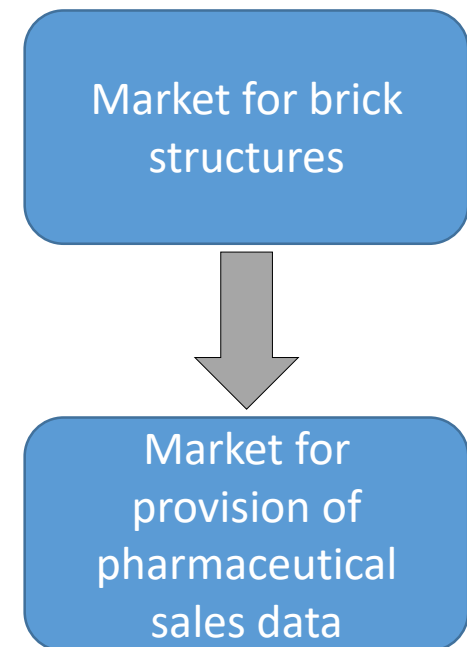
■ Conclusion → very strict conditions

■ Reason → see A-G in *Bronner*, par. 57:

‘For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus while competition was increased in the short term it would be reduced in the long term. Moreover, the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits.’



- IMS owns copyright protected brick structure
- This structure has become a **standard** for providing regional sales data to pharmaceutical companies
- IMS refused to give NDC a licence IMS
- As a result, NDC was driven out of the market



■ Court of Justice: exercise of an exclusive right may in exceptional circumstances involve abusive conduct

■ Par. 38:


‘It is clear from that case-law that, in order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be satisfied, namely, that that refusal is preventing the emergence of a new product for which there is a potential consumer demand, that it is unjustified and such as to exclude any competition on a secondary market.’




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- Sufficient that a **potential or hypothetical market** can be identified
 - Indispensability of the products or services to carry on a particular business
 - Determinative that two different stages of production can be identified which are interconnected



Assessment after *IMS Health*

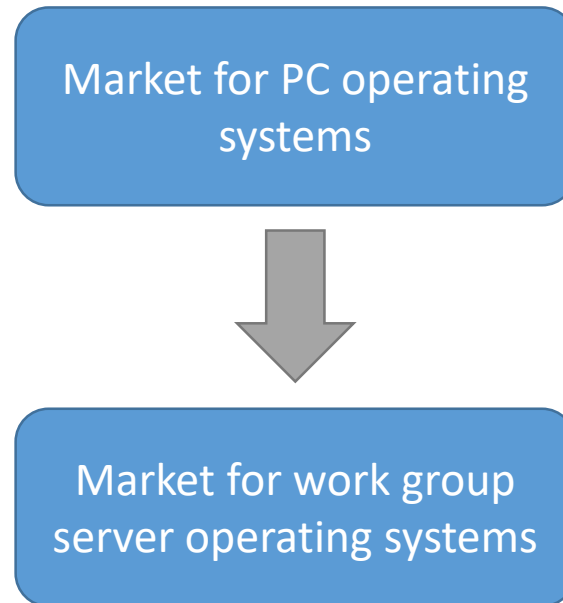
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- Market definition:
 - Main market
 - Derivative market

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- Dominance on the main market

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- Four conditions to establish abuse:
 - Indispensability of input
 - Preventing emergence of new product
 - Elimination of competition
 - No objective justification on derivative market



 Microsoft refused to give Sun access to interoperability information



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- General Court used same conditions as in *IMS Health* but applied these much more leniently:
 - In order to compete viably on the market it is necessary for competitors to be able to interoperate with Windows **on an equal footing** (compare *Bronner*)
 - Not required to show that all competition on the market is eliminated. What matters is that the refusal is **liable or likely to eliminate all effective competition**
 - Introduction of a new product is not the only parameter which determines whether a refusal is capable of causing prejudice to consumers. **Limitation of technical development** is sufficient (compare *IMS Health*)



Objective justification:

- Mere fact that a product is covered by intellectual property rights cannot constitute objective justification
→ Otherwise a refusal to license can never amount to abuse
- Negative effect on incentives to innovate
→ According to General Court, Microsoft merely put forward '*vague, general and theoretical arguments*'



Application to data

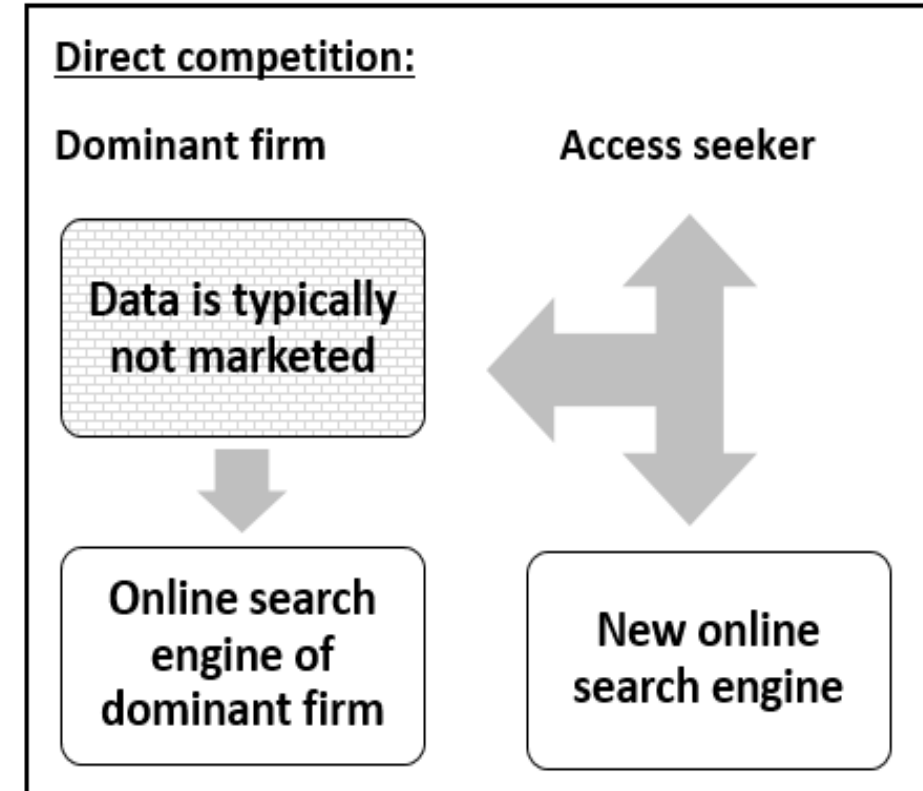
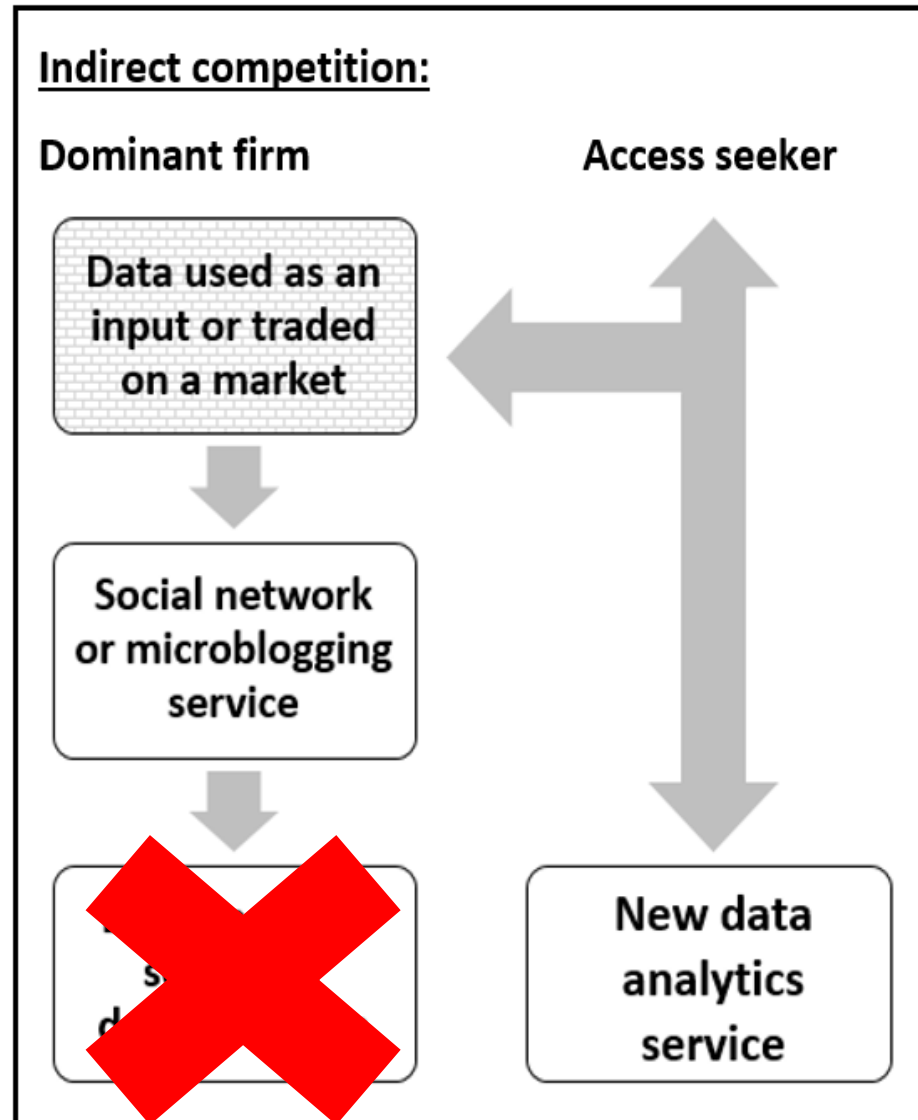


Indispensability of data:

- *Google/DoubleClick* merger: combination of data would not give the merged entity a **competitive advantage that could not be matched by competitors** (par. 364-365)
- *Facebook/WhatsApp* merger: there would '*continue to be a large amount of Internet user data that are valuable for advertising purposes and that are **not within Facebook's exclusive control***' (par. 188)



Scenarios as regards access to data



Elimination of competition on derivative market



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- Essential facilities doctrine only protects against ‘leveraging’
 - According to current case law, presence of the dominant firm on the downstream market that the access seeker wants to enter is required
 - As a result, the even more problematic scenario of a dominant firm precluding the **opening up of new markets** is thus not covered!



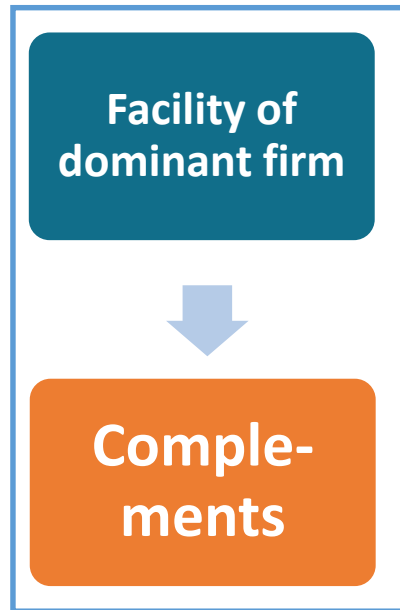
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- Decision Belgian competition authority about National Lottery in September 2015:
 - given its nature and size, the data could not have been reproduced by competitors in the market at **reasonable financial conditions and within a reasonable period of time** (par. 69)

 - *US PeopleBrowsr/Twitter case:*
 - Other platforms would not provide the same set of **data regarding users' sentiments and influence**
 - *Superior Court of San Francisco* imposed temporary restraining order and mandated Twitter to continue providing full access
 - Settlement in April 2013

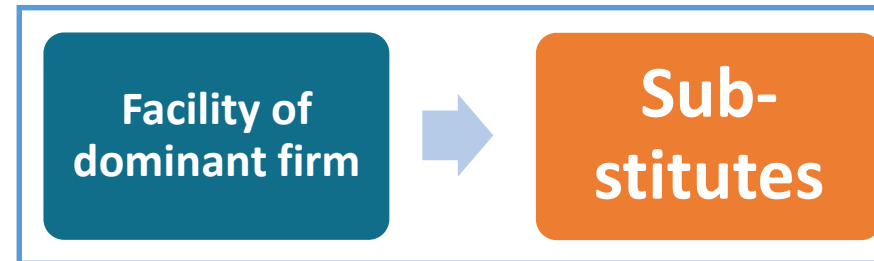


Policy choice in refusal to deal cases

Access:



No access:



Data is unlike other assets previously being considered

Data is
inherently
non-rivalrous

Possible
personal
nature of
data

Value of data
goes beyond
its current
use

Data is a by-
product of
past success



Data Economy initiative of the European Commission



Ongoing developments regarding data access and portability



■ Relevant policy documents:

- Commission Communication January 2017 'Building a European Data Economy'
- Commission Communication April 2018 'Towards a common European data space' and Staff Working Document 'Guidance on sharing private sector data'

■ Incentivizing data sharing beyond competition enforcement

■ Focus is on non-personal data

■ Agriculture and automotive as priority sectors

■ Policy **dilemma** between data innovation and data protection



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