



What is prohibited by Article 102 TFEU?

Article 102 TFEU provides that “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.”

There are two key questions that must be considered in applying Article 102 TFEU:

1. Does the undertaking have a dominant position?
2. Has the undertaking engaged in conduct that is an abuse of that dominant position?

What is a dominant position?

The definition provided by the EU Courts is: “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers.”

Assessing whether an undertaking holds a dominant position involves two steps:

1. Define the market in which the undertaking is operating.
2. Assess whether the undertaking holds a dominant position on that market.

What constitutes an abuse of a dominant position?

There is no single test, or definition, of the types of conduct that might constitute an abuse of a dominant position. Instead, the question of whether conduct is prohibited by Article 102 TFEU involves a detailed assessment of the conduct and its effects.

Nevertheless, the EU Courts and the Commission have developed legal tests or principles which apply to specific types of conduct and explain the circumstances in which that conduct constitutes an abuse of a dominant position. These legal tests, and the categories of conduct that might constitute an infringement of Article 102 TFEU, continue to evolve to take account of new practices and circumstances.

What types of conduct might constitute an abuse of a dominant position?

Examples of conduct that might constitute an abuse of a dominant position include:

Tying: a tying arrangement involves conduct where the purchaser of a product/service is required to purchase another distinct product/service. This can take a number of forms, including a contractual requirement to purchase another product/service. It can also extend to a situation where two separate products/services are integrated together.

Predatory pricing: this is conduct where a dominant firm deliberately reduces prices to a loss-making level when faced with increased competition from existing competitors or a new entrant to the market, with a view to trying to force them out of the market.

Refusal to supply: in certain exceptional circumstances, the refusal to supply goods or services may constitute an abuse of a dominant position.



For more information:

see section 4 of DFF’s *Short guide to competition law for digital rights litigators*.