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## Controlling Dominance in European Markets

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# Controlling Dominance in European Markets

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## **Abstract**

The theme of this Article addresses an area of European Union ("EU") law that has witnessed continuing complex questions for regulation: the role of law in the evolving processes of controlling dominance through competition laws in the liberalized markets of Europe. These markets offer new challenges for competition law, especially where new business platforms emerge. These markets also present new challenges in identifying how far a private law right of freedom to contract and rights to property can be reconciled with the demise of the state in providing essential services to citizens and the replacement of such services with new universal obligations provided by state and non-state (private) undertakings. Europe is in an exciting period of addressing a move away from a purely formal application of its laws on dominant positions to and a move closer towards a U.S.-style, effects-based approach. This Article sets the European debate in its legal and political context in order to address the challenges facing Europe.

# CONTROLLING DOMINANCE IN EUROPEAN MARKETS

*Erika Szyszczak\**

## INTRODUCTION

Fittingly for this tribute to Lord Slynn of Hadley, the last time Lord Slynn and I met was at the Fordham University School of Law, at the conference entitled “Fifty Years of European Community Law,” organized by Roger Goebel in February 2008.<sup>1</sup> Our paths had crossed many times, from early appearances in the Employment Appeal Tribunal in England, to the European Court of Justice (“ECJ”) in Luxembourg, and at academic conferences and in training sessions in the central and eastern European Accession States, especially in Slovenia, one of Lord Slynn’s favorite places for academic debate on European Union (“EU”) law and fine wines.

Lord Slynn was particularly adept at seeing the changes the enlargement of the EU would usher in. The theme of this Article addresses an area of EU law that has witnessed dramatic changes in the last decade of Lord Slynn’s life and poses continuing complex questions for regulation: the role of law in the evolving processes of controlling dominance through competition laws in the liberalized markets of Europe. These markets offer new challenges for competition law, especially where new business platforms emerge, but also in identifying how far a private law right of freedom to contract and rights to property can be reconciled with the demise of the state in providing essential services to citizens and the replacement of such services with new universal obligations provided by state and non-state (private) undertakings. Europe is in an exciting period of addressing a move away from a purely formal application of its laws on dominant positions to moving closer to a U.S.-style, effects-based

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1. The conference papers are published in 31 *FORDHAM INT’L L.J.* 1097, 1097–772 (2008) & 32 *FORDHAM INT’L L.J.* 345, 345–730 (2009).

approach. In recent years there has been more litigation against dominant firms not only by competitors, but also by national and regional regulatory bodies. This is particularly true in the United States and Europe,<sup>2</sup> where mergers and alleged anti-competitive conduct by dominant firms supplying essential goods and services may have an impact on economic development and innovation throughout the whole business food chain and the national economy. This, in turn, has led to a greater role for the courts in shaping a policy response to the regulation of dominant firms. Eager to claim back the policy initiative, regulators have considered guidelines for prioritizing and identifying the most important forms of anticompetitive behavior, which should be tackled by legal enforcement.

The topic has significance for trans-Atlantic audiences where similar debates ensue over the role of guidelines in the level and effectiveness of regulation of dominant firms in competitive markets.<sup>3</sup> This Article sets the European debate in its legal and political context in order to address the challenges facing Europe.

### I. THE EUROPEAN LANDSCAPE

The date for the completion of the Single European Market, December 31, 1992, marks a significant turning point for the modernization and direction of competition law in Europe. The following decade saw a wave of liberalization and privatization of markets previously owned, regulated, or controlled by state intervention,<sup>4</sup> alongside restructuring, merger and acquisition activity which allowed non-EU firms to enter and trade in EU markets previously protected from competition. The internal

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2. Seen, for example, in the recent use of competition law against Intel, Microsoft, and Qualcomm in both the United States and the European Union ("EU").

3. The Obama administration pledged to address dominance after years of alleged neglect under the Bush administration. See Don Clark & Jessica E. Vascellaro, *Silicon Valley Girds for New Antitrust Regime*, WALL ST. J., May 18, 2009, at B1. In the United States, as in Europe, there is a lack of consensus on how to regulate dominance, seen most vividly in the differences between the Department of Justice, which has attempted to produce guidelines, and members of the Federal Trade Commission. See Diane Bartz, *US Justice Dept Issues Monopoly Guide; FTC Dissents*, REUTERS, Sept. 8, 2008, <http://www.reuters.com/article/idUSN0845441220080908>.

4. See ERIKA SZYSZCZAK, *THE REGULATION OF THE STATE IN COMPETITIVE MARKETS IN THE EUROPEAN UNION* ch. 1 (2007).

market provisions were used to start the process of liberalization, but competition rules, especially articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”) (formerly articles 81 and 82 of the Treaty Establishing the European Community (“EC Treaty”))<sup>5</sup> are viewed as the

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5. Consolidated Version of the Treaty on the Functioning of the European Union arts. 101, 102, 2008 O.J. C 115/47, at 88–89 [hereinafter TFEU]; Consolidated Version of the Treaty Establishing the European Community arts. 81, 82, 2006 O.J. C 321 E/37, at 70–71 [hereinafter EC Treaty]. Two provisions of the original Treaty of Rome (“Treaty establishing the European Economic Community” or “EEC Treaty”) addressed the control of market power in what is now the EU: first, article 86 EEC, which was re-numbered article 82 EC and is now article 101 TFEU; and second, article 90 EEC, which was re-numbered article 86 EC and is now article 106 TFEU. Treaty establishing the European Economic Community arts. 86, 90, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter ECC Treaty]; EC Treaty, *supra*, arts. 82, 86, 2006 O.J. C 321 E, at 74–75, 76; TFEU, *supra*, arts. 101, 106, 2008 O.J. C 115, at 88–91. A separate provision addressed cartels and agreements and concerted practices: article 85 EEC, which was renumbered as article 81 EC and is now, after the Treaty of Lisbon, article 101 TFEU. EEC Treaty, art. 85, at 31; EC Treaty, *supra*, art. 81, 2006 O.J. C 321 E, at 70–71; TFEU, *supra*, art. 101, 2008 O.J. C 115, at 88–89. This Article uses the new numbering of the competition law provisions which came into operation after the Treaty of Lisbon was ratified in 2009. Article 101 TFEU (formerly article 81 EC) states:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make 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.

2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

TFEU, *supra*, art. 101 2008 O.J. C 115, at 88–89; EC Treaty, *supra*, art. 81, 2006 O.J. C 321 E, at 70–71. Article 102 TFEU (formerly article 82 EC) states:

crowbar, or can opener, for greater market liberalization. The move towards the liberalization of markets allowed for innovation in research and development, the creation of new consumer markets, and increased expectations from consumers in such markets. This in turn created new sites for the application of law, for example, in the relationship between competition and regulation in the EU internal market, the role of the Commission in the enforcement of the competition rules, and through sectoral inquiries, the enforcement and settlement<sup>6</sup> of

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Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common 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.

TFEU, *supra*, art. 102, 2008 O.J. C 115, at 89; EC Treaty, *supra*, art. 82, 2006 O.J. C 321 E, at 88.

6. See, e.g., Steve Lohr & James Kanter, *A.M.D.-Intel Settlement Won't End Their Woes*, N.Y. TIMES, Nov. 12, 2009, at B1 (discussing the recent settlement between Intel and its competitor, Advanced Micro Devices); Commission Press Release, IP/09/1941 (Dec. 16, 2009) (describing the Microsoft/Commission settlement on web browser choice); Press Release, NEC, NEC Withdraws its Complaint Submitted to the European Commission Relating to Qualcomm's Licensing Practice (Nov. 24, 2009).

The Commission may also settle competition investigations and complaints by the use of commitments. Cf. *Alrosa v. Commission*, Case T-170/06, [2007] E.C.R. II-2601, ¶ 1 (noting the challenge to commitments). Commitments have been undertaken in the utilities sector as a means of opening up markets and making them competitive. The Commission opened an investigation into the French dominant firm Gaz de France SA. The potential infringement consists of behavior that might prevent or reduce competition on downstream supply markets for natural gas in France through, in particular, a combination of long-term reservation of transport capacity and a network of import agreements, as well as through underinvestment in import infrastructure capacity. These suspected practices, constituting possible infringements of articles 101 and 102 TFEU (articles 81 and 82 EC), were allegedly engaged in by Gaz de France SA, its subsidiaries and companies under its control. Commission Press Release, MEMO/08/328 (May 22, 2008).

The Commission adopted an article 9 decision under Regulation No. 1/2003 that renders legally binding commitments offered by the French energy company GDF Suez to boost competition in the French gas market. In particular, the commitments address Commission concerns that GDF Suez may have closed off competitors from access to gas import capacity into France in breach of EU rules on abuse of a dominant market position. GDF Suez offered a major structural reduction of its long-term

competition disputes, and the private settlement of disputes between competitors and regulators, with new remedies for monitoring and enforcement. Of significance in Europe is the special role of incumbents in the newly liberalized markets, especially where their commercial activities overlap with supplying traditional services of general economic interest, renamed “universal service obligations” in the liberalization legislation<sup>7</sup> and with public service obligations in state aid law.<sup>8</sup> This in turn has created new roles for competition law, particularly in the debate on the balance between public and private enforcement of competition law, the balance between regulation and competition law principles,<sup>9</sup> and whether competition law and regulation may be used to fulfill socio-economic objectives in European integration.<sup>10</sup>

This explosion of new economic actors and economic relationships created pressures for the structure of the EU

reservations on French gas import infrastructure capacity. Commission Press Release, IP/09/1097 (July 8, 2009); *see also* Commission Press Release, MEMO/09/567 (Dec. 17, 2009).

7. *See* Jim Davies & Erika Szyszczak, *Universal Service Obligations and Public Service Obligations in Liberalised Markets*, in *DEVELOPMENTS IN SERVICES OF GENERAL INTEREST* (Erika Szyszczak et al. eds.) (forthcoming 2011).

8. *See generally* *Altmark Trans GmbH v. Nahverkehrsgesellschaft Altmark GmbH*, Case C-280/00, [2000] E.C.R. I-7747.

9. For example, as a result of the *Microsoft* decision and the cases on margin squeezes in the telecommunications sector, the Commission is increasingly turning competition law into a de facto price regulation tool, even where liberalized sectors are subject to regulation. *See, e.g.*, Hearing Officer Final Report COMP/38.784, *Wanadoo España v. Telefónica*, 2008 O.J. C 83/3; *Deutsche Telekom AG v. Commission*, Case T-271/03, [2008] E.C.R. II-477; *Telefónica and Telefónica España v. Commission*, Case T-336/07 (CFI Sept. 10, 2007) (not yet reported); *see also* Opinion of Advocate General Ruiz-Jarabo Colomer, *Commission v. Poland*, Case C-227/07, [2008] E.C.R. I-8403. The opinion concerns the regulation of the liberalized telecommunications sector and the application of the Access Directive to regulate interconnection. Council Directive No. 2002/19/EC, 2002 O.J. L 108/7. It also illuminates the contradiction in stimulating the opening-up process by imposing a statutory obligation to negotiate access to the networks without first analyzing whether the competitive process needs such intervention and where such intervention may stifle the spontaneity of agreements. *See* Opinion of Advocate General Ruiz-Jarabo Colomer, *TeliaSonera Finland Oyj*, Case C-192/08, [2009] E.C.R. I-\_\_\_\_ (delivered May 14, 2009) (not yet reported).

10. The wider public policy role for competition law has focused upon article 101 TFEU, and it is only in the process of modernization that a wider, consumer welfare interest in article 102 TFEU has started a debate on the role of controlling dominance in the market. As will be seen later in this Article, part of the new constitutional settlement of the EU has been to create a balance between social and economic priorities and to constitutionalize a set of European fundamental values.

internal market and was accompanied by a realization of the need to modernize EU competition law. The overall approach to modernization has been slow and piecemeal with attention focused upon improving the procedural aspects of the enforcement of competition law, rather than wider discussions of the substantive content and policy role of competition law.<sup>11</sup> The latter has been addressed in a less unified manner,<sup>12</sup> through the evolution of Commission policy and the ECJ's case law, and more recently by a Commission staff paper,<sup>13</sup> a report from the Economic Advisory Group for Competition Policy ("EAGCP"),<sup>14</sup> and guidelines on article 102 TFEU.<sup>15</sup> Article 86 EC (now article 106 TFEU) attracted even less attention, and yet its role in linking state monopolies and undertakings that are granted special and exclusive rights is linked with article 102 TFEU by ensuring that state intervention in competitive markets is subject to the rules of competition where an economic activity is involved<sup>16</sup> and the state intervention is not designed to supply a

11. See David J. Gerber, *Two Forms of Modernization in European Competition Law*, 31 *FORDHAM INT'L L.J.* 1235, 1256, 1263 (2008) (analyzing the procedural and substantive processes of modernization in competition law).

12. See *THE REFORM OF EC COMPETITION LAW: NEW CHALLENGES* (Ioannis Lianos & Ioannis Kokkoris eds., 2009) (discussing outstanding issues in competition law).

13. EUROPEAN COMMISSION, *DG COMPETITION DISCUSSION PAPER ON THE APPLICATION OF ARTICLE 82 OF THE TREATY TO EXCLUSIONARY ABUSES* (2005), available at <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> (last visited Aug. 30, 2010).

14. JORDI GAUL ET AL., *REPORT BY THE EAGCP: AN ECONOMIC APPROACH TO ARTICLE 82 EC* (July 2005), available at, [http://ec.europa.eu/competition/publications/studies/eagcp\\_july\\_21\\_05.pdf](http://ec.europa.eu/competition/publications/studies/eagcp_july_21_05.pdf) (last visited Aug. 30, 2010).

15. Commission Communication, 2009 O.J. C 45/7 (Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings).

16. See *Firma Ambulanz Glöckner v. Landkreis Südwestpfalz*, Case C-475/99, [2001] E.C.R. I-8089 (holding an organization providing emergency patient transport services to be engaged in economic activity and subject to competition rules); *Höfner v. Macrotron GmbH*, Case C-41/90, [1991] E.C.R. I-1979 (finding a public employment agency to be engaged in economic activity subject to competition law). On the other hand, public interest tasks not engaged in economic activity are shielded from EU economic law. See *Cañ v. Servizi ecologici porto di Genova SpA*, Case C-343/95, [1997] E.C.R. I-1547 (ruling anti-pollution surveillance fulfils a task typically belonging to a public authority and therefore is not economic activity subject to competition law); *SAT Fluggesellschaft mbH v. Eurocontrol*, Case C-364/92, [1994] E.C.R. I-43 (holding Eurocontrol, a company engaged in activities typically within the public authority, does not engage in an undertaking subject to article 106 TFEU). The concept of solidarity is also used to protect social and welfare activities from the full application of economic law. See *British United Provident Association Ltd. v. Commission*, Case T-289/03, [2008]



service of general economic interest.<sup>17</sup> The case law on article 106 TFEU continues to be sparse, its modern focus being not so much upon the interaction of article 106 TFEU with article 102 TFEU and the consequent concept of abuse of a dominant position, but on the funding of services of general economic interest and the interaction with the procurement rules and state aid.<sup>18</sup>

The last decade has seen a remarkable focus globally in addressing the question of how to regulate market power and identify when market power is abused. In the EU this debate has been captured in academic commentary on Commission policy and European court judgments, filtered through the program of “modernization” of competition law, and more recently in political debate over the appropriate balance between an “economic” agenda in which competitive markets play a central part, and a “social” and “fundamental rights” dimension.

A theme of the modernization agenda has been to move away from a formal enforcement agenda toward an effects-based, economic approach to the enforcement of competition law in Europe. Article 102 TFEU (article 82 EC) was the subject of

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E.C.R. II-81 (discussing the criteria considered for deciding which state services are those of general economic interest); *Federación Española de Empresas de Tecnología Sanitaria v. Commission*, Case C-205/03P, [2006] E.C.R. I-6295, ¶ 8 (arguing that the Spanish health system “operates according to the principle of solidarity in that it is funded from social security contributions and other State funding and provides services free of charge to its members on the basis of universal cover”); *AOK Bundesverband v. Ichthyol-Gesellschaft Cordes*, Case C-264/01, [2004] E.C.R. I-2493, ¶ 65 (holding “groups of sickness funds . . . do not constitute undertakings or associations of undertakings within the meaning of Article 81 EC when they determine fixed maximum amounts corresponding to the upper limit of the price of medicinal products whose cost is borne by sickness funds”); *Cisal di Battistello Venanzio v. Istituto nazionale per l’assicurazione contro gli infortuni sul lavoro*, Case C-218/00, [2002] E.C.R. I-691 (holding that the *Istituto nazionale per l’assicurazione contro gli infortuni sul lavoro* “fulfils an exclusively social function” and is therefore not engaged in economic activity subject to competition law); *Poucet v. Assurances Générales de France*, Joined Cases C-159/91 & C-160/91, [1993] E.C.R. I-666 (ruling that certain organizations charged with the management of social security schemes do not fall within the concept of undertaking as described in articles 85 and 86 of the EC Treaty).

17. See *British United Provident Association Ltd. v. Commission*, Case T-289/03, [2008] E.C.R. II-81, ¶ 1 (“[A] State measure necessary for the protection of a mission of general economic interest could not be characterised as State aid.”); *THE CHANGING LEGAL FRAMEWORK FOR SERVICES OF GENERAL INTEREST IN EUROPE: BETWEEN COMPETITION AND SOLIDARITY* (Markus Krajewski et al. eds., 2009).

18. For a discussion of these two topics, see SZYSZCZAK, *supra* note 4, at chs. 6–7.

scrutiny first by the Global Competition Law Centre,<sup>19</sup> second by a series of roundtable discussions organized by the Organisation for Economic Co-operation and Development during the 2000s, and third by the EAGCP.<sup>20</sup> Finally, the Commission published a staff discussion paper on article 82 EC in 2005.<sup>21</sup> The paper was not a consultative document, but nevertheless attracted comment from over one hundred practitioners and academics,<sup>22</sup> with the Commission conducting a public hearing in June 2006.<sup>23</sup> The document was controversial and did not attract consensus, even within the Commission. After a lapse of three years, on December 3, 2008, the Commission adopted a guidance paper<sup>24</sup> to set out its enforcement priorities on article 102 TFEU. Unlike the other documents, the guidance paper was not subject to consultation or comment before its release. The legal status of this guidance is untested<sup>25</sup> and the institutional capacity of the Commission to deliver policy changes has been questioned.

19. GLOBAL LAW COMPETITION CENTRE, RESEARCH PAPERS ON ARTICLE 82 EC (2005) *available at* <http://www.coleurop.be/content/gclc/documents/GCLC%20Research%20Papers%20on%20Article%2082%20EC.pdf>.

20. GAUL ET AL., *supra* note 14.

21. European Commission, *supra* note 13.

22. See European Commission, Article 82 Review, Comments on the public consultation on discussion paper on the application of Article 82 to exclusionary abuses (March 2006) *available at* <http://ec.europa.eu/competition/antitrust/art82/contributions.html> (last visited Aug. 20, 2010) (listing the responses to the public consultation of the Paper).

23. See European Commission, Article 82 Review, Public Hearing on Article 82, June 14, 2006, *available at* <http://ec.europa.eu/competition/antitrust/art82/hearing.html> (providing video recordings of the hearing).

24. Commission Communication, *supra* note 15, 2009 O.J. C 45/7.

25. Indeed, in the *Intel* decision, the Commission stated that the guidance paper is not intended as a statement of law and that the ultimate interpretation of article 102 TFEU rests with the General Court and ECJ. Commission Decision No. COMP/37.990, *slip op.* ¶ 916 (Eur. Comm'n May 13, 2009), *available at* [http://ec.europa.eu/competition/sectors/ICT/intel\\_provisional\\_decision.pdf](http://ec.europa.eu/competition/sectors/ICT/intel_provisional_decision.pdf) (provisional non-confidential version). The Commission states further that the guidance paper is intended to set priorities for future enforcement, and does not apply to cases initiated before the publication of the guidance paper. *Id.* See also the warning delivered by Advocate General Kokott:

Vodafone argues that an answer to the first question is unnecessary as the legal position has already been clarified by the interpretation guidelines published by the Commission. On that point, it must be observed, first, that communications from the Commission are not legally binding and, therefore, are incapable of anticipating interpretation by the Court in the course of proceedings under Article 234 EC. Second, even if the legal position is clear, a reference for a preliminary ruling is admissible; there is at most the possibility

The focus upon the Commission's enforcement strategy, however, only tells half the story, since the history of the enforcement of abuse of a dominant position in the EU is one not so much of public enforcement strategies, but of private litigation, often at the national level, brought by complaints from competitors.

The EU position on *how* to control dominance in the market is different from other competition and antitrust regimes because of the need to control both private and public power in the market place, as well as devise the framework for the regulation of hybrid forms of power, where different degrees of public and private economic activity provide essential welfare and public services in competitive, liberalized markets. Yet, in both the public and private regulatory models there is a lack of clarity in the objectives of the regulation of dominant positions in Europe.

## II. *THE FUTURE ROLE OF COMPETITION POLICY IN THE EU*

The debate over the regulation of dominance in the EU needs to be set against the historical and cultural background of the rapid economic changes that have taken place in Europe over the last twenty years. The original numbering of the articles of the Treaty Establishing the European Economic Community may have changed, but the content of the competition law provisions in the basic treaty provisions has defied any significant rewording. Instead, the Commission was entrusted with the flexibility and evolution of competition law through day-to-day management of case handling and policy-making, enforcement and the use of soft governance techniques in the form of notices, communications, or staff papers. These processes gave flexibility to the evolution of competition law, but they lacked transparency and democratic input, and have been criticized where the Commission allegedly attempts to change the direction of competition policy.

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that the Court might give its decision by reasoned order in accordance with Article 104(3) of the Rules of Procedure of the Court of Justice. Opinion of Advocate General Kokott, *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, Case C-8/08, [2009] E.C.R. I-4529, ¶ 29.

The European Courts (originally the Court of First Instance (“CFI”) but after the Treaty of Lisbon renamed the General Court) and the European Court of Justice review the legality of the Commission’s actions and through the preliminary ruling procedure of article 267 TFEU (article 234 EC) provide definitions and guiding principles on the application of competition law in Europe. However, the use of Article 267 TFEU has resulted in ad hoc case law. Judicial review focuses on the Commission’s use of its power and assessment of evidence by the General Court. This review has occurred without the benefit of the Advocates’ General input into the wider teleological consequences of a ruling. Consequently, the case law has a limited role in determining a normative element to competition law.

Over the years, competition law has moved through the hierarchy of EC Treaty rules to establish itself as a fundamental part of the establishment of an internal market.<sup>26</sup> Article 3(1)(g) EC stated: “[T]he activities of the Community shall include . . . a system ensuring that competition in the internal market is not distorted.”<sup>27</sup> The ECJ has described this as a “fundamental provision.”<sup>28</sup> In *ADBHU*, the Court acknowledged that “[t]he principles of free movement of goods and competition, together with freedom of trade as a fundamental right, are general principles of Community law, of which the Court ensures observance.”<sup>29</sup>

Thus competition policy has traditionally been seen as complementing and promoting the aims of European integration.<sup>30</sup> This inevitably creates conflicts where states wish to promote a stronger interventionist economic agenda and when interest groups express a political view that free markets may not

26. See *Eco Swiss China Time Ltd. v. Benetton Int’l NV*, Case C-126/97, [1999] E.C.R. I-3055, ¶ 36 (“according to . . . Article 3(1)(g) EC, Article 81 of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market.”).

27. Consolidated Version of the Treaty Establishing the European Community art. 3(1)(g), 2002 O.J. C 325/33, at 40 [hereinafter EC Treaty 2002 Consolidated Version].

28. *Courage Ltd. v. Crehan*, Case C-453/99, [2001] E.C.R. I-6297, ¶ 20.

29. *Procureur de la République v. Ass’n de défense des brûleurs d’huiles usagées*, Case 240/83, [1985] E.C.R. 531, ¶ 9.

30. Claus Dieter Ehlermann, *The Contribution of EC Competition Policy to the Single Market*, 29 COMMON MARKET L. REV. 257, 259 (1992).

always be the best vehicle for delivering a social agenda. Competition policy has also assumed a role in promoting various EU policies, for example environmental protection, social protection, and industrial policy. In relation to article 102 TFEU, the objectives of controlling dominance in the market have not been articulated in a clear or coherent manner. Indeed, O'Donoghue and Padilla argue that it was not until the Commission's staff discussion paper of 2005 that the Commission set out the core objectives of article 102 TFEU, and then only in relation to exclusionary abuses.<sup>31</sup>

#### A. *The Treaty of Lisbon of 2009: Downgrading Competition?*

The objectives of competition law have been affected by the Treaty of Lisbon. This treaty changed the status of competition law by removing it from one of the activities of the EU.<sup>32</sup> The EC Treaty was largely reproduced in the TFEU, with the Treaty on European Union ("TEU") setting out the fundamental principles on which the EU is based.<sup>33</sup> Article 3(3) TEU states, "[t]he Union shall establish an internal market."<sup>34</sup> Thus, in the new legal order, references to a system of undistorted competition have been deleted in the treaties' main bodies. Instead, competition is mentioned in Protocol No. 27 on the internal market and competition.<sup>35</sup> Barents asks whether the removal of the principle of undistorted competition to one of the "barns" of the treaties has removed the constitutional value of competition law as one of the cornerstones of the economic constitution of the EU.<sup>36</sup>

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31. ROBERT O'DONOGHUE & A JORGE PADILLA, *THE LAW AND ECONOMICS OF ARTICLE 82 EC 4* (2006).

32. Article 3(1)(g) EC had stated that "the activities of the Community shall include a system ensuring that competition in the internal market is not distorted." EC Treaty 2002 Consolidated Version, *supra* note 27.

33. TFEU, *supra* note 5, O.J. C 115; EC Treaty, *supra* note 5, 2006 O.J. C 321 E; Consolidated Version of the Treaty on the European Union, 2008 O.J. C 115/13 [hereinafter TEU post-Lisbon].

34. TEU post-Lisbon, *supra* note 33, art. 3(3), 2008 O.J. C 115, at 17.

35. *Id.* Protocol 27, at 309.

36. René Barents, *Constitutional Horse Trading: Some Comments on the Protocol*, in *VEWS OF EUROPEAN LAW FROM THE MOUNTAIN* 123, 126 (Bulterman et al. eds., 2009).

A protocol has the same legal status as the TFEU and is considered an integral part of the treaty.<sup>37</sup> The background history to the Treaty of Lisbon suggests that there was a deliberate political attempt to downgrade the role of competition in the EU. The relegation of competition to a protocol was engineered by interventions by President Sarkozy of France, who not only gave a rhetorical denunciation of the focus of European integration in favoring economic considerations over social welfare goals,<sup>38</sup> but also suggested that competition law should be refocused in favor of a national industrial policy.<sup>39</sup> In response, the then Commissioner for competition policy, Neelie Kroes, gave a sharp response: it would be business as usual.<sup>40</sup>

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37. According to Article 51 TEU, “[t]he Protocols and Annexes to the Treaties shall form an integral part thereof.”

38. Support for greater emphasis on integration’s social aspects had already been seen in the earlier, difficult adoption of Directive 2006/123/EC, 2006 O.J. L 376/36 and in the Polish interventions in the original draft of a treaty establishing a European constitution. The perceived conflict over prioritizing the economic over the social has been an enduring feature of European integration since the Paris Summit of 1972 and highlighted in raw debates over the content of EU treaties and secondary law, as well what is perceived as the bias in court judgments.

39. At a press interview speaking of the Protocol, Sarkozy is reported as saying: This perhaps gives a little more humanity to Europe. Because as an ideology, as dogma, what did competition give to Europe? It has given less and less to the people who vote at the European elections, and less and less to the people who believe in Europe. There was perhaps a need to reflect. I believe in competition, I believe in markets, but I believe in competition as a means and not an end in itself. This may also give a different legal direction to the Commission. That of a competition that is there to support the emergence of European champions, to carry out a true industrial policy.

Alan Riley, *The EU Reform Treaty and the Competition Protocol: Undermining EC Competition Law*, CEPS POLICY BRIEF (Centre for European Policy Studies, Brussels), Sept. 2009, at 4 (quoting President Sarkozy).

40. Neelie Kroes said:

An Internal Market without competition rules would be an empty shell—nice words, but no concrete results.

The Protocol on Internal Market and Competition agreed at the European Council clearly repeats that competition policy is fundamental to the Internal Market. It retains the existing competition rules which have served us so well for 50 years. It re-confirms the European Commission’s duties as the independent competition enforcement authority for Europe.

Now I would like to get back to the job. The Commission will continue to enforce Europe’s competition rules firmly and fairly: to bust cartels and monopolies, to vet mergers, to control state subsidies. That is in the interests of our Internal Market. It is in the interests of European citizens and consumers, it is what Europe’s business community quite rightly expects and

The Commission's views on policy setting and on prioritizing antitrust law enforcement are confusing in the light of modern competition law's aims. While embarking upon a modernization program, the Commission, in official policy documents and in practice, has not necessarily changed its old approach of protecting "competition on the merits."<sup>41</sup> The Commissioner's response does not address whether removing article 3(1)(g) EC from the treaty's main body affects the aims of controlling dominance in the market by ensuring that there is competition, that markets are not foreclosed, and that barriers to an integrated market are not created.<sup>42</sup> It also does not answer the question as to whether the modernization process in EU competition law will move closer to the U.S. model for antitrust law of a consumer-welfare-as-economic-efficiency approach, which the Commission argues motivates the EU modernization process. Although the Commission can attempt an enforcement agenda, the litigation agenda will continue to be dominated by complaints from private bodies, usually competitors, and attention will be focused on the European courts' responses to the challenges posed by changing markets. Courts will play an important role in defining the EU's values in the future. After decades of neglect, the provisions addressing dominance in the market have moved to the spotlight as issues of consumer welfare in private markets and of competition in public markets take a significant place in the discourse on the role of modern competition law.

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deserves, and it is a firm foundation for Europe's prosperity, notably by ensuring fair conditions for international investment.

Neelie Kroes, European Commission for Competition, Statement on results of June 21–22 European Council—Protocol on Internal Market and Competition (June 23, 2007).

41. This phrase is used in Guidance on the Commission's enforcement priorities in applying article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, *supra* note 15, ¶¶ 1, 6, and by then Competition Commissioner Neelie Kroes at the Fordham Corporate Law Institute. Neelie Kroes, Preliminary Thoughts on Policy Review of Article 82, Speech at the Fordham Corporate Law Institute (Sept. 23, 2005); *see also* Organisation for Economic Co-operation and Development [OECD], *Competition on the Merits*, OECD Doc. DAF/COMP(2005)27 (Mar. 30, 2006), available at <http://www.oecd.org/dataoecd/7/13/35911017.pdf>.

42. *See* Kroes, *supra* note 41.

## III. ARTICLE 102 TFEU (ARTICLE 82 EC): THE QUIET LIFE

Article 102 TFEU (article 82 EC) does not prevent holding a dominant position, but it does prevent abuse of such a position.<sup>43</sup> Although article 102 TFEU does not contain exemptions or justifications, the ECJ has held that conduct that *prima facie* infringes article 102 TFEU may be objectively justified where a dominant firm is acting in a proportionate manner to protect its own commercial interests<sup>44</sup> or to ensure safety.<sup>45</sup> In the Commission's 2005 discussion paper, the Commission added a new justification where a dominant firm can show that its conduct produces efficiencies that outweigh the negative effects on competition.<sup>46</sup> This is known as the "efficiency defense" and is recognized in U.S. law.<sup>47</sup>

In the European Economic Community's ("EEC") early years, enforcement of article 102 TFEU was almost non-existent.<sup>48</sup> The few cases that reached the Commission and the courts were characterized primarily by the use of article 102 TFEU (article 82 EC) against non-EU multinational firms.<sup>49</sup> A leading commentator, René Joliet, who later became judge at the Court of Justice, argued that the original article 102 TFEU was designed

43. TFEU, *supra* note 5, art. 102, 2008 O.J. C 115, at 47; EC Treaty, *supra* note 5, art. 82, 2006 O.J. C 321 E, at 37.

44. United Brands Co. and United Brands Cont'l B.V. v. Commission, Case C-27/76, [1978] E.C.R. 207, ¶¶ 189–90.

45. Hilti AG v. Commission, Case C-53/92P, [1994] E.C.R. I-667.

46. EUROPEAN COMMISSION, *supra* note 13, ¶ 77.

47. William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 ANTITRUST L.J. 207, 209 (2003).

48. See generally I. Samkalden & I.E. Druker, *Legal Problems Relating to Article 86 of the Rome Treaty*, 3 COMMON MKT. L. REV. 158 (1966). The first Commission decisions were against GEMA I, GEMA II, GEMA III, and Continental Can. Commission Decision No. 71/224/EEC, [1971] O.J. L 134/15 (GEMA I); Commission Decision No. 72/268/EEC, [1972] O.J. L 166/22 (GEMA II); Commission Decision No. 82/204/EEC, [1981] O.J. L 94/12 (GEMA III); Commission Decision No. 72/21/CEE, [1971] O.J. L 7 (Continental Can).

49. See, e.g., Hugin Kassaregister AB & Hugin Cash Registers Ltd. v. Commission, Case 22/78, [1979] E.C.R. 1869 (a Swedish firm before accession); United Brands v. Commission, Case 27/76, [1978] E.C.R. 207; Istituto Chemioterapico Italiano SpA & Commercial Solvents Corp. v. Commission, Joined Cases 6/73 & 7/73, [1974] E.C.R. 223. See also Imperial Chem. Indus. Ltd. v. Commission, Case 48/69, [1972] E.C.R. 619 (a UK firm before UK accession). The *Imperial Chemical Industries* case is especially interesting since it involved the use of article 101 TFEU against a multinational firm accused of concerted practices in an oligopolistic market, a forerunner of the attempts to identify issues of tacit collusion and joint dominance under article 102 TFEU. See *id.*



to tackle only *exploitative* conduct, as reflected in the original French and German versions of the EEC Treaty.<sup>50</sup> Appeals against the Commission decisions revolved around the legality of the Commission's actions and procedures and left few opportunities for the Court to develop a coherent jurisprudence on the policy underpinning article 102 TFEU as the Court's attention was turned to the definitions involved in the skeletal provisions of article 102 TFEU.

The handful of cases emanating from disputes at the national level reached the Court via article 267 TFEU (article 234 EC).<sup>51</sup> Many of the cases involved intellectual property rights, raising questions of whether such rights should be addressed by specialized concepts and whether a normative dimension can be applied from these rulings to all cases of abuse of a dominant position. As Vickers points out, reliance on litigation neglected the normative dimension to controlling dominance in the internal market; "there would be a danger that competition law towards abuse of dominance could become a set of ad hoc and unpredictable rules that are consistent neither with each other nor with the policy goals of the law."<sup>52</sup>

The disadvantages of using litigation as the policy approach for controlling abuse of a dominant position in the EU are seen in cases which extended the scope of article 102 TFEU beyond the natural wording to include changes to the structure of the market.<sup>53</sup> Unlike section 2 of the Sherman Act of 1890,<sup>54</sup> which captures behavior that may result in the acquisition of monopoly power, article 102 TFEU only captures behavior once a dominant position exists.<sup>55</sup> There was also an underlying question about when article 102 TFEU *should* be used. Criticism was leveled at the implementation of article 102 TFEU through litigation. The

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50. RENE JOLIET, *MONOPOLIZATION AND ABUSE OF DOMINANT POSITION* (1970). For a detailed discussion of the early intentions of the drafters of the EEC Treaty, see P. Akman, *Searching for the Long-Lost Soul of Article 82 EC*, 29 OXFORD J. OF LEGAL STUD. 267 (2009).

51. TFEU, *supra* note 5, art. 267, 2008 O.J. C 115, at 164; EC Treaty, *supra* note 5, art. 234, 2006 O.J. C 321 E, at 147–48.

52. John Vickers, *Abuse of Market Power*, 115 ECON. J. F244, F247 (2005).

53. See, e.g., *Italiano SpA & Commercial Solvents Corp. v. Commission*, Joined Cases 6–7/73, [1974] E.C.R. 223, ¶ 32; *Continental Can v. Commission*, Case 6/72, [1973] E.C.R. 215, ¶ 20–26.

54. Sherman Antitrust Act, 15 U.S.C. § 2 (1980).

55. See Vickers, *supra* note 52, at 247.

Commission and the courts took a formalistic approach where abuse of a dominant position was assessed based on effects on the competitive structure of the market or the conduct's form, rather than on the actual effects on consumers.<sup>56</sup> The case law indicates that article 102 TFEU was perceived as being used by the Commission and courts to protect competitors, not competition.<sup>57</sup> This is seen in the early case of *Commercial Solvents*<sup>58</sup> and in the more recent case of *British Airways*.<sup>59</sup> In contrast, the United States' Sherman Act does not prohibit the exercise of legitimate monopoly power; instead, success in a competitive market is allowed to flourish.<sup>60</sup> What *is* of concern to U.S. regulators is the use of antitrust law to protect and promote consumer welfare and efficiency—and this underpins the enquiry as to whether there is illegal acquisition or maintenance of a monopoly position in the market which produces anti-competitive effects.<sup>61</sup>

Very few issues of individual consumer harm have emerged in the discussions of the *purpose* of article 102 TFEU, in litigation from consumers claiming damages, or in an injunction to compensate for private harm suffered by the abuse of a dominant position.<sup>62</sup> Even now, after the Commission's new guidelines,

56. See *Michelin v. Commission*, Case T-203/01, [2003] E.C.R. II-4071, ¶¶ 236–37; *AKZO v. Commission*, Case C-62/86, [1991] E.C.R. I-3359, ¶¶ 6–7 (defining dominant position in terms of effect on the market); *Hoffmann-La Roche v. Commission*, Case 85/76, [1979] E.C.R. 461, at 467.

57. See Eleanor M. Fox, *We Protect Competition, You Protect Competitors*, 26(2) WORLD COMPETITION 149 (2003); Eleanor M. Fox, *What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 20 ANTITRUST L.J. 371, 373 (2002).

58. *Commercial Solvents*, [1974] E.C.R. 223, ¶ 32.

59. *British Airways v. Commission*, Case C-95/04P, [2007] E.C.R. I-2331, ¶ 133.

60. See *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 399 (2004).

61. See Frank H. Easterbrook, *When is it Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 COLUM. BUS. L. REV. 345, 345 (2003) (arguing that courts should not determine whether corporations have engaged in exclusionary practices).

62. Private enforcement of article 102 TFEU depends on an individual's right to sue based on legal standing and harm suffered. Although injunction may be seen as a useful remedy, the usual remedy for a breach of competition rules will be damages to compensate for harm suffered. Private enforcement does not address any of the central ideas of the modern purpose of article 102 TFEU counteracting general welfare losses, for example, where an abuse of a dominant position can lead to a decrease in innovation and a loss in dynamic efficiency where consumers are deprived of better quality products. An argument has been made for the optimal use of private enforcement of article 102 TFEU where there is a strong correlation between individual damages and negative welfare effects of the dominant firm's behavior. See Mark-Oliver

criticisms are leveled at the lack of clarity of the *purpose* of article 102 TFEU and how an effective consumer voice can be found.<sup>63</sup>

During the 1980s and 1990s, the Commission showed greater interest in the enforcement of article 102 TFEU, and new concepts emerged to capture perceived threats to the internal market. As the case law shows, neither the Commission nor the European courts have wholeheartedly embraced clear, consistent criteria for managing the role of article 102 TFEU.

In contrast to the soft law guidance and *ex ante* guidance in the form of block exemptions provided under article 101 TFEU, and guidelines for mergers, the Commission guidance on article 102 TFEU is remarkable for its paucity<sup>64</sup> despite the fact that the Commission used soft governance techniques in its 1965 Memorandum on Concentrations issued to define abuse under the EEC Treaty.<sup>65</sup> Similarly, article 102 TFEU lagged behind article 101 TFEU (article 81 EC) with respect to using economic assessment of the effects of a dominant undertaking's behavior on the market.<sup>66</sup> This weakness is acknowledged in the preliminary public announcements on why article 102 TFEU was to be modernized.<sup>67</sup> On the other hand, the Commission and the courts have allowed article 102 TFEU to evolve and address modern competition issues by considering new concepts. The next section of this Article addresses whether these concepts have been rigorously thought through, are sustainable, and are sufficiently flexible to provide generic responses to sector-specific dominance issues and allow for the modernization of article 102 TFEU.

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Mackenrodt, *Public vs. Private Enforcement of Antitrust Law in Unilateral Conduct Cases* 32 (Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No.09-11, 2009), available at <http://ssrn.com/abstract=1470611>.

63. See Liza Lovdahl Gormsen, *The Conflict between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC*, 3 *EUR. COMPETITION J.* 329, 344 (2007); Laura Parret, *Do We (Still) Know What We Are Protecting?*, 49 (Tilec Discussion Paper, University of Tilburg, The Netherlands, 2009), available at [http://papers.ssrn.com/so13/papers.cfm?abstract\\_id=1379342](http://papers.ssrn.com/so13/papers.cfm?abstract_id=1379342).

64. Although guidance is available in the liberalization of markets process, as seen in notices published in the telecommunications and postal sectors.

65. The memorandum is dated December 1, 1965 but is usually referred to as the 1966 Memorandum from the date of its publication.

66. Kroes, *supra* note 41; Philip Lowe, Speech at the Thirtieth Annual Conference on International Antitrust Law and Policy, Fordham Corporate Law Institute (Oct. 23, 2003).

67. See Kroes, *supra* note 41; Lowe, *supra* note 66.

## IV. ADAPTATION: SURVIVAL OF THE FITTEST?

A. *Special Responsibility*

The most important legal doctrine that has emerged in relation to article 102 TFEU (article 82 EC) is the idea that a dominant undertaking has a special responsibility to the market. This doctrine highlights the difference in thinking between the United States and the EU regarding the existence of dominant firms. Kavanagh, Marshall, and Niels argue that the notion that a dominant firm is a threat to competition is deeply embedded in the ordo-liberal school of thought, which influenced the early development of competition law in Europe.<sup>68</sup> Individual freedom is the primary objective of competition policy: “A dominant firm is in effect regarded as the proverbial bull in the china shop—it must be restrained to prevent it from inflicting further damage to its already fragile surroundings.”<sup>69</sup>

The concept of special responsibility was first mentioned in the *Michelin I* case in 1983.<sup>70</sup> The special responsibility is not intended to impair undistorted competition in the market.<sup>71</sup> Such a responsibility is related to EU competition law protecting competitors in the market and the competitive structure of the market. It goes further than pure competition law principles in that it suggests a responsibility or duty placed upon private undertakings normally associated with public law duties, suggesting that in certain situations private power should exercise self-restraint.<sup>72</sup>

The actual content of the special responsibility duty is vague. In *Compagnie Maritime Belge*<sup>73</sup> the CFI stated that the special responsibility of dominant undertakings is that they are subject to article 102 TFEU when non-dominant undertakings are not. This

68. See James Kavanagh, Niel Marshall & Gunnar Niels, *Reform of Article 82 EC—Can the Law and Economics Be Reconciled?*, in *ARTICLE 82 EC: REFLECTIONS ON ITS RECENT EVOLUTION 3* (Ariel Ezrachi ed., 2009).

69. Gunnar Niels & Helen Jenkins, *Reform of Article 82: Where the Link between Dominance and Effects Breaks Down* 26 *EUR. COMPETITION L. REV.* 605, 605 (2005).

70. *Michelin v. Commission*, Case 322/81, [1983] E.C.R. 3461, ¶ 56.

71. *Id.*

72. See GIULIANO AMATO, *ANTITRUST AND THE BOUNDS OF POWER: THE DILEMMA OF LIBERAL DEMOCRACY IN THE HISTORY OF THE MARKET* 65–66 (1997).

73. *Compagnie Maritime Belge Transports v. Commission*, Joined Cases T-24–26 & 28/93, [1996] E.C.R. II-1201, ¶¶ 106–07.

implies that there should be a degree of certainty as to the scope of article 102 TFEU. But in fact, an uncertainty is created by the lack of specificity of the obligations imposed by the idea of a special relationship created in the case law.

A special relationship suggests that the obligation applies *ex ante*, and is a continuing obligation. This creates problems where an undertaking is found to be in a dominant position under unusual market circumstances, or where a low market share is used to identify dominance in the market.<sup>74</sup> The obligation is questionable given that dominance in itself is not illegal and there are *legal* means by which a dominant undertaking can maintain or even improve its dominance.

The concept of special responsibility would be better suited to play a part of the concept of super dominance, which is discussed in the next section of this Article. It has also been questioned whether the idea of special responsibility has a role to play in the modernization of article 102 TFEU, which focuses upon consumer welfare and takes a more economic-effects approach to the enforcement.<sup>75</sup> As Kavanagh et al. point out, modern economic theory shows that competitive dynamics function even where large firms are present in markets and that large firms can improve markets' competitive dynamics and efficiency, thereby bringing consumer benefits.<sup>76</sup>

### B. *Superdominance*

A better understanding of the concept of special responsibility of dominant undertakings would be to attach the idea to another concept developed by the Commission and the courts: superdominance. Where undertakings have very large market shares, one sees an idea of even greater responsibility

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74. In EU competition law there is no safe harbor for low market shares because the Commission and courts will take other indicators into consideration. *See, e.g.*, British Airways v. Commission, Case T-219/99, [2003] E.C.R. II-5917, ¶ 211. The Commission and CFI upheld a finding of dominance on a market share of 39.7 percent. *Id.*

75. Rafael Allendesalazar, *Can We Finally Say Farewell to the "Special Responsibility" of Dominant Companies?*, in *EUROPEAN COMPETITION LAW ANNUAL 2007: A REFORMED APPROACH TO ARTICLE 82 EC 319* (Clause Dieter Ehlermann & Mel Marquis eds., 2008).

76. *See* Kavanagh et al., *supra* note 68, at 3.

toward the market. In the Commission's *Microsoft*<sup>77</sup> decision the Commission identifies the market share as over ninety percent of the relevant market, putting Microsoft in a "quasi-monopoly" position and an "overwhelmingly dominant position."<sup>78</sup>

At the national level, the United Kingdom's Competition Appeal Tribunal ("CAT") has used a variety of different terms to capture the market power of a firm holding a very high percentage share of a market: "quasi-monopoly," "dominance approaching a monopoly," "super-dominance," and "overwhelming dominance."<sup>79</sup> In *Napp Pharmaceutical Holdings Ltd Subsidiaries v. Director General of Fair Trading*,<sup>80</sup> the undertaking held ninety percent of the market share and had only one significant competitor during the period of the abuse of the dominant position. Here the CAT applied UK antitrust law (which is identical in wording to article 102 TFEU) and held that Napp is a superdominant undertaking in both the hospital and community segments, with, in consequence, a particularly onerous responsibility not to further impair the structure of the existing feeble competition.<sup>81</sup>

The European courts have not entirely embraced super dominance. The term "super dominance" was first used by Advocate General Fennelly in *Compagnie Maritime Belge*,<sup>82</sup> where members of a liner conference held a ninety percent market share. The Advocate General argued that a superdominant company had a duty not to preclude competition in the market.<sup>83</sup> The term "superdominance" was not used by the Court. Instead the Court reverts back to the language of special responsibility: "[T]he undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on

77. Commission Decision No. C(2004)900, *slip op.* (Eur. Comm'n Apr. 21, 2004), cited in 2007 O.J. L 32/23 (*Microsoft*), available at <http://ec.europa.eu/competition/antitrust/cases/decisions/37792/en.pdf>.

78. *Id.*

79. See, e.g., Competition Commission Appeal Tribunal Case No. 1001/1/1/01, 2002, ¶ 219 (citing Opinion of Advocate General Fennelly, *Compagnie Maritime Belge Transports SA v. Commission*, Joined Cases C-395-96/96P, [2000] E.C.R. I-1365).

80. *Id.* ¶ 338.

81. *Id.* ¶ 337.

82. Opinion of Advocate General Fennelly, *Compagnie Maritime Belge*, [2000] E.C.R. I-1365, ¶ 137.

83. *Id.*

the common market.”<sup>84</sup> In *Tetra Pak I*<sup>85</sup> the Court refers to a position of “quasi-monopoly” whereas in *Irish Sugar* the Court of First Instance refers to the “extensive” dominant position.<sup>86</sup>

Article 102 TFEU does not distinguish the behavior of a superdominant undertaking from that of a dominant undertaking. Nor does article 102 TFEU refer to *degrees* of dominance or different responsibilities of dominant undertakings. The Court in *Tetra Pak II* held that the scope of the special responsibility of a dominant undertaking should be assessed in the special circumstances of each case.<sup>87</sup> In its guidance the Commission suggested that the *degree* of dominance will be a factor in establishing foreclosure effects: “in general, the stronger the dominant position, the higher the likelihood that conduct protecting that position leads to anticompetitive foreclosure.”<sup>88</sup> This suggests that the Commission presumes that large market shares are anticompetitive.<sup>89</sup>

The concept is also susceptible to criticism from an economics perspective. Economic analysis recognizes the concept of monopoly and the concept of a dominant price-setting undertaking that faces a competitive fringe acting as price-takers. In each of the cases where superdominance comes into play, it could be argued that it is the nature of the abuse that is at issue, not the nature of the dominance of the undertaking.<sup>90</sup> However, Appeldoorn argues that in cases like *Microsoft*, where large market shares are identified, the Commission attaches duties to the undertaking based on its size and not its behavior.<sup>91</sup> Thus “if

84. *Compagnie Maritime Belge*, [2000] E.C.R. I-1365, ¶ 37.

85. *Tetra Pak v. Commission (Tetra Pak I)*, Case C-333/94P, [1996] E.C.R. I-5951, ¶¶ 28, 31, 48.

86. *Irish Sugar v. Commission*, Case T-228/97, [1999] E.C.R. II-2969, ¶ 185.

87. *Tetra Pak II*, [1996] E.C.R. I-5951, ¶ 24.

88. Commission Communication, *supra* note 15, 2009 O.J. C 45, at 10.

89. See Opinion of Advocate General Fennelly, *Compagnie Maritime Belge Transports SA v. Commission*, Joined Cases C-395/96P & C-396/96P, [2000] E.C.R. I-1365, ¶ 142; see also *Irish Sugar*, [1999] E.C.R. II-2969, ¶ 186.

90. Cf. O’Donoghue & Padilla, *supra* note 31, at 168 (“Undertakings with a high degree of market power usually have greater incentive and ability to abuse their dominance.”).

91. J. Appeldoorn, *He Who Spareth His Rod, Hateth His Son? Microsoft, Superdominance and Article 82 EC*, 26 EUR. COMPETITION L. REV. 653, 656–57 (2005).

a dominant undertaking has a ‘special’ responsibility, a superdominant has one that is even greater.”<sup>92</sup>

### C. *Essential Facilities*

One aspect of achieving dominance or a monopoly is that the dominant firm will own and regulate access to facilities in upstream or downstream markets to which access is essential for any competition to emerge or exist. In both the United States and the EU, a dominant firm’s refusal to deal is not necessarily illegal. Both jurisdictions have a commitment to freedom to contract and the right to own and manage property rights. Both jurisdictions acknowledge that courts are not the best place to determine access to property rights, and that such schemes are better left to regulators. Both jurisdictions are also acutely aware of the disincentives a “duty-to-deal” principle may have on successful dominant firms, such as disincentives to invest and innovate if the outcomes have to be shared.<sup>93</sup> In recent years the problems of superdominance have shown that in certain sectors, particularly the pharmaceutical, media, and information technology sectors, a monopolistic or near-monopolistic firm may reach a stage of vertical integration of products that leaves consumers with little choice, and the firm itself finds it is going nowhere in terms of its own capacity to innovate, resulting in a cannibalization of its own products.

It has long been established that in certain situations under article 102 TFEU, a dominant undertaking has a duty to deal with a third party with whom it may not wish to commence, or continue, a commercial relationship.<sup>94</sup> This may be to exclude

92. R. WHISH, *COMPETITION LAW* 185, (6th ed. 2009).

93. *See Verizon Commc’n. Inc.*, 540 U.S. 398, 415 (2004); *Oscar Bronner GmbH v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH*, Case C-7/97, [1998] E.C.R. I-7791; *see also* Peter Thalmann, *Refusals to Deal—The Role of Long-Term Effects in the Design of Remedies* 17 (The University of Oxford Centre for Competition Law and Policy, Working Paper No. CCLP (L) 20), *available at* [http://www.competition-law.ox.ac.uk/lawfile/users/ezrachia/CCLP\\_L\\_20.pdf](http://www.competition-law.ox.ac.uk/lawfile/users/ezrachia/CCLP_L_20.pdf).

94. *See, e.g., Télémarketing (CBEM) v. SA Compagnie luxembourgeoise de télédiffusion (CLT)*, Case 311/84, [1985] E.C.R. 3261; *Hugin Kassaregister AB & Hugin Cash Registers Ltd. v. Commission*, Case 22/78, [1979] E.C.R. 1869; *Istituto Chemioterapico Italiano SpA & Commercial Solvents Corp. v. Commission*, Joined Cases 6–7/73, [1974] E.C.R. 223.



competition from the market<sup>95</sup> or to control the market through horizontal and vertical distribution conditions which make it difficult for customers and consumers to deal with competitors.<sup>96</sup>

The Commission had looked to import the idea of an “essential facilities” doctrine into EU antitrust law from U.S. law in a series of interventions in the transport sector. In a case involving access to port services and facilities, the Commission used the phrase “essential facilities.”<sup>97</sup> But analysis of U.S. and EU case law reveals that such a doctrine is tenuous in both jurisdictions and has been used in different economic contexts. In the United States, essential facilities issues began with requests for access to physical networks and facilities where a dominant firm controlled a bottleneck, but in modern times have tended to emerge in cases involving joint ventures and monopoly networks. In the EU, the cases started by the Commission held similar attributes in terms of access to physical networks and bottlenecks, but they have focused more on access to intellectual property rights to obtain access to established distribution networks.<sup>98</sup> In commentaries on U.S. law, the idea of an essential facilities doctrine is traced back to a U.S. Supreme Court decision, *United States v. Terminal Railroad Ass’n*,<sup>99</sup> although it is recognized that the term was not actually used in the ruling. Lower courts in the United States have used the terminology,<sup>100</sup> but in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, the U.S. Supreme Court cast serious doubt on whether an “essential

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95. See, e.g., *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Commercial Solvents*, [1974] E.C.R. 223.

96. See, e.g., *United Brands Co. and United Brands Cont’l B.V. v. Commission*, Case C-27/76, [1978] E.C.R. 207 (United Brands refused to continue supplying a long-standing Danish ripener and distributor, Olesen, with trademarked Chiquita bananas because Olesen had dealt and been involved in advertising and promoting a rival’s bananas); *Sot. Lelos kai Sia EE v. GlaxoSmithKline AVEE Farmakeftikon Proionton*, Joined Cases C-468–78/06, [2008] E.C.R. I-7139 (holding that a dominant undertaking in the pharmaceuticals market abuses its position where it refuses to meet ordinary orders from wholesalers engaged in promoting parallel exports).

97. Commission Decision IV/34.174, [1992] 5 C.M.L.R. 255 (B&I Line/Sealink Harbours).

98. See *id.*

99. *United States v. Terminal R.R. Ass’n*, 224 U.S. 383 (1912).

100. See, e.g., *MCI Commc’n. Corp. v. American Tel. and Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983).

facilities” doctrine was sustainable in U.S. antitrust law.<sup>101</sup> In the EU, the Commission and Advocates General have used the concept, but only the CFI (now the General Court) has referred specifically to the term “essential facilities.”<sup>102</sup>

In looking at a refusal to deal as an infringement of article 102 TFEU, the ECJ held that a refusal to license registered designs to produce car panels was not in itself an abuse of a dominant position.<sup>103</sup> In later cases the Court was willing to set out the narrow terms on which a duty to deal (or to license) may be created.

In *Oscar Bronner* the ECJ set out the clearest set of criteria to apply to “a-duty-to-deal” under a claim to physical property access (here a regional newspaper demanded access to a national newspaper’s distribution network) using article 102 TFEU.<sup>104</sup> The Court held that a refusal to deal would only be an abuse under article 102 TFEU where there are indispensable goods or services, and the refusal to deal would be likely to eliminate all competition in the downstream market.<sup>105</sup> Three criteria emerged from this ruling: (1) the refusal to deal must be likely to eliminate all competition from the downstream market; (2) it is not capable of justification; and (3) access to the facility is indispensable to the competitor’s business, with no actual or potential substitute for it.<sup>106</sup> The Court gives further clarification of what is “indispensable” in this context: it would not be economically viable for the competitor to create the facility.<sup>107</sup>

Other cases have applied the “duty-to-deal” to intellectual property rights: *Magill*,<sup>108</sup> *IMS Health*,<sup>109</sup> and *Microsoft*.<sup>110</sup> *Magill*

101. *Verizon Commc’n. Inc. v. Law Office of Curtis V. Trinko*, 540 U.S. 398, 410–12 (2004).

102. *See e.g., Coe Clerici Logistics SpA v. Commission*, Case T-52/00, [2003] E.C.R. II-2123, ¶¶ 73, 98–99, 104.

103. *AB, Volvo v. Erick Veng Ltd.*, Case C-238/87, [1988] E.C.R. I-6211, ¶ 8.

104. *Oscar Bronner GmbH v. Mediaprint Zeitungs - und Zeitschriftenverlag GmbH*, Case C-7/97, [1998] E.C.R. I-7791, ¶ 41.

105. *Id.* ¶¶ 41–46.

106. *Id.*

107. *Id.* ¶ 41.

108. *Radio Telefis Eireann (RTE) v. Commission (Magill)*, Joined Cases C-241 & 242/91P, [1995] E.C.R. I-743, ¶¶ 10–11, 49–57.

109. *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, Case C-418/01, [2004] E.C.R. I-5039, ¶¶ 31–52.

110. *Microsoft v. Commission*, Case T-201/04, [2007] E.C.R. II-3601, ¶¶ 284–88, 1329–30.

concerned a refusal to grant a license to create a comprehensive weekly television listing guide which would create a new product and would benefit consumers since each television firm owning the copyright to its own listings created individual guides.<sup>111</sup> The ECJ ruled that a refusal to deal would not in itself constitute an abuse of a dominant position but may do so in exceptional circumstances.<sup>112</sup> Here there were exceptional circumstances: (1) a new product that would benefit consumers was prevented from entering the market; (2) there was no justification for the refusal to grant the license; and (3) the television broadcasters, contrary to the principles of *Commercial Solvents*,<sup>113</sup> had reserved to themselves the secondary market of weekly television guides, excluding all competition from that market.<sup>114</sup> Just as the raw material was indispensable in *Commercial Solvents*, here the license was indispensable for the creation of a new comprehensive television guide. Thus, in *Magill* the ECJ held that a refusal to license an intellectual property right could be an abuse of a dominant position in exceptional circumstances.<sup>115</sup> In this case, access to raw data protected by intellectual property rights owned by the dominant undertakings prevented the creation of a new competitor product on the market.

In contrast, in another intellectual property case, *IMS Health*, the Court refined the three cumulative conditions that must be satisfied for finding an abuse of a dominant position where there is a refusal to deal.<sup>116</sup> In this case, the competitor wanted to enter a dominated market and duplicate the products offered.<sup>117</sup> The Court stated that this was not sufficient to grant a right of access to the intellectual property.<sup>118</sup> In *Tierce Ladbroke SA v. Commission*, the CFI found that a refusal to license French televised broadcasts of horse races to Ladbrokes betting offices in Belgium was not an abuse of a dominant position because having

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111. *Magill*, [1995] E.C.R. I-743, ¶¶ 1–3.

112. *Id.* ¶¶ 49–57.

113. *Istituto Chemioterapico Italiano SpA & Commercial Solvents Corp. v. Commission*, Joined Cases 6/73 & 7/73, [1974] E.C.R. 223, ¶¶ 23–25, 27–29.

114. *Magill*, [1995] E.C.R. I-743, ¶¶ 54–56.

115. *Id.* ¶ 54; *see also Tierce Ladbroke SA v. Commission*, Case T-504/93, [1997] E.C.R. II-923, ¶ 115.

116. *IMS Health*, Case C-418/01, [2004] E.C.R. I-5039, ¶ 38.

117. *Id.* ¶ 49.

118. *Id.* ¶¶ 39–52.

the televised broadcasts was not necessary for Ladbroke's betting business and the refusal did not prevent the emergence of a new product on the market.<sup>119</sup>

In *Microsoft*, the Commission expanded upon the duty to supply with a set of unbundling and monitoring remedies.<sup>120</sup> The Commission found that Microsoft had abused its dominant position in the personal computer operating system market by refusing to share interoperability information with competitors who needed this essential information to enter and compete in the workgroup server market.<sup>121</sup>

The essential facilities doctrine has a narrow application in EU law. It is used only where a dominant undertaking holds a monopoly position and controls an essential facility thereby creating a bottleneck over one stage of production to another, or one market to another, or in the case of physical facilities (such as airline routes, ports, harbors), physical access to markets and outlets. In intellectual property law, it has a very narrow application where denial of access would stifle innovation and deny consumers new products. More precisely, the "duty-to-deal" is better described as a duty to provide or share the dominant undertaking's facilities.

#### D. *Essential Services*

The term "essential facilities" has confusingly been associated with the idea of "essential services" in the context of relaxing the application of the internal market and competition rules for essential (or public) services provision in competitive markets.<sup>122</sup> Competitors and consumers have brought complaints where economic services are provided under state regulation and the state either does not provide good enough services or cannot meet demand. The state may raise article 106(2) TFEU (article

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119. *Ladbroke*, [1997] E.C.R. II-923, ¶¶ 123–34.

120. Commission Decision No. C(2004)900, *slip op.* (Eur. Comm'n Apr. 21, 2004) available at <http://ec.europa.eu/competition/antitrust/cases/decisions/37792/en.pdf>; *Microsoft v. Commission*, Case T-201/04, [2007] E.C.R. II-3601, ¶¶ 284–88, 1329–30.

121. *Id.*

122. Cosmo Graham, *Essential Facilities and Services of General Interest*, 1 DIRITTO E POLITICHE DELL'UNIONE EUROPEA 22 (2007).

86(2) EC)<sup>123</sup> as a shield, but only where there is a state monopoly or an undertaking with special or exclusive rights to provide a service of general economic interest. The justification for the relaxation of the rules of competition law is that the goods or services being provided are core activities which a Member State deems important to be provided locally, regionally, or nationally.

The scope of what constitutes an essential service is in flux in Europe as governments attempt to cut public spending and roll back the welfare state by experimenting with different modes of funding and delivering essential services.<sup>124</sup> At the same time, the free movement of persons and the concept of EU citizenship has opened up access to public welfare markets (on the principle of non-discrimination to migrant EU nationals, and in some cases their non-EU national families). In many Member States, such services may be provided by commercial operators, and consumers may pay for some of these services. This opening up of public markets to economic principles creates acute problems for the application of EU economic law to such hybrid goods and services.<sup>125</sup>

The initial regulatory regime of liberalization in the EU has associated the idea of essential services with the concept of universal service obligations.<sup>126</sup> In this situation either a public or private non-dominant undertaking may be entrusted with the universal service obligation—and the provision of the universal service obligation is encumbered with a number of standards relating to access, quality, price, and continuity of the service provided, alongside special provisions relating to vulnerable classes of consumers.

More recent thinking and policy have linked essential public services with fundamental and human rights ideas.<sup>127</sup> The Charter of Fundamental Rights of the European Union (“Charter”) has a general clause and a number of provisions that

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123. TFEU, *supra* note 5, art. 106(2), 2008 O.J. C. 115, at 91; EC Treaty, *supra* note 5, art. 86, 2006 O.J. C. 321 E, at 76.

124. *See*, Erika Szyszczak, *Legal Tools in the Liberalisation of Welfare Markets*, in *INTEGRATING WELFARE FUNCTIONS INTO EU LAW—FROM ROME TO LISBON* (Ruth Nielsen ed., 2009).

125. *See id.*

126. *See* DAVIES & SZYSZCZAK, *supra* note 7; Szyszczak, *supra* note 4, at chs. 5, 7.

127. *See* Szyszczak, *supra* note 124.

address essential services.<sup>128</sup> Whether these rights are justiciable is a contentious point. The U.K. government, for example, would argue that such rights are only “principles,” the view taken in a paper delivered by Lord Goldsmith QC in 2001.<sup>129</sup> Lord Goldsmith QC was the United Kingdom’s representative to the convention which first drafted the Charter.<sup>130</sup> He argued that there is a distinction in the Charter between civil and political rights, which are individual, justiciable classic rights guaranteed under the European Convention on Human Rights, and new social and economic rights, which are not justiciable but exist to inform policy and can be classified as principles.<sup>131</sup> Social and economic rights are thus seen as aspirational. In the revised Explanations to the Charter<sup>132</sup> there are examples of these principles: article 25 (rights of the elderly), article 26 (integration of persons with disabilities), and article 37 (environmental protection).<sup>133</sup> In the revised form of the Charter, article 52(5) recognizes that there are differences between principles and rights, and the new Explanations to the Charter reinforce this.<sup>134</sup> However, the explanations also state that some articles may contain elements of rights and principles, citing as examples, article 23 on equality between men and women, article 33 on family and professional life, and article 34 on social security and social assistance.<sup>135</sup> This will inevitably lead to requests from the national courts to the ECJ for interpretation of Charter provisions.

At the national level in the United Kingdom, the Equality Act of 2010<sup>136</sup> creates and extends existing duties for the Equality and Human Rights Commission to ensure that socio-economic disadvantage is addressed in a number of areas linking inequality and disadvantage. It also places duties upon public authorities to

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128. Charter of Fundamental Rights of the European Union, 2000 O.J. C 364/01.

129. Lord Goldsmith QC, *A Charter of Rights, Freedoms and Principles*, 38 COMMON MKT. L. REV. 1201, 1212 (2001); SELECT COMMITTEE ON EUROPEAN UNION, TENTH REPORT, 2007-8, H.L. 62-I.

130. Goldsmith, *supra* note 129, at 1201.

131. *Id.* at 1212.

132. Draft Charter of Fundamental Rights of the European Union, Convent 49, Charter 4473/00 (2000).

133. *Id.* arts. 25, 26, 37.

134. *Id.* art. 52(5).

135. *See id.* arts. 23, 33, 34.

136. Equality Act, 2010, c.15, (Eng.)

address the quality of services delivered to disadvantaged groups. These developments create inroads into traditional divisions between public and private law, creating more onerous duties upon non-state, commercial bodies to think beyond freedom to contract and develop new redistributive roles for private law. New triangular relationships emerge between the state, the individual, and private suppliers of goods and services.<sup>137</sup> New academic work has suggested that such relationships are complex, with an emerging series of complex inter-connecting triangular relationships involving regulators, public policy making bodies, and public enforcement bodies.<sup>138</sup>

Within EU legislation there are mechanisms of universal service obligation, and EU state-aid law also recognizes that the antitrust rules may be relaxed where a subsidy or other favorable treatment (for example a tax concession) is given to a universal service obligation provider.<sup>139</sup> The European Court of Justice has attempted to put the provision of such services on a commercial footing by stating that where a transparent procurement process is not undertaken, criteria must be applied to ensure that firms and undertakings delivering services of general economic interest are not over-subsidized and work along efficient principles.<sup>140</sup>

#### E. *Collective Dominance and Tacit Collusion*

The use of joint ventures and specialization agreements, and an emerging, dynamic mergers and acquisitions market, especially after the legal completion of the Internal Market in 1992, created the possibility of oligopolistic markets emerging in a number of sectors in the European market. Article 102 TFEU specifies that “one or more” undertakings may enjoy a dominant position in the relevant market, and if such undertakings use this market power to maintain or increase their position in the

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137. See generally Gunther Teubner, *After Privatisation? The Many Autonomies of Private Law*, in FROM DISSONANCE TO SENSE: WELFARE STATE EXPECTATIONS PRIVATISATION AND PRIVATE LAW (Thomas Wilhelmsson & Samuli Hurri eds., 1999).

138. Davies & Szyszczak, *supra* note 7.

139. See, e.g., *Altmark Trans GmbH v. Nahverkehrsgesellschaft Altmark GmbH*, Case C-280/00, [2000] E.C.R. I-7747.

140. See Erika Szyszczak, *Financing Services of General Economic Interest*, 67 MOD. L. REV. 982, 983 (2004).

market, this may be an abuse of a collective dominant position.<sup>141</sup> Thus, article 102 TFEU differs from section 2 of the Sherman Act which does not apply to jointly-held monopolies.<sup>142</sup> In Europe, the concept of collective dominance lacks precision. Courts create and apply principles derived from merger cases without any rigorous analysis of the legal links necessary between firms in order to show collective market power. Where formal legal links are absent, the criteria necessary to show tacit collusion are equally under-developed. The ECJ used the idea of collective dominance in 1988 in a situation where undertakings had structural links.<sup>143</sup> When the concept was recognized, the European courts held that collective dominance could be determined by the structure of the market and that such links were not a prerequisite to finding collective dominance. Economists recognize that an oligopoly may be able to coordinate the behavior of dominant undertakings and eliminate competition in the market by the use of tacit collusion. This theory has found its way into competition law through the concept of collective dominance.

Collective dominance was recognized by the CFI in *Società Italiana Vetro SpA v. Commission*.<sup>144</sup> In that case the CFI recognized that two or more economically independent undertakings could collectively hold a dominant position and that there would be an abuse of that position if there were “economic links” between the two undertakings.<sup>145</sup> Only if such links are present can the Commission effectively assess whether there is an abuse of a dominant position. The concept is vague in its legal requirements and thresholds. The CFI did not provide a complete list of examples of “economic links” and it has been left to academic commentators to suggest examples of structural links between the two undertakings, like mutual shareholdings, shared management, and shared directorships in the undertakings. The undertakings may have horizontal agreements

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141. TFEU, *supra* note 5, art. 102, 2008 O.J. C 115, at 89; EC Treaty, *supra* note 5, art. 82, 2006 O.J. C 321 E, at 74.

142. Sherman Antitrust Act, 15 U.S.C. §2 (1890).

143. *See* Société Alsacienne et Lorraine de Télécommunications et d'électronique v. SA Novasam, Case 247/86, [1988] E.C.R. 5987, ¶¶ 21–22.

144. *Società Italiana Vetro SpA v. Commission*, Joined Cases T-68, T-77–78/89, [1992] E.C.R. II-1403.

145. *Id.* ¶¶ 357–59.



sharing common terms for commercial activities.<sup>146</sup> There is little Commission or judicial guidance on the intensity of joint or mutual links that triggers either the reality of a collective dominance position or its abuse. In *Irish Sugar* the CFI found that a fifty-one percent level of cross-shareholdings and common directorships between Irish Sugar and one of its distributors was sufficient evidence of economic links between two undertakings, linked through vertical agreements.<sup>147</sup>

In *Compagnie Maritime Belge Transports*<sup>148</sup> and *TACA*<sup>149</sup> the CFI found horizontal links: a tariff-fixing conference agreement between shipping companies, and the implementation of an agreement that was seen as an economic link for the purposes of establishing collective dominance.<sup>150</sup> The behavior in each case was overt collusion,<sup>151</sup> a price-fixing agreement normally dealt with using article 101 TFEU (article 81 EC).<sup>152</sup> However, in *Compagnie Maritime Belge Transports*, the ECJ introduced a new element to the concept of collective dominance by suggesting that “economic links” may not always be necessary for finding that there is a collective dominant position. Instead, a new element called “connecting factors” was introduced:

The existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position; such a finding may be based on other connecting factors and would depend on an economic assessment, and, in particular, on an assessment of the market in question.<sup>153</sup>

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146. See ALISON JONES AND BRENDA SUFRIN, *EC COMPETITION LAW* 924–30 (2008); O'DONOGHUE & PADILLA, *supra* note 31; JONATHAN FAULL & ALI NIKPAY, *THE EC LAW OF COMPETITION* 114 (2007).

147. *Irish Sugar v. Commission*, Case T-228/97, [1999] E.C.R. II-2969, ¶ 28.

148. *Compagnie Maritime Belge Transports SA v. Commission*, Joined Cases C-395–96/96P, [2000] E.C.R. I-1365.

149. *Atlantic Container Line AB v. Commission (TACA)*, Case T-191/98 [2003] E.C.R. II-3275.

150. *Id.* ¶ 325; *Compagnie Maritime Belge Transports*, [2000] E.C.R. I-1365, ¶¶ 15–19.

151. *TACA*, [2003] E.C.R. II-3275, ¶ 18; *Compagnie Maritime Belge Transports*, [2000] E.C.R. I-1365, ¶ 29.

152. TFEU, *supra* note 5, art. 101, 2008 O.J. C. 115, at 88; EC Treaty, *supra* note 5, art. 81, 2006 O.J. C. 321 E, at 73–74.

153. *Compagnie Maritime Belge Transports*, [2000] E.C.R. I-1365, ¶ 45.

Again the vague language used by the Court led to a range of ideas from scholars as to what connecting factors and behavior would be caught by the Court's language.<sup>154</sup>

In a merger case, *Airtours*, the CFI held that the Commission must show that a collective dominant position existed by adducing convincing evidence.<sup>155</sup> It addressed the concept of tacit collusion by creating a set of criteria (conditions) that the Commission must show for to prove collusion. The *Airtours* criteria were cited and used by the CFI in the article 102 TFEU case, *Piau*.<sup>156</sup> The conceptual confusion over tacit collusion is revealed in both *Airtours* and *Piau*, where *legal* links between the firms could be found, making the issue of *tacit* collusion irrelevant.<sup>157</sup> *Piau* was an agent for footballers who complained to the Commission that FIFA, the governing body of football, issued a regulation that allegedly restricted competition in the EU.<sup>158</sup> On investigation by the Commission, FIFA amended the regulation to the Commission's satisfaction, but this did not satisfy *Piau*, who challenged the Commission's decision.<sup>159</sup> The CFI and ECJ concluded that FIFA held a dominant position, but had not abused the position.<sup>160</sup> The courts' reasoning in *Piau* is extraordinary because there was evidence that the FIFA regulation created legal links between football clubs in Europe.

More recently, in a merger case, *Impala*, the ECJ established a series of principles for finding tacit collusion in the context of pre-existing collective dominance.<sup>161</sup> Five of the leading undertakings in the recorded music market were allegedly colluding on prices prior to the merger of Sony and BMG.<sup>162</sup> The Commission had found that the relevant market was not transparent enough for tacit collusion to occur.<sup>163</sup> The CFI

154. See Stephen Preece, *Compagnie Maritime Belge: Missing the Boat?*, 21 EUR. COMPETITION L. REV. 388, 388–90 (2000).

155. *Airtours plc v. Commission*, Case T-342/99, [2002] E.C.R. II-2585, ¶ 63.

156. *Piau v. Commission*, Case T-193/02, [2005] E.C.R. II-209, ¶ 111, *appeal dismissed*, Case 171/05P [2006] E.C.R. I-37.

157. *Piau*, [2005] E.C.R. II-209, ¶¶ 8, 21.

158. *Id.* ¶ 57.

159. *Id.* ¶ 13.

160. *Id.* ¶ 63.

161. *Bertelsmann AG v. Indep. Music Publ'r and Labels Ass'n*, Case C-413/06P, [2008] E.C.R. I-4951, ¶¶ 113, 122–24.

162. *Id.* ¶ 18.

163. *Id.* ¶ 56.

rejected this finding, stating that the Commission had not applied the correct legal standards to reach its conclusion.<sup>164</sup> However, on appeal the ECJ held that the CFI misapplied the market transparency test.<sup>165</sup>

In the Commission's discussion paper<sup>166</sup> a distinction was drawn between collective dominance as a result of agreements and collective dominance as a result of tacit collusion, but in the final guidance<sup>167</sup>, collective dominance is not discussed.

## V. *MODERNIZATION THROUGH SOFT GOVERNANCE*

The concepts deployed by the Commission and the courts opened up ideas about the scope of regulating dominant firms in the market, but to date have added little to the dynamic application of regulating dominance in the market. New research suggests that there are lacunae in the scope and reach of article 102 TFEU (article 82 EC) that article 101 TFEU (article 81 EC) cannot tackle. One example would be where a non-dominant firm is able to exercise power over other firms in the market. This may be to the detriment of consumers where the competitors' firms are in a weaker bargaining position. Kokkoris identifies areas where anti-competitive conduct and harm to consumers may occur in the context of price discrimination and excessive pricing.<sup>168</sup>

The focus of article 102 TFEU was upon the control of dominance in commercial markets, but intellectual property issues played and continue to play a prominent role. Against this backdrop, new problems of controlling dominance in the recently liberalized and emerging markets arose and have continued to increase rapidly due to liberalization. Traditional liberalized markets in the areas of utilities, postal services, and telecommunications are special because the price the Commission was willing to concede to open up markets previously dominated by state monopolies in Europe was to allow for partial liberalization, with the State retaining an interest in a reserved sector where special or exclusive rights can be retained

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164. *Id.*

165. *Id.* ¶ 130.

166. European Commission, *supra* note 13, ¶¶ 43–50.

167. Commission Communication, *supra* note 15, 2009 O.J. C 45/7.

168. IOANNIS KOKKORIS, A GAP IN THE ENFORCEMENT OF ARTICLE 82 (2009).

by the state. This has created problems where the incumbent operates in both the reserved sector and the newly liberalized commercial sector. In addition to the competition rules of article 102 TFEU the state-aid rules have also been significant in identifying and regulating illegal cross-subsidization.<sup>169</sup> Even in the future, when full liberalization of these markets is envisaged, the prominence of established market positions and high market shares, along with consumer loyalty and familiarity, will prove to be testing times for EU competition law.

Thus, the Commission's response to the pressures of modernization was narrow and limited. The discussion paper on article 82 EC focused merely on exclusionary abuses, and limited the scope of debate on article 102 TFEU thereby inviting criticism.<sup>170</sup> However, the debate has centered on commercial markets and ignored the wider problems associated with hybrid markets. With a continuing reliance on free markets as the basis for economic and social development, and the interdependence of trade at the global level, there is a recognized need for competition law to be rigorous in addressing trade barriers that may be placed by non-state entities trading across borders.

#### VI. MODERNIZATION THROUGH PRACTICE: PLUS LA MÊME CHOSE?

The question lurking in the background is whether there is a general or normative approach for treating dominant firms in ways that enhance efficiency and consumer welfare.<sup>171</sup> It may be that sector-specific approaches will be necessary and different processes and remedies will be offered. For example, new multimedia platforms pose different challenges to competition law than the telecommunications market. The commercialization of welfare services (particularly in the healthcare sector) also create new challenges, especially where the existence of

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169. The postal sector is one of the most difficult sectors to regulate in this regard. In the energy sector, the General Court recently leveled criticisms against the Commission for not applying the private investor test to France when granting a tax concession to *Électricité de France*, a public undertaking wholly owned by France. *See Électricité de France v. Commission*, Case T-156/04 [2009] E.C.R. \_\_ (not yet reported).

170. European Commission, *supra* note 13, ¶¶ 51–53.

171. *Kanal 5 Ltd v. Föreningen Svenska Tonsättares Internationella Musikbyrå UPA*, Case C-52/07, [2008] E.C.R. 9275, ¶¶ 35–38.

monopoly suppliers and merger activity may foreclose markets to competitors and consumers, and where there are public interests at stake in ensuring quality, access, and continuity of such services for consumers.<sup>172</sup> In the partially liberalized sectors, the Commission has used negotiations and accepted commitments to reach agreements to open up markets in the utilities sector, which has been difficult to liberalize fully because of incumbents with state support. Similar issues may arise in the postal sector, where the final phase of liberalization is to be implemented by December, 31 2010.<sup>173</sup> There are likely to be a number of challenges to the incumbents' behavior as they seek to maintain dominant positions.

Where does this leave the normative elements of tackling abuse by dominant firms? Temple Lang argues that "insofar as the Guidance Paper tries to modify or extend the law, most of the statements made are open to serious criticism, either for unnecessary complexity, vagueness, anticompetitive effects, or difficulty of application."<sup>174</sup> Lang points out that discrimination and reprisals are related to exclusionary abuse, but are not linked by the Commission.<sup>175</sup> Akman describes the limitations of the review as "peculiar":

'[E]xclusionary' abuses refer to those practices of a dominant undertaking which seek to harm the competitive position of its competitors or to exclude them from the market, whereas 'exploitative' abuses can be defined as attempts by a dominant undertaking to use the opportunities provided by its market strength in order to harm customers directly. Given that according to the EC Commission the ultimate objective of Article 82 EC is enhancing 'consumer welfare', one would have expected its review to a fortiori

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172. See Marcel Canoy & Wolf Sauter, *Hospital Mergers and the Public Interest: Recent Developments in the Netherlands* 9 (TILEC Discussion Paper, Paper No. DP2009-035, 2009), available at <http://arno.uvt.nl/show.cgi?fid=96263> (last visited Aug. 30, 2010).

173. See generally Damien Geradin & David Henry, *Abuse of Dominance in the Postal Sector—The Contribution of the Guidance Paper on Article 82 EC* (TILEC Discussion Paper, Paper No. 2010-021, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1435362](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1435362).

174. John Temple Lang, *Article 82 EC—The Problems and the Solution* (FEEM Working Paper, Paper No. 65.2009, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1467747](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1467747)

175. See *id.* at 6.

include an assessment of ‘exploitative’ abuses since these can immediately and directly harm consumers.<sup>176</sup>

Lang argues for returning to the test in the original treaty provisions and as interpreted by the ECJ: an exclusionary abuse must involve limiting production, marketing, or technical development of competitors of the dominant firm, if harm is caused to consumers.<sup>177</sup>

The European courts have not displayed an appreciation of an effects-based approach which focuses upon consumer welfare as the underpinning or guiding principle. In the most significant rulings since the Commission’s staff paper, form, rather than effects and impact on consumer concerns, has been the main focus of the courts. A clear example of the attachment to a formalistic approach is seen in a case on predatory pricing in the liberalized market of telecoms, *France Télécom SA v. Commission*, concerning predatory pricing in the market for ADSL-based internet services.<sup>178</sup> Initially, consumers may benefit from predatory pricing because it delivers lower prices in the short term.<sup>179</sup> But the CFI held that the lack of harm to consumers did not prevent an abuse of a dominant position. In *British Airways*, Advocate General Kokott continued with the direct protection of consumers by protecting the competitive structure of markets.<sup>180</sup> The Court held that anticompetitive practices that harm the effective competitive structure of a market may be indirectly detrimental to consumers, but that there is no requirement when applying article 102 TFEU to prove direct harm to consumers.<sup>181</sup> In *Microsoft*, the CFI upheld the Commission’s finding of an abuse of a dominant position by taking a formalistic approach and stating that it was not necessary to show direct effects on consumers stemming from the abuse of the dominant position.<sup>182</sup>

176. Pinar Akman, *Exploitative Abuse in Article 82 EC: Back to Basics?* 11 (Cambridge Yearbook of European Legal Studies Working Paper 09-1, 2009), available at [http://www.uea.ac.uk/polopoly\\_fs/1.105848!wp091\\_exploitative\\_abuse\\_in\\_article82EC\\_PA.pdf](http://www.uea.ac.uk/polopoly_fs/1.105848!wp091_exploitative_abuse_in_article82EC_PA.pdf) (last visited Aug. 20, 2010).

177. See Lang, *supra* note 174, at 2.

178. *France Télécom SA v. Commission*, Case T-340/03, [2007] E.C.R. II-107, ¶¶ 22–24, *appeal dismissed*, Case C-202/07, [2009] E.C.R. \_\_\_.

179. *Id.* ¶ 194.

180. Opinion of Advocate General Kokott, *British Airways v. Commission*, Case C-95/04P, [2007] E.C.R. I-2331, ¶ 311.

181. *British Airways*, [2007] E.C.R. I-2331, ¶ 306.

182. *Microsoft v. Commission*, Case T-201/04, [2007] E.C.R. II-3601, ¶¶ 708–10.

Moreover the Commission has ignored its own enforcement priorities. On September 21, 2009, the Commission published a provisional non-confidential version of a decision made on May 13, 2009 fining the U.S. firm Intel €1.06 billion for abuse of a dominant position.<sup>183</sup> The abuse comprised (1) granting conditional rebates and payments to a number of original export manufacturers (“OEMs”) and a large retailer of consumer electronics purchasing Intel’s x86 central processing units, and (2) paying OEMs to delay, cancel, and restrict the commercialization of specific Advanced Micro Devices products.<sup>184</sup> Damien Geradin has criticized the decision, arguing that the Commission appears to have paid little attention to its guidance paper and attached itself to the European courts’ formalistic case law, which has applied “a *per se* prohibition” on conditional rebates.<sup>185</sup> The Commission purported in the decision to conduct an “as efficient competitor test” to demonstrate that its decision is in line with the guidance paper, but its statement that this is not required means that it would have found Intel’s rebates to violate article 102 TFEU even if the test had shown that Intel’s rebates are not capable of foreclosing competition.<sup>186</sup> The case has been appealed to the General Court.<sup>187</sup> The appeal will be a major test of the EU’s resolve to place consumer welfare at the heart of controlling dominant undertakings. However, the case also raises questions of how far a sector-specific approach is the way forward, especially in markets which are dynamic and where there is a need for dominant firms to constantly negotiate incentives with customers where output increases and prices decrease. New cases may not necessarily shed further light on the rigor of the Commission’s enforcement priorities, especially where they are settled privately and through negotiation and commitments. A crucial test for the Commission

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183. See Commission Decision No. COMP/37.990, *slip op.* (Eur. Comm’n May 13, 2009), available at [http://ec.europa.eu/competition/sectors/ICT/intel\\_provisional\\_decision.pdf](http://ec.europa.eu/competition/sectors/ICT/intel_provisional_decision.pdf) (provisional non-confidential version).

184. *Id.* ¶¶ 924–25, 1641.

185. Damien Geradin, *The Decision of the Commission of 13 May 2009 in the Intel Case: Where is the Foreclosure and Consumer Harm?* 3 (Tilberg Univ. Working Paper Series, 2009), available at [http://www.intel.com/pressroom/legal/docs/Damian\\_paper.pdf](http://www.intel.com/pressroom/legal/docs/Damian_paper.pdf) (last visited Feb. 7, 2010).

186. See *id.*

187. Intel v. Commission, Case T-286/09 (pending case); see Action brought on 22 July 2009—Intel v. Commission, [2009] O.J. C 220/41.

is how far it can be proactive in creating an enforcement agenda instead of being reactive to complaints.