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“Competition is a sin”: Can super-dominant undertakings compete on the merits? 559

How does the extent of a firm’s dominant position bear on the notion of “abuse” under art.102? Given the astronomical fines which the Commission have levied against companies, it is surprising that the position is unclear. Nonetheless, it is suggested that, in some circumstances, firms nearing monopoly market power have been (where there exists a situation of “super-dominance”) and are forbidden from competing on the merits. Although there *is* a sensible role for market power in the assessment of abuse, its recasting of how the notion of abuse is enforced entirely is inappropriate. Instead, super-dominance should encompass the accounting of dominance when assessing whether an abuse has occurred. The accounting exercise ought, moreover, to be sensitive to the market in question—just as the calculation of dominance is—by asking whether growth in an already significant market share will lead to welfare losses on the market. This assessment considers the nature of art.102 and, in so doing, also reviews the culture of enforcement by the Commission, as well as the jurisprudence of the courts.

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The ECN Plus Directive seeks to remedy the uneven enforcement of EU competition law in the Member States. The key objective is the harmonisation of national procedural rules governing the parallel enforcement of EU Competition Law by National Administrative Competition Authorities and the alignment of their enforcement powers with that of the Commission. Main elements include uniform rules on their legal and operational independence and adequate resources, investigative powers, sanctions and fines, leniency, and mutual assistance.

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Part 1 of this article discussed the phenomenon of spontaneous approximation with reference to the process of voluntary alignment of national fining policies to the Commission’s guideline on fines, a soft law measure. As case studies, the development of the fining rules issued by the German Bundeskartellamt and the Hungarian Gazdasági Versenyhivatal were described. It was concluded that based on a brief survey of other national fining policies, spontaneous approximation has taken place in several Member States. This article attempts to find answers for the voluntary alignment of national fining policies to the Commission’s guideline, a Union soft law measure which only binds the Commission and has no indirect harmonization purpose.

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