

LIGUE INTERNATIONALE DU DROIT DE LA CONCURRENCE
INTERNATIONAL LEAGUE OF COMPETITION LAW
INTERNATIONALE LIGA FÜR WETTBEWERBSRECHT

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RESOLUTION

QUESTION A: ABUSE OF A DOMINANT POSITION AND GLOBALIZATION

- A. Whereas in some jurisdictions the competition law prohibition of anticompetitive unilateral conduct is expressed as the prohibition of ‘abuse of a dominant position’ and this resolution covers all such prohibitions irrespective of how they are expressed;
- B. Whereas legal certainty and business certainty are fundamental to encourage business, investment and innovation;
- C. Whereas many jurisdictions have significantly different approaches to establishing dominance;
- D. Whereas many jurisdictions contain presumptions of dominance at market share levels significantly diverging from such presumptions in other jurisdictions;
- E. Whereas the undertakings established to be dominant in many jurisdictions may be the same undertakings;
- F. Whereas there is a lack of guidance as to what constitutes abuse in many jurisdictions;
- G. Whereas even across jurisdictions where there is a definition of and guidance on abuse, these do not necessarily cover the same conduct or exhibit the same principles;
- H. Whereas similar practices are prohibited in some and allowed (or even encouraged) in other jurisdictions;
- I. Whereas there is no consensus as to what makes or should make unilateral conduct unlawful;
- J. Whereas anticompetitiveness must be assessed on a case-by-case basis taking into account relevant principles of economics;
- K. Whereas form-based prohibitions risk committing decisional errors and effects-based prohibitions render decision-making more complicated;
- L. Whereas in some jurisdictions the assessment of abuse of a dominant position is based on an analysis of economic effects, efficiencies and/or consumer harm, whilst other jurisdictions adopt more formalistic approaches;
- M. Whereas the rules applicable to undertakings with market power differ even within the EU as a result of special provisions concerning relative market power or abuse of economic dependency in several Member States;
- N. Whereas exploitative abuse of a dominant position is prohibited in some jurisdictions but not in others;
- O. Whereas competition authorities around the world diverge significantly regarding how active they are in pursuing cases and taking decisions and in particular, in taking decisions concerning the abuse of a dominant position;

- P. Whereas in some jurisdictions there is a concern that the enforcement of the prohibition of abuse of dominance is liable to lead to too many restrictions on business rights and opportunities, whilst in other jurisdictions, there is a concern that the prohibition is not sufficiently enforced;

The Ligue considers that it is important to participate in this debate and therefore recommends

1. The acknowledgement that market shares only provide a first indication of ‘market power’ and it is ‘market power’ that is relevant for the assessment of abuse of a dominant position;
2. That statutory presumptions of dominance be based on the same or at least similar market share thresholds or that such presumptions based on market share thresholds be abandoned altogether;
3. Working towards establishing common parameters for what makes a conduct abusive (ie what makes unilateral conduct anticompetitive);
4. The provision of guidance (while maintaining flexibility) by competition authorities concerning their interpretation of the abuse of a dominant position that would increase transparency, legal certainty and business certainty;
5. The acknowledgement that the aim of the prohibition of an abuse of a dominant position is the protection of competition for the benefits this will ultimately bring to consumers;
6. The acknowledgement that focusing solely on exclusionary abuse to the exclusion of exploitative abuse risks protecting competitors rather than consumers;
7. That in order to protect competition for the benefit of consumers, the test for abuse should be construed so as to include both exclusion and exploitation;
8. The recognition that dominant undertakings’ business practices can be justified if such practices produce gains in economic efficiency and these efficiencies should be taken into account before reaching a finding of ‘abuse’;
9. The acknowledgement that modern competition law practice and analysis should not take place in isolation from fundamental economic principles; and
10. The acknowledgement that a common understanding and a common, principled approach to the concept of ‘abuse’ would both increase legal certainty and business certainty, and promote innovation and investment, all of which are desirable objectives.