



AKZO presumption of dominance: Time to abandon?

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I. Introduction

EU competition law has been and still is relying primarily on market shares for an analysis of a dominant position. There seems to be two magical thresholds. First, it is unlikely that a dominant position would be found below 40% market share. The Guidance on enforcement priorities maintain “*that dominance is not likely if the undertaking's market share is below 40 % in the relevant market*”.¹ There is a theoretical dispute whether this represents a safe harbour,² but what is safe is to conclude that the European Commission links its expectations to this 40 % threshold. On the opposite side, the European Court of Justice established a presumption of dominance over 50% market share in its AKZO judgment.³

The history shows that the (soft) presumption of an absence of dominance below 40% may be quite solidly to be relied on. A firm with a lowest market share to be convicted of an abuse of a dominant position on the EU level was British Airways, with its market share in a given period dropping to 39.7% in one out of five relevant years.⁴ Nor the negative (soft) presumption is attacked in theory.

On the contrary, the positive (AKZO) presumption is highly questionable. It is not explicitly enshrined in primary and secondary EU law, but it has in fact been established by the case law of the Court of Justice. Again, in this sense, the question is whether it is possible to speak of (rebuttable) presumption from a purely theoretical point of view, but in practice, such a discussion is rather irrelevant. If the Court states that a certain market share

¹ Para. 14 of the Guidance on enforcement priorities.

² See *Whish, R., Bailey, D.* Competition Law. 8th ed. Oxford: Oxford University Press, 2015, p. 194.

³ ECJ's judgment in case C-62/86, *AKZO* [1991] ECR I-3359, para. 60.

⁴ CFI's judgment in case T-219/99, *British Airways* [2003] ECR II-5917, para. 211-215 (confirmed on appeal in case C-95/04 P, *British Airways* [2007] ECR I-2331).

'is, in itself, save in exceptional circumstances, to be evidence of the existence of a dominant position',⁵ it does, at least from a practical point of view, establishes a presumption.

The threshold of 50% was first applied in the *AKZO* case. Here, the Court (referring to the *Hoffmann-La Roche* judgment) stated that the 50% share could be considered very high and was therefore, in itself, save in exceptional circumstances, an evidence of the existence of a dominant position.⁶ The Court therefore *de facto* introduced a rebuttable presumption of a dominant position for market shares above 50%.⁷ At the same time, however, it referred to other relevant factors which the Commission considered in this case.⁸ The existence of a presumption of a dominant position for a market share of 50% or more was confirmed by the Court in *Astra Zeneca*.⁹ The purpose of this post is to briefly to evaluate whether the AKZO presumption is valid and effective. As the title already suggests, I am going to argue that the AKZO presumption shall be abandoned.

II. Assessment of market share presumptions

First, it will be necessary to answer the question whether the given presumptions are correct (valid), i.e. whether a market share really has sufficient informative value in relation to the dominant position, and whether it measures it with a sufficient accuracy. Second, we need to answer the question of whether the AKZO presumption is effective, i.e. whether it is applied in practice and its use helps the goal of the presumption.

III.A Validity

Validity is a category expressing whether a given measure (here a market share) really expresses what we want to measure (a dominant position). The key to the validity is therefore whether a market share actually reflects the company's competitive position. Although the concept is primarily legal, the dominant position has major economic connotations. Although the terminology in this area is inconsistent and the exact meaning of the term "dominant position" is disputed, there is no doubt that it is linked to the concept of market power. Reference is most

⁵ Judgment of the ECJ in Case C-62/86, *AKZO* [1991] ECR I-3359, paragraph 60.

⁶ Judgment of the ECJ in Case C-62/86, *AKZO* [1991] ECR I-3359, paragraph 60.

⁷ See *Jones, A., Sufrin, B.* EU Competition Law. 6. vyd. Oxford: Oxford University Press, 2016, p. 323.

⁸ Judgment of the ECJ in Case C-62/86, *AKZO* [1991] ECR I-3359, paragraph 61.

⁹ SD judgment in Case C-457/10 P, *AstraZeneca* ECLI: EU: C: 2012: 770, paragraph 167.

often made to the definition in the *United Brands* judgment, according to which a dominant position is "a position of economic strength enjoyed by an undertaking".¹⁰

Unlike the notion of a dominant position, however, a market power is a matter of scale. Some market power is not enough for the company to behave independently of other competitors and customers. This requires significant market power.¹¹ Such market power should therefore be characterized by relative longevity and materiality in scope.¹² In order for the presumption to be sufficiently reliable, the 50% market share threshold should distinguish market power that is still insignificant and, conversely, market power so significant that it allows an undertaking to behave largely independently of competitors and customers.

However, a market share is only one of several indicators of market power. There is a relationship between market power and a market share, but there is no direct (100%) correlation.¹³ The higher market share of *ceteris paribus* increases market power, but is also influenced by other factors. In cases with the same market share, the actual market power can theoretically be diametrically different. Thus, from a theoretical point of

view, market share is not an accurate or correct expression of market power. Therefore, it cannot in itself be an identifier of the (non-)existence of a dominant position. However, for some products, usually where there are clear boundaries between substitutable and irreplaceable products, other relevant factors are already indirectly (and not exactly) taken into account in the definition of the relevant market, so the correlation between a market share and market power may be high. In other markets, typically in the digital economy, a looser correlation can be expected.

III.B Effectiveness

The benefit of a presumption of the existence of a dominant position is largely determined by the practice of competition authorities and whether they apply it. Unlike other areas of law, there is a relatively high degree of concentration of competition law enforcement in the hands of national competition authorities and the Commission. Competition authorities can thus essentially decide on the fate of such a presumption.

Thus, the effectiveness of a positive (AKZO) presumption can be quantified using the

¹⁰ Judgment of the ECJ in Case No 27/76, *United Brands* [1978] ECR 207, paragraph 65.

¹¹ See *Lianos, I., Korah, V., Siciliani, P.* Competition Law. Oxford: Oxford University Press, 2019, p. 825.

¹² *Werden, G.J.* Demand Elasticities in Antitrust Analysis. *Antitrust Law Journal*, Vol. 66, No. 2, 1998, p. 378.

¹³ *Kaplow, L., Shapiro, C.* Antitrust in *Polinsky, A.M., Shavell S. (eds.) Handbook of Law and Economics*. Elsevier, 2007, p. 1092.

Commission's decision-making practice. The AKZO judgment dates from 1991.¹⁴ Between 1992 and 2019, the Commission issued a total of 241 decisions concerning Article 102 TFEU and its predecessor (Article 82). Of these decisions, a total of 16 mentions "*large market shares*",¹⁵ which is the distinctive wording used in the AKZO judgment.

16 out of 241 decisions is, in itself, a relatively low number, that questions the effectiveness of the presumption. However, using the wording of the AKZO judgment does not even mean that the Commission based its conclusion that a dominant position existed on AKZO's presumption. Let's have a look into details of each of the 16 cases and whether they relied on the AKZO presumption.

In the *Irish Sugar* case, the Commission also assessed the size of the shares of other competitors, regulatory restrictions, the distribution system, purchasing power and other factors.¹⁶ In *AstraZeneca*, the Commission assessed the position of the competitor under investigation at almost one

hundred paragraphs, and in some of the analyzed years, although its share exceeded 50%, it did not find a dominant position.¹⁷ In the *Microsoft* case, in addition to market shares, the Commission also addressed competitors' shares, market links or barriers to entry in various ways of defining the market and calculating the share.¹⁸ In the *Intel* case, the Commission also assessed barriers to entry, product differentiation and financial strength.¹⁹ In the case *Prokent-Tomra* Commission examined, among other things, past reactions of Tomra to the entry of new competitors, the purchasing power or Tomra's self-assessment of its position.²⁰ In *Wanadoo Interactive*, the relative position vis-à-vis competitors, the group's position in the surrounding markets and the synergies resulting from belonging to the group were also assessed.²¹ In *Telefonica España*, the Commission examined the purchasing power, barriers to entry and other factors.²² The same factors were examined by the Commission in the *Rio Tinto Alcan* case, together with the possibilities for customers to change supplier.²³ In the *Slovak Telekom* case, the Commission also assessed the

¹⁴ Judgment of the ECJ in Case C-62/86, *AKZO* [1991] ECR I-3359.

¹⁵ These are cases IV / 34.621, COMP / A.37.507 / F3, COMP / C - 3 / 37.792, COMP / C-3 / 37.990, COMP D3 / 38.044, COMP / E-1 / 38.113, COMP / 38.233, COMP / 38.784, AT.39230, AT.39523, AT.39740, AT.39759, AT.39985, AT. 40099, AT. 40134 and AT.40153 (all cited below).

¹⁶ Commission Decision of 14. 5. 1997 in Case IV / 34.621 - *Irish Sugar*, OJ [1997], L258 / 1, paragraphs 99-110.

¹⁷ Commission Decision of 15. 6. 2005 in Case COMP / A.37.507 / F3 - *AstraZeneca*, paragraph. 512-601 (a share of over 50% without dominance see para. 599 and 601).

¹⁸ Commission Decision of 24.3.2004 in Case COMP / C - 3 / 37.792 - *Microsoft*, paragraphs 428-541.

¹⁹ Commission Decision of 13.5.2009 in Case COMP / C-3 / 37.990 - *Intel*, paragraphs 837-912.

²⁰ Commission Decision of 29.3.2006 in Case COMP / E-1 / 38.113 - *Prokent-Tomra*, paragraphs 57-96.

²¹ Commission Decision of 16. 7. 2003 in Case COMP / 38.233 - *Wanadoo Interactive*, para. 207-253.

²² Commission Decision of 4.7.2007 in Case COMP / 38.784 - *Wanadoo España v Commission*, paragraphs 220-277.

²³ Commission Decision of 20.12.2012 in Case AT.39230 - *RIO TINTO ALCAN*, paragraphs 35-57.

market structure, barriers to entry, purchasing power and indirect effects due to the downstream situation.²⁴ In *Google Search (Shopping)*, Commission mentioned the AKZO presumption only to diminish the importance of market shares in dynamic markets and addressed barriers to entry, the specifics of the markets for the products provided for free, multi-homing and general behavior of customers.²⁵ In the *ARA Foreclosure* case, the assessment of dominance was brief, yet included an assessment of relative position vis-à-vis competitors and regulatory constraints.²⁶ In *Motorola*, a crucial point was indispensability of the product, lock-in of the sector and the question of purchasing power, even though the Motorola's market share was 100%.²⁷ In *Google Android*, in addition to market shares, the Commission addressed in almost 300 paragraphs barriers to entry, purchasing power, and in particular the impact of downstream and neighboring market pressures.²⁸ In *AB InBev*, the Commission also examined competitors' pricing policy, barriers to entry and purchasing power.²⁹ In *Amazon*, the Commission also assessed barriers to entry, financial strength of a competitor or conflicting purchasing power.³⁰

²⁴ Commission Decision of 15.10.2014 in case AT.39523 - *Slovak Telekom*, paragraphs 275-354.

²⁵ Commission Decision of 27.6.2017 in Case AT.39740 - *Google Search (Shopping)*, paragraphs 264-330 (especially paragraphs 266-267).

²⁶ Commission Decision of 20.9.2016 in Case AT.39759 - *ARA Foreclosure*, paragraphs 58-66.

²⁷ Commission Decision of concerning 29. 4. 2014 AT.39985 - *Motorola*, para. 221-270.

Only in *IMS Health*, the Commission assessed only market shares and found a dominant position on this basis.³¹ It is fair to say that this decision was not a substantive decision but a decision on an interim measure and was therefore much shorter. Nevertheless, it still had 220 paragraphs, the only one of which was devoted to the assessment of the position of the IMS and included only the market share of IMS and its two competitors.³²

Of the 241 decisions, the *de facto* only Commission decision based its conclusion on the dominant position of a competitor solely on the basis of market shares, that is to say, using the AKZO presumption. For other decisions, the scope of the assessment of dominance varied from case to case, but market share was always only one of several factors. Thus, a positive presumption did not lead to any savings in resources, as the Commission assessed the existence of a dominant position in detail as if no presumption existed.

It could be discussed what was the reason of the Commission's approach. Possibly, the extensive assessment in the decisions resulted from the respective undertakings arguing

²⁸ Commission Decision of 18 July 2018 in Case AT.40099 - *Google Android*, paragraphs 431-727.

²⁹ Commission Decision of 13 May 2019 in Case AT.40134 - *AB InBev*, paragraphs 60-77.

³⁰ Commission Decision of 4.5.2017 in AT.40153 - *E - book MFNs and related matters (Amazon)*, paragraphs 52-67.

³¹ Commission decisions of 3. 7. 2001 in COMP D3/38.044 - *IMS Health* (interim measures), para. 57-62.

³² *Ibid.*, paragraph 58.

against the existence of a dominant position and even potentially presenting evidence to that respect. However, that does not change the conclusion about the ineffectiveness of the presumption.

A positive presumption should serve the competition authorities to ensure that a detailed assessment of the dominant position is not necessary in their analysis. This should be reflected in the Commission's decisions on infringements of Article 102 TFEU, because in other types of decisions (rejections of complaints) there is no need to argue the existence of the dominant position as it is sufficient to provide the reason for rejection without analyzing the dominant position (as is done in practice, too).

It can therefore be concluded that the Commission is very reserved about the AKZO presumption application. In its decisions, it *de facto* used it only once when

deciding on an interim measure.³³ In other cases, its application is avoided, even in situations where market shares by far exceeded 50% and were very close to 100%. There is no effectiveness of the AKZO presumption we could talk about.

VI. Conclusion and further proposed steps

The AKZO presumption finds virtually no application in practice. Taking into account structural changes in markets and the development of the digital economy, it would be the right time for the Commission to explicitly confirm that it does not intend to apply it anymore. The positive AKZO presumption may have historically had its place in the case law of the Court of Justice, but this period has passed.

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³³ See *IMS Health*, cited above.