Competition Law II: Abuse

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Introduction

The second pillar of EU competition law focuses on the – bad – behaviour of a single undertaking. For Article 102 does not require the collusive behaviour of two or more economic actors. It sanctions the *unilateral* behaviour of a dominant undertaking where this behaviour amounts to a "market abuse". The provision states:

> 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.

Article 102 encapsulates a number of fundamental choices with regard to the Union's *economic* constitution. For by concentrating on a "dominant position within the internal market", it goes beyond pure monopolies and is thus wider than its American counterpart.[1] But by insisting on market *abuse*, it is also narrower than the American equivalent. For unlike the latter, Article 102 will not directly outlaw market *structures*. Dominance is not itself prohibited – only the *abuse* of a dominant position.[2]

Like Article 101, the prohibition of market abuse will however only apply where an abusive behaviour "may affect trade between Member States".[3] Yet when this abuse is shown to have Union-wide effects it appears to be prohibited as such. For Article 102 has – unlike Article 101 – no "third paragraph" exempting abusive behaviour on the ground of its pro-competitive effects.

In sum: a violation of Article 102 implies the satisfaction of only three criteria. First, we must establish what the "market" is in which the undertaking operates. Second, the undertaking must be "dominant" within that market. And third, the undertaking must have "abused" its dominance.[4] All three aspects will be discussed below (a–c). Finally, we will analyse whether the Union legal order has – despite the absence of an express exemption – allowed for "objective justifications" of abusive conduct (d).

[1] Section 2 of the US American Sherman Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony[.]".

[2] *Europemballage and Continental Can* v. *Commission*, *Case* 6/72, [1973] ECR 215, para. 26.

[3] On this point, see Chapter 12 – Section 1(b).

[4] Article 102 TFEU does not mention a "restriction of competition" as part of this provision. However, the Court has found that this element is an implied requirement; see *Michelin* v. *Commission (Michelin II)*, Case-T-203/01, [2003] ECR II-4071, para. 237: "Unlike Article [101 (1) TFEU], Article [102 TFEU] contains no reference to the anti-competitive aim or anticompetitive effect of the practice referred to. However, in the light of the context of Article [102 TFEU], conduct will be regarded as abusive only if it restricts competition."

1. The "Market": Product and Geographic Dimensions

Dominance is relational: it is the power to master something; and under Article 102 this "something" is the "market". However, there is not one market in which all undertakings compete. Undertakings compete in different products and in different areas. The market concept is thus a concept with two dimensions: a *product* dimension and a *geographic* dimension. The first dimension concerns the question as to what goods or services compete with each other. Where two products do not compete, they are not in the same market. According to this functional concept of the market, there is not one market but many separate "product" markets. Two competing goods must however also "physically" meet in the same area. This aspect of the market concept is called its geographic dimension.

How has the Union legal order defined both dimensions? In relation to the product market, it concentrates on the "interchangeability" of two products. In the words of the European Court in *Hoffmann–La Roche*:

> The concept of the relevant market in fact implies that there can be effective competition between the products which form part of it and this presupposes that there is a *sufficient degree of interchangeability between all the products* forming part of the same market in so far as a specific use of such products is concerned.[5]

The interchangeability or "substitutability" of a product typically expresses itself in *demand* substitution. Demand substitution analyses whether the consumer regards two products as interchangeable "by reason of the products' characteristics, their prices and their intended use".[6] The principal test here is that of cross-price

[5] *Hoffmann–La Roche & Co. AG* v. *Commission*, Case 85/76, [1979] ECR 461, para. 28 (emphasis added). And see also *Europemballage and Continental Can* v. *Commission*, Case 6/72 (supra n. 2), para. 32: "The definition of the relevant market is of essential significance, for the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products".

[6] Commission, "Notice on the Definition of relevant market for the purposes of [Union] competition law", [1997] OJ C372/5, para. 7: "A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use".

elasticity. Cross-price elasticity measures whether a "small but significant non-transitory increase in price" (SSNIP) in one product incentivizes consumers to switch to another product.[7] Where this is the case, two goods are – from an econometric point of view – in the same product market. But apart from purely quantitative criteria, the European Court may use additional *qualitative* criteria.[8] Moreover, it may even analyse the degree of potential competition by future market entrants. This aspect is called *supply* substitution; that is: the extent to which an undertaking could switch from a non-competing to a competing product.[9]

If two products are (theoretically) found to be competing, they must still be offered in the same geographic market. In the words of the Court:

> "The opportunities for competition under Article [102] of the Treaty must be considered having regard to the particular features of the product in question *and with reference to a clearly defined geographic area in which it is marketed and where the conditions of competition are sufficiently homogeneous*[.]"[10]

[7] *Ibid.*, para. 15: "The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. One way of making this determination can be viewed as a speculative experiment, postulating a hypothetical small, lasting change in relative prices and evaluating the likely reactions of customers to that increase. The exercise of market definition focuses on prices for operational and practical purposes, and more precisely on demand substitution arising from small, permanent changes in relative prices. This concept can provide clear indications as to the evidence that is relevant in defining markets." The problem with this – relational – test is that it cannot measure whether the price of the examined product is – in absolute terms – already inflated. This fallacy of the SSNIP test has become known as the "Cellophane Fallacy" after the American Supreme Court's decision in *US* v. *Du Pont*, 351 US 377 (1956).

[8] See *United Brands Company and United Brands Continentaal BV* v. *Commission*, Case 27/76, [1978] ECR 207, where the Court found that in light of its distinct qualities, the "banana market is a market which is sufficiently distinct from other fresh fruit markets" (*ibid.*, para. 35).

[9] See *Michelin* v. *Commission (Michelin I)*, Case 322/81, [1983] ECR 3461, esp. para. 41.

[10] *United Brands* v. *Commission*, Case 27/76 (supra n. 8), para. 11 (emphasis added). And see also *Deutsche Bahn* v. *Commission*, Case T-229/94, [1997] ECR II-1689, para. 92: "Inasmuch as the applicant submits that the Commission's definition of the geographical market is undermined by the difference in the competitive situation, it is sufficient to state that the definition of the geographical market does not require the objective conditions of competition between traders to be perfectly homogeneous. It is sufficient if they are 'similar' or 'sufficiently homogeneous' and, accordingly, only areas in which the objective conditions of competition are 'heterogeneous' may not be considered to constitute a uniform market."

Two competing products might not be offered in the same (national) market for legal reasons;[11] or, if they are, foreign products might be disadvantaged.[12] And even if two products are competing in a similar legal context, transportation costs might limit the geographic market considerably.[13] The question thus is this: when are competitive conditions "sufficiently homogeneous" so as to "be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas"?[14] That is a question of fact that the courts will have to answer.[15]

If they have answered it positively, the geographic market for a product so identified must represent a "substantial part" of the internal market. What is a "substantial part" of the European market? The European Courts have established a presumption that the territory of a Member State constitutes a substantial part of the internal market.[16] However, they have equally found this requirement to be satisfied for a part of a Member State,[17] and even a port within a city.[18]

2. Market Dominance

(a) General Considerations

There exists an inverse relationship between the identified "market" and the potential "dominance" of an undertaking within that market. The

[11] The primary "culprit" here is often (national) intellectual property rights. On the nature and effects of these rights, see L. Bently and B. Sherman, *Intellectual Property Law* (Oxford University Press, 2008), Chapter 1.
[12] We saw in Chapter 9 above that the free movement of goods provisions allow for the discriminatory treatments of foreign goods *if* justified on grounds of public policy.
[13] See Commission Decision 88/518 relating to a proceeding under [ex-]Article 86 of the EEC Treaty (Case No. IV/30.178 Napier Brown – British Sugar), [1988] OJ L284/41.
[14] Commission, Notice on the Definition of relevant market (supra n. 6), para. 8.
[15] In the absence of any special legal or factual elements, the geographic market is the entire internal market of the Union; see *Hilti AG* v. *Commission*, Case T-30/89, [1991] ECR II-1439.
[16] See *Belgische Radio en Televisie (BRT) and others* v. *SABAM and others*, Case 127/73, [1974] ECR 313; *Michelin* I, Case 322/81 (supra n. 9); and *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (TTP)* v. *Commission*, Case C-241/91P, [1995] ECR I-743.
[17] See *Coöperatieve Vereniging "Suiker Unie" UA and others* v. *Commission*, Case 40/73, [1975] ECR 1663.
[18] See *Merci convenzionali porto di Genova* v. *Siderurgica Gabrielli*, Case C-179/90, [1991] ECR I-5889.

greater the market the smaller will be the likelihood of dominance; and, alternatively, the smaller the market the greater will be the likelihood of dominance. Put colloquially: a big fish in a big pond is different from a big fish in a small pond. And sometimes the pond might be so small that there is only room for one fish.[19]

What then is market dominance? Dominance is wider than monopoly. Whereas monopoly technically refers to a situation in which *one* single undertaking dominates the market, Article 102 is not confined to that situation. But exactly when an undertaking is dominant the provision does not tell. The European Courts have therefore tried to define dominance by distinguishing it from related phenomena such as monopoly. In *Hoffmann–La Roche*,[20] the European Court thus held:

> The dominant position thus referred to relates to a position of economic strength enjoyed by an undertaking which enables it to prevent the 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 the consumers. *Such a position does not preclude some competition, which it does where there is a monopoly or a quasi-monopoly*, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment. *A dominant position must also be distinguished from parallel courses of conduct which are peculiar to oligopolies* in that in an oligopoly the courses of conduct interact, while in the case of an undertaking occupying a dominant position the conduct of the undertaking which derives profits from that position is to a great extent determined unilaterally.[21]

A dominant position is thus distinct from a monopolistic position as well as from an oligopolistic position. While the former excludes all competition, oligopolies are market structures in which a "few" undertakings dominate the market.[22]

But what characterizes market dominance specifically? The Court admitted that the answer to that question was determined by several

[19] In *Hugin* v. *Commission*, Case 22/78, [1979] ECR 1869, the Court defined the relevant market in such narrow terms that only one undertaking – the plaintiff – was found to inhabit the "pond" of spare parts for Hugin's cash registers.

[20] *Hoffmann-La Roche & Co. AG* v. *Commission*, Case 85/76 (supra n. 5).

[21] *Ibid.*, paras. 38–9.

[22] "Oligo" means "few" in Greek.

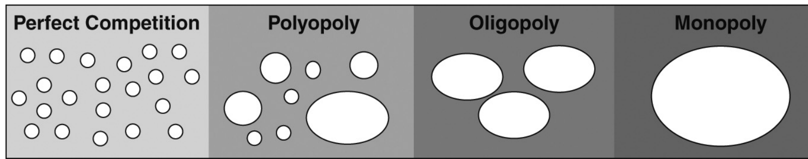

Figure 13.1. Market Structures

factors, yet nonetheless found that "among these factors a highly important one is the existence of very large market shares".[23] Thus, the higher the market share, the higher the probability of dominance. The Court has indeed held that a market share above 50 per cent was a clear indication of market dominance.[24] But even below 50 per cent, the Court may find market dominance. However, a finding of dominance here involves a number of determinants,[25] in particular: the structure of the relevant market.[26] This second factor compares the market share of the accused undertaking with those of its biggest competitors.[27] For while an undertaking may not have "absolute" dominance over the market, it might still enjoy a "relative" dominance over its competitors.[28] The Court has nonetheless found that if an undertaking has a market share below 40 per cent of the relevant market, a finding of dominance is unlikely.[29]

[23] *Ibid.*, para. 39.
[24] *AKZO Chemie BV* v. *Commission*, Case C-62/86, [1991] ECR I-3359, para. 60: "With regard to market shares the Court has held that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. That is the situation where there is a market share of 50% such as that found to exist in this case."
[25] See Commission, "Guidance on the Commission's enforcement priorities in applying Article [102] of the [FEU] Treaty to abusive exclusionary conduct by dominant undertakings", [2009] OJ C45/7, para. 20.
[26] *Hoffmann-La Roche & Co. AG* v. *Commission*, Case 85/76 (supra n. 5), para. 40: "A substantial market share as evidence of the existence of a dominant position is not a constant factor and its importance varies from market to market according to the structure of these markets, especially as far as production, supply and demand are concerned."
[27] See *United Brands*, Case 27/76 (supra n. 8), esp. paras. 110 et seq. The Court is likely to infer dominance where the market share of an undertaking is twice as big as those of all of its competitors combined (see *British Airways* v. *Commission*, Case T-219/99, [2003] ECR II-5917).
[28] Another factor that may influence a finding of dominance are entry barriers through the existence of a service network (see *Michelin* v. *Commission*, Case 322/81 (supra n. 9)).
[29] Commission, "Guidance on the Commission's enforcement priorities in applying Article [102]" (supra n. 25), para. 14.

(b) Collective Dominance

A dominant position appears to be fundamentally different from an oligopoly. For the latter involves a situation in which a small number of undertakings are – more or less – equally strong within the market, and it would thus seem that none of them could *individually* dominate the market.

But could Article 102 capture these oligopolistic undertakings *collectively?* The concept of collective dominance is suggested by the very wording of the provision. After all, Article 102 refers to an "abuse of one *or more undertakings of a dominant position*".[30] And, teleologically, it would be logical to capture situations in which oligopolistic undertakings went beyond "parallel courses of conduct".[31] Indeed: a collective *abuse* would have the same consequences as that of a single dominant undertaking.[32]

The European Courts have – belatedly – accepted the idea of collective dominance.[33] In *Vetro et al.* v. *Commission*,[34] three Italian producers of flat-glass challenged a Commission decision that had found them guilty of violating Article 102. Their joint market shares were 95 per cent, and the Commission claimed that the undertakings would "present themselves on the market as a single entity and not as individuals".[35] To cement this argument the Commission pointed to the existence of collusive behaviour

[30] Article 102 TFEU (emphasis added).

[31] *Hoffmann-La Roche & Co. AG* v. *Commission*, Case 85/76, (supra n. 5) para. 39.

[32] Suffice to say here that once the Union has found collective dominance to exist, the abuse of this dominant position may be collective or individual; see *Irish Sugar plc* v. *Commission*, Case T-228/97, [1999] ECR II-2969, para. 66: "Whilst the existence of a joint dominant position may be deduced from the position which the economic entities concerned together hold on the market in question, the abuse does not necessarily have to be the action of all the undertakings in question. It only has to be capable of being identified as one of the manifestations of such a joint dominant position being held. Therefore, undertakings occupying a joint dominant position may engage in joint or individual abusive conduct. It is enough for that abusive conduct to relate to the exploitation of the joint dominant position which the undertakings hold in the market."

[33] For an overview of the case law, see R. Wish, "Collective Dominance" in D. O'Keeffe et al. (eds.), *Judicial Review in European Union Law: Liber Amicorum in Honour of Lord Slynn of Hadley* (Kluwer, 2000), 581; as well as: R. Nazzini, The Foundations of European Union Competition Law: The Objectives and Principles of Article 102 (OUP, 2011), Chapter 11.

[34] *Vetro, Pisana and Vernante Pennitalia* v. *Commission*, Joined Cases T-68/89, T-77/89 and T-78/89, [1992] ECR II-1403. The Commission claimed that this was the first case on collective dominance and for that reason suggested not imposing any fines (*ibid.*, para. 33).

[35] *Ibid.*, para. 31.

under Article 101. Intervening in the proceedings, the United Kingdom objected that it was "only in very special circumstances that two or more undertakings may jointly hold a dominant position within the meaning of Article [102], namely, when the undertakings concerned fall to be treated as a single economic unit in which the individual undertakings do not enjoy a genuine autonomy in determining their conduct on the market and are not to be treated as economically independent of one another".[36]

The General Court – rightly – rejected that argument, since it implied that the notion of "undertaking" in Article 102 was different from that in Article 101.[37] And moving from text to teleology, the Court continued:

> There is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, *united by such economic links* that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market... However, it should be pointed out that for the purposes of establishing an infringement of Article [102] of the Treaty, it is not sufficient... to "recycle" the facts constituting an infringement of Article [101], deducing from them the finding that the parties to an agreement or to an unlawful practice jointly hold a substantial share of the market, that by virtue of that fact alone they hold a collective dominant position, and that their unlawful behaviour constitutes an abuse of that collective dominant position.[38]

The simple existence of contractual or collusive relations between the three undertakings was thus not sufficient to establish collective dominance. But what did the requirement that the firms be united by "economic links" then mean?

Some clarification was given in *CEWAL*,[39] where the European Court confirmed the General Court's finding that "a dominant position may be held by several undertakings".[40] Collective dominance thereby required that legally independent undertakings "present themselves or act together on a particular market as a collective entity".[41] And "[i]n order to establish the existence of a collective entity as defined above, it is necessary to examine the economic links or factors which give rise to a connection

[36] *Ibid.*, para. 342.
[37] *Ibid.*, para. 358. On the notion of "undertaking", see: Chapter 12 – Section 1(a) above.
[38] *Ibid.*, paras. 358 and 360 (emphasis added).
[39] *Compagnie maritime belge transports SA, Compagnie maritime belge and Dafra-Lines* v. *Commission*, Joined Cases C-395/96P and C-396/96 P, [2000] ECR I-1365.
[40] *Ibid.*, para. 35. [41] *Ibid.*, para. 36.

between the undertakings concerned".[42] The mere existence of collusion within the meaning of Article 101 was inconclusive; yet, such collusion could "undoubtedly, where it is implemented, result in the undertakings concerned being so linked as to their conduct on a particular market that they present themselves on that market as a collective entity vis-à-vis their competitors, their trading partners and consumers".[43] All depends on the "nature and terms of an agreement, from the way in which it is implemented and, consequently, from the links or factors which give rise to a connection between undertakings".[44]

While an agreement between undertakings may thus indicate collective dominance, the European Courts have found that this is not the only way. And in *Piau*,[45] the General Court provided the following abstract criteria for a finding of collective dominance:

> Three cumulative conditions must be met for a finding of collective dominance: first, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy; second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market; thirdly, the foreseeable reaction of current and future competitors, as well as of consumers, must not jeopardise the results expected from the common policy.[46]

3. Abuse of Market Dominance

If dominance is a relational concept, abuse is a situational concept. Situational concepts are like semantic chameleons: their meaning depends on the context in which they are used. What counts as "abuse" in Article 102 indeed depends not so much on the type of behaviour as such as on its "context"; namely, that this is the behaviour of a *dominant* undertaking. Thus: where a non-dominant undertaking refuses to supply a distributor, this behaviour is a perfectly legitimate offspring of the freedom of contract. However, were a dominant undertaking to do the same, this might constitute an illegitimate abuse. The abusive character of the behaviour

[42] *Ibid.*, para. 41. [43] *Ibid.*, para. 44. [44] *Ibid.*, para. 45.
[45] *Piau* v. *Commission*, Case T-193/02, [2005] ECR II-209. [46] *Ibid.*, paras. 110–11.

is here added from "outside". It is the market structure that "colours" the behaviour. And since that market structure is – like physical space around big stellar masses – distorted by the very presence of a dominant firm, the latter's action may have an anti-competitive effect, even if the same action of a non-dominant undertaking would not.[47]

What we see as examples of abusive behaviour in Article 102 must be understood in this light. The forms of action listed in the provision are not illegal as such; they become illegal because of the standing of the actor within the market. For within that market a dominant undertaking has "a special responsibility".[48] And because of that special responsibility, there are special duties imposed on a dominant undertaking. However, these special duties will find a limit in its right to self-defence. "[T]he fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked[.]"[49]

What types of abusive behaviour are covered by Article 102? The provision covers both exploitative as well as exclusionary abuses. For it "is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure".[50] The "maintenance of effective competition on the relevant market" is nonetheless the central aim behind Article 102.[51]

[47] The European Court has tried to express this conceptual link between the concept of "abuse" and market dominance in *Hoffmann-La Roche & Co. AG* v. *Commission*, Case 85/76 (supra n. 5), para. 91: "The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition." For an even more explicit judicial statement, see *France Télécom* v. *Commission*, Case T-340/03, [2007] ECR II-107, para. 186: "[I]t follows from the nature of the obligations imposed by Article [102 TFEU] that, in specific circumstances, undertakings in a dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in themselves abuses and which would even be unobjectionable if adopted or taken by non-dominant undertakings."

[48] *Michelin* v. *Commission*, Case 322/81 (supra n. 9), para. 57.

[49] *United Brands* v. *Commission*, Case 27/76 (supra n. 8), para. 189.

[50] *Europemballage Corporation and Continental Can Company* v. *Commission*, Case 6/72 (supra n. 2), para. 26.

[51] *Michelin* v. *Commission*, Case 322/81 (supra n. 9), para. 30.

What will "relevant" market here mean? A restrictive reading would insist that the special duties imposed on a dominant undertaking are confined to the market that it dominates. But the Union legal order has preferred a – slightly – wider reading. It has extended the prohibition of abuse to "downstream" or "adjacent" markets in which the undertaking is *not* dominant.[52] The application of Article 102 in "distinct, but associated" markets is thus possible. However in *Tetra Pak*,[53] the European Court insisted on "a link between the dominant position and the alleged abusive conduct, which is normally not present where conduct on a market distinct from the dominated market produces effects on that distinct market".[54] Article 102 would thus only apply in "special circumstances" to conduct found in the associated market, in which the undertaking was not dominant.[55]

The following subsections will now look at common forms of abusive behaviour alongside the (non-exhaustive) list in Article 102.

(a) Article 102 [2] (a) and "predatory pricing"

The first illustration of abusive behaviour given by Article 102 consists of "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions".[56] This wide category includes "excessive pricing", as well as "predatory pricing". The former exploits the consumer, while the latter is designed to exclude a competitor. Excessive pricing is hard to establish.[57] For predatory pricing, on the other hand, the European Courts have developed a detector test that indicates when abusive conduct is, or is likely to be, present.

In *AKZO*,[58] the European Court had to deal with two undertakings producing organic peroxides. Peroxides are used in the plastics industry, but can equally be used as bleaching agents for flour. AKZO had traditionally been active with regard to both applications, whereas a second company – ECS – had only recently extended its activities from the flour to the plastics application. In order to secure ECS's withdrawal from the

[52] See *Istituto Chemioterapico Italiano and Commercial Solvents Corporation* v. *Commission*, Cases 6 and 7/73, [1974] ECR 223.
[53] *Tetra Pak International* v. *Commission*, Case C-333/94 P, [1996] ECR I-5961.
[54] *Ibid.*, para. 27. [55] *Ibid.* [56] Article 102 [2] (a) TFEU.
[57] See *United Brands* v. *Commission*, Case 27/76 (supra n. 8), paras. 235 et seq. However, see also *General Motors Continental NV* v. *Commission*, Case 26/75, [1975] ECR 1367.
[58] *AKZO Chemie BV* v. *Commission*, Case C-62/86 (supra n. 24).

plastics application, AKZO attacked its competitor on the flour application by systematically offering "unreasonably low prices designed to damage ECS's business viability, compelling ECS either to abandon the customer to AKZO or to match a loss-making price in order to retain the customer".[59] This was a commercially clever strategy, since AKZO used price reductions in a sector which was vital for its competitor but of limited importance to itself.[60] But was this a commercially legitimate strategy? The Court found that AKZO held a dominant position and that therefore "not all competition by means of price can be regarded as legitimate".[61]

What then was the distinction between legitimate and illegitimate price competition? In the opinion of the Court it was this:

> Prices below average variable costs (that is to say, those which vary depending on the quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced. Moreover, prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.[62]

The Court here established a rule and a presumption for illegitimate predatory pricing.[63] Where the price of the product was below average variable

[59] *Ibid.*, para. 9. [60] *Ibid.*, para. 42. [61] *Ibid.*, para. 70. [62] *Ibid.*, para. 71–2.

[63] The ruling was confirmed in *Tetra Pak International SA* v. *Commission*, Case C-333/94P (supra n. 53), esp. paras. 39 et seq. According to the Commission's "Article [102] Guidance" (supra n. 25), the Commission will apply a slightly different test (*ibid.*, para. 26): "The cost benchmarks that the Commission is likely to use are average avoidable cost (AAC) and long-run average incremental cost (LRAIC). Failure to cover AAC indicates that the dominant undertaking is sacrificing profits in the short term and that an equally efficient competitor cannot serve the targeted customers without incurring a loss. LRAIC is usually above AAC because, in contrast to AAC (which only includes fixed costs if incurred during the period under examination), LRAIC includes product

costs the pricing policy of an undertaking was abusive per se. It thereby would not matter whether there existed a possibility of recuperating the losses in the long term.[64] By contrast, where the price was between average variable costs and average total costs, there was still a possibility that this could be an abuse of dominance. However, an abusive behaviour would here only be established where the pricing policy could be shown to be part of a strategic plan to eliminate a competitor. This "subjective" element within the definition of predatory pricing undermines, to some extent, the Court's idea that the concept of abuse is an "objective" concept.[65] The General Court has tried to gloss over this development by asserting that an anti-competitive intent and an anti-competitive effect may – occasionally – "be one and the same thing".[66]

(b) Article 102 [2] (b) and "refusal to supply"

The Treaties define a second form of abusive conduct as "limiting production, markets or technical development to the prejudice of consumers".[67] One can consider the "refusal to supply" as a generic expression of that category. This potentially abusive type of conduct best illustrates the "special responsibilities" of a dominant undertaking. For the general principle of freedom of contract would normally allow any contracting party to reject an offer for a contract. But this freedom cannot be granted where the market structure is such that there is no alternative supply.

In *Commercial Solvents*,[68] the Court had to deal with the refusal by the dominant producer of the raw material aminobutanol to Zoja – a manufacturer of ethambutol. The producer had decided to expand its production to the manufacture of the finished product; and in pursuit of this vertical integration strategy, it had decided to cut off the supply of raw materials "to certain parties in order to facilitate its own access to the

specific fixed costs made before the period in which allegedly abusive conduct took place. Failure to cover LRAIC indicates that the dominant undertaking is not recovering all the (attributable) fixed costs of producing the good or service in question and that an equally efficient competitor could be foreclosed from the market.

64 See *France Télécom* v. *Commission*, C-202/07P, [2009] ECR I-2369, esp. para. 110.

65 See *Hoffmann-La Roche* v. *Commission*, Case 85/76 (supra n. 5), para. 91.

66 *France Télécom* v. *Commission*, Case T-340/03, [2007] ECR II-107, para. 195.

67 Article 102[2] (b) TFEU. For a recent overview over exclusionary discrimination under Article 102 in general, see: P. Ibáñez Colomo, Exclusionary Discrimination under Article 102 TFEU, (2014) 51 C.M.L. Rev. 141.

68 See *Istituto Chemioterapico Italiano* v. *Commission*, Cases 6 and 7/73 (supra n. 52).

market for the derivatives".[69] In unequivocal terms, the Court found that this was not a legitimate commercial strategy for a dominant undertaking:

> [A]n undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers) act in such a way as to eliminate their competition which in the case in question, would amount to eliminating one of the principal manufacturers of ethambutol in the common market.[70]

The Court consequently considered the refusal to supply an abuse of a dominant position that violated Article 102. This reasoning was confirmed in *Magill*.[71] In the absence of a comprehensive weekly television guide in Ireland, each television station here published its own guide, while licensing daily newspapers to produce daily listings free of charge. Magill saw a commercial gap and tried to fill it. Yet it was prevented from publishing a comprehensive weekly guide by the Irish television stations (as well as the BBC). Was this an abuse of a dominant position? The European Courts thought this was a clear violation of Article 102 [2] (b), as the refusal to supply the information "prevented the appearance of a new product" that the dominant undertakings "did not offer and for which there was a potential consumer demand".[72]

Did *Magill* endorse a "essential facilities" doctrine?[73] The question was raised in *Bronner*.[74] The applicant here was a producer of a small Austrian newspaper, who wished to use the – integrated – home-delivery distribution network of a dominant competitor "against payment of reasonable remuneration".[75] Bronner argued that the normal postal delivery service would not constitute an alternative delivery option, as it would not take place until the late morning; and the establishment of its own home-delivery service was "entirely unprofitable".[76]

[69] *Ibid.*, para. 24. [70] *Ibid.*, para. 25.

[71] *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (TTP)* v. *Commission*, Joined Cases C-241/91P and C-242/91P (supra n. 16).

[72] *Ibid.*, paras. 54 et seq.

[73] For critical overviews of the American doctrine, see B. Doherty, "Just What are Essential Facilities?", 38 (2001) *Common Market Law Review*, 397; as well as A. Rodenhausen, "The Rise and Fall of the Essential Facilities Doctrine", 29 (2008) *European Competition Law Review*, 310.

[74] *Bronner* v. *Mediaprint Zeitungs- und Zeitschriftenverlag and others*, Case C-7/97, [1998] ECR I-7791.

[75] *Ibid.*, para. 8. [76] *Ibid.*

Could it therefore demand to use its competitor's distributional infrastructure? The Court disagreed, and gave an extremely restrictive reading of its prior jurisprudence. Only when the service was "indispensable" for carrying on the business in question, because it was "impossible" to develop a new product without the service, would the Union – in "exceptional circumstances" – require a competitor to make available its facilities.[77] And this was not the case here. For even if the Court admitted that there was only one nationwide home-delivery scheme in the Member State,[78] other methods of distribution were available and it was furthermore not impossible for any publisher of daily newspapers to establish – alone or in cooperation with other publishers – a second home-delivery scheme.[79] This restrictive stance has been confirmed in later jurisprudence.[80]

(c) Article 102 [2] (c) and "discretionary pricing"

A third category of abusive behaviour is defined as "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage".[81] The emblematic expression of this is discriminatory pricing. Price discrimination may thereby take place directly or indirectly. Direct discrimination might be found where an undertaking charges different prices depending on the nationality or location of its customers.[82] The best-known commercial techniques of indirect price discrimination are discounts or rebates. They have been subject to an extensive European jurisprudence.[83]

In *Hoffmann-La Roche*,[84] the Court was asked to analyse the commercial lure of a loyalty rebate offered by a dominant undertaking. Fidelity rebates are discounts that are conditional – regardless of the quantity bought – on the customer's promise to buy exclusively from one undertaking. According to the Commission, this had a discriminatory effect since Roche "offer[ed] two purchasers two different prices for an identical quantity of the same product depending on whether these two buyers agree or

[77] *Ibid.*, paras. 38–41. [78] *Ibid.*, para. 42. [79] *Ibid.* para. 44.
[80] See *IMS Health* v. *NDC Health*, Case C-418/01, [2004] ECR I-5039; and *Microsoft* v. *Commission*, Case T-201/04, [2007] ECRII-3601.
[81] Article 102[2] (c) TFEU.
[82] *United Brands* v. *Commission*, Case 27/76 (supra n. 8), paras. 204 et seq.
[83] For an overview, see A. Jones and B. Sufrin, *EU Competition Law: Text, Cases and Materials* (Oxford University Press, 2014), 454 et seq.
[84] *Hoffmann-La Roche* v. *Commission*, Case 85/76 (supra n. 5).

not to forego obtaining their supplies from Roche's competitors".[85] The Court agreed:

> The *fidelity* rebate, unlike *quantity* rebates exclusively linked with the volume of purchases from the producer concerned, is designed through the grant of a financial advantage to prevent customers from obtaining their supplies from competing producers. Furthermore the effect of fidelity rebates is to apply dissimilar conditions to equivalent transactions with other trading parties in that two purchasers pay a different price for the same quantity of the same product depending on whether they obtain their supplies exclusively from the undertaking in a dominant position or have several sources of supply.[86]

The Court here distinguished between legitimate "quantity rebates" and illegitimate "fidelity rebates". However, the dividing line between the two has never been easy to draw. This is illustrated by *Michelin I*.[87] Was a "target discount", that is: a discount that was given once the seller had achieved a given sales target, a quantitative or a loyalty discount? The Court found that the discount system operated by Michelin did "not amount to a mere quantity discount linked solely to the volume of goods purchased", as it "depended primarily on the dealer's turnover in Michelin tyres without distinction of category and not on the number".[88] However, neither was the rebate a clear fidelity rebate, as the Commission had not succeeded in demonstrating that the discount system was discriminatory.[89] In *Michelin II*,[90] the General Court appears to have followed this logic to its end by suggesting that while there is a presumption of legality for quantity discounts, they must nonetheless be subjected to a detailed analysis as to their potentially abusive character.[91]

[85] *Ibid.*, para. 80. [86] *Ibid.*, para. 90.
[87] *Michelin* v. *Commission*, Case 322/81 (supra n. 9). [88] *Ibid.*, paras. 72 and 89.
[89] *Ibid.*, para. 91. [90] *Michelin* v. *Commission*, Case T-203/01 (supra n. 4).
[91] *Ibid.*, paras. 58–9: "Quantity rebate systems linked solely to the volume of purchases made from an undertaking occupying a dominant position are generally considered not to have the foreclosure effect prohibited by Article [102 TFEU]. If increasing the quantity supplied results in lower costs for the supplier, the latter is entitled to pass on that reduction to the customer in the form of a more favourable tariff. Quantity rebates are therefore deemed to reflect gains in efficiency and economies of scale made by the undertaking in a dominant position. It follows that a rebate system in which the rate of the discount increases according to the volume purchased will not infringe Article [102 TFEU] unless the criteria and rules for granting the rebate reveal that the system is not based on an economically justified countervailing advantage but tends, following

The evolution of the case law thus shows a blurring of the traditional dichotomy between (per se legal) quantity discounts and (per se illegal) loyalty discounts.[92] The modern effects-based test has here introduced a more economic approach into the analysis of Article 102.

(d) Article 102 [2] (d) and "tying or bundling"

The fourth expressly mentioned illustration of an abusive behaviour outlaws the commercial practice of "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"*.[93] This mouthful is often simply referred to as "tying" and "bundling". While there is a subtle distinction between both commercial techniques,[94] both express themselves in "connecting" the sale of one product to the sale of another.[95]

We find a good illustration of this sales technique in *Tetra Pak II*.[96] The case involved a dominant manufacturer of cartons and carton-filling machines. Tetra Pak had tied the sale of the former to the sale of the latter – claiming that the machinery for packaging was indivisible from the cartons. The General Court rejected that claim. Finding that there were independent manufacturers specializing in cartons for machines from different manufacturers,[97] and that Tetra's own cartons could be used on different machines,[98] carton and carton-filling machines were considered

the example of a loyalty and target rebate, to prevent customers from obtaining their supplies from competitors."

[92] See *British Airways* v. *Commission*, Case C-95/04P, [2007] ECR I-2331, paras. 67–8.

[93] Article 102[2] (d) TFEU (emphasis added).

[94] E. Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart, 2010), 219: "The distinction between bundling and tying is technical. In the case of tying, one of the products, that is the tied product, can be purchased independently. In the case of bundling, no distinction is made between the purchases of the products involved. Either none of the products can be purchased independently of the other (pure bundling) or both products can be purchased independently but their joint sale gives customers a discount (mixed bundling)".

[95] The European Courts appear to use both terms interchangeably; see *Microsoft* v. *Commission*, Case T-201/04 (supra n. 80), para. 935.

[96] *Tetra Pak* v. *Commission*, Case T-83/91, [1994] ECR II-755. But see also *Hilti* v. *Commission*, Case T-30/89 (supra n. 15).

[97] *Tetra Pak* v. *Commission*, Case T-83/91 (supra n. 96), para. 82. Much of the argument concentrated on non-aseptic cartons.

[98] *Ibid.*, para. 132.

products that could be separately sold. And since their tying was not in line with commercial usage,[99] the dominant undertaking had abused its market power.[100]

This form of analysis was refined in *Microsoft* – one of the longer judgments of European law.[101] The case examined the choice of the software giant to tie a media player to its operating system. The General Court here had recourse to four analytical elements in showing an abuse of dominance. In addition to the existence of two separate products,[102] the Union competition authorities would need to demonstrate that the dominant undertaking "coerced" customers to buy the tied product by not giving them a choice (not) to obtain the product.[103] And even though the Windows Media Player was a media functionality that did not require consumers to pay extra, the Court found that "in consequence of the impugned conduct, consumers are unable to acquire the Windows client PC operating system without simultaneously acquiring Windows Media Player, which means that the condition that the conclusion of contracts is made subject to acceptance of supplementary obligations must be considered to be satisfied".[104] The third element of the test then examined whether this technique foreclosed competition for the bundled product,[105] while the fourth element analysed the absence of an objective justification for the seemingly abusive conduct.

This last element theoretically applies to all types of abuse and will be considered in the final section.

99 *Ibid.*, para. 137.

100 *Ibid.*, para. 140. The judgment was confirmed on appeal; see *Tetra Pak* v. *Commission*, Case C-333/94P (supra n. 53), where the Court even pointed out that (*ibid.*, para. 37) "[i]t must, moreover, be stressed that the list of abusive practices set out in the second paragraph of Article [102] of the Treaty is not exhaustive". "Consequently, even where tied sales of two products are in accordance with commercial usage or there is a natural link between the two products in question, such sales may still constitute abuse within the meaning of Article [102] unless they are objectively justified."

101 *Microsoft* v. *Commission*, Case T-201/04 (supra n. 80). The judgment contains 1,373 paragraphs of factual and legal arguments.

102 *Ibid.*, paras. 872 et seq.

103 *Ibid.*, paras. 945 et seq.

104 *Ibid.*, para. 961. For a criticism of the application of this second criterion in the *Microsoft* decision itself, see Rousseva, *Rethinking Exclusionary Abuses* (supra n. 94), 252: "the mere fact that consumers did not have to pay an extra price for [the Windows Media Player] and could also freely download an alternative media player meant that consumers had a choice".

105 *Microsoft* v. *Commission*, Case T-201/04 (supra n. 80), paras. 976 et seq.

4. Objective Justification: Apparently Abusive Behaviour?

Article 102 contains – unlike Article 101 – no separate paragraph dealing with possible justifications for abuses of a dominant position.[106] Article 102 thus appears to be an "absolute" prohibition. However, the European Courts do examine whether there exists an "objective justification" of the apparently abusive behaviour of a market leader.[107] The existence of unwritten grounds of justification is not uncommon and can be seen in other areas of European law.[108] And yet, the idea of objective justifications has remained "one of the most vague concepts associated with the application of Article [102]".[109]

In order to explain the European jurisprudence on the concept of objective justification, two jurisprudential lines are traditionally distinguished. According to a first line, the behaviour of a dominant firm is not considered abusive due to a special context. Thus: where a crisis within an industry leads to general supply shortages, the refusal to supply non-traditional customers has not been seen as abusive behaviour.[110] However, the European Courts insist that the special context must be "beyond the control of the dominant undertaking and which it cannot overcome by any means other than by adopting the conduct which is prima facie abusive".[111] Moreover, the special context justification has generally not been extended to public policy considerations. Thus: the fact that an undertaking may deal with products that are potentially dangerous for the health of consumers was not deemed an objective justification for

[106] Cf. *Atlantic Container Line and Others* v. *Commission*, Joined Cases T-191/98, T-212/98 to T-214/98, [2003] ECR II-3275, para. 1109: "Before considering those grounds for justification, it must be noted at the outset that there is no exception to the principle in [European] competition law prohibiting abuse of a dominant position. Unlike Article [101] of the Treaty, Article [102] of the Treaty does not allow undertakings in a dominant position to seek to obtain exemption for their abusive practices."

[107] For an analysis of the case law, see Rousseva, *Rethinking Exclusionary Abuses* (supra n. 94), Chapter 7.

[108] On the emergence of implied justifications within the free movement of goods provisions, see Chapter 9 – Sections 1(b) and 4(a) above.

[109] Rousseva, *Rethinking Exclusionary Abuses* (supra n. 94), 259. For an overview of the potential defences under Article 102, see: R. Nazzini, The Foundations of European Union Competition Law: The Objective and Principles of Article 102 (OUP; 2011), Chapter 9.

[110] *Benzine en Petroleum Handelsmaatschappij and others* v. *Commission*, Case 77/77, [1978] ECR 1513, esp. paras. 33 and 34.

[111] Rousseva, *Rethinking Exclusionary Abuses* (supra n. 94), 265.

the abusive conduct towards a competitor. For the undertaking will here need to explain why the special context was not addressed by the relevant public authorities.[112]

A second jurisprudential line concerns the "efficiency defence". In *British Airways*,[113] the European Court indeed appeared to use a relative concept of abuse when examining the legality of a system of discounts and bonuses established by a dominant undertaking. For according to the Court, "the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer".[114] However, other judgments have expressly pointed in the opposite direction.[115] The most elaborate discussion of the efficiency defence has taken place in *Microsoft*.[116] Here, the General Court appeared to accept the theoretical existence of an objective justification on the ground of productive or dynamic efficiencies. However, with regard to the practical application of the defence in this case it held that Microsoft had not shown "that the integration of Windows Media Player in Windows creates technical efficiencies or, in other words, that it 'lead[s] to superior technical product performance'".[117] And while the Commission has recently shown a positive attitude towards the efficiency defence under Article 102,[118] the legal parameters for this second objective justification have nonetheless remained very vague indeed.

[112] See *Tetra Pak* v. *Commission*, Case T-83/91 (supra n. 96), para. 84: "Moreover, even on the assumption, shared by the applicant, that machinery and cartons from various sources cannot be used together without the characteristics of the system being affected thereby, the remedy must lie in appropriate legislation or regulations, and not in rules adopted unilaterally by manufacturers, which would amount to prohibiting independent manufacturers from conducting the essential part of their business." See now Commission, "Guidance on Article [102]" (supra n. 25), para. 29: "Exclusionary conduct may, for example, be considered objectively necessary for health or safety reasons related to the nature of the product in question. However, proof of whether conduct of this kind is objectively necessary must take into account that it is normally the task of public authorities to set and enforce public health and safety standards. It is not the task of a dominant undertaking to take steps on its own initiative to exclude products which it regards, rightly or wrongly, as dangerous or inferior to its own product."

[113] *British Airways* v. *Commission*, Case C-95/04P (supra n. 92). [114] *Ibid.*, para. 86.

[115] *France Télécom* v. *Commission*, Case T-340/03 (supra n. 66), esp. para. 217.

[116] *Microsoft* v. *Commission*, Case T-201/04 (supra n. 80). [117] *Ibid*, para. 1159.

[118] For an attempt to provide such guidelines, see now Commission, "Guidance on Article [102]" (supra n. 25), para. 30. The Commission here suggests four criteria that parallel the four conditions under Article 101 (3).