THESIS SUBMISSION IN PARTIAL REQUIREMENT FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY TO THE UNIVERSITY OF OXFORD

THE INFLUENCE OF EU'S CONSTITUTIONAL AND INSTITUTIONAL PECULIARITIES ON THE INTERPRETATION OF ABUSE OF DOMINANCE UNDER ARTICLE 102 TFEU

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HILARY TERM 2020

ABSTRACT

The Influence of EU's Constitutional and Institutional Peculiarities on the Interpretation of Abuse of Dominance under Article 102 TFEU

This thesis examines the implications of EU's constitutional and institutional peculiarities for the interpretation of abuse of dominance under Article 102 TFEU. The purpose is to shed light on the limitations to the interpretation of Article 102, which stem from EU's constitutional and institutional framework. These limitations impact on both the substance and the form of the designed legal tests for Article 102 and dictate the proper role of economics in interpreting the concept of abuse of dominance. In constitutional terms, the thesis finds that the EU Treaties mandate a multi-goal and holistic approach to Article 102, meaning that there are multiple objectives and values external to market competition that are relevant to the interpretation of Article 102. The discussion of the relevant case law documents that the designed legal rules successfully reconcile the market-oriented objectives of Article 102 with policies of social nature, thereby allowing the provision to operate according to the constitutional role imposed on it by the Treaties. From an institutional perspective, the thesis maps out the complex institutional framework for the decentralised enforcement of Article 102. This unveils the mismatch between the complicated institutional setting and the necessity of ensuring effective enforcement and uniform interpretation of Article 102. The thesis argues that in this constitutional and institutional context the employed tests must remain clear so as to permit Article 102 to effectively and consistently pursue its objectives across the EU. In this regard, any economic statement or theory must be compatible with both the constitutional foundations of Article 102 and the institutional setting within which it must be enforced. More economic analysis may thus be injected into the interpretation of abuse of dominance only if it can be translated into clear and workable legal rules that are compatible with EU's constitutional foundations and institutional realities.

Word Count: 100,000

ACKNOWLEDGEMENTS

This thesis is the culmination of my thinking in the area of abuse of dominance, the origins of which can be traced back to the research that I conducted for my MPhil in 2015. Just a few hours before submission, I feel the need to express my immense gratitude to those who encouraged me and supported me throughout this journey.

First and foremost, I would like to thank my supervisor, Professor Steve Weatherill, for his continuous support and guidance, and for giving me space to develop my own ideas and analytical skills. His faith in me helped me build academic self-confidence and progress. His overall charisma will always be a source of invaluable inspiration.

I am grateful to Professor Ariel Ezrachi, who has read and assessed this work at all stages, from the qualifying test to the confirmation of status and now the final viva examination. His constructive criticism has significantly influenced the content of this thesis. I am also deeply thankful to Professor Stefan Enchelmaier for his insightful suggestions, which were extremely helpful for this thesis to take its final shape.

Many more people have helped me develop the ideas presented in this thesis with constructive discussions. I am particularly thankful to Dr Julian Nowag for taking the time to discuss with me ideas relating to my thesis, without ever showing any signs of boredom. Special thanks are also due to Dr Sotirios Lekkas, Anna Ventouratou and Maria Kallidopoulou for proofreading the thesis.

My DPhil studies in Oxford would not have been possible without the generous financial support of the Onassis Foundation and the Foundation for Education and European Culture (IPEP).

The encouragement and support of my friends have been tremendous throughout the DPhil years. I have no words to thank in particular: Dr Sotirios Lekkas, Nikiforos Panagis, Antonis Chatzivasileiadis, Anna Ventouratou, and Dr Akis Papastavridis. We shared the good and bad DPhil moments, all of which will be remembered with nostalgia. Their friendship is invaluable to me.

My deepest gratitude goes to my mother and brothers for their unconditional support, trust, care and love. I am also indebted to Maria Kallidopoulou, who had to live with the ups and downs of the tough final year of this doctorate. She has spent days on this thesis giving me comments which have improved it immensely and her patience has been endless. I am very lucky to have the support of both my family and Maria – this work is dedicated to them.

Konstantinos Sidiropoulos
Brussels, 24 April 2020

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

AAC: Average Avoidable Costs

ABA: American Bar Association

AEC(s): As-Efficient Competitor(s)

AG: Advocate General

AGCM: Italian Competition Authority

AIC: Average Incremental Costs

AL Rev: Antitrust Law Review

ALJ: Antitrust Law Journal

APEC: Asia-Pacific Economic Cooperation

ATC: Average Total Costs

AVC: Average Variable Costs

CFREU: Charter of Fundamental Rights of the European Union

CJEU: Court of Justice of the European Union

CL Rev: Competition Law Review

CLI: Competition Law Insight

CLPD: Competition Law & Policy Debate

CMA: Competition and Markets Authority

CML Rev: Common Market Law Review

CNMC: Spanish Competition Authority

CPI: Competition Policy International

CUP: Cambridge University Press

CYELS: Cambridge Yearbook of European Legal Studies

DG COMP: Directorate General for Competition

DG GROW: Directorate General for Internal Market, Industry, Entrepreneurship and SMEs

EAGCP: Economic Advisory Group on Competition Policy

EASPD: European Association of Service Providers for Persons with Disabilities

EC J: European Competition Journal

ECLR: European Competition Law Review

ECN: European Competition Network

ECSC: European Coal and Steel Community

EEA: European Economic Area

EEC: European Economic Community

EL Rev: European Law Review

ELJ: European Law Journal

GCR: Global Competition Review

Geo LJ: Georgetown Law Journal

GWB: German Law Against Restraints of Competition

HUP: Harvard University Press

ICN: International Competition Network

IP: Intellectual Property

J Corp L: Journal of Corporation Law

JAE: Journal of Antitrust Enforcement

JBL: Journal of Business Law

JCLE: Journal of Competition Law and Economics

JECLP: Journal of European Competition Law and Practice

JITE: Journal of Institutional and Theoretical Economics

JLEP: Journal of Law, Economics & Policy

JLS: Journal of Law and Society

LQR: Law Quarterly Review

LRAIC: Long Run Average Incremental Costs

LS: Legal Studies

MLR: Modern Law Review

NCA(s): National Competition Authority/(ies)

NRA(s): National Regulatory Authority(ies)

NYU L Rev: New York University Law Review

OECD: Organisation for Economic Co-operation and Development

OJ: Official Journal of the European Union

OJLS: Oxford Journal of Legal Studies

OUP: Oxford University Press

QJE: Quarterly Journal of Economics

R&D: Research and Development

SGEI: Services of General Economic Interest

SME(s): Small- and Medium-Sized Enterprise(s)

TEU: Treaty on European Union

TFEU: Treaty on the Functioning of the European Union

UCP: University of California Press

WC: World Competition

TABLE OF CASES

COURT OF JUSTICE

GENERAL COURT

AG OPINIONS

EUROPEAN COMMISSION

NCAs

US JUDGMENTS

TABLE OF LEGISLATION

EU TREATIES AND INTERNATIONAL INSTRUMENTS

DIRECTIVES

REGULATIONS

TABLE OF OTHER PRIMARY AUTHORITIES

EUROPEAN COMMISSION

ICN

OECD

US DEPARTMENT OF JUSTICE

INTRODUCTION

In any kind of competitive process, including competition in markets, certain competitors win. Based on the assumption underpinning modern liberal economies that competition benefits consumers and society as a whole, competition law should seek to promote this process in the market context by giving incentives to firms to win business from their competitors. It would thus be inconsistent with this basic assumption to condemn a firm because it ended up with significant market power by virtue of its investments in innovation and its superior performance. At the same time, however, safeguarding pluralism is an important means of guaranteeing healthy markets. Thus, delineating clear-cut rules for provisions which regulate the unilateral conduct of market players with substantial market power is a far cry from being a straightforward task because of their controversial nature and the fact that they are susceptible to divergent interpretations.

The provision controlling the unilateral conduct of dominant firms in the EU legal order is currently Article 102 TFEU, which prohibits the abuse of a dominant position.[1] This is perhaps the most controversial area of EU competition law, and as such, has generated a voluminous body of bibliography aiming to contribute to the debate around the optimal application of Article 102.[2] The legal and academic interest in Article 102 has particularly

[1] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 102.

[2] See eg Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2003: What is an Abuse of a Dominant Position?* (Hart Publishing 2006); Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing 2008); Ariel Ezrachi (ed), *Article 82: Reflections on its Recent Evolution* (Hart Publishing 2009); Ekaterina Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart Publishing 2010); Liza Lovdahl Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (CUP 2010); Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Hart Publishing 2012); Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart Publishing 2013); Vasiliki Brisimi, *The Interface between Competition and the Internal Market: Market Separation under Article 102 TFEU* (Hart Publishing 2014); Fabiana Di Porto and Rupprecht Podszun (eds), *Abusive Practices in Competition Law* (10th ASCOLA Workshop, Edward Elgar 2018); Chiara Fumagalli, Massimo Motta and Claudio Calcagno, *Exclusionary Practices: The Economics of Monopolisation and Abuse of Dominance* (CUP 2018).

increased since the European Commission ('Commission') launched the process of reviewing the provision with the objective of introducing a more economically inspired approach to abuse of dominance.[3] In this context, the 'form-based approach' of the EU courts was generally contrasted to an allegedly superior 'more economics approach' to abuse of dominance. Indeed, much ink has been spilled over the debate concerning the dichotomy between the 'formalistic approach' and the 'economic approach' to Article 102.[4]

That being said, however, little attention has been paid so far to the influence of EU's constitutional and institutional peculiarities on the interpretation and enforcement of Article 102. This thesis discusses these peculiarities and highlights their implications for the concept of abuse of dominance, thereby offering a novel approach to Article 102 which is based on EU's constitutional foundations and the institutional setting within which the provision is to be enforced. The purpose is to shed light on issues that have generally been neglected in the relevant literature, namely the natural limitations to the interpretation of Article 102, which stem from EU's peculiar constitutional and institutional framework. These limitations impact on both the substance and the form of the designed legal tests for Article 102 and dictate the proper role of economics in interpreting the concept of abuse of dominance.

Consequently, the manner in which EU's constitutional and institutional realities affect the interpretation of the concept of abuse and the enforcement of Article 102 is the core of the overall enquiry. Building on the role of Article 102 in the scheme of the EU Treaties and on EU's features that emerge from its nature as a market without a state, conclusions are drawn in

[3] EAGCP, 'An Economic Approach to Article 82' (Brussels, July 2005) (EAGCP Report); Commission, 'DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses' (Brussels, December 2005) (Discussion Paper); Commission, 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' (Communication) [2009] OJ C45/7 (Priorities Paper).

[4] See chapter 6.

relation to the proper approach to abuse of dominance in view of the peculiar constitutional mandates and institutional features of the EU. In this regard, the thesis first endeavours to identify the constitutional objectives and values of Article 102 in light of the EU Treaties, so as to subsequently assess the current state of the law and highlight the inherent restrictions in formulating the relevant legal rules. The analysis then turns to the particularities of the institutional setting within which Article 102 is to be enforced and its implications for designing legal tests under Article 102. Having answered the question regarding the implications of EU's constitutional and institutional peculiarities for the interpretation of the concept of abuse, the proper role of economics in this context is uncovered.

In constitutional terms, the thesis finds that the EU Treaties mandate a multi-goal and holistic approach to Article 102, meaning that there are multiple objectives and values external to market competition that are relevant to the interpretation of Article 102. Particularly, Article 102 is designed to protect both the integrity of the internal market and the multiple facets of consumer interest. At the same time, its application must at least avoid contradicting socio-political values that are aimed at establishing an internal market committed to a highly competitive social market. In this regard, the subsequent discussion of the relevant case law documents that the designed legal rules successfully reconcile the market-oriented objectives of Article 102 with policies of social nature, thereby allowing the provision to operate according to the constitutional role imposed on it by the Treaties.

From an institutional perspective, the thesis sets out the complex institutional relationships within and between the multiple administrative and judicial bodies that are involved in the application of Article 102, as well as the complicated processes of decision-making at both the EU and the national levels. In this regard, the existing enforcement framework is designed to ensure simultaneously the involvement of various decision-makers and the uniform interpretation of Article 102, which entails that the constitutionally mandated

multi-goal and holistic approach must also be pursued at national level. This calls for aligning the capacity of multiple enforcers embedded in diverging institutional settings with the aspiration of preserving an effective decentralised system of enforcement with uniform interpretation and predictable outcomes.

The thesis argues that in this constitutional and institutional context the employed tests must remain clear so as to permit Article 102 to effectively and consistently pursue its objectives across the EU. This does not merely serve predictability and administrability, it primarily secures the functionality of the constitutionally demanded multi-goal and holistic approach to Article 102. It thus serves the core of the normative content of Article 102 insofar as the only technique to draw the strands of the Treaties' normative choices together is reliance on presumptions that form clear rules. Likewise, accomplishing an effective enforcement and uniform interpretation of Article 102 in the peculiar institutional setting under which the provision is to be enforced also dictates the formulation of clear rules. This institutional framework produces certain elements of uncertainty that can only be remedied through the design of clear legal tests under Article 102. Consequently, both the constitutional peculiarities of the EU and the institutional framework within which Article 102 is to be enforced dictate the design of clear rules for the assessment of the unilateral conduct of dominant firms.

There are therefore limitations to the interpretation of Article 102 stemming from EU's constitutional and institutional peculiarities. In this regard, any economic statement or theory must be compatible with both the constitutional foundations of Article 102 and the institutional setting within which it must be enforced. More economic analysis may thus be injected into the interpretation of Article 102 only if it can be translated into clear and workable legal rules that are compatible with EU's constitutional foundations and institutional realities. Put simply, a shift to a 'more economics approach' to abuse of dominance should be driven by qualitative criteria, meaning that it should genuinely optimise the designed tests so as to better serve the

EU Treaties' mandates. Under this logic, the 'more economics approach' to rebates that the Commission's Priorities Paper advocates is used as a case study to conclude that the EU courts' 'formal approach' is preferable to a 'more economics approach' which alludes to an economic paradigm that is incompatible with the objectives and broader policy concerns of Article 102, and neglects EU's institutional setting.

The thesis is structured in the following manner. Chapter 1 presents the historical background, general scheme and key legal concepts pertaining to the abuse of dominance doctrine. Chapter 2 explores the objectives pursued by Article 102. Chapter 3 discusses socio-political values and general principles of EU law which are relevant in the analysis of Article 102. Chapter 4 turns to the EU courts' case law, exploring the actual reflection of the multi-goal and holistic approach in the applicable rules under Article 102. Chapter 5 looks at the institutional setting and enforcement arrangements concerning Article 102. Chapter 6 is dedicated to the Commission's push towards a 'more economics approach' to Article 102 and, more broadly, to the proper role of economics in the analysis of abuse of dominance. The final chapter draws together the conclusions of the research.

1. ARTICLE 102: HISTORY, GENERAL SCHEME AND KEY CONCEPTS

The thesis aims to clarify the confusing distinction between lawful and unlawful behaviour under Article 102 by exploring the implications of EU's constitutional and institutional peculiarities for the interpretation of Article 102. Before doing so, however, this chapter presents the origins and subsequent development of the abuse of dominance doctrine so as to delineate the core of Article 102 and set the scene for the discussion to follow. In this regard, a brief account of the historical background to the adoption of what is now Article 102 is provided, followed by a description of the provision's general scheme. Subsequently, the chapter discusses the major legal concepts that the EU courts have developed in relation to Article 102. Finally, it concludes by emphasising the role of Article 102 within the broader scheme of the EU Treaties.

I. Historical Background

The creation of a competition law regime in what is now the EU is not an ahistorical matter. On the contrary, its creation and development was heavily influenced by external circumstances, such as war and depression.[1] Particularly, in the aftermath of the Second World War, certain European leaders desired a new kind of political Europe that would permit its reconstruction from ruin and would secure peace. The gist of the idea was to reconstruct Europe

[1] For a comprehensive account of these circumstances see Derek Urwin, *The Community of Europe: A History of European Integration Since 1945* (2nd edn, Longman 1995). See also Per Jebsen and Robert Stevens, 'Assumptions, Goals and Dominant Undertakings: The Regulation of Competition under Article 86 of the European Union' (1996) 64 ALJ 443, 445; David Evans, 'Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules' (2009) 10 Chicago Journal of International Law 161, 171-2; Ariel Ezrachi, 'Sponge' (2017) 5 JAE 49, 51-59, arguing that history and ideologies affect the development of competition law, which, in turn, reflects political and cultural preferences.

on the basis of a larger integrated European market, which would bring gains in productivity that could not have been achieved otherwise.[2]

In this context, emerged the European Coal and Steel Community ('ECSC'), which subsequently became part of the EU.[3] As declared in Article 2 of the ECSC Treaty, its aim was to achieve economic expansion, growth of employment, and an improved standard of living through the creation of a common market for coal and steel. For the attainment of these objectives, the Treaty had also laid down competition rules.[4] This had a special symbolic value because it provided a precedent for the inclusion of competition law provisions in the EEC Treaty.[5] In this regard, Article 66(7) of the ECSC Treaty is the progenitor of what is now Article 102.[6] Although the provision targeted both the abuse of a dominant position and the anticompetitive acquisition of such a position,[7] Article 66 as a whole provided somewhat of a model for what is now Article 102 in that the provision established the principle that the competition rules should be viewed in the context of the Treaties' broader objectives.

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[2] David Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP 2001) 167. See also Alan Milward, *The Reconstruction of Western Europe 1945-51* (Methuen & Co. Ltd 1984) 123-4, discussing the role of the US, which employed the Marshall Aid as leverage in order to force Europe's integration.

[3] The six states signing the Treaty of Paris in 18 April 1951 and establishing the ECSC were: France, Germany, Belgium, the Netherlands, Luxembourg, and Italy.

[4] ECSC Treaty, arts 65, 66(1)-(7).

[5] Michael Wise, 'Competition Law and Policy in the European Union' (2007) 9 OECD Journal of Competition Law and Policy 7, 11; Kiran Klaus Patel and Heike Schweitzer (eds), *The Historical Foundations of EU Competition Law* (OUP 2013) 5; Lorenzo Federico Pace and Katja Seidel, 'The Drafting and the Role of Regulation 17: A Hard-Fought Compromise' in Kiran Klaus Patel and Heike Schweitzer (eds), *The Historical Foundations of EU Competition Law* (OUP 2013) 58.

[6] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), art 102. The numbering of the relevant Treaty provisions, which were initially laid down in Articles 85 to 89 of the 1957 Treaty establishing the EEC, changed over time, but their content remained substantively unchanged. Thus, so as to avoid confusion, the current Treaty numbering and naming is used even where referring to times when earlier versions of the Treaties were in force.

[7] See Gerber, *Law and Competition in Twentieth Century Europe* (n 2) 338, attributing this to the intellectual influence of the US. cf George Ball, *The Past Has Another Pattern: Memoirs* (W W Norton 1982) 89; William Diebold, *The Schuman Plan: A Study in Economic Cooperation 1950-1959* (Praeger 1959) 352ff, arguing that the role of the US in drafting the competition rules of the ECSC Treaty had generally been concealed.

After all, the draftsmen of what is now Article 102 could not benefit from any existing national competition law regimes with regard to market power, since at the time that the plans for European integration were taking concrete form in the 1950s, no European country other than Germany had significant experience with competition law.[8] Particularly, a public policy protecting and encouraging competition was of very recent origin in Europe at the time of the signing of the EEC Treaty.[9] Moreover, the competition laws that existed in certain European countries focused on the regulation of cartels rather than single-firm monopolies.[10] Hence, the provision on abuse of dominance in the EEC Treaty was drafted from scratch insofar as there existed no similar rules in the national legal systems.[11] National and EU competition policies have thus evolved in parallel over time.[12]

That being said, a potential influence for shaping the text of Article 102 could have been the provision of Section 2 of the US Sherman Act.[13] It would have indeed been rational for the draftsmen of Article 102 to use Section 2 as a model. First, the provision had been in force for over six decades at the time of the Treaty negotiations.[14] Second, there was already a

[8] See eg Harlan Morse Blake (ed), *Business Regulation in the Common Market Nations Volume II* (McGraw-Hill 1969) 84-109, discussing the legal framework in France and the Netherlands; Gerber, *Law and Competition in Twentieth Century Europe* (n 2) 150, discussing the legal framework in Germany prior to the adoption of the German Law Against Restraints of Competition ('GWB').

[9] See Hans Thorelli, 'Antitrust in Europe: National Policies After 1945' (1959) 26 University of Chicago Law Review 222; Gerber, *Law and Competition in Twentieth Century Europe* (n 2) 179.

[10] Thorelli (n 9) 233.

[11] James Rahl (ed), *Common Market and American Antitrust: Overlap and Conflict* (McGraw-Hill 1970) 22-23.

[12] Ivo Samkalden and Irwin Druker, 'Legal Problems Relating to Article 86 of the Rome Treaty' (1966) 3 CML Rev 158, 160; Adrian Kuenzler and Laurent Warlouzet, 'National Traditions of Competition Law' in Kiran Klaus Patel and Heike Schweitzer (eds), *The Historical Foundations of EU Competition Law* (OUP 2013) 90; Heike Schweitzer and Kiran Klaus Patel, 'EU Competition Law in Historical Context: Continuity and Change' in Kiran Klaus Patel and Heike Schweitzer (eds), *The Historical Foundations of EU Competition Law* (OUP 2013) 208.

[13] Sherman Act 1890 15 USC §§ 1-7, s 2. The Sherman Act is the foundational statute of US antitrust law. The term used in the US for competition law is 'antitrust' law. For a general analysis of the origins of the Sherman Act see William Letwin, 'Congress and the Sherman Antitrust Law: 1887-1890' (1956) 23 University of Chicago Law Review 221.

[14] The Sherman Act was passed by Congress in 1890.

rich jurisprudence on the relevant issues. Third, US thinking and experience with antitrust law had contributed to the shaping of the competition rules in the ECSC Treaty.[15] Historical circumstances and practical concerns, however, motivated a different reaction to market power than the one existing in the US.[16]

To start with, the initial aim in Europe was to encourage the growth of enterprises and the existence of large production, thereby creating the conditions for competing on the world markets.[17] Thus, a provision analogous to Section 2 that would prohibit monopoly acquisition or attempted monopolisation seemed unappealing.[18] Moreover, the fact that the competition rules in the EEC were to be enforced in a fragmented market meant that the provision on abuse of dominance had to be enforced in a way that it would assist the struggle to create a common integrated market in Europe. Finally, the provision in the EEC would have been part of an overall Treaty framework, unlike its counterpart in the US which is a legal provision in a stand-alone statute. As a result, the provision on the control of market power could not have been regarded as detached from the overall aims of the Treaty. In a similar vein, the policy that would develop would not have been that of a single state but of transnational institutions in which the national interests of the Member States would potentially influence decision-making.[19] These constitutional and institutional realities contrasted sharply with the approach

[15] Gerber, *Law and Competition in Twentieth Century Europe* (n 2) 338.

[16] Scott James, 'The Concept of Abuse in the EEC Competition Law: An American View' (1976) 92 LQR 242; Eleanor Fox, 'The Modernization of Antitrust: A New Equilibrium' (1981) 66 Cornell Law Review 1140.

[17] For further analysis see Gerber, *Law and Competition in Twentieth Century Europe* (n 2) 168.

[18] Similarly Ekaterina Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart Publishing 2010) 18-19. See also Corwin Edwards, *Controls of Cartels and Monopolies: An International Comparison* (Oceana Publications 1967) 15, emphasising the divergent cultural perceptions of competition in Europe and the US.

[19] William Kovacic, 'Competition Policy in the European Union and the United States: Convergence or Divergence?' in Xavier Vives (ed), *Competition Policy in the EU: Fifty Years on from the Treaty of Rome* (OUP 2009) 327-8. See generally Evans (n 1) 161. For the EU perspective see Gerber, *Law and Competition in Twentieth Century Europe* (n 2) 385-6, arguing that '[being] the legal regime of a transnational organization, [EU] competition law is necessarily "special"'.

of US antitrust law, which relied (and still relies) primarily on traditional legal forms and institutions to protect competition.[20] Hence, all these considerations urged the draftsmen of Article 102 to meticulously avoid replicating the corresponding US provision.

In this context, the records on the negotiations of the EEC Treaty indicate that the German and French positions represented the two extreme poles concerning the design of what is now Article 102.[21] On the one hand, the German delegation envisaged a free market economy as the lynchpin of the common market and regarded discrimination on price to be compatible with this ideal. According to the German position, while cartels were to be banned as a general rule, the creation and existence of market power were not considered problematic; the concern was only with the misuse of that economic power. On the other hand, the French favoured a dirigiste approach with rules allowing intervention and economic planning by the Member States. In broad terms, the French delegation proposed a regulatory approach with a broad non-discrimination principle as the general rule to be applied to both cartels and unilateral conduct. This would have been a provision establishing as a general rule the prohibition of cartels, abusive practices and monopolies, while providing for extensive derogations.

The view that ultimately prevailed with regard to the shaping of the text of Article 102 was that of the German delegation.[22] Timing was critical to the influence that the German perception had on the rule in the EEC. Particularly, as the EEC Treaty negotiations proceeded,

[20] Kovacic (n 19) 324; Brigitte Leucht and Mel Marquis, 'American Influences on EEC Competition Law Two Paths, How Much Dependence?' in Kiran Klaus Patel and Heike Schweitzer (eds), *The Historical Foundations of EU Competition Law* (OUP 2013) 126.

[21] For a discussion of the negotiations after the Spaak Report see Heike Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing 2008) 130-8; Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Hart Publishing 2012) 80-85.

[22] See Treaty establishing the European Economic Community [1957] OJ C224/6 (EEC), art 86.

the German competition law statute (the 'GWB') was in its final stage of preparation.[23] Germany had therefore the most extensive experience with competition law, and thus inevitably influenced the shaping of the competition rules. Additionally, the key figures of the German delegation had strong ties to Ordoliberalism, which was an economic philosophy that emerged in Germany in the 1930s and supplied a widely discussed framework for the development of a competition policy.[24] This, in turn, made the German recommendation of subjecting the monopolies to the control of 'abuse' more persuasive.[25] In any event, Germany had the additional concern to ensure that the competition provisions in the EEC Treaty do not deviate from the provisions in the newly drafted GWB.[26] And, in fact, the final wording of Article 102 resembles the corresponding provision in the GWB: both provisions do not oppose the creation and existence of a dominant position but seek to prevent its abusive use.[27]

Having said that, it is also important to highlight that the focus of the EEC Treaty has been the establishment of a common market in Europe with the ultimate aim to create economic conditions similar to those of a single state.[28] In this context, Article 102 assumed the additional role of contributing to the conversion of a fragmented market into an integrated one.[29] As a

[23] Andreas Weitbrecht, 'From Freiburg to Chicago and Beyond—the First 50 Years of European Competition Law' (2008) 29 ECLR 81, 82.

[24] Thorelli (n 9) 223; Gerber, *Law and Competition in Twentieth Century Europe* (n 2) 259, emphasising the role of the Ordoliberal School. cf Akman, *The Concept of Abuse in EU Competition Law* (n 21) 62, stressing that Ordoliberals did not have a fully developed concept of abuse at the time of the EEC Treaty negotiations; Peter Behrens, 'The Ordoliberal Concept of "Abuse" of a Dominant Position and its Impact on Article 102 TFEU' in Fabiana Di Porto and Rupprecht Podszun (eds), *Abusive Practices in Competition Law* (10th ASCOLA Workshop, Edward Elgar 2018) 5-7, explaining that Ordoliberals have gradually developed such a concept.

[25] Rousseva, *Rethinking Exclusionary Abuses* (n 18) 17.

[26] Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' (n 21) 132.

[27] For an account of the relevant provision in the GWB see Harlan Morse Blake (ed), *Business Regulation in the Common Market Nations Volume III* (McGraw-Hill 1969) 160-80.

[28] See Preable to EEC (n 22); Forward to the Spaak Report, 9-10. See Pierre-Henri Laurent, 'Paul-Henri Spaak and the Diplomatic Origin of the Common Market 1955-1956' (1970) 85 Political Science Quarterly 373, 378.

[29] See EEC (n 22), arts 85-90.

result, first, competition was not conceived as a goal in itself but as a means to achieve other goals. Second, there is a special dimension in the competition law regime that has been established by the EEC because it assumes the highly instrumental role of establishing an integrated market.[30] Yet again, the Treaty of Rome, which represented an entirely novel form of constitutional organisation, perceived market integration as a means to grander political ends. In other words, the creation of the internal market has from the outset been conceptualised as a tool for implementing other policies.[31] This entails that the EEC's competition law was conceived as a means to achieve the Treaty's broader objectives. Thus, the provision containing the prohibition of abuse of dominance had to respond to a wide range of concerns.

II. General Scheme

The text of what is now Article 102 has remained substantively unchanged since the signing of the EEC Treaty,[32] and reads as follows:

> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> (b) limiting production, markets or technical development to the prejudice of consumers;
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[33]

[30] Similarly eg Richard Whish and David Bailey, *Competition Law* (7th edn, OUP 2012) 54.

[31] See especially EEC (n 22), art 2.

[32] The numbering of the relevant Treaty provision changed over time, but its content remained substantively unchanged. A purely decorative change is the replacement of the concept of 'common market' by the substantively interchangeable concept of 'internal market'.

[33] TFEU (n 6), art 102.

The provision plainly does not prohibit the existence or acquisition of a dominant position, but instead targets the abusive conduct of firms holding a dominant position in a defined relevant market. The two substantive conditions for the application of Article 102 are the existence of a dominant position by one or more undertakings, and the abuse of this position. The provision also includes two jurisdictional requirements which establish the circumstances under which an abuse of dominance becomes capable of assessment under Article 102, namely that the dominant position must be held within the internal market or in a substantial part thereof, and that the abusive conduct must affect trade between Member States.

These requirements, however, are not defined, and hence, the first sentence of the provision does not provide any indication as to the meaning of abuse of a dominant position, other than the statement that such conduct is 'incompatible with the internal market'. The list of abuses laid down in Article 102(a)-(d), does provide some guidance as to the meaning of the concept of abuse. Nevertheless, even this is of limited assistance since the wording of the provision ('[s]uch abuse may, *in particular*, consist in: […]') reveals that this is just an illustrative list of potential abusive practices.[34]

The fact that the provision lacks sharply defined criteria led in the early years to fears that it would 'remain a dead letter'.[35] The general uncertainty prevailing during the EEC Treaty negotiations on how best to deal with positions of market power was ultimately reflected in the text of the relevant provision. This uncertainty was also linked to the question of enforcement, which was left open when the EEC Treaty entered into force in 1958. Particularly, it was not

[34] eg Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECLI:EU:T:1994:246 (*Tetra Pak II*), para 37; Case T-201/04 *Microsoft Corp v Commission* [2007] ECLI:EU:T:2007:289, para 860, holding that the list of practices contained in Article 102 is not an exhaustive enumeration of abusive practices.

[35] See Samkalden and Druker (n 12) fn 14.

foreseen at the time that what is now Article 102 would be directly applicable;[36] and indeed it had not been enforced for over a decade.[37]

III. Key Concepts

Article 102 is framed in sufficiently broad terms to allow ample interpretative discretion to the EU authorities. Indeed, the CJEU has played an active role in shaping the substantive content of Article 102. Particularly, the EU judiciary has provided definitions for the concepts of 'dominant position' and 'abuse' and has developed certain further guiding tools and doctrines. This section thus provides an overview of these key legal concepts and guiding tools.

A. Dominant Position

The prohibition contained in Article 102 applies only to undertakings that enjoy a dominant position in a given market. Thus, the first step for the application of the provision is to establish the existence of dominance. This would require, by definition, the identification of the boundaries of competition, ie the identification of the relevant product and geographic markets where the undertaking concerned is active.[38] Hence, the evaluation of whether there exists a dominant position in each particular case would require a two-stage test: first, the market needs to be defined and, then, it can be assessed whether the undertaking has market power amounting to a dominant position.[39]

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[36] This issue has been resolved at a later stage: see Council Regulation (EEC) No 17 of 6 February 1962 First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ Spec Ed 87 (Reg 17); replaced with effect from 1 May 2004 by Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 (Reg 1/2003). The enforcement structure and institutional setting within which Article 102 is to be enforced is discussed in chapter 5.

[37] The first abuse of dominance case before the Court of Justice was Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission* [1973] ECLI:EU:C:1973:22 (*Continental Can*).

[38] *Continental Can* (n 37), para 32, emphasising the essential significance of market definition for the appraisal of a dominant position. See Commission, 'Notice on the Definition of Relevant Market for the Purposes of Community Competition Law' [1997] OJ C372/5 (Notice on Relevant Market), paras 2 and 5.

[39] eg *Continental Can* (n 37), para 32; Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECLI:EU:C:1978:22 (*United Brands*), para 10; Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECLI:EU:C:1979:36 (*Hoffmann-La Roche*), para 21; Case 322/81 *NV Nederlandsche Banden*

The problem, however, is that, as explained above, the provision itself does not provide a definition of the term 'dominant position'. The concept refers to market power, but this does not answer the question of what degree of market power would amount to a dominant position within the meaning of Article 102. After all, every undertaking has some degree of market power and there are numerous theories explaining market power.[40] It has therefore been the task of the EU judiciary to define the meaning of the expression 'dominant position' for the application of Article 102. This definition was provided by the Court of Justice in its seminal judgment in *United Brands*, where it held that:

> the dominant position referred to in [Article 102] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.[41]

This broad definition remains the basic legal test for dominance. In essence, it describes dominance as the ability of an undertaking to prevent competition from flourishing because its market power is so substantial that it can behave, at least to an appreciable extent, independently of other market actors. Therefore, the underlying idea is that the presence of a dominant firm in a market entails that the state of competition on that market is already distorted, which enables it to exploit its market power.[42]

Industrie Michelin v Commission [1983] ECLI:EU:C:1983:313 (*Michelin I*), para 37; Case T-219/99 *British Airways plc v Commission* [2003] ECLI:EU:T:2003:343, para 91; Case T-340/03 *France Télécom SA v Commission* [2007] ECLI:EU:T:2007:22, para 78. See Notice on the Relevant Market (n 38), para 11.

[40] See Giorgio Monti, 'The Concept of Dominance in Article 82' (2006) 2 EC J 31, describing four potentially relevant concepts of market power for the identification of dominance under Article 102.

[41] *United Brands* (n 39), para 65.

[42] Monti, 'The Concept of Dominance in Article 82' (n 40) 38; Richard Whish, '*Intel v Commission*: Keep Calm and Carry on!' (2014) 6 JECLP 1, 2.

Subsequently, in *Hoffmann-La Roche* the Court of Justice reiterating the basic definition of dominance,[43] explicated further that an undertaking may be dominant even if it does not determine on its own the conditions under which competition will develop; it is enough for it to exert an appreciable influence on them.[44] It is therefore not necessary for the finding of a dominant position that an undertaking is absolutely free from its competitors and customers, although a significant freedom from the competitive pressures is required. The degree of market power required to satisfy the filter of dominance in Article 102 is not measured directly by examining whether the undertaking concerned prices above cost.[45] It is rather measured indirectly through the assessment of a combination of several factors, which, taken together, illustrate the overall market circumstances.[46]

The first factor to examine in this regard is the market shares of the undertaking concerned.[47] The Court of Justice in *Hoffmann-La Roche* stressed the prime importance of the existence of high market shares over a period of time as an indicator of dominance.[48] Affirming the relevance of market shares for the finding of a dominant position, the Court in *AKZO* went on to establish a rebuttable presumption of dominance where an undertaking has a market share

[43] *Hoffmann-La Roche* (n 39), para 38.

[44] ibid para 39.

[45] cf Abba Lerner, 'The Concept of Monopoly and the Measurement of Monopoly Power' (1934) 1 Review of Economic Studies 157; Joe Bain, 'The Profit Rate as a Measure of Monopoly Power' (1941) 55 QJE 271, proposing mathematical formulas for the measurement of the degree of market power in every given case, known as the Lerner Index and the Bain Index respectively.

[46] See eg *United Brands* (n 39), para 66; *Hoffmann-La Roche* (n 39), para 39; Case T-30/89 *Hilti AG v Commission* [1991] ECLI:EU:T:1991:70, para 90; Case C-250/92 *Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA* [1994] ECLI:EU:C:1994:413, para 47; Case C-280/08P *Deutsche Telekom AG v Commission* [2010] ECLI:EU:C:2010:603, para 170. See also Commission, 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' (Communication) [2009] OJ C45/7 (Priorities Paper), para 10.

[47] Notice on Relevant Market (n 38), para 53, stipulating that market shares are calculated on the basis of the undertaking's sales on the relevant product and geographic market.

[48] *Hoffmann-La Roche* (n 39), para 41. cf *Hoffmann-La Roche* (n 39), para 40, holding that the importance of market shares may vary from one market to another.

of 50% or more ('the *AKZO* presumption').[49] The *AKZO* presumption of dominance overturns the evidential burden of proof to the allegedly dominant undertaking, which must put forward convincing evidence that it does not possess a position of dominance, despite its large market share on the relevant market.[50]

Although it makes perfect sense to refer to market shares as an indicator of a certain degree of market power,[51] the case law has consistently held that market shares are not conclusive and that a comprehensive examination of the conditions prevailing in the market is essential for this assessment. [52] Indeed, even the existence of a market share exceeding 70% does not necessarily provide a clear image of the undertaking's market position. Particularly, market shares fail to provide any information on the existence of potential competition, ie on firms that are not yet active on the relevant market but have the ability to readily enter into it.[53]

Most of the times (even in cases where the *AKZO* presumption applies), the Commission and the EU courts evaluate all the market circumstances.[54] The relevant factors were helpfully summarised and systematised by the Commission in the following terms:

> [t]he assessment of dominance will take into account the competitive structure of the market, and *in particular* the following factors:

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[49] Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECLI:EU:C:1991:286 (*AKZO Chemie*), para 60.

[50] See Lisbeth La Cour and Peter Møllgard, 'Meaningful and Measurable Market Dominance' (2003) 24 ECLR 132; Frances Dethmers and Ninette Dodoo, 'The Abuse of *Hoffmann-La Roche*: The Meaning of Dominance under EC Competition Law' (2006) 27 ECLR 537 criticising the over-reliance on market shares as an indicator of dominance and arguing that the 50% threshold is too low.

[51] Pranvera Këllezi, 'Abuse below the Threshold of Dominance? Market Power, Market Dominance, and Abuse of Economic Dependence' in Mark-Oliver Mackenrodt, Beatriz Conde Gallego and Stefan Enchelmaier (eds), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* (Springer 2008) 60.

[52] eg *United Brands* (n 39), paras 65-67; *Hoffmann-La Roche* (n 39), paras 38-40; T-30/89 *Hilti* (n 46), para 90; *Gøttrup-Klim* (n 46), para 47.

[53] Priorities Paper (n 46), para 16.

[54] eg *Michelin I* (n 39), paras 53-60; *Eurofix-Bauco v Hilti* (Case IV/30.787 and 31.488) Commission Decision 88/138/EEC [1988] OJ L65/19, paras 69-70; *Soda-ash — ICI* (Case COMP/33.133-D) Commission Decision 2003/7/EC [2003] OJ L10/33, paras 127-8; *Intel* (Case COMP/37.990) [2009] D(2009) 3726 final, paras 853ff.

> — constraints imposed by the existing supplies from, and the position on the market of, actual competitors (*the market position of the dominant undertaking and its competitors*),
> — constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors (*expansion and entry*),
> — constraints imposed by the bargaining strength of the undertaking's customers (*countervailing buyer power*).[55]

As a general proposition, dominance under Article 102 is not equated to substantial market power in the sense that it is understood in economic theory, ie as the freedom to set prices and reduce output.[56] It is a broader and differentiated concept for the assessment of which one needs to examine factors which hint to the commercial power of the firm on the relevant market.[57] In this regard, economies of scale and scope and other efficiencies are relevant factors in order to establish dominance.

Central to this analysis is the definition of the relevant market. In this context, relatively small firms may be found dominant, especially in markets narrowly drawn.[58] Hence, the size of the firm in terms of absolute turnover is not relevant in order to find dominance. In any event, for Article 102 to apply it is still necessary for the conduct of the firm to be at least capable of having an effect on inter-state trade, which reveals the peculiar setting within which Article 102 is to be enforced.[59]

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[55] Priorities Paper (n 46), para 12 (emphasis added).

[56] Monti, 'The Concept of Dominance in Article 82' (n 40) 32-38.

[57] Emanuela Arezzo, 'Is there a Role for Market Definition and Dominance in an Effects-based Approach?' in Mark-Oliver Mackenrodt, Beatriz Conde Gallego and Stefan Enchelmaier (eds), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* (Springer 2008) 37.

[58] For such cases see eg Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission* [1979] ECLI:EU:C:1979:138; *BBI/Boosey & Hawkes: Interim measures* (Case IV/32.279) Commission Decision 87/500/EEC [1987] OJ L286/36; Case 226/84 *British Leyland Public Limited Company v Commission* [1986] ECLI:EU:C:1986:421; Case C-551/03P *General Motors BV v Commission* [2006] ECLI:EU:C:2006:229.

[59] On this requirement see eg *Michelin I* (n 39), para 104; Joined Cases C-241, 242/91P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* [1995] ECLI:EU:C:1995:98 (*Magill*), para 70; Case T-228/97 *Irish Sugar plc v Commission* [1999] ECLI:EU:T:1999:246, para 170.

Overall, the concept of dominance, as developed by the CJEU, shows due regard to the concern and the social cost of false negatives by virtue of the inherent flexibility in the wording 'to an appreciable extent'.[60] The concept is thus calculatedly nuanced. In practice, however, a dominant position within the meaning of Article 102 has been found only where the firm concerned had a relatively large market share compared to its main competitors.[61]

B. Special Responsibility

The EU courts have repeatedly stated that dominant firms carry a special responsibility not to distort competition within the internal market. This notion was first introduced by the Court of Justice in its *Michelin I* judgment, where it held that:

> [a] finding that an undertaking has a dominant position is not in itself a recrimination but simply means that […] the undertaking concerned has *a special responsibility* not to allow its conduct to impair genuine undistorted competition on the [internal] market.[62]

This passage, which has been reproduced in virtually all Article 102 judgments ever since,[63] seems to be a statement of the obvious. In essence, it states that holding a dominant market position is not prohibited as such under Article 102; what is prohibited is the abuse of that position. Also, it describes the specificity of Article 102, namely the fact that only the unilateral conduct of dominant firms comes within the scope of the provision. In other words, a course

[60] cf Këllezi (n 51) 77 and 83, explaining that, under exceptional circumstances, the economic dependence on an undertaking may be covered by Article 102.

[61] See *Virgin/British Airways* (Case IV/D-2/34.780) Commission Decision 2000/74/EC [2000] OJ L30/1, para 88, which is the only finding of dominance where the firm concerned held a market share of below 40% (39.7%). Even there, however, the dominant firm's market share was over 2.2 times the combined share of its four largest rivals. See also Priorities Paper (n 46), para 14, stipulating that '[t]he Commission's experience suggests that dominance is not likely if the undertaking's market share is below 40 % in the relevant market'.

[62] *Michelin I* (n 39), para 57 (emphasis added).

[63] eg Case T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission* [1993] ECLI:EU:T:1993:31, para 67; Case T-65/98 *Van den Bergh Foods Ltd v Commission* [2003] ECLI:EU:T:2003:281, para 158; Case T-170/06 *Alrosa Company Ltd v Commission* [2007] ECLI:EU:T:2007:220, para 146; Case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission* [2009] ECLI:EU:T:2009:317, para 132; *Deutsche Telekom AG* (n 46), para 176; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECLI:EU:C:2011:83 (*TeliaSonera*), para 24; Case C-413/14P *Intel Corp. v Commission* [2017] ECLI:EU:C:2017:632, para 135.

of conduct that would be perfectly legitimate and unobjectionable if performed by non-dominant firms may be abusive within the meaning of Article 102, and hence illegitimate when carried out by undertakings with significant market power.[64] Although such a descriptive doctrine may provide certain insights as to the EU courts' approach to abusive practices under Article 102, it cannot of itself constitute the basis for the determination of concrete and specific criteria to assess potentially abusive behaviour.[65] Therefore, the special responsibility doctrine is not employed in the jurisprudence as a substantive legal test for distinguishing abusive from legitimate market behaviour of dominant firms.[66]

Certain commentators, however, have approached this concept with creativity. In fact, this concept is understood by some to be the lynchpin of the Ordoliberal approach that the EU courts are said to promote.[67] It is thus argued that the special responsibility doctrine is the basis on which the EU courts are promoting the protection of competitors at the expense of other legitimate competition law objectives.[68] Other commentators suggest that the doctrine has its origins in fairness, and thereby implies that ethics play a role in the application of Article 102.[69] These are creative readings of the notion of special responsibility, which are inconsistent with the language used by the EU courts. The notion seems to be a descriptive one with no normative

[64] In this vein see Joined Cases T-191, 212 to 214/98 *Atlantic Container Line AB and Others v Commission* [2003] ECLI:EU:T:2003:245, para 1460.

[65] Similarly John Temple Lang and Robert O'Donoghue, 'GCLC Research Papers on Article 82 EC: The Concept of an Exclusionary Abuse under Article 82 EC' [2005] GCLC College d'Europe 38, 42.

[66] Similarly Eirik Østerud, *Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law: The Spectrum of Tests* (Kluwer Law 2010) 39.

[67] Liza Lovdahl Gormsen, 'Article 82 EC: Where are we Coming from and where are we Going to?' (2006) 2 CL Rev 5, 10.

[68] Liza Lovdahl Gormsen, 'The Conflict between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC' (2007) 3 EC J 329, 339.

[69] Giuliano Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Hart Publishing 1997) 65ff; Antonio Bavasso, 'The Role of Intent Under Article 82 EC: From "Flushing the Turkeys" to "Spotting Lionesses in Regent's Park"' (2005) ECLR 616, 617.

content, which intends to stress the specificity of Article 102 as a provision designed to deal with the unilateral conduct of dominant firms.[70] In other words, it is simply an acknowledgment that, according to the EU Treaties, dominant firms' conduct is treated differently.[71]

Be this as it may, the utility of the doctrine is limited to the fact that it underlines the undeniable fact that EU competition law is focused on the protection of the competitive process as a means to protect the interest of consumers and the integration of the internal market. Hence, the concept of special responsibility may, at best, suggest that the EU courts are keen to adopt a strict approach against a dominant firm's market conduct.[72] Such a strict enforcement should not come as a surprise considering the constitutional peculiarities of the EU that affect the interpretation of Article 102, which are analysed in the following chapters.

Suffice it to say here that it is reasonable that EU competition rules adopt a strict stance against any market conduct that is potentially liable to undermine the competitive structure of the market, and thereby obstruct the integration of EU's internal market. Undertakings with substantial market power are viewed with suspicion as they have both the ability and the incentive to impair the remaining competition on the market in order to protect and enhance their market position.[73] It is thus considered that dominant undertakings may take measures with potentially detrimental effects to the still ongoing process of market integration. Being an ongoing process, the internal market is fragile and prone to failures. This is why there is less

[70] Similarly Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles Article 102* (OUP 2011) 174-6; Ekaterina Rousseva and Mel Marquis, 'Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU' (2013) 4 JECLP 32, 43.

[71] Wouter Wils, 'The Judgment of the EU General Court in *Intel* and the so-called "More Economic Approach" to Abuse of Dominance' (2014) 37 WC 405, 429.

[72] Østerud (n 66) 35.

[73] See eg Joined Cases C-468 to 478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* [2008] ECLI:EU:C:2008:504 (*Sot Lélos*), para 66.

faith in the self-correcting ability of the market in the EU as opposed to the US.[74] In any event, the idea that the concept of special responsibility implies that Article 102 protects competitors is an empty slogan insofar as there cannot be any competition without competitors, and hence the application of Article 102 may often have the incidental effect of protecting competitors.[75]

C. Abuse of Dominance

The concept of abuse of dominance is the central legal concept in relation to the prohibition contained in Article 102 precisely because the provision does not target the existence of dominance as such but the abuse of dominance. The controversy surrounding Article 102 therefore stems from the concept of 'abuse', in that it involves an evaluation of whether a behaviour on the part of a dominant firm deviates from 'normal competition' or 'competition on the merits'. In this regard, the next chapters show that the realm of abuse of dominance is shaped by reference to a range of objectives and values. This section provides a short description of the main features of the concept so as to set the scene for the discussion to follow.

i. *Definition*

A definition of the concept of abuse of dominance was first articulated by the Court of Justice in the *Hoffmann-La Roche* judgment, where it was stated that:

> [t]he concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of the market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators,

[74] There is no 'special duty' imposed on firms with significant market power under US antitrust law.

[75] Similarly Wolfgang Wurmnest, 'The Reform of Article 82 EC in the Light of the "Economic Approach"' in Mark-Oliver Mackenrodt, Beatriz Conde Gallego and Stefan Enchelmaier (eds), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* (Springer 2008) 10. Contrast Ekaterina Rousseva, 'Modernizing by Eradicating: How the Commission's new Approach to Article 81 EC Dispenses with the Need to Apply Article 82 EC to Vertical Restraints' (2005) 42 CML Rev 587.

> has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.[76]

Unsurprisingly, this is a very general and broad definition which intends to encapsulate all the potential forms of practices that a dominant firm may implement in order to exclude its competitors from the market. Nevertheless, even though this passage is regularly cited as an authority on the meaning of abuse of dominance, by no means does it provide an all-encompassing definition of the term 'abuse' under Article 102. Most importantly, it fails to embrace the broad category of exploitative abuses, ie the type of abuses where customers and/or consumers are directly harmed by, for instance, the imposition of excessive prices or unfair trading conditions.[77] Consequently, this definition provides limited guidance on the identification of the specific forms of conduct that are prohibited by virtue of Article 102.[78]

Nevertheless, the definition of abuse in *Hoffmann-La Roche* illuminates certain characteristics of the concept that assisted the EU courts to flesh out specific rules and tests for particular categories of potentially abusive practices. First, it describes abuse as an 'objective concept'. Thus, the conduct of a dominant firm may infringe Article 102 regardless of the existence of fault.[79] Second, it appears that the form of the practice is relevant for its subsequent assessment under Article 102. From this we can infer that certain forms of conduct by dominant firms may be treated more strictly than others. That is, certain practices may be regarded as being presumably abusive when carried out by dominant firms.[80] Third, the definition of abuse puts emphasis on market structure and on residual competition. This process-oriented approach

[76] *Hoffmann-La Roche* (n 39), para 91. For a recent judgment providing the same definition see Case C-170/13 *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland Gmb* [2015] ECLI:EU:C:2015:477, para 45.

[77] The wording of the provision explicitly refers to these types of abuse in Article 102(2)(a), giving as an example of abusive conduct the imposition of unfair purchase or selling prices or other trading conditions.

[78] cf Østerud (n 66) 44, arguing that the definition of the concept of abuse is meaningless.

[79] eg *BPB Industries* (n 63), para 141.

[80] The legal tests applied to abusive practices under Article 102 are discussed in chapter 4.

is dictated by the wording of Article 102 and the spirit of the Treaties, which stress the prime importance of the adequate functioning of the internal market with effective competition.[81]

ii. *Prohibition of Exclusionary Practices*

Article 102 has most frequently been applied to practices of dominant undertakings that are characterised as exclusionary. Exclusionary abuses refer to practices of dominant firms that are designed to, or have the effect of, diminishing actual competition and/or preventing the emergence of increased competition, and are distinguished from exploitative abuses. In short, the former type of abuses harms consumers indirectly through the elimination of competitors, whereas exploitative abuses harm consumers directly.

It has not been self-evident from the outset that Article 102 covers exclusionary abuses.[82] This was established in the very first case to come before the Court of Justice under Article 102.[83] Specifically, in *Continental Can* it had been argued that Article 102 regulated only the direct exploitation of consumers, and thus could not apply to practices that negatively affect the competitive process to the (indirect) detriment of consumers.[84] Rejecting this argument, the Court held that the provision refers not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their

[81] See Consolidated Version of the Treaty on the European Union [2012] OJ C326/13 (TEU), art 3(3) in conjunction with TFEU (n 6), art 3(c) and Protocol No 27 on the internal market and competition annexed to the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] OJ C115/309 (Protocol No 27). Similarly Daniel Zimmer, 'On Fairness and Welfare: The Objectives of Competition Policy' in Claus-Dieter Ehlermann, Mel Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing 2008).

[82] René Joliet, *Monopolization and Abuse of Dominant Position: A Comparative Study of the American and European Approaches to the Control of Economic Power* (Nijhoff 1970) 252. See also Pinar Akman, 'Searching for the Long-Lost Soul of Article 82EC' (2009) 29 OJLS 267, 270, arguing that the drafters of what is now Article 102 intended to prohibit merely exploitative abuses and that the provision is not fit for the purpose of regulating exclusionary abuses.

[83] *Continental Can* (n 37).

[84] ibid para 19.

impact on competition.[85] Interestingly, the Court reached this conclusion by interpreting the provision in light of the general spirit of the Treaty.[86] This openly and powerfully teleological reasoning of the Court has been followed consistently in subsequent judgments, confirming that Article 102 is applicable to both exploitative and exclusionary abuses.[87]

Attempting to achieve EU's broader goals through the interpretation of Article 102 'in light of the general spirit of the Treaties' is fully consistent with the political and historical context of the adoption of the provision. It has been explained that Article 102 was conceived as an 'implementation provision' of the wider Treaty goals.[88] Thus, this systematic and holistic interpretation of the concept of abuse, as one attempting to avoid competition from being distorted in such a way that it would prevent the achievement of the broader objectives of the Treaty, is historically and constitutionally justified.

iii. *Spectrum of Tests*

The EU courts do not opt for a single test for all types of abuses. Instead, a spectrum of tests has been developed, which denotes that there is not a single explanation for all abuses under Article 102. In this regard, the doctrine of special responsibility and the definition of abuse may provide certain insights as to the attitude of the EU courts towards unilateral conduct control, but none of these guiding tools constitute a substantive unified test for all possible

[85] ibid para 26.

[86] ibid paras 22-26. See Akman, 'Searching for the Long-Lost Soul of Article 82EC' (n 82) 296, characterising this judgment as the 'apotheosis of the teleological method' to the extent that it has led to Article 102 being used for a purpose for which it was not designed for.

[87] eg *Hoffmann-La Roche* (n 39), para 125; *Michelin I* (n 39), para 70; T-219/99 *British Airways* (n 39), para 306; Case C-95/04P *British Airways plc v Commission* [2007] ECLI:EU:C:2007:166, para 106; *France Télécom* (n 39), para 266; Case T-286/09 *Intel Corp. v Commission* [2014] ECLI:EU:T:2014:547, para 105.

[88] Similarly eg Thomas Eilmansberger, 'How to Distinguish Good from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Anti-competitive Abuses' (2005) 42 CML Rev 129, 135.

forms of abusive practices; and arguably a unified test would be unworkable in practice, since different theories of harm underpins different categories of abuses.

The EU courts have therefore identified abusive practices on a case-by-case basis, developing a spectrum of tests for different categories of practices. This spectrum of tests is further analysed in chapter 4, where the case law concerning exclusionary abuses is discussed extensively. Suffice to say here that conduct-specific tests have been developed for the assessment of particular practices under Article 102.

D. Efficiency Defence and Objective Justification

Contrary to Article 101, which contains a provision providing a defence for an otherwise unlawful agreement or decision, the text of Article 102 lacks a clause that would give the possibility to a dominant firm to put forward a defence for its conduct.[89] This creates a conceptual problem as any defence for the unilateral conduct of a dominant firm must be incorporated into the concept of abuse. Despite the absence of such clause, the EU courts have progressively developed a two-stage analytical framework for Article 102 similar to the one under Article 101. Hence, the EU judiciary allows dominant firms to escape the application of the prohibition enshrined in Article 102 by advancing a plea of efficiency defence and/or objective justification.[90]

[89] TFEU (n 6), art 101(3). cf *Atlantic Container* (n 64), para 1112, holding that 'abusive practices are prohibited regardless of the advantages which may accrue to the perpetrators of such practices or to third parties'.

[90] For example see *United Brands* (n 39), para 184; Case 311/84 *Centre belge d'études de marché - Télémarketing (CBEM) v SA Compagnie* [1985] ECLI:EU:C:1985:394, paras 26-27; T-30/89 *Hilti* (n 46), paras 115-9; *Tetra Pak II* (n 34), para 220; *Magill* (n 59), para 55; *Irish Sugar* (n 59), paras 189; T-340/03 *France Télécom* (n 39), para 217; *Microsoft* (n 34), paras 1091-167; C-95/04P *British Airways* (n 87), paras 69 and 85-87; *TeliaSonera* (n 63), paras 75-76; Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECLI:EU:C:2012:172 (*Post Danmark I*), paras 40-41; C-413/14P *Intel* (n 63), para 140.

In fact, it is now well established that a dominant firm may always defend itself against a *prima facie* finding of abusive conduct.[91] There are, however, diverging views among commentators regarding the taxonomy of defences in the context of Article 102.[92] This is because the EU courts have initially attempted to remedy the lack of an exemption provision in the text of Article 102 through recourse to the general concept of objective justification.[93] This judge-created legal construct appeared to refer to any possible justification, including economic or other efficiencies and public policy considerations.[94]

It appears, however, that both the Commission and the CJEU have over the years developed two separate defences within Article 102, namely the efficiency defence and the objective justification. With regard to the efficiency defence, it is viewed as modelled upon Article 101(3), thereby considering as relevant only economic efficiencies that also benefit consumers.[95] Particularly, for a dominant firm to successfully defend itself it must provide evidence that its behaviour: generates efficiencies that benefit consumers; is indispensable for achieving these efficiencies; and does not eliminate effective competition.[96] As to the objective

[91] Tjarda van der Vijver, 'Objective Justification and Article 102 TFEU' (2012) 35 WC 55, 65-68.

[92] See eg Giorgio Monti, *EC Competition Law* (CUP 2007) 203-11; Ekaterina Rousseva, 'The Concept of "Objective Justification" of an Abuse of a Dominant Position: Can it Help to Modernise the Analysis under Article 82 EC?' (2006) 2 CL Rev 27; Tjarda van der Vijver, 'Article 102 TFEU: How to Claim the Application of Objective Justifications in the Case of *prima facie* Dominance Abuses?' (2013) 4 JECLP 121.

[93] See eg *United Brands* (n 39), paras 189-90; *Irish Sugar* (n 59), paras 188-9; *Microsoft* (n 34), paras 1144-67.

[94] See eg van der Vijver, 'Article 102 TFEU: How to Claim the Application of Objective Justifications' (n 92) 121-2, arguing that there are three sources of objective justifications, namely one based on legitimate business behaviour, one concerning efficiency considerations, and one relating to public interest concerns.

[95] eg Case T-193/02 *Laurent Piau v Commission* [2005] ECLI:EU:T:2005:22, paras 117-9; C-95/04P *British Airways* (n 90), para 86; Priorities Paper (n 46), paras 28-31.

[96] TFEU (n 6), art 101(3); Priorities Paper (n 46), para 30.

justification, it enables dominant firms to justify their conduct on the basis of non-economic considerations, such as public health, safety and environmental protection.[97]

Consequently, dominant firms can defend themselves against a *prima facie* finding of abusive conduct by claiming efficiency and/or public interest considerations.[98]

IV. Concluding Remarks

A series of historical, political and practical considerations urged the draftsmen of the EEC Treaty to develop their own peculiarly European version of competition law. What is now Article 102 is itself rather terse and vague, leaving core concepts undefined. The provision thus leaves the judges with significant leeway for interpretation. The EU courts have indeed played an active role in shaping Article 102. Particularly, the EU judiciary has provided authoritative definitions of the key legal concepts and has incorporated presumptions, filters and benchmarks so as to ensure a sensible application of Article 102 in individual cases. In this regard, it has even developed doctrines that were not prescribed in the text of the provision, namely the efficiency defence and the objective justification.

That being said, what is now Article 102 has historically been conceived as part of a system that is employed as a means to achieve the broader objectives set out in the Treaties.[99] The EU courts have also interpreted Article 102 'in light of the general spirit of the Treaties' in order to achieve EU's broader goals. This has always been the main source of the peculiar features pertaining to Article 102. It is explained in the following chapters that this

[97] T-30/89 *Hilti* (n 46), paras 115-9; *Tetra Pak II* (n 34), paras 83-84 and 138; Priorities Paper (n 46), para 29. See also *CECED* (Case IV.F.1/36.718.) Commission Decision 2000/475/EC [2000] OJ L187/47, paras 55-63.

[98] The doctrines of efficiency defence and objective justification will be discussed again in different parts of the thesis.

[99] Similarly Liza Lovdahl Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (CUP 2010) 63, 82-83 and 175; Anca Daniela Chirita, 'Undistorted, Un(fair) Competition, Consumer Welfare and the Interpretation of Article 102 TFEU' (2010) 33 WC 417.

‘instrumentalisation’ of the provision that controls abuse of dominance mandates a broad understanding of the pursued goals and a holistic interpretation of the Treaties. This constitutes the constitutional peculiarities that will be identified in this thesis and which influences the interpretation of abuse of dominance under Article 102. In this regard, the analysis first turns to the objectives pursued by Article 102.

2. OBJECTIVES PURSUED BY ARTICLE 102

There is no single idea regarding the goals of competition law.[1] Competition laws around the globe accommodate a range of goals,[2] and these goals may change over time.[3] We are thus far from having an international consensus of what competition law is or should be for. EU competition law is no exception to this picture: it pursues a multitude of different aims, either explicitly or implicitly.

Even so, the identification of the goals of competition law is important. At a conceptual level, clearly defined goals increase transparency, which, in turn, enhances legitimacy of decision-making and accountability of decision-makers. Establishing a set of objectives enables the relevant authorities to issue well-received decisions in individual cases,[4] and leads to an open debate as to the appropriateness of the legal tests. From a legal point of view, the identification of the precise goals of competition law has a bearing on the subsequent interpretation and application of the law in specific cases.[5] For instance, it affects the

[1] See eg OECD, 'The Objectives of Competition Law and Policy' (CCNM/GF/COMP(2003)3, 29 January 2003) <http://www.oecd.org/daf/competition/2486329.pdf> accessed 6 January 2019; ICN, 'Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies' (Unilateral Conduct Working Group, 6th Annual Conference of the ICN, Moscow, May 2007) <http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf> accessed 6 January 2019. For an excellent analysis of this phenomenon see Ariel Ezrachi, 'Sponge' (2017) 5 JAE 49.

[2] David Evans, 'Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules' (2009) 10 Chicago Journal of International Law 161, noting that divergence is the norm.

[3] See eg Dennis Mueller, 'Lessons from the United States's Antitrust History' (1996) 14 International Journal of Industrial Organization 415, tracing the changes in US antitrust law.

[4] cf Samantha Custer, *Does Openness Enhance Public Trust: A Cross-Country Assessment of the Relationship between Openness of Budgeting Processes and Perceptions of Government Corruption* (ProQuest 2013) 32, concluding that openness is not necessarily positively associated with enhanced public trust.

[5] Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books 1978) 50, arguing that '[e]verything else follows from the answer we give' to the question regarding the goals of competition law; Maurice Stucke, 'Reconsidering Antitrust's Goals' (2012) 53 Boston College Law Review 551, 558; Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles Article 102* (OUP 2011) 2. cf ABA, 'Report on Antitrust Policy Objectives' (12 February 2003) <https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/report_policyobjectives.authcheckdam.pdf> accessed 6 January 2019, 2. Contrast Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' (2013) UCL CLES Working Paper Series 3/2013, <http://ssrn.com/abstract=2235875>

interpretation of the term 'abuse' under Article 102. This, *inter alia*, explains the so-called 'trans-Atlantic antitrust divide', which refers to the difference in the approach taken to competition policy by the EU and the US. This is reasonable: to the extent that law reflects a particular society, its stage of economic development and its ideals, relevant differences are to be expected.[6] The EU is undoubtedly different: it is a market without a state; and in this context, the EU was—and still is—concerned with the furthering of the ideal of the internal market.

In this vein, Article 102 reflects the underlying principles and objectives of the EU Treaties.[7] Its historical influences may contribute to its proper interpretation and application.[8] This, however, cannot be the sole guide. For instance, of relevance is also that Article 102 is part of an overall Treaty framework, unlike its counterpart in the US which is a legal provision in a stand-alone statute.[9] Therefore, Article 102 must be interpreted accordingly, ie in a teleological and contextual manner.[10] In this context, certain Treaty provisions which do not directly relate to it may, nevertheless, have an impact on its interpretation. This illustrates the peculiar constitutional setting of the EU and the hybrid nature of EU competition law.

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accessed 6 January 2019, 3, supporting that determining the goals of EU competition law will not necessarily provide any information on its content and that the focus should be on the institutions.

[6] Eleanor Fox, 'We Protect Competition, You Protect Competitors' (2003) 26 WC 149, 165; Barry Hawk, 'Article 82 and Section 2' in OECD, *Paper on Competition on the Merits* (DAF/COMP(2005)27, 30 March 2006) <http://www.oecd.org/competition/abuse/35911017.pdf> accessed 6 January 2019, 253ff; Evans (n 2) 162.

[7] Commission, 'XXIInd Report on Competition Policy' (1992) 13, stating that '[c]ompetition policy cannot therefore be pursued in isolation, as an end in itself, without reference to the legal, economic, political and social context'.

[8] See eg Pinar Akman, 'Searching for the Long-Lost Soul of Article 82EC' (2009) 29 OJLS 267; Liza Lovdahl Gormsen, 'Article 82 EC: Where are we Coming from and where are we Going to?' (2006) 2 CL Rev 5.

[9] Sherman Act 1890 15 USC §§ 1-7, s 2.

[10] Philip Marsden and Liza Lovdahl Gormsen, 'Guidance on Abuse in Europe: The Continued Concern for Rivalry and a Competitive Structure' (2010) 55 Antitrust Bulletin 875, 886. cf Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart Publishing 2013) 55, stressing that Article 102 should be treated as a 'living instrument'.

There is a persistent and ongoing debate as regards the theoretical underpinnings and the sources of influence of Article 102. On the one hand, the debate surrounds the question of whether the EU is mainly concerned with the economic freedom of market players and rivalry, or whether instead it focuses on consumer welfare and efficiency gains.[11] On the other hand, certain scholars and practitioners identify the influence that US legal thinking had on the application of the unilateral conduct control in the EU.[12] In this vein, the 'structural approach', which is based on the so-called Structure-Conduct-Performance paradigm ('S-C-P') and had dominated the US jurisprudence from the 1940s to the 1970s,[13] appears to have some relevance in understanding the strict and interventionist approach that the EU adopts to abuse of dominance.[14] This is based on the belief that markets are prone to failure, and therefore it is appropriate to have a broad view of abusive conduct by dominant firms and to give wide discretionary powers to the competition enforcement authorities.

Although the US has moved away from such an approach,[15] the EU continues to follow a 'structural stance'. This is not to say that the EU adopts an S-C-P approach equivalent to the

[11] See eg Gormsen, 'Article 82 EC: Where are we Coming from' (n 8); Liza Lovdahl Gormsen, 'The Conflict between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC' (2007) 3 EC J 329; Liza Lovdahl Gormsen, 'The Parallels between the Harvard Structural School and Article 82 EC and the Divergences between the Chicago and Post-Chicago Schools and Article 82 EC' (2008) 4 EC J 221; David Gerber, 'The Future of Article 82: Dissecting the Conflict' in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law: A Reformed Approach to Article 82 EC* (Hart Publishing 2008); Marsden and Gormsen (n 10); Akman, 'Searching for the Long-Lost Soul of Article 82EC' (n 8); Pinar Akman, 'The Role of "Freedom" in EU Competition Law' (2014) 34 LS 183.

[12] See eg Gormsen, 'The Parallels between the Harvard Structural School and Article 82 EC' (n 11); O'Donoghue and Padilla (n 10) 60-63.

[13] Broadly speaking, the S-C-P paradigm is based on the idea that there is a causal link between the market structure, the market players' conduct and their performance. Hence, market structure influences the conduct of firms, which in turn has an impact on their performance. See Leonard Weiss, 'The Structure-Conduct-Performance Paradigm and Antitrust' (1979) 127 University of Pennsylvania Law Review 1104, 1105ff.

[14] Doris Hildebrand, 'The European School in EC Competition Law' (2002) 25 WC 3, 6; Giorgio Monti, *EC Competition Law* (CUP 2007) 86.

[15] The shift towards an efficiency-oriented approach in the US has been pushed forward by the so-called 'Chicago School philosophy'. See William Kovacic, 'The Intellectual DNA of Modern US Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix' (2007) 1 Columbia Business Law Review 1, 6.

one adopted by the US jurisprudence in the 1940s, but merely to emphasise that the protection of the competitive process and the structure of the market were and still are relevant under Article 102. This may be explained by the fact that EU's internal market is fragile and less competitive and dynamic than the one in the US. Additionally, the internal market is still growing and evolving, especially as a result of the EU's enlargement(s). Hence, there is still a consensus in the EU regarding the benefits of an active competition law enforcement.[16]

Even though the discussion of the philosophical foundations of Article 102 is interesting, it can potentially be misleading. What matters for the purpose of this chapter is the actual goals that the law pursues rather than the multiple, complicated and, at times, inconsistent, initial and subsequent, sources of influence for the establishment of these goals.[17] In this regard, despite the fact that after more than fifty years of EU competition law enforcement there is still no consensus as regards the standard of harm applied under Article 102, there is no disagreement as to the ultimate twin objective of EU competition law: the integration goal and the economic goal.[18] The former goal relates to the elimination of barriers to internal market integration, whereas the latter is linked to the concern of maintaining effective competition within the internal market for the benefit of consumers. Even so, the common denominator of both these goals is the 'internal market' in that the latter defines the substance of both the integration goal and the economic goal of Article 102.

[16] In this vein Lianos, 'Some Reflections on the Question of the Goals' (n 5) 3. cf Federico Etro and Ioannis Kokkoris, 'Toward an Economic Approach to Article 102 TFEU' in Federico Etro and Ioannis Kokkoris (eds), *Competition Law and the Enforcement of Article 82* (OUP 2010) 35.

[17] cf Ezrachi, 'Sponge' (n 1) 52, arguing that the scope of competition law is a complex and, at times, inconsistent expression of a multitude of values.

[18] Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (3rd edn, Sweet & Maxwell 2010) 6. See also Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission* [1973] ECLI:EU:C:1973:22 (*Continental Can*), para 25, holding that the competition provisions in the Treaty are pursuing the same aim.

With this in mind, the chapter sets out a framework for the understanding of the objectives of Article 102. It demonstrates that there is a plurality of goals in a multi-level hierarchical order under Article 102. Specifically, the ultimate goals are the promotion of market integration and the protection of consumer interest. These goals are propelled through the intermediate goal of the protection of the competitive process (in other words, the structure of the market), which, in turn, is protected through the use of proxies (or intermediate goals of lower rank), such as, consumer choice, consumer welfare, efficiency and economic freedom. In essence, Article 102 has a multitude of intermediary goals and a twin ultimate goal promoted through the protection of the competitive process. It is argued that this approach is consistent with primary EU law and portrays the application of Article 102 in practice. Namely, the provision is triggered when the competitive process is distorted, the latter being revealed by means of proxies, in order to protect consumer interest and the integrity of the internal market.

I. Potential Objectives

Before analysing the actual objectives pursued by Article 102, this section attempts to clarify the meaning and evaluate the implications of certain putative goals that are arguably most relevant in the context of abuse of dominance. This is particularly important since it appears that the persisting confusion regarding the objectives pursued by Article 102 is primarily the result of the lack of clarity as to what exactly is meant by each objective.

A. Quantifiable Economic Objectives

i. *Consumer Welfare*[19]

Most competition law regimes promote, either solely or among others, the goal of consumer welfare.[20] Most legal scholars and practitioners also argue that this goal should be the universal objective of each and every competition law system.[21] The concern, however, with the consumer welfare objective is that there is no unanimously accepted definition of it among competition authorities and competition law experts.[22]

The goal of consumer welfare is defined here as the goal of maximising consumer surplus, ie, that part of total surplus given to consumers. Consumer surplus is the difference between the maximum price that consumers are willing and able to pay for a commodity and the market price.[23] In other words, consumer surplus exists whenever consumers pay less for a good or service than they are prepared to pay, and increases the less they have to pay relative to what they are willing and able to spend. This understanding of the objective of consumer welfare is to be distinguished from the broader putative goal of Article 102, namely the protection of consumer interest, which is examined further down in this section. The consumer

[19] Bork, *The Antitrust Paradox* (n 5), misleadingly introducing the term into the competition law vocabulary to refer to 'total welfare'. See Katalin Cseres, *Competition Law and Consumer Protection* (Kluwer Law 2005) 331-3, referring to this confusing usage of 'consumer welfare' as the 'Chicago trap'.

[20] OECD, 'The Objectives of Competition Law and Policy' (n 1) 5; ICN, 'Report on the Objectives of Unilateral Conduct Laws' (n 1) 9, stating that thirty of the thirty-three respondents state that their unilateral conduct rules aim to promote consumer welfare.

[21] See eg Russell Pittman, 'Consumer Surplus as the Appropriate Standard for Antitrust Enforcement' (2007) 3 CPI 205. See also Nazzini (n 5) 45, arguing that consumer welfare is used in practice to disguise different objectives under the false impression that there exists consensus.

[22] ICN, 'Competition Enforcement and Consumer Welfare Survey: Setting the Agenda' (10th Annual Conference of the ICN, the Hague, May 2011) <http://www.internationalcompetitionnetwork.org/uploads/library/doc857.pdf> accessed 15 May 2017, 19-21; ICN, 'Report on the Objectives of Unilateral Conduct Laws' (n 1) 9-12; Stucke, 'Reconsidering Antitrust's Goals' (n 5) 558. See also Joseph Broadley, 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress' (1987) 62 NYU L Rev 1020, 1032, stating that it 'is the most abused term in modern antitrust analysis'.

[23] Joseph Mayer, 'Consumer's Surplus' (1926) 16 American Economic Review 77.

welfare goal entails that Article 102 would apply only when there is a net decrease in consumer surplus irrespective of the augmentation or diminution in total surplus. Since Article 102 would apply solely to prevent increases in prices and restrictions of output resulting from the exercise of market power by dominant firms, a unilateral trade practice would only be abusive if there is an actual or likely price increase and/or output restriction.[24]

The adoption of consumer welfare as the sole or main objective of competition law generally, and of Article 102 specifically, has been criticised on several grounds. The first criticism stems from the fact that such an approach discriminates between the efficiencies that benefit consumers and those that benefit producers, thereby considering 'wealth transfers from consumers to producers as being rather harmful than neutral'.[25] It is thus argued that, contrary to the teachings of welfare economics, it disregards the fact that gains to producers and shareholders can have significant positive effects on the overall welfare of society.[26] A second criticism that is linked to the first one, is that competition policy is not well-suited to promote distributional goals compared to other policies, such as tax and subsidy schemes.[27]

More importantly, however, consumer welfare (as consumer surplus) is not an appropriate goal for Article 102 because it can lead to sub-optimal outcomes and adverse effects to consumers. This is because the impact of trade practices on consumers is limited to the measurement of effects in price and output. Despite the fact that these are indicia of negative

[24] Felix Engelsing and others, 'A Bundeskartelllamt/Competition Law Forum Debate on Reform of Article 82: A "Dialectic" on Competing Approaches' (2006) 2 EC J 211, 221.

[25] Kati Cseres, 'The Controversies of the Consumer Welfare Standard' (2006) 3 CML Rev 121, 149. See also Marc Duhamel and Peter Townley, 'An Effective and Enforceable Alternative to the Consumer Surplus Standard' (2003) 26 WC 3, 21.

[26] Cseres, 'The Controversies of the Consumer Welfare Standard' (n 25) 127.

[27] Nazzini (n 5) 41-43; Massimo Motta, *Competition Policy: Theory and Practice* (CUP 2004) 18; Louis Kaplow, 'On the Normative Choice of Welfare Standards in Competition Law' in Daniel Zimmer (ed), *The Goals of Competition Law* (5th ASCOLA Workshop, Edward Elgar 2012) 8. cf Robert Pitofsky, 'The Political Content of Antitrust' (1979) 127 University of Pennsylvania Law Review 1051, 1060.

effects on competition and are easily quantifiable, they are not always accurate indicators of (anti-)competitive effects. Quality, effective consumer choice, and innovation are of critical importance when a market's competitiveness is assessed, even though these efficiencies are of non-quantifiable nature.[28] Indeed, '[c]ompetition law is about competition'; and 'competition means more than just consumer welfare [in the sense of consumer surplus]'.[29]

ii. *Total (Social) Welfare*

Certain economists and legal experts argue that the ultimate and/or sole goal of competition law is, or should be, what is referred to as total or social welfare objective.[30] Total welfare refers to the sum of consumer surplus and producer surplus.[31] Consumer surplus has already been discussed. As to producer surplus, it is the difference between the minimum amount that producers are willing and able to accept for supplying a good or service and the price they actually receive by supplying it.[32] Hence, this surplus amount is the producers' benefit from the supply of the commodity; the greater the difference between the two amounts, the greater the producers' benefit.

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[28] Similarly Cseres, 'The Controversies of the Consumer Welfare Standard' (n 25) 150. In this vein see also the wording of Article 101(3) TFEU, which is relevant to the assessment of the goals pursued by Article 102.

[29] Daniel Zimmer, 'On Fairness and Welfare: The Objectives of Competition Policy' in Claus-Dieter Ehlermann, Mel Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing 2008) 104.

[30] Joseph Farrell and Michael Katz, 'The Economics of Welfare Standards in Antitrust' (2006) Competition Policy Center Paper CPC06-061, <http://www.ibrac.org.br/UPLOADS/Eventos/324/Farrell_Katz_2006.pdf> accessed 6 January 2019, 9-10; Nazzini (n 5) 40, arguing that competition law intends to promote the long-term social welfare that results from effective competition. cf Bruce Lyons, 'Could Politicians be More Right than Economists? A Theory of Merger Standards' (2002) Revised CCR Working Paper CCR 02-1, <http://competitionpolicy.ac.uk/documents/107435/107587/ccp2-1.pdf> accessed 6 January 2019, 1; Cseres, 'The Controversies of the Consumer Welfare Standard' (n 25) 124, arguing that '[w]hile society's total welfare is usually the ultimate goal of competition policy it is rarely its exclusive goal'. Contrast O'Donoghue and Padilla (n 10) 6.

[31] Bishop and Walker, *The Economics of EC Competition Law* (n 18) 29.

[32] Farrell and Katz (n 30) 1.

Interestingly, total welfare brings together two measures that are conceptually in tension: '[c]onsumers desire a low price, while producers seek high profits'.[33] The total welfare objective thus entails the equal weighting of the welfare of both consumers and producers, thereby treating wealth distribution between these two categories of economic agents neutrally.[34] By assuming that the distribution of income is socially optimal, the total welfare objective stands for allocating resources to those who value them most. In essence, the idea is that promoting total welfare generates the most for society as a whole and strives for the enhancement of aggregate social wealth.[35]

The inference of the total welfare objective for Article 102 is that a practice carried out by dominant firms which cause a decline in consumer surplus (in terms of higher prices and/or lower output) would be tolerable and lawful, under the condition that the said practice generates an increase in producer surplus (ie, profits) which would at least compensate for the consumer's welfare loss.[36] On this approach therefore, a conduct is lawful if it produces greater gains to the dominant firm and/or its competitors than losses to consumers or *vice versa*, as long as the overall gains are larger than the overall losses.[37]

The total welfare objective has a strong foundation in welfare economics to the extent that it relies on the equal valuation of the welfare of all economic agents and promotes

[33] Broadley, 'The Economic Goals of Antitrust' (n 22) 1036.

[34] Cseres, 'The Controversies of the Consumer Welfare Standard' (n 25) 126.

[35] Jonathan Baker, 'Competition Policy as a Political Bargain' (2006) 73 ALJ 483, 516; Farrell and Katz (n 30) 8.

[36] See eg Bork, *The Antitrust Paradox* (n 5) 90-91; Herbert Hovenkamp, 'Antitrust Policy After Chicago' (1985) 84 Michigan Law Review 213, 231; Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* (3rd edn, Thomson/West 2005) 62.

[37] cf Cseres, 'The Controversies of the Consumer Welfare Standard' (n 25) 125, arguing that, 'despite its economic rationale, it is unlikely that competition agencies or courts would adopt a policy that permits fixed cost-savings of producers and thus increase in total welfare but harms consumers by increasing prices'.

efficiency.[38] Nevertheless, the total welfare objective, which is the product and the cornerstone of the Chicago School's neoclassical economic theory,[39] only identifies those efficiencies which are measurable, namely near term static efficiencies.[40] This approach wholly ignores long-run technological efficiencies, that is, efficiencies generated by the development of new products and processes,[41] promoting certain efficiencies (those related to the optimal allocation of resources and production costs) to the exclusion of a plethora of other potentially more important sources of social wealth enhancement.[42] Additionally, it poorly considers society's judgments about the appropriate distribution of economic welfare,[43] and undermines consumers' confidence in competition and their political support for competition policy.[44]

iii. *Static Economic Efficiencies*

Under the influence of Chicago School's antitrust theories that grew in popularity in the 1970s and dominated competition policy discourses in the US by the 1980s, many experts of the field imperatively emphasise the promotion of economic efficiency as the ultimate concern of competition policy.[45] As US Judge Frank Easterbrook famously wrote in this regard:

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[38] Duhamel and Townley (n 25) 17; Nazzini (n 5) 40.

[39] See Bork, *The Antitrust Paradox* (n 5) 90, where 'consumer welfare' is, in actual fact, alluding to 'total welfare'.

[40] Maurice Stucke, 'Should Competition Policy Promote Happiness?' (2013) 81 Fordham Law Review 2575, 2607.

[41] Eleanor Fox, 'The Politics of Law and Economics in Judicial Decision Making: Antitrust as A Window' (1986) 61 NYU L Rev 554, 583; Kenneth Davidson, *Reality Ignored: How Milton Friedman and Chicago Economics Undermined American Institutions and Endangered the Global Economy* (CreateSpace Independent Publishing Platform 2001) 85-86.

[42] cf Victoria Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' (2015) CL Rev 131, 136.

[43] Farrell and Katz (n 30) 8.

[44] Baker, 'Competition Policy as a Political Bargain' (n 35) 519.

[45] Frank Easterbrook, 'The Limits of Antitrust' (1984) 63 Texas Law Review 1, 13; Hovenkamp, 'Antitrust Policy After Chicago' (n 36) 226.

> I agree with Robert Bork that, whatever one makes of [the] history [of antitrust laws],[46] the antitrust laws should be treated as if they served no goal other than economic efficiency.[47]

The quasi-canonical status of efficiency in modern US antitrust law is based on the rationale that it allows for quantifiable results,[48] and hence predictable and relatively objective outcomes.[49] However, economic efficiency is a far cry from being a simple concept and the literature has failed to adduce a definition encompassing all aspects relevant to competition policy. In accordance with the ordinary meaning of the term, efficiency entails the optimal use of certain means to achieve an end. In the competition policy context, the definition that is routinely used as a starting point is the one provided by Carlton and Perlof, according to which:

> [t]he standard assumption in most economic models is that the primary objective of a manager of a firm is to maximize the firm's profits. The manager must sell the optimal amount of output, and the firm engages in efficient production: *no more output could be produced with existing technology, given the quantity of inputs used*.[50]

According to this definition, efficiency is achieved when firms produce and supply goods and/or services pursuant to consumer preferences and at the minimum technologically feasible cost.[51] This assumes a static market framework where the only relevant efficiencies are near term efficiencies associated with price, production costs and the allocation of resources.

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[46] Referring to the controversial historical interpretation of US competition law statutes provided in Robert Bork, 'Legislative Intent and the Policy of the Sherman Act' (1966) 9 Journal of Law and Economics 7, 16, where it is argued that the intention of the drafters was the promotion of efficiency.

[47] Frank Easterbrook, 'Predatory Strategies and Counterstrategies' (1981) 48 University of Chicago Law Review 263, 266.

[48] Lina Khan, 'The New Brandeis Movement: America's Antimonopoly Debate' (2018) 9 JECLP 131, 132.

[49] Easterbrook, 'The Limits of Antitrust' (n 45) 15.

[50] Dennis Carlton and Jeffrey Perloff, *Modern Industrial Organization* (4th edn, Pearson 2015) 12 (emphasis added).

[51] Kenneth Elzinga, 'The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?' (1977) 125 University of Pennsylvania Law Review 1191, 1992.

Thus, although there is consensus among competition law experts that there are three forms of efficiency (allocative, productive and dynamic),[52] only the first two forms are caught in this context. Therefore, what matters is that production matches consumer preferences (allocative efficiency)[53] and that production is effectuated at the lowest possible cost (productive efficiency).[54] In fact, most of the time, when a commentator or a competition authority claim that the goal of competition law and policy is the promotion of efficiency it is understood to mean the promotion of allocative and productive efficiency, ie the quantifiable immediate and short-term efficiencies generated by a particular practice.[55]

Having said that, it must also be stressed that the current interchangeable usage of (static) efficiency and consumer welfare is erroneous.[56] Consumer welfare and static efficiency have distinct conceptual meanings.[57] When the principal goal pursued is consumer welfare, allocative efficiency becomes relatively less important since the focus is on the impact of trade practices on short-term consumer interests relating to price and output, irrespective of whether resources have been allocated optimally.[58] The concurrent and interchangeable use of the two

[52] See, eg, Frederic Scherer, 'Antitrust, Efficiency, and Progress' (1987) 62 NYU L Rev 998, characterising economic efficiency 'multifaceted' and identifying the three different forms of efficiencies; ICN, 'Report on the Objectives of Unilateral Conduct Laws' (n 1) 12; ABA, 'Report on Antitrust Policy Objectives' (n 5) 10. For a good analysis of the three forms of efficiency see Motta (n 27) 40-64.

[53] Bishop and Walker, *The Economics of EC Competition Law* (n 18) 26.

[54] ibid 25.

[55] OECD, 'Dynamic Efficiencies in Merger Analysis' (DAF/COMP(2007)41) (15 May 2008), <http://www.oecd.org/competition/mergers/40623561.pdf> 6 January 2019, 18.

[56] John Kirkwood and Robert Lande, 'The Chicago School's Foundation is Flawed: Antitrust Protects Consumers, Not Efficiency' in Robert Pitfosky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (OUP 2008) 93-94.

[57] Joseph Brodley, 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress' (1987) 62 NYU L Rev 1020.

[58] cf Daskalova (n 42) 141.

concepts can only be justified by the expectation that enhancing allocative and productive efficiencies would result in lower prices for consumers.

The goal of promoting economic efficiency in the context of unilateral conduct of dominant firms under Article 102 would mean no more than promoting total welfare. This is because total welfare stands for allocating resources to those who value them most and it also takes account of productive efficiency. Furthermore, it treats wealth distribution between consumers and producers neutrally. Hence, to the extent that the economic efficiency objective refers to static efficiencies to the exclusion of dynamic efficiency, what has been said in the context of the total welfare goal applies here *mutatis mutandis*.

Economic efficiency, in its static form, has been heavily criticised as a competition policy goal. First, just like the concept of consumer welfare, economic efficiency has also been abusively used to mean different things, without acknowledging that it is a broad economic concept which cannot be reduced to allocative and/or productive efficiency.[59] By extension, there has been a failure to recognise that focusing competition policy on the promotion of a particular type of efficiency does not simultaneously promote other forms of efficiencies.[60] Second, economic efficiency is not self-defining: it can only be fully understood by reference to its different manifestations (allocative, productive and dynamic).[61] Therefore, 'the promotion of efficiency' cannot be the answer to the question 'what is the goal of competition policy'; a relatively comprehensive answer to this question would only be one specifying the efficiencies intended to promote. Then again, third, despite the fact that the main rationale for

[59] Albert Foer, 'On the Inefficiencies of Efficiency as the Single-minded Goal of Antitrust' 60 Antitrust Bulletin 103, 107, arguing that the notion of economic efficiency does not necessarily mean the same thing to everyone.

[60] Stucke, 'Reconsidering Antitrust's Goals' (n 5) 578.

[61] ibid.

setting the promotion of static efficiency as the central objective is its quantifiability, there are in practice significant measurement difficulties.[62] Brodley noted in this regard that:

> [p]ractical difficulties of courtroom proof severely limit implementation of efficiency goals, however important. Indeed, the only efficiency that appears reasonably measurable is production efficiency - and then only after the fact. In advance of a transaction, none of the three types of efficiencies appears measurable.[63]

The difficulties of measuring efficiencies, even the so-called 'static' ones, mean that preconceptions regarding necessity and intensity of intervention are relevant. For example, US antitrust law has for many years been enforced under a presumption of market and business efficiency, which, by definition, entail a presumption of non-intervention.[64] In fact, following a Schumpeterian view of economic growth and progress,[65] dominant firms in the US are regarded as presumably efficient, and thus are seldom found to act unlawfully.[66] This approach willingly[67] ignores 'X-inefficiencies', ie the distance between the assumed efficient business behaviour and the actual inefficient behaviour exhibited by firms lacking the motivation to use their resources efficiently due to the absence of effective competitive pressure.[68] On the basis of these weaknesses, the idea of efficiency as a policy goal for competition law, propounded

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[62] For an account of the difficulties of quantifying allocative and productive efficiencies see Stucke, 'Reconsidering Antitrust's Goals' (n 5) 579-84.

[63] Brodley (n 57) 1028.

[64] Fox, 'We Protect Competition, You Protect Competitors' (n 6) 153.

[65] Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (eBook edn, Start Publishing 2012) 149, stating that 'as soon as we go into details and inquire into the individual items in which progress was most conspicuous, […] a shocking suspicion dawns upon us that big business may have had more to do with creating that standard of life than with keeping it down'.

[66] eg *Verizon Commc'ns Inc. v. Law Offices of Curtis v Trinko, LLP* [2004] 540 US 398. See Eleanor Fox, 'The Efficiency Paradox' in Robert Pitfosky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (OUP 2008) 77, arguing that this approach is an 'efficiency paradox' because 'by trusting dominant firm strategies […] to produce efficiency, modern U.S. antitrust protects monopoly and oligopoly, suppresses innovative challenges, and stifles efficiency'.

[67] George Stigler, 'The Xistence of X-Efficiency' (1976) 66 American Economic Review 213.

[68] Harvey Leibenstein, 'Allocative Efficiency vs ''X-Efficiency''' (1966) 56 American Economic Review 392; Harvey Leibenstein, 'X-Inefficiency Xists: A Reply to an Xorcist' (1978) 68 American Economic Review 203.

by the scholars of the Chicago School, has been described as 'circular',[69] and thereby as being an 'illusion'.[70] In any event, the idea of efficiency, which has been closely linked to a rule of non-intervention against firms holding dominant positions, is based on specific assumptions, namely: the rationality and profit-maximising behaviour of economic actors, the rarity of market failures, the inability of governments to effectively intervene into economic activities in order to serve the public interest, and price theory as the prime economic model.[71] Therefore, adopting or not Chicago's 'efficiency approach' involves an ideological choice.[72]

Be this as it may, the difficulties that the promotion of efficiency as a competition policy goal exhibits and the implied arbitrariness of decision-making, led Foer to wonder 'whether it was worth opening up the Pandora's Box of efficiency in the first place'.[73]

B. Non-Quantifiable Economic Objectives

i. *Dynamic Efficiency*

The third category of efficiencies, next to allocative and productive, is dynamic efficiency. The latter refers to long-run technological efficiency. It is thus the efficiencies resulting from R&D and innovation which lead to the introduction of new or improved products or processes.[74]

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[69] Frederick Rowe, 'The Decline of Antitrust and the Delusion of Models: The Faustian Pact of Law and Economics' (1984) 72 Geo LJ 1511, 1547.

[70] ibid 1550.

[71] See Richard Posner, 'The Chicago School of Antitrust Analysis' (1979) 127 University of Pennsylvania Law Review 925. cf Eugene Buttigieg, *Competition Law: Safeguarding the Consumer Interest: A Comparative Analysis of US Antitrust Law and EC Competition Law* (Wolters Kluwer 2009) 381, contradicting Chicagonian assumptions regarding consumer behaviour.

[72] Harold Demsetz, 'Two Systems of Belief about Monopoly' in Harvey Goldschmid, Michael Mann, Fred Weston (eds), *Industrial Concentration: The New Learning. The 1974 Conference on Industrial Concentration* (Boston Little, Brown 1974); Frederick Rowe, 'Commentary: Antitrust as Ideology' (1981) 50 Antitrust Law Journal 721, 726.

[73] Foer, 'On the Inefficiencies of Efficiency' (n 59) 127.

[74] OECD, 'Glossary of Industrial Organisation Economics and Competition Law' (1993) <http://www.oecd.org/dataoecd/8/61/2376087.pdf> accessed 6 January 2019, 23; Eleanor Fox, 'The Efficiency Paradox' in Robert Pitfosky (ed), How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust (OUP 2008) 78; Andrew Abel and others, 'Assessing Dynamic Efficiency:

Academics in law and economics,[75] as well as policymakers,[76] consider that, as a matter of principle, dynamic efficiency is significantly more important to economic growth and social wealth enhancement than static efficiencies.[77] This is even more so in the context of the digital market economy, which is dominated by dynamic efficiency rather than static efficiencies' concerns.[78] Indeed, the most common efficiency improvement in the digital economy is produced by the fostering of technological progress, ie dynamic efficiency.[79]

In the EU, dynamic efficiency is recognised as the weightiest concern in the context of policymaking for the long run.[80] This is linked to the Commission's emphasis on economic growth as the central economic goal, which can only be achieved through competitiveness and innovation.[81] In this context, it has been claimed that:

Theory and Evidence' 56 Review of Economic Studies 1; Mark Blaug, 'Is Competition Such a Good Thing? Static Efficiency versus Dynamic Efficiency' 19 Review of Industrial Organization 37.

[75] eg Michael Porter, *The Competitive Advantage of Nations* (Free Press 1990); Albert Foer, 'The Goals of Antitrust: Thoughts on Consumer Welfare in the US' in Philip Marsden (ed), *Handbook of Research in Trans-Atlantic Antitrust* (EE 2006).

[76] OECD, 'Dynamic Efficiencies in Merger Analysis' (n 55) 10, stressing that 'innovation is responsible for most of the increase in material standards of living that has taken place since the industrial revolution and […] that dynamic efficiencies have a considerably greater potential to benefit consumers than static efficiencies have'.

[77] This had already been emphasised in 1942: see Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (Allen & Unwin 1942) 81-106.

[78] Ariel Ezrachi, 'EU Competition Law Goals and the Digital Economy' (2018) Oxford Legal Studies Research Paper 17/2018, <https://ssrn.com/abstract=3191766> accessed 6 January 2019, 18.

[79] Bo Carlsson, 'The Digital Economy: What is New and What is Not?' (2004) 15 Structural Change and Economic Dynamics 245, 246.

[80] eg Commission, 'Communication for a European Industrial Renaissance' (2014) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014DC0014> accessed 8 January 2019; European Parliament, 'Fact Sheets on the European Union: Innovation Policy' (2018) <http://www.europarl.europa.eu/ftu/pdf/en/FTU_2.4.6.pdf> accessed 8 January 2019; Margrethe Vestager, 'Competition and the Future of Europe' (at the Mediafin New Year Event, Brussels, 17 January 2018).

[81] Commission, 'Single Market Integration and Competitiveness Report' (2016) <https://ec.europa.eu/docsroom/documents/20210/attachments/2/translations/en/renditions/native> accessed 8 January 2019; Commission, 'European Competitiveness Report: Helping Firms Grow' (2014) <https://ec.europa.eu/docsroom/documents/6706/attachments/1/translations/en/renditions/native> accessed 8 January 2019. See also Margrethe Vestager, 'Competition and a Fair Dear for Consumers Online' (at the Netherlands Authority for Consumers and Markets Fifth Anniversary Conference, The Hague, 26 April 2018); Carles Esteva Mosso, 'Innovation in EU Merger Control' (at the 66th ABA Section of Antitrust Law Spring Meeting, Washington, 12 April 2018).

> [the] fundamental objectives of antitrust law include not only the protection of price competition and associated productive and allocative efficiency, but also the protection of innovation competition to promote dynamic efficiency through the development of new products and processes.[82]

This passage suggests that the promotion of economic efficiency as a fundamental purpose of competition policy is broadly defined to include the enhancement of dynamic efficiency. In practice, however, the focus of most competition enforcers is static efficiencies to the exclusion of dynamic efficiency.[83]

The justification for this is the complexity of assessing the long-term interest of consumers for innovation and dynamic efficiency.[84] The real concern is precisely its dynamic nature which, by definition, implies the impossibility of directly calculating it, ie quantifying it.[85] At the same time, it is argued that economics does not offer credible tools to indirectly measure dynamic efficiency in a comprehensive manner.[86] Undoubtedly, it is very difficult to measure –or even to predict– what has yet to happen, let alone to quantify it with precision;[87] and this puts competition authorities in an uncomfortable position.[88] The situation becomes even more complicated if one considers that 'promoting dynamic efficiencies really means

[82] ABA, 'Report on Antitrust Policy Objectives' (n 5) 22.

[83] ICN, 'Competition Enforcement and Consumer Welfare' (n 22) 36, stating that '[m]any Respondents seem to prefer a long-term approach in theory, and favour a dynamic perspective over a static one. However, many Respondents seem to admit that enforcement realities frequently oblige them to have regard to short-term effects, and often to use a static perspective'.

[84] Lianos, 'Some Reflections on the Question of the Goals' (n 5) 18.

[85] Andrew Tepperman and Margaret Sanderson, 'Innovation and Dynamic Efficiencies in Merger Review' (Report commissioned by the Canadian Competition Bureau, CRA International 2007) 13-16.

[86] In this vein Stucke, 'Reconsidering Antitrust's Goals' (n 5) 585; Daskalova (n 42) 136.

[87] OECD, 'Dynamic Efficiencies in Merger Analysis' (n 55) 9.

[88] ICN, 'Competition Enforcement and Consumer Welfare' (n 22), 10, noting, among others, 'the uncertainty inherent in innovative activity regarding its cost, timing, and the likelihood and extent of its commercial success, difficulties in measuring innovation itself, the problem of how to conceptually transform innovation into some measure of welfare'.

promoting *socially beneficial innovations*',[89] and hence it would be necessary to distinguish beneficial from harmful innovation.

Even so, if competition authorities disregard dynamic efficiency as a goal of competition law, they dismiss the potentially most substantial source of benefit for society.[90] This proposition is reinforced because of the potential for conflict among the different categories of efficiencies.[91] That is, having as the main goal of competition policy the promotion of, for example, allocative or productive efficiency will not necessarily enhance dynamic efficiency. To the extent therefore that dynamic efficiency is of a non-quantifiable nature, competition enforcers must find an alternative way to incorporate it into competition law analysis. This can be achieved through indirect means, namely by integrating legal thinking and economic theory into operational legal rules.[92] In practice, this would translate into legal presumptions based on assumptions that are in accordance with economic theory.[93] After all, economics is the only tool providing an improved understanding of market realities and of commercial practices based on a systematic examination of lessons of practical experience.[94]

Economic theory, however, provides different and contradictory insights regarding the market conditions under which innovation can be better promoted. On the one hand, there is the Schumpeterian perspective according to which monopolistic conditions are more prone to

[89] Stucke, 'Reconsidering Antitrust's Goals' (n 5) 583 (emphasis added).

[90] Brodley (n 57) 1026.

[91] See Foer, 'On the Inefficiencies of Efficiency' (n 59) 107-8.

[92] See generally Ioannis Lianos, 'Categorical Thinking in Competition Law and the "Effects-based" Approach in Article 82 EC' in Ariel Ezrachi (ed), *Article 82: Reflections on its Recent Evolution* (Hart Publishing 2009) 35, stressing that '[c]lassification is inherent in the legal process and constitutes an essential feature of the analytical framework of Article 102'.

[93] David Bailey, 'Presumptions in EU Competition Law' (2010) 31 ECLR 362.

[94] Pablo Ibáñez Colomo, 'Intel and Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy' (2014) LSE Legal Studies Working Paper 29/2014, <http://ssrn.com/abstract=2530878> accessed 21 January 2019, 5-6.

swift technological progress than a competitive market structure.[95] On the other hand, the Arrowian theoretical model illustrates that dynamic efficiency flourishes in a competitive market environment.[96] Empirical research on this issue seems to contradict Schumpeter's theoretical growth model, supporting the hypothesis that market competition stimulates innovative activity.[97] Moreover, recent studies have shown that SMEs drive dynamic competition.[98] In any event, the relationship between competition and innovation is not a straightforward one.[99]

Ultimately, the choice of how to incorporate dynamic efficiency into the analysis of competition law has cultural and normative content.[100] Indeed, different jurisdictions have varying cultural preferences and have been intellectually influenced by divergent ideas in calibrating their analytical approach to competition policy.[101] Thus, they may have dissimilar techniques for promoting dynamic efficiency. Even more important is the normative component of the choice. Specifically, the choice of how to promote dynamic efficiency within

[95] Schumpeter, *Capitalism, Socialism, and Democracy* (n 77) 106.

[96] Kenneth Arrow, 'Economic Welfare and the Allocation of Resources for Invention' in Richard Nelson (ed), *The Rate and Direction of Inventive Activity: Economic and Social Factors* (Princeton University Press 1962).

[97] See Stephen Nickell, 'Competition and Corporate Performance' (1996) 104 Journal of Political Economy 724; Stephen Nickell, Daphne Nicolitsas and Neil Dryden, 'What Makes Firms Perform Well?' (1997) 41 European Economic Review 783; Richard Blundell, Rachel Griffith and John Van Reenen, 'Market Share, Market Value and Innovation in a Panel of British Manufacturing Firms' (1999) 66 Review of Economic Studies 529.

[98] Steven Davis, John Haltiwanger and Ron Jarmin, 'Turmoil and Growth: Young Businesses, Economic Churning, and Productivity Gains' (Report, Ewing Marion Kauffman Foundation 2008). See also Stacy Mitchell, 'The View from the Shop—Antitrust and the Decline of America's Independent Businesses' (2016) 61 Antitrust Bulletin 498, stressing the need to bring back into competition policy a commitment to SMEs because they deliver distinct consumer benefits.

[99] See eg Philippe Aghion and others, 'Competition and Innovation: An Inverted U Relationship' (2002) 120 QJE 701; Philippe Aghion and Rachel Griffith, *Competition and Growth: Reconciling Theory and Evidence* (MIT Press 2005).

[100] Evans (n 2) 161.

[101] Fox, 'We Protect Competition, You Protect Competitors' (n 6) fn 53.

competition law analysis is influenced by the normative values of a legal order.[102] This is even more so in the context of the EU where the competition rules are part of an overall Treaty framework, and hence must be interpreted in such a way as to fulfil, or at least be consistent with, its general principles and objectives.[103] For instance, an element that affects this choice is the importance attributed to SMEs.[104] In this regard, it is the normative choices of the EU Treaties that dictate the economic theories that will be relied on, and not *vice versa*; the latter merely assist in shaping rules that are in accordance with those normative choices.[105] As a result, some jurisdictions, such as the US, are more sympathetic to a Schumpeterian logic, while others are more inclined towards Arrow's perceptions.

In the context of Article 102, a Schumpeterian approach would call for a minimal enforcement of the provision with dominant firms' practices being almost immune from being found unlawful. A different approach would be one that, through the protection of the competitive process, would attempt to keep markets contestable, open and accessible to newcomers. The latter approach is based on the assumption that the increased incentives of non-dominant firms and of potential newcomers to invest and compete would generate

[102] Oles Andriychuk, 'Rediscovering the Spirit of Competition: On the Normative Value of the Competitive Process' (2010) 6 EC J 575.

[103] Commission, 'XXIInd Report' (n 7) 13, stating that '[c]ompetition policy cannot therefore be pursued in isolation, as an end in itself, without reference to the legal, economic, political and social context'.

[104] See eg Commission, '"Think Small First" - A "Small Business Act" for Europe' [2008] COM(2008) 394 final. See also Motta (n 27) 22, arguing that the Commission seems to consider that SMEs are more likely to innovate, and to create employment than larger firms, and thus make a larger contribution to growth and innovation.

[105] David Gerber, 'The Future of Article 82 (n 11) 6, emphasising that '[t]he normative role of economics is the one that creates problems'.

dynamic efficiencies.[106] Each of these approaches is based on a discrete belief regarding the optimal way of organising the economy.[107]

ii. *Effective Consumer Choice and Freedom to Participate in the Marketplace*

Potential objectives pursued by Article 102 also include the protection of effective consumer choice and the competitors' freedom to participate in the marketplace.[108] These putative goals of Article 102 reside on the implicit assumption that a larger and accessible market will offer more choice for consumers.[109] On this ground, the two goals are intertwined, springing up from the conditions of inequality existing in the market as a consequence of the operation of the dominant firm.[110]

The concept of 'consumer choice', as a goal for competition policy, can be defined as the ability of consumers/customers to choose freely the products or services that best correspond to their needs and the suppliers with which they wish to deal.[111] The argument for considering the protection of consumer choice as a goal pursued by Article 102 is that dominant

[106] cf Christian Ahlborn and Carsten Grave, 'Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective' (2006) 2 CPI 197, 210; Heike Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing 2008) 162.

[107] cf Peter Behrens, 'The Ordoliberal Concept of "Abuse" of a Dominant Position and its Impact on Article 102 TFEU' in Fabiana Di Porto and Rupprecht Podszun (eds), *Abusive Practices in Competition Law* (10th ASCOLA Workshop, Edward Elgar 2018) 23.

[108] ICN, 'Report on the Objectives of Unilateral Conduct Laws' (n 1) 14, documenting economic freedom as the fourth most popular goal.

[109] For an example of this reasoning see Case C-202/07P *France Télécom SA v Commission* [2009] ECLI:EU:C:2009:214, para 112.

[110] On the link between the two goals see *Microsoft* (Case COMP/C-3/37.792) [2004] OJ L32/23, para 835, holding that 'it constitutes an abuse when an undertaking in a dominant position directly or indirectly ties its customer by a supply obligation since this deprives the customer of the ability to choose freely his sources of supply and denies other producers access to the market'.

[111] Paul Nihoul, 'Freedom of Choice: The Emergence of a Powerful Concept in European Competition Law' (2012) 3 Concurrences Review 55.

firms seek to hinder choice as a step towards removing competitors, and hence competition.[112] Thus, conversely, competition law may need to preserve the freedom to participate in the market place, by guaranteeing equality of opportunity among rivals, as a step towards ensuring consumer choice. In this context, intervention may be required to ensure the persistence of a sufficient degree of choice for customers and consumers.[113] This is especially the case when the target of a competition law intervention is the tying of customers to particular suppliers holding substantial market power.

To the extent that the customers' capability to switch to other suppliers is a relevant concern, the protection of consumer choice plays a role under Article 102.[114] This could potentially mean that Article 102 protects the residual range of consumers' choice. The cornerstone of such an approach is that consumers may only benefit from potential efficiencies as a result of the residual competitive pressure existing on the market, which dominant firms should be prevented from eliminating by means of exclusionary practices.[115] More broadly, but in a similar vein, it has been argued that preserving diversity can be one response to issues of market uncertainties.[116]

At the same time, however, the protection of consumer choice entails the protection of the opportunities of non-dominant firms to compete and of newcomers to access the market.

[112] ibid 20.

[113] ibid 27.

[114] cf ibid 18.

[115] Peter Behrens, 'The Ordoliberal Concept of "Abuse" of a Dominant Position and its Impact on Article 102 TFEU' in Fabiana Di Porto and Rupprecht Podszun (eds), *Abusive Practices in Competition Law* (10th ASCOLA Workshop, Edward Elgar 2018) 11, arguing that '[t]his approach is supported by Article 101(3) TFEU which grants an efficiency exemption from the prohibition of cartels only if there is no substantial elimination of competition'.

[116] Maurice Stucke, 'What is Competition?' in Daniel Zimmer (ed), *The Goals of Competition Law* (5th ASCOLA Workshop, Edward Elgar 2012) 50; Andreas Fuchs, 'Characteristic Aspects of Competition and their Consequences for the Objectives of Competition Law - Comment on Stucke' in Daniel Zimmer (ed), *The Goals of Competition Law* (5th ASCOLA Workshop, Edward Elgar 2012) 56.

Indeed, these two concepts are two sides of the same coin: effective consumer choice exists only insofar as there are reasonable options of suppliers to choose from.[117] And this, by definition, means protecting somehow the economic freedom of rivals to participate in the marketplace in order to ensure equality of opportunity.[118]

The approach according to which the protection of economic freedom is the major objective of competition policy is attributed to the German Ordoliberal School of thought.[119] The aim of an Ordoliberal competition policy is 'the protection of individual economic freedom of action as a value in itself, through the restraint of undue economic power'.[120] There are two ways of perceiving this: a deontological and a consequentialist or utilitarianist.[121] According to the deontological viewpoint, economic freedom is the end of competition policy and must be preserved irrespective of the potential effects on consumers and efficiency.[122] The consequentialist or utilitarianist standpoint, on the other hand, is based on the underlying idea that economic freedom, political democracy, and efficiency march together.[123] Hence, on this approach, while economic freedom is the guiding principle, its preservation will indirectly lead

[117] Laura Parret, 'Do we (Still) Know What we are Protecting?' (2009) TILEC Discussion Paper DP 2009-010, <http://ssrn.com/abstract=1379342> accessed 8 January 2019, 15.

[118] For a critical perspective see Akman, 'The Role of "Freedom" in EU Competition Law' (n 11) 212.

[119] For an excellent account see David Gerber, 'Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe' (1994) 42 American Journal of Comparative Law 25.

[120] Wernhard Möschel, 'The Proper Scope of Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy' (2001) 157 JITE 3, 4.

[121] Lianos, 'Some Reflections on the Question of the Goals' (n 5) 24-26.

[122] Andriychuk 'Rediscovering the Spirit of Competition' (n 102) 575; Massimiliano Vatiero, 'Dominant Market Position and Ordoliberalism' (2015) 62 International Review of Economics 291, 302. See also Manfred Streit, 'Economic Order, Private Law and Public Policy: The Freiburg School of Law and Economics' (1992) 148 JITE 675, 685ff; Hawk, 'Article 82 and Section 2' (n 6) 253.

[123] Henry Oliver, 'German Neoliberalism' (1960) 74 QJE 117, 139. cf Frank Maier-Rigaud, 'On the Normative Foundations of Competition Law - Efficiency, Political Freedom and the Freedom to Compete' in Daniel Zimmer (ed), *The Goals of Competition Law* (5th ASCOLA Workshop, Edward Elgar 2012) 137.

to benefits for consumers in terms of prices and technological progress, and to the preservation of political democracy.[124]

In the context of Article 102, this approach has been criticised as protecting the interests of competitors of the dominant undertaking, rather than the interests of consumers.[125] Moreover, it has been argued that a policy which protects economic freedom risks treating efficiency as an offence.[126] Nonetheless, the positive effects of competition can only be unfolded if competition law set a frame for the market participants' freedom to act.[127] Thus, competition law enforcement is compatible with the economic freedom of the entrepreneur because of its underlying idea of promoting competitive markets.[128] In fact, individual economic freedom is the ultimate source of competition, which, in turn, benefits consumers.[129]

It is generally claimed that the focus of the EU on the protection of rivals' opportunities to compete is an important factor distinguishing EU from US competition law with regard to the control of the unilateral conduct of dominant firms.[130] Even so, any criticism regarding consumer choice and the economic freedom to participate in the marketplace, as objectives of Article 102, is only meaningful if these objectives are considered to be principal or ultimate

[124] Ahlborn and Grave (n 106) 210; Maier-Rigaud (n 123) 139. This approach is consistent with the so-called 'New Brandeis School' or 'hipster antitrust', which signals a break with the Chicago School: see eg Carl Shapiro, Antitrust in a Time of Populism' (2018) 61 International Journal of Industrial Organization 714; Khan, 'The New Brandeis Movement' (n 48) 131.

[125] ABA, 'Report on Antitrust Policy Objectives' (n 5) 4.

[126] Ahlborn and Grave (n 106) 214.

[127] Fuchs (n 116) 58.

[128] Elzinga (n 51) 1202.

[129] Behrens (n 115) 9.

[130] Laura Parret, 'The Multiple Personalities of EU Competition Law: Time for a Comprehensive Debate on its Objectives' in Daniel Zimmer (ed), *The Goals of Competition Law* (5th ASCOLA Workshop, Edward Elgar 2012) 67.

goals.[131] If, however, these are only employed as proxies, among others, for the protection and promotion of a competitive market process, then the criticism outlined above may be ill-founded. This argument is developed further down in this chapter.

iii. *Protection of the Competitive Process*

The overview of the competition law objectives conducted by the OECD in 2003 revealed that most jurisdictions across the world pursue the objective of maintaining, protecting and encouraging the process of competition.[132] In a similar vein, a 2007 ICN report, describing the approaches of competition agencies specifically to the objectives of unilateral conduct laws, observed that all but one of its member agencies cited ensuring an effective competitive process as focal to the enforcement of these laws.[133]

The omnipresence of the goal of ensuring a competitive process (or structure) is understandable insofar as competition law is concerned with competition, and competition constitutes a process rather than an outcome.[134] Under this vision, competition law sets the rules of the game of competition on markets,[135] and is grounded on the perception that a competitive market structure 'is not a self-generating and self-maintaining gift of nature but something that needs to be actively pursued and cultivated'.[136] Hence, the objective of

[131] cf Stucke, 'Reconsidering Antitrust's Goals' (n 5) 592, arguing that economic freedom cannot be the primary goal because promoting this objective 'inherently involves trading in some people's freedom to promote others''.

[132] OECD, 'The Objectives of Competition Law and Policy' (n 1) 2.

[133] ICN, 'Report on the Objectives of Unilateral Conduct Laws' (n 1) 38 and Annex A, documenting that the Pakistan authority did not refer to the objective of ensuring an effective competitive process.

[134] Stucke, 'What is Competition?' (n 116) 45.

[135] Franz Böhm, 'Rule of Law in a Market Economy' in Alan Peacock and Hans Willgerodt (eds), *Germany's Social Market Economy: Origins and Evolution* (Palgrave Micmillan 1989) 46-67.

[136] Viktor Vanberg, 'The Freiburg School: Walter Eucken and Ordoliberalism' (2004) Freiburg Discussion Papers on Constitutional Economics 04/11, <https://www.econstor.eu/bitstream/10419/4343/1/04_11bw.pdf> accessed 8 January 2019, 14.

preserving a competitive market structure entails striving for maintaining a market structure that is favourable to effective competition.

The goal of ensuring a competitive process in the context of abuse of dominance control is generally understood either intrinsically or instrumentally.[137] Particularly, it is commonly argued that the competitive process may be regarded either as an intrinsic value that must be protected irrespective of the generated outcome,[138] or as a vehicle by which to achieve other goals.[139] This distinction is also illustrated in the 2007 ICN report where, although virtually all member agencies announced 'ensuring an effective competitive process' as being a relevant concern, certain authorities regarded it as a goal of their unilateral conduct rules while other considered it to be a means for the promotion of other goals.[140] Interestingly, some competition authorities reported that the protection of the competitive process operates both as a goal in its own right and as a means to achieve other desirable goals.[141]

The protection of the competitive process in its own right, ie as an institution, is interwoven with Ordoliberalism and is interpreted as a deontological stance to competition policy.[142] The gist of the Ordoliberal theory is to achieve an economic order of 'complete

[137] Oles Andriychuk, 'Thinking Inside the Box: Why Competition as a Process is a Sui Generis Right - A Methodological Observation' in Daniel Zimmer (ed), *The Goals of Competition Law* (5th ASCOLA Workshop, Edward Elgar 2012) 107.

[138] ibid 102, considering that the ultimate goal should be the protection of competition as a process, treating it as a societal value in its own right, because competition constitutes the essence of liberal democracy.

[139] Stucke, 'Reconsidering Antitrust's Goals' (n 5) 570.

[140] ICN, 'Report on the Objectives of Unilateral Conduct Laws' (n 1) 6-8.

[141] ibid 6, documenting that fifteen out of thirty-two viewed enhancing an effective competitive process in this way.

[142] Massimiliano Vatiero, 'The Ordoliberal Notion of Market Power: An Institutionalist Reassessment' (2010) 6 EC J 689, 702, stating that the defence of the competitive process is seen as an end rather than a means in the Ordoliberal philosophy.

competition',[143] where no firm has the power to coerce conduct of other firms in the market.[144] This would require 'a positive agenda by the State to protect the competitive process from economic power and political power'.[145] The deontological angle of this approach is that it purports to promote the competitive process (perceived as an institution), regardless of the effects on consumers and/or competitors.[146] In the context of Article 102, such an approach would entail that a practice conducted by dominant firms would be abusive if it leads to the deterioration of the market structure in terms of diminishing existing competition. This occurs, for example, when a dominant firm interferes with the natural flow of competition through exclusionary practices. Since economic freedom is the ultimate source of competition, the goal of protecting the competitive process as such and the objective of protecting the freedom to participate in the marketplace are very much alike. That is also the reason why both these goals have been credited to Ordoliberalism.

There is, however, a slightly different understanding of the goal of protecting the competitive process, one that views it as being compatible with a consequentialist approach.[147] This standpoint grasps the process of competition as one that would be conducive to achieving a desired outcome.[148] The underlying idea of this approach is that competition as a process of rivalry among market players has wealth generating powers and is advantageous to consumers.

[143] Vanberg (n 136) 13.

[144] Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Hart Publishing 2012) 58.

[145] Lianos, 'Some Reflections on the Question of the Goals' (n 5) 25.

[146] cf Case C-95/04P *British Airways plc v Commission* [2007] ECLI:EU:C:2006:133, Opinion of AG Kokott, para 68.

[147] Fox, 'We Protect Competition, You Protect Competitors' (n 6) 155-6, arguing that '[p]rotection of the competitive process […] is likely to promote incentives to compete and to serve both consumers and efficient and progressive market actors, whose interest are symbiotic'.

[148] Nazzini (n 5) 22.

In this context, competition law sets the rules of the game to guarantee the preservation of this process over the long run so as to assure the expected consumer's benefits deriving from it.[149]

In practice, however, the distinction between protecting an effective competitive process as an institution, on the one hand, and as a vehicle for achieving other objectives, on the other, seems to be an issue of labelling and rhetoric presentation rather than one of substantive relevance. This is because an effective competitive process can only be defined by the effects that a competition law regime considers desirable, and thus by reference to other goals which are used as proxies for identifying a deterioration of the competitive process. These proxies *may* include all or some of the following: consumer surplus, productive efficiency, improved quality of goods and services, increased choice, unrestricted market entry, and dynamic efficiency, as well as socio-political concerns.

These desirable effects/proxies of an effective competitive process can conflict in an *in concreto* context, but this may be unproblematic to the extent that the relevance and importance of each of these proxies differ depending on the facts of the case. Further, a competition law system may equate the protection of an effective competitive process exclusively with the protection of rivals or with the promotion of consumer welfare, using one of the latter as the sole proxy of competitive distortion.[150] In this sense, Stucke is right to claim that 'the objective of an *effective competitive process* is simply a belief in other objectives, which can conflict'.[151]

[149] Broadley, 'The Economic Goals of Antitrust' (n 22) 1021, arguing that '[t]he antitrust goals of promoting innovation and production efficiency with the ultimate aim of protecting consumer interest can be assured only by preserving competitive processes over the long run; Vanberg (n 136) 8-9; Behrens (n 115) 10.

[150] ABA, 'Report on Antitrust Policy Objectives' (n 5) 4, stating that 'the preservation of competition does not always mean the same thing in different jurisdictions [… and that] some countries use the phrase to signal the preservation of competitors'.

[151] Stucke, 'Reconsidering Antitrust's Goals' (n 5) 570.

In practice, what matters is the identification of the employed proxies for deducing a distortion of the competitive process, which would, in turn, trigger the application of Article 102.

The goal of protecting an effective competitive process in the context of Article 102 has been criticised as simply signaling the preservation of non-dominant competitors.[152] However, one should not neglect that market competition presupposes conditions of relatively dispersed market power.[153] Put simply, a market structure with no competitors is not a competitive process, let alone an effective competitive process.[154] Consequently, the protection of the competitive process sometimes leads to the indirect protection of competitors.[155] In this regard, this criticism is reasonably sensible only if the protection of the competitive process is equated with the protection of non-dominant rivals, ie when the sole relevant proxy for establishing a distortion of the competitive process is the reduction of the number of rivals.

Even so, a competition law regime alleging to have as its main goal the protection of the competitive process is certainly one that lacks faith in the ability of market forces to preserve effective competition and remedy market failures. Indeed, following a process-oriented approach enables a competition policy to serve a variety of economic purposes and be sufficiently flexible to ensure the existence of an effective competitive process.[156] Hence, in

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[152] See, eg, Ian Forrester, 'Article 82: Remedies in Search of Theories?' (2005) 28 Fordham International Law Journal 919, 920; Ekaterina Rousseva, 'Modernizing by Eradicating: How the Commission's New Approach to Article 81EC Dispenses with the Need to Apply Article 82 to Vertical Restraints' (2005) 42 CML Rev 587, 592; Gormsen, 'The Conflict between Economic Freedom and Consumer Welfare' (n 11) 339-42.

[153] Behrens (n 115) 12.

[154] Louis Schwartz, '"Justice" and Other Non-Economic Goals of Antitrust' (1979) 127 University of Pennsylvania Law Review 1076, 1078; Liza Lovdahl Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (CUP 2010) 17.

[155] Wolfgang Wurmnest, 'The Reform of Article 82 EC in the Light of the "Economic Approach"' in Mark-Oliver Mackenrodt, Beatriz Conde Gallego and Stefan Enchelmaier (eds), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* (Springer 2008) 10; Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' (n 106) 142, describing this criticism as an 'empty slogan'.

[156] Zimmer (n 29) 104.

accordance with the teachings of both the Ordoliberal and the Post-Chicago Schools, systems of competition law emphasising the protection of the competitive process distrust the classical *laissez-faire* hypothesis of self-correcting market forces.[157] The implication is that these competition law systems tend to follow a restrictive approach to dominant firms' conduct, because dominant firms' conduct is capable of producing detrimental effects in markets to the prejudice of consumers, precisely due to their substantial market power.

In any event, the ultimate beneficiary of an effective competitive process is the consumer, and hence safeguarding its existence through proxies ensures the protection of consumer interests.[158]

iv. *Protection of Consumer Interest*

Competition law officials and competition authorities frequently claim that the focus of their law, policy and enforcement is the interest of consumers or, put differently, to prevent

[157] On Ordoliberalism see eg David Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP 2001) 255. On the Post-Chicago School see eg Michael Jacobs, 'An Essay on the Normative Foundations of Antitrust Economics' (1995) 74 North Carolina Law Review 219, 259; Andrew Gavil and others, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* (2nd edn, Thomson/West 2008) 70.

[158] cf Behrens (n 115) 11.

consumer harm.[159] Indeed, the significance of the protection of consumer interest in competition law is rarely challenged.[160]

Notwithstanding pronouncements that consumers are at the heart of competition policy, the terminology employed is confusing.[161] In the EU context, for example, the Commission employs seemingly interchangeably the terms 'consumer welfare',[162] 'consumer benefits',[163] 'consumer harm',[164] and 'consumer detriment',[165] to refer to a broad notion of consumer interest.[166] As was previously implied, it is useful for reasons of conceptual clarity to distinguish the putative goal of consumer welfare from consumer interest in the broad sense.

[159] In the context of the EU see *inter alia* Commission, 'XXXII Report on Competition Policy' (2002) 3 and 163; Neelie Kroes, 'Competition Policy and Consumers' (SPEECH/06/691 at the General Assembly of Bureau Européen des Unions de Consommateurs, Brussels, 16 November 2006); Philip Lowe, 'The Design of Competition Policy Institutions for the 21st Century: The Experience of the European Commission and DG Competition' (2008) 3 Competition Policy Newsletter; Joaquín Almunia, 'Competition - What's in it for Consumers?' (SPEECH/11/803 at the Polish Competition and Consumer Office, Poznan, 24 November 2011), 3, stressing that the Commission pursues the 'objective of protecting consumers'; Johannes Laitenberger, 'Enforcing EU Competition Law: Principles, Strategy and Objectives' (at the Fordham University, 44th Annual Conference on International Antitrust Law and Policy, New York, 15 September 2017), 6, stating that the ultimate beacon of the Commission's action is consumers' protection; Margrethe Vestager, 'A Market that Works for Consumers' (Studienvereinigung Kartellrecht International EU Competition Law Forum, Brussels, 12 March 2018); Margrethe Vestager, 'Competition Assessments and Abuse of Dominance' (EUI Competition Workshop, Florence, 22 June 2018), 5.

[160] See Cseres, *Competition Law and Consumer Protection* (n 19). See also Jules Stuyck, 'EC Competition Law After Modernisation: More than Ever in the Interest of Consumers' (2005) 28 Journal of Consumer Policy 1. cf Parret, 'The Multiple Personalities of EU Competition Law' (n 130) 81, arguing that the aim of EU competition law has probably always been consumers' benefit, albeit indirectly.

[161] See ICN, 'Competition Enforcement and Consumer Welfare' (n 22).

[162] eg Laitenberger, 'Enforcing EU Competition Law' (n 159) 3.

[163] ICN, 'Competition Enforcement and Consumer Welfare' (n 22) 20 (fn 42), where the Commission refers to 'consumer benefits' signifying 'low prices, high quality products, a wide selection of goods and services, and innovation'.

[164] eg Commission, 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' (Communication) [2009] OJ C45/7 (Priorities Paper), para 22.

[165] ibid paras 11 and 19.

[166] See eg ibid para 19.

These are two different concepts and, by extension, two distinguishable goals for Article 102 with potentially different implications.[167]

On the one hand, consumer welfare, in its technical economics sense, is identical to consumer surplus.[168] That is, the two terms can be used interchangeably, even though – conceptually – consumer welfare refers to the economic goal of Article 102 and consumer surplus is the economic measure of this goal. On the other hand, consumer interest includes a broader spectrum of concerns, including freedom of choice, high quality of goods and services, innovation, and consumer welfare in the narrow technical sense. The reason for distinguishing between the two concepts/goals is twofold: i) consumer welfare as consumer surplus concerns only the quantifiable effects of a conduct on price and output, whereas consumer welfare in the broader sense (ie, as consumer interest) is not quantifiable – at least not all of its aspects can be calculated with precision;[169] and ii) the goal of consumer interest better reflects the potential consumer harm generated by anticompetitive practices of dominant firms, since it includes a variety of proxies and is not limited to effects on price and output.

Setting the protection of consumer interest as the ultimate goal of competition law displays a view of it as promoting the interest of a group of economic actors (ie, consumers) to the detriment of others. Leaving aside the distributive justice arguments, which will be discussed in chapter 3, there are at least three additional reasons justifying the emphasis of competition authorities on consumer interest.[170] First, it is reasonable for a competition policy

[167] We can also use the terms consumer welfare in the narrow sense and consumer welfare in the broad sense. The first concept is synonym to consumer surplus while the second one includes consumer surplus and other non-quantifiable proxies.

[168] Broadley, 'The Economic Goals of Antitrust' (n 22) 1033. See also Mayer (n 23) 77.

[169] For example, consumer choice and innovation increase the welfare of consumers but cannot be arithmetically measured. cf Lianos, 'Some Reflections on the Question of the Goals' (n 5) 18.

[170] For a broader analysis see ibid 21-23.

to have as its ultimate objective the protection of consumer interest as opposed to other economic actors, insofar as all economic actors are potentially final consumers.[171] Second, final consumers are in a greater need for legal protection in a market because, being at the very end of the market chain, they are unable to pass-on potential losses to actors further down the market chain.[172] Thus, an effective competitive process is first and foremost to the advantage of final consumers.[173] Finally, a pro-consumer competition policy objective seems justified as a measure of re-balancing the asymmetry between consumers and firms with respect to lobbying in competition law proceedings.[174]

In the context of abuse of dominance, it is often argued that the goal of protecting consumer interest implies that the concrete effects of a practice on consumers must be shown before reaching any decision under Article 102.[175] On this approach, if direct effects of conduct on consumers are not demonstrated in individual cases, the goal of protecting consumer interest becomes a mere slogan.[176] This approach, however, treats as equivalent two distinct issues. The first issue is the identification of the goals pursued by Article 102. The second, distinct, issue is the translation of the goals into operational tests/rules. In this regard, the fact that

[171] In this vein Johannes Laitenberger, 'Tackling the Issues that Matter to Consumers' (AmCham EU 33rd Competition Policy Conference, Brussels, 26 October 2016), 1.

[172] Lianos, 'Some Reflections on the Question of the Goals' (n 5) 22.

[173] Baker 'Competition Policy as a Political Bargain' (n 35) 519, arguing that protection of consumers is by far the most important one in practice.

[174] Cseres, 'The Controversies of the Consumer Welfare Standard' (n 25) 127-8; Farrell and Katz (n 30) 23.

[175] Cseres, 'The Controversies of the Consumer Welfare Standard' (n 25) 146 and 170; Gormsen, 'The Conflict between Economic Freedom and Consumer Welfare' (n 11) 342.

[176] Pinar Akman, '"Consumer Welfare" and Article 82EC: Practice and Rhetoric' (2009) 32 WC 71.

consumer interest may be the ultimate goal of Article 102 does not necessarily lead to tests quantifying the exact effects of a dominant firm's practice on consumers.[177]

First of all, the objective of protecting consumer interest encompasses a broad spectrum of proxies/effects on consumers, some of which are of a non-quantifiable nature. Second, some of these proxies may be more pertinent than others in the *in concreto* application of Article 102, depending on the facts of the case or on the category of the abusive conduct. Third, a requirement to show a concrete negative impact on final consumer would mean that most of the abusive practices arising along a supply chain would be insulated from competition law enquiry.[178] Most importantly, fourth, the above criticism is biased insofar as it implies consumer welfare goal, operationalised via a direct demonstration of harmful consumer effects relating to price increases or output reduction. This is a narrow understanding of consumer harm, ignoring a whole set of harmful effects deriving from dominant firms' practices. Moreover, adhering to Chicago School's economic theories, this stance gives disproportionate weight to factors susceptible of measurement to the exclusion of non-quantifiable factors.[179] On the contrary, the goal of protecting consumer interest denotes multiple goals, all of which revolve around the promotion of (different prisms of) consumer benefit.

Protecting consumer interest does mean that proof of consumer harm is required, but it does not always denote evidence of immediate and actual consumer harm; potential harm might suffice.[180] This is achieved in practice by advancing a plausible and consistent theory of

[177] Heike Schweitzer, 'Efficiency, Political Freedom and the Freedom to Compete - Comment on Maier-Rigaud' in Daniel Zimmer (ed), *The Goals of Competition Law* (5th ASCOLA Workshop, Edward Elgar 2012) 172.

[178] Daskalova (n 42) 138. cf Svend Albæk, 'Consumer Welfare in EU Competition Policy' in Caroline Heide-Jorgensen and others (eds), *Aims and Values in Competition Law* (DJØF Publishing 2013) 75.

[179] Fox, 'The Politics of Law and Economics in Judicial Decision Making' (n 41) 583.

[180] See generally Jonathan Cohen, *The Probable and the Provable* (Clarendon Press 1977) 27; Ronald Allen, 'The Nature of Juridical Proof' (1991) 13 Cardozo Law Review 373; Michael Pardo and Ronald Allen, 'Juridical Proof and the Best Explanation' (2008) 27 Law and Philosophy 223.

consumer harm, establishing a sound causal link between the particular commercial practices and the consumer harm.[181]

II. Authorities Offering Guidance on the Objectives Pursued by Article 102

Having clarified the meaning and consequences of the most relevant putative objectives for Article 102, this section attempts to identify the actual objectives pursued by the provision. To do so, the analysis turns to the authoritative sources of the EU, namely the primary EU law and the EU courts' case law. The discussion of EU primary law will show that the EU Treaties mandate that Article 102 should pursue a plurality of objectives and that the ultimate objectives in this regard are the protection of the integrity of the internal market and the protection of consumer interest. As to the EU courts' case law, it has ensured the functionality of the EU Treaties' demands through the teleological method of interpretation and by measuring the distortion of the competitive process via multiple consumer-related proxies. Finally, the chapter concludes by proposing the construction of the multi-level hierarchy of objectives as a framework that provides a systematic understanding of the objectives pursued by Article 102.

A. Primary EU Law

i. *Protection of the Integrity of the Internal Market*

The concern for the establishment and well-functioning of the internal market has dominated the implementation of the competition rules, including Article 102. The EU competition rules were drafted as a legal complement to the provisions establishing the four economic freedoms: the abolished public barriers to trade should not be replaced by 'private barriers' created by anticompetitive conduct in the marketplace.[182] Article 102 is therefore treated as a means to

[181] Penelope Papandropoulos, 'Implementing an Effects-based Approach under Article 82' (2008) Concurrences 1, 3.

[182] Joined Cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966] ECLI:EU:C:1966:41, p 340; Joined Cases C-468 to 478/06 *Sot. Lélos kai Sia EE and Others v*

achieve the broader goal of the completion of the internal market.[183] As will be shown in chapter 4, EU authorities are greatly preoccupied with the integration of the internal market in the context of applying Article 102. This is legally sound, since it has a strong textual foothold and is consistent with the whole spirit of the Treaties.

Specifically, the wording of Article 102 itself suggests that the provision must also act as a motor for integration.[184] In fact, the significance of the market integration goal can be discerned effortlessly from its wording. First, Article 102 prohibits certain practices by dominant firms 'as incompatible with the internal market'.[185] Moreover, the link between market integration and Article 102 is echoed in the provision's jurisdictional requirement of 'effect on inter-state trade'.[186] In this regard, Article 102 provides that '[a]ny abuse […] of a dominant position […] shall be prohibited […] *in so far as it may affect trade between Member States*'.[187] Thus, a textual interpretation of the provision shows that abuse of dominance is prohibited primarily because it runs counter to the aim of integrating the internal market. This connotes that trade barriers – both public and private – should be abolished, and that goods,

GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE [2008] ECLI:EU:C:2008:504 (*Sot Lélos*), para 37.

[183] Commission, 'XXIXth Report on Competition Policy' (1999) 19, stating that '[t]he second [objective of competition policy] is the single market objective. An internal market is an essential condition for the development of an efficient and competitive industry'.

[184] Michael Wise, 'Competition Law and Policy in the European Union' (2007) 9 OECD Journal of Competition Law and Policy 7, 8; Andreas Weitbrecht, 'From Freiburg to Chicago and Beyond—the First 50 Years of European Competition Law' (2008) 29 ECLR 81, 82.

[185] The same holds true as regards Articles 101 and 107 TFEU, which concern agreements between undertakings and state aids that may 'be incompatible with the internal market'. In the same vein see also Article 108(1) TFEU which empowers the Commission to propose to the Member States that provide state aids any measure that is required 'by the progressive development or by the functioning of the internal market'.

[186] Vasiliki Brisimi, *The Interface between Competition and the Internal Market: Market Separation under Article 102 TFEU* (Hart Publishing 2014) 28-39.

[187] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), art 102 (emphasis added).

services, workers and capital should enjoy complete freedom of movement within the EU.[188] To this end, Article 102 seeks to prevent any practice or conduct that may lead to the isolation of the domestic markets, as well as to encourage trade between Member States.

This interpretation is further substantiated by Protocol No 27 which stipulates that 'the internal market as set out in Article 3 TEU includes a system ensuring that competition is not distorted'.[189] This provision makes the link between the protection of the competitive process and the objective of the internal market explicit. Moreover, the link between competition law and the objective of the internal market is apparent in Article 3(3) TEU which states that '[t]he Union shall establish an internal market' in order to achieve 'a highly competitive social market economy'. Overall, these provisions demonstrate that EU competition policy is part of the broader internal market objective.[190]

This textual and contextual interpretation of Article 102 has important implications in relation to the objectives pursued by the provisions. Particularly, first, it reveals that the integration of the internal market is constitutionally required to be a standalone ultimate objective of Article 102. In this regard, Article 102 is designed to actively contribute to EU's specific concern over avoiding market partitioning and suppression of parallel trade. Consequently, Article 102 must be applied to prohibit practices of dominant firms which are either aiming at restricting cross-border trade or have the effect of partitioning national markets. Second, it implies that the objective of protecting the integrity of the internal market takes precedence over other objectives in the application of the prohibition of abuse of

[188] ibid art 26(2).

[189] Protocol No 27 repealed and replaced Article 3(1)(g) TEC, by merely reproducing the latter's text. In legal terms, by virtue of Article 51 TEU, Protocol No 27 has the same legal value as the Treaties, ie, the TEU and the TFEU.

[190] Lianos, 'Some Reflections on the Question of the Goals' (n 5) 42, arguing that the modifications introduced by the Lisbon Treaty 'confirm the importance of market integration in EU competition law'.

dominance.[191] In other words, market integration appears to be the prime objective pursued by Article 102.[192] Indeed, as will be shown in chapter 4, the hierarchical primacy of the objective of internal market integration in the context of Article 102 is supported by the Commission's decisional practice and the EU courts' case law. Consequently, the protection of the integrity of the internal market is a hierarchically superior standalone objective of Article 102.

The primacy of the internal market objective, which stems from the interlock of Article 102 with it, can only be disavowed by means of Treaty amendment. Particularly, it would be necessary to place competition policy in a hierarchically superior position and to bestow it with a standalone legal character, as opposed to its current instrumental nature as a tool to achieve the objective of integrating the internal market. There has been an attempt to elevate competition policy's status to an autonomous EU objective.[193] Specifically, Article I-3 of the proposed EU Constitution, setting out the Union's objectives, stipulated *inter alia* that '[t]he Union shall offer its citizens […] *an internal market where competition is free and undistorted*'.[194] The draft EU Constitution would thus have made competition policy an EU objective. However, its defeat in the referenda in France and the Netherlands in 2005 which entailed its withdrawal,[195] led to a reform treaty, the Lisbon Treaty.[196]

[191] To the same effect see Anca Daniela Chirita, 'Undistorted, Un(fair) Competition, Consumer Welfare and the Interpretation of Article 102 TFEU' (2010) 33 WC 417, 430.

[192] To that effect see Laitenberger, 'Enforcing EU Competition Law' (n 159) 4-5. Contrast Cseres, 'The Controversies of the Consumer Welfare Standard' (n 25) 151-2.

[193] Treaty establishing a Constitution for Europe [2004] OJ C310/1.

[194] ibid art I-3 (emphasis added).

[195] Patrick Wintour, 'EU Scraps Timetable for Ratifying Constitution' <https://www.theguardian.com/politics/2005/jun/17/eu.politics> accessed 8 January 2019.

[196] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1.

The Lisbon Treaty eliminated the provision which would have established competition policy as a distinct objective of the EU and, instead, linked it to the functioning of the internal market, retaining its instrumental character. Nevertheless, despite arguments to the contrary,[197] this secures rather than weakens the position of competition policy since the internal market remains the defining project of the EU legal order.[198] Indeed, it is explained below that, through the teleological method of interpretation, this link gives Article 102 flexibility, as well as the aptitude to serve multiple goals.

ii. *Plurality of Objectives and Protection of Consumer Interest*

Despite the wording of Article 102 according to which an abuse of dominance 'shall be prohibited as incompatible with the internal market', a dominant firm's practice may be prohibited even if it increases trade and irrespective of any market-partitioning effect. This means that the wording of Article 102 has a twofold connotation. First, it establishes in constitutional terms that Article 102 must pursue the objective of promoting market integration, and hence any conduct obstructing inter-State trade must be assessed restrictively. Second, it indicates in broad terms that the proper functioning of the internal market requires that dominant undertakings are precluded from abusing their market strength.[199]

The pertinent issue in this regard is the identification of the economic objectives of Article 102, other than the promotion of market integration. Some guidance can be inferred from the wording of Article 102 in conjunction with its position within the constitutional

[197] Nicolas Sarkozy, 'Conférence de Presse Finale à L'occasion du Conseil Européen à Bruxelles' (Paris, 23 June 2007) <http://www.ambafrance-uk.org/Conference-de-presse-finale-du,9147> accessed 9 January 2019; Alan Riley, 'The EU Reform Treaty and the Competition Protocol: Undermining EC Competition Law' (2007) 28 ECLR 703.

[198] Julian Nowag, 'Changing the Competition Regime Without Altering the Treaty's Chapter on Competition?' in Martin Trybus and Luca Rubini (eds), *The Treaty of Lisbon and the Future of European Law and Policy* (Edward Elgar 2012) 410-11; Wolf Sauter, *Coherence in EU Competition Law* (OUP 2016) 32.

[199] Nazzini (n 5) 109-10.

architecture of the EU Treaties and revolves again around the fact that primary EU law instrumentally links the provision to the accomplishment of the internal market. Particularly, Article 102 is part of a system which is employed as a means to achieve the integration of the internal market. The EU Treaties, however, does not treat the internal market as an end in itself but as a tool for grander aims.[200] Therefore, since the prohibition contained in Article 102 is explicitly linked to the internal market, internal market's broader goals must be taken into account for its interpretation.[201] As a result, the constitutional structure of the EU Treaties, and the position of Article 102 within this structure, demand and assume a plurality of goals approach.[202] This is a constitutional requirement that cannot be overlooked or dismissed.[203]

From the contextual reading of Article 102, its inferred goal seems to be the objective of ensuring an effective/undistorted competitive structure/process, which is a prerequisite for the proper functioning of the internal market.[204] This understanding of the goals of Article 102 was phrased by AG Kokott in the following terms:

> [Article 102] forms part of a system designed to protect competition within the internal market from distortions [(Protocol No 27)]. Accordingly, [Article 102], like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the *structure of the market* and thus *competition as such (as an*

[200] See Consolidated Version of the Treaty on the European Union [2012] OJ C326/13, arts 2 and 3, clearly establishing this at the constitutional level. See also Treaty establishing the European Economic Community [1957] OJ C224/6 (EEC), art 2, clarifying that this has always been true.

[201] Per Jebsen and Robert Stevens, 'Assumptions, Goals and Dominant Undertakings: The Regulation of Competition under Article 86 of the European Union' (1996) 64 ALJ 443, 449. See also Hawk, 'Article 82 and Section 2' (n 6) 253, arguing that an exclusive focus on consumer welfare and efficiency is difficult under Article 102.

[202] Ivo Samkalden and Irwin Druker, 'Legal Problems Relating to Article 86 of the Rome Treaty' (1966) 3 CML Rev 158; David Gerber, 'Law and the Abuse of Economic Power in Europe' (1988) 62 Tulane Law Review 57, 90.

[203] Parret, 'The Multiple Personalities of EU Competition Law' (n 130) 81.

[204] Nowag, 'Changing the Competition Regime' (n 198) 405.

> *institution)*, which has already been weakened by the presence of the dominant undertaking on the market.[205]

This approach to the objectives of Article 102 has been described as the epitome of Ordoliberal thinking.[206] Be this as it may, AG Kokott's phrasing is partially accurate. On the one hand, it accurately describes the direct objective of Article 102, namely the protection of competition as such, which may not necessarily mean the protection of 'the immediate interests of individual competitors or consumers'. For instance, it may also mean the protection of the interest of future consumers through the promotion of dynamic efficiency. On the other hand, this phrasing fails to convey the distinction between direct and ultimate objectives.

As has already been explained, an effective competitive process can only be defined by the effects that a competition law regime considers desirable, and hence by reference to other goals which are used as proxies for identifying a deterioration of the competitive process. In other words, the objective of protecting a competitive structure/process expresses an endorsement of other objectives. Otherwise competition law becomes a tautology in the following terms: 'the competition rules protect competition'.[207] It is self-evident, as AG Kokott emphasises, that protecting competition is the direct objective of Article 102, but this is a circular logic which begs the question of what the protection of competition is intended to serve. Hence, the question as to the ultimate objective of Article 102 remains. In practice, what matters is the identification of the employed proxies for deducing a distortion of the competitive process, which would, in turn, trigger the application of Article 102.

In this regard, it can be deduced from certain scattered primary EU law provisions that the ultimate economic objective of Article 102 should be concentrated around the protection

[205] *British Airways*, Opinion of AG Kokott (n 146), para 68 (emphasis added).

[206] Lianos, 'Some Reflections on the Question of the Goals' (n 5) 33.

[207] Stucke, 'Reconsidering Antitrust's Goals' (n 5) 569.

of consumer interest. Of relevance in this regard are the provisions of Article 12 TFEU and Article 38 CFREU, which give a prominent place to the protection of consumers within the EU legal order generally, forming also an integral part of EU competition policy.[208] Additionally, reference to consumer interests can be found in the text of Article 102 itself. Specifically, Article 102(b) defines an example of abusive conduct of dominant firms as consisting of 'limiting production, markets or technical development *to the prejudice of consumers*'.[209] This provision, however, does not itself clarify whether Article 102 is to be regarded as a direct instrument for the protection of consumer interest, insofar as the list in Article 102 merely gives examples of prohibited abuses of dominant position. Hence, the reference to consumers in Article 102(b) does not necessarily justify the acceptance of consumer interest as the ultimate economic objective of Article 102, ie in cases other than those envisaged by Article 102(b).[210]

Having said this, however, the fact that the ultimate economic objective of Article 102 is the protection of consumer interest can be inferred from the interpretation of Article 101. Particularly, Article 101(3) provides for a legal exception to Article 101(1), setting out that an anti-competitive agreement or concerted practice that generates productive or dynamic efficiencies can only be exempted when: i) consumers receive a fair share of these efficiencies; ii) any short-term harm to consumers is indispensable for the production of these efficiency gains; and iii) the agreement or concerted practice does not substantially eliminate competition (to the detriment of consumers).[211] All three conditions are concerned with safeguarding consumer interests, by guaranteeing that consumers, either in the short run or in the long run, partake of efficiencies. This holds true for the last condition as well insofar as consumers may

[208] Chirita (n 191) 423 and 430.

[209] TFEU (n 187), art 102(b) (emphasis added).

[210] Buttigieg, *Competition Law: Safeguarding the Consumer Interest* (n 71) 66.

[211] See TFEU (n 187), art 101(3).

only benefit from potential efficiencies as a result of the residual competitive pressure existing on the market.[212]

Cumulatively, these three conditions unequivocally express that the ultimate objective of Article 101 is the protection consumer interest. Indeed, there is no convincing reason to think that Article 101(3) exceptionally allows restrictions of competition if they attain one goal or set of goals, while the prohibition of such restrictions in Article 101(1) pursues a different goal or set of goals. Thus, the beneficial effects required for an exemption in the third paragraph of Article 101 reveal the goals of Article 101 as a whole. Although this interpretation concerns Article 101, it must be extended to all the competition rules of the TFEU, since, according to the EU courts' case law, the objectives of the competition rules are the same.[213] *A fortiori*, this holds true with regard to Articles 101 and 102, since the Court has held that these provisions 'cannot be interpreted in such a way that they contradict each other, because they serve to achieve the same aim'.[214] Therefore, Article 102 is constitutionally required to pursue both the objective of protecting the integrity of the internal market and the objective of protecting consumer interest.

Just as with Article 101, however, the objective of protecting consumer interest does not entail that the exclusive focus of Article 102 should be on consumer surplus and static efficiencies. On the contrary, the protection of consumer interest under Article 102 should also ensure high quality, wide selection of goods and services, and innovation. This understanding of the objective of protecting consumer interest is consistent with the constitutionally mandated

[212] cf Behrens (n 115) 11.

[213] Joined Cases C-501, 513, 515 and 519/06P *GlaxoSmithKline Services Unlimited v Commission* [2009] ECLI:EU:C:2009:610, para 63; Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone* [2009] ECLI:EU:C:2009:343, para 38.

[214] *Continental Can* (n 18), para 25.

plurality of goals approach to Article 102 in that it denotes multiple goals, all of which revolve around the protection of different prisms of consumer interest.

B. EU Courts' Jurisprudence

i. *Teleological Interpretation*

The EU courts' starting point for the identification and enunciation of the goals pursued by Article 102 has historically been the usage of the teleological method of interpretation. The teleological method consists of interpretation by reference to the context and the whole system of the Treaty, that is, its general objectives and philosophy.[215]

In *Continental Can* the Court of Justice employed the teleological method of interpretation to reach the conclusion that the prohibition laid down in Article 102 refers not only to practices which may cause harm to consumers directly, but also to those which are detrimental to them through their impact on an effective competition structure.[216] This reasoning signified that Article 102 is to be interpreted to cover both unilateral exclusionary abusive practices by dominant firms and merger control.[217] Especially regarding the introduction of merger control, the Court by interpreting Article 102 broadly filled in a legal gap due to the absence at that time of a provision foreseeing it.[218] In this regard, the Court rejected the applicants' argument that the omission of the merger control rules from the EEC Treaty was a deliberate choice of the legislator, which must be respected.[219] The Court did so by reference to 'the spirit, general scheme and wording of Article [102], as well as to the system

[215] Anna Bredimas, *Methods of Interpretation and Community Law* (North-Holland 1978) 77.

[216] *Continental Can* (n 18), paras 25-26. See also Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECLI:EU:C:2011:83 (*TeliaSonera*), para 24.

[217] *Continental Can* (n 18), para 25.

[218] Rules on merger control existed in the ECSC Treaty (Article 66(1)-(6)) but were not included in the EEC Treaty.

[219] *Continental Can* (n 18), para 22.

and objectives of the Treaty'.[220] The Court went on to stress that Article 102 is part of EU competition policy, which is:

> based on Article 3(f) [EEC, which was the pre-Lisbon Article 3(1)(g) TEC, and is now Protocol No 27] according to which the [EU's] activity shall include the institution of a system ensuring that competition in the [Internal] Market is not distorted. […] But if [Protocol No 27] provides for the institution of a system ensuring that competition in the [Internal] Market is not distorted, then it requires *a fortiori* that competition must not be eliminated. […] Going beyond this limit involves the risk that the weakening of competition would conflict *with the aims of the [Internal] Market*.[221]

In a similar vein, on multiple subsequent occasions the EU courts made explicit reference to both the attainment of the aims of the internal market and the link of Article 102 with (what is now) the provision of Protocol No 27 for the purpose of establishing the objectives pursued by the prohibition of abuse of dominance.[222] The teleological method of interpretation thus becomes the vehicle through which Article 102 is linked to both the achievement of the internal market itself and the objectives that the internal market is intended to serve.[223] This *prima facie* constitutionally appropriate approach leads to a broad understanding of the objectives pursued by Article 102 and enables the provision to operate in a way that could potentially fill in legislative gaps, thereby broadening the realm and reach of the concept of abuse.

The broad understanding of the goals of Article 102 by the Court of Justice was revealed in the judgment in *TeliaSonera*.[224] The Court employed once again a teleological interpretation,

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[220] ibid.

[221] ibid paras 24-25 (emphasis added).

[222] Joined Cases 6, 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* [1974] ECLI:EU:C:1974:18 (*Commercial Solvents*), paras 63 and 183; Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECLI:EU:C:1979:36 (*Hoffmann-La Roche*), paras 125 and 132; Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission* [1979] ECLI:EU:C:1979:138, para 17; Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECLI:EU:C:1983:313 (*Michelin I*), para 29.

[223] cf Brisimi (n 186) 26, describing this as the 'polysemous character' of the teleological method.

[224] *TeliaSonera* (n 216).

and, by reference to Article 3(3) TEU in conjunction with Protocol No 27, held that 'Article 102 TFEU is one of the competition rules referred to in Article 3(1)(b) TFEU which are necessary for the functioning of th[e] internal market'.[225] Hence, the Court emphasised that the goals of Article 102 must be deduced from the aims of the internal market. On the basis of this, the Court went on to make the ambitious statement that:

> [t]he function of [the competition] rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union.[226]

This passage is conceptually so broad that it mischievously fails to give any indication regarding the ultimate goals of Article 102. It seems that the wording has been copied-and-pasted from a 2002 judgment in *Roquette Frères*, which had been used, however, in a completely different context.[227] Be this as it may, this generic phrasing is a manifestation of the interlock of Article 102 with other EU policies, and expresses the plurality of the goals pursued by the provision, which is a constitutional requirement. In fact, despite this confusing paragraph, in the *TeliaSonera* judgment the Court implies that the objective of Article 102 is the protection of consumer interest,[228] which denotes multiple intermediary goals.

Overall, the teleological method is the interpretative tool that practically links Article 102 to the internal market. Thus, the internal market operates as the overarching objective of Article 102, pursuant to provisions of constitutional level. In essence, the internal market grounds Article 102 in the core project of the EU. This link is manifested in the interpretation of Article 102 in three different ways: the internal market (a) operates as a (hierarchically

[225] ibid paras 20 and 21.

[226] ibid para 22.

[227] Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission* [2002] ECLI:EU:C:2002:603, para 42.

[228] *TeliaSonera* (n 216), para 24.

superior) stand-alone objective; (b) functions as a tool for the identification of other (economic) objectives; and (c) requires the inclusion of non-economic public policy values. This chapter only examines the *stricto sensu* objectives of Article 102, and hence does not assess the non-economic public policy values, which are analysed in the following chapter.

ii. *Competitive Process and Multiple Consumer-Related Goals*

The objective of integrating the internal market does not exclude the relevance of consumer interest in the analysis of Article 102. The EU case law always regarded consumers to be at the heart of what competition law is all about. The Commission and the EU judiciary gradually adopted their own version of the consumer welfare approach in the interpretation and application of Article 102.[229] This version is better described as the objective of protecting consumer interest and is based on the protection of the competitive process/structure, which may be explained by the need to ensure a wide scope for the application of Article 102.[230]

The emphasis on the protection of the competitive process was already clear from the definition of the concept of abuse provided by the Court of Justice in the seminal judgment in *Hoffmann-La Roche*.[231] Specifically, the Court described the concept of abuse as being one 'relating to the behaviour of an undertaking in a dominant position which is such as *to influence the structure of a market*',[232] and went on to hold that it 'covers not only abuse which may directly prejudice consumers but also abuse which indirectly prejudices them *by impairing the effective competitive structure*'.[233] In a similar vein, AG Kokkot in *British Airways* argued that:

> [Article 102], like the other competition rules of the Treaty, is […] *designed to protect the structure of the market* and thus competition as such (as an

[229] Weitbrecht (n 184) 85.

[230] cf Zimmer (n 29) 103.

[231] *Hoffmann-La Roche* (n 222).

[232] ibid para 91 (emphasis added).

[233] ibid para 125.

> institution), which has already been weakened by the presence of the dominant undertaking on the market. In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared.[234]

The relevance of protecting the structure of competition (or, alike, ensuring an effective competitive process) has also been confirmed in the more recent Article 102 case law.[235]

Certain authors argue that there is a direct link between the goal of ensuring an effective competitive process and the special responsibility doctrine proclaimed by the EU courts.[236] In essence, the argument is that the special responsibility doctrine is a direct manifestation of the goal of ensuring an effective competitive process.[237] In the context of Article 102, however, this seems conceptually problematic. This is so to the extent that the emphasis on the goal of ensuring an effective competitive process is not a peculiarity of the abuse of dominance case law; it is also referred to in Article 101 judgments, where the Court of Justice explicitly extends its findings to 'the other competition rules of the Treaty'.[238] In essence, in both Article 101 and Article 102 cases the goal of protecting the competitive process implies that there is not always the need to identify a direct link between a business practice and the reduction of consumer

[234] *British Airways*, Opinion of AG Kokott (n 146), para 68 (emphasis added). See also Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECLI:EU:C:2011:342 (*Post Danmark I*), Opinion of AG Mengozzi, paras 54-56.

[235] eg Case C-23/14 *Post Danmark A/S v Konkurrencerådet* [2015] ECLI:EU:C:2015:651 (*Post Danmark II*), para 26. See also *Google Search (Shopping)* (Case AT.39740) [2017] C4444 final, para 332.

[236] On the notion of special responsibility see *Michelin I* (n 222), para 57; Case T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission* [1993] ECLI:EU:T:1993:31, para 67; Case T-65/98 *Van den Bergh Foods Ltd v Commission* [2003] ECLI:EU:T:2003:281, para 158; Case T-170/06 *Alrosa Company Ltd v Commission* [2007] ECLI:EU:T:2007:220, para 146; Case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission* [2009] ECLI:EU:T:2009:317, para 132; Case C-280/08P *Deutsche Telekom AG v Commission* [2010] ECLI:EU:C:2010:603, para 176; *TeliaSonera* (n 216), para 24; Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECLI:EU:C:2012:172 (*Post Danmark I*), para 23; *Post Danmark II* (n 235), para 71.

[237] See Lianos, 'Some Reflections on the Question of the Goals' (n 5) 34-35.

[238] See text to n 213.

welfare in order to find a breach of competition law. This is because the competition rules are not designed to protect exclusively the immediate interest of consumers.[239]

In any event, insofar as the EU courts consider that protecting the competitive process is a goal pursued by Article 102, the notion of special responsibility is linked to this goal but is not a manifestation of it. The EU courts have simply introduced the idea that dominant firms have a special responsibility not to distort the competitive process within the internal market, which is a schematic way of stating the goal pursued by the provision. That is, the utility of the doctrine is limited to that it underlines the fact that Article 102 is focused on the protection of the competitive process as a means to enhance market integration and consumer interest.[240]

It should be recalled in this regard that a viable competitive market system is only a means, not an end. Therefore, competition is itself valueless, and, by implication, conceptualising the protection of the competitive process as the ultimate goal of competition law is meaningless.[241] It has already been explained that an effective competitive process can only be defined by reference to other goals which are used as proxies for identifying the deterioration of the competitive process. Consequently, the goal of ensuring an effective competitive process is in reality a belief in the promotion of other objectives.

In this context, the EU courts have emphasised that the ultimate beneficiary of an effective competitive process is the consumer, and hence safeguarding the former ultimately ensures the protection of consumer interest.[242] In this vein, the EU courts and certain Advocates

[239] cf Akman, *The Concept of Abuse in EU Competition Law* (n 144) 135.

[240] cf Gormsen, 'The Parallels between the Harvard Structural School and Article 82 EC' (n 11) 234.

[241] cf Elzinga (n 51) 1212.

[242] Case T-228/97 *Irish Sugar plc v Commission* [1999] ECLI:EU:T:1999:246, paras 111 and 185; C-280/08P *Deutsche Telekom* (n 236), para 180; *Post Danmark I* (n 236), para 24. See also Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint* [1998] ECLI:EU:C:1998:264, Opinion of AG Jacobs, para 58; Joined Cases C-

General have stated on multiple occasions that Article 102 is aimed at practices which may cause damage to consumers, either directly or indirectly.[243] Moreover, according to the EU courts, any defence put forward by a dominant firm against an allegation of abusive conduct must, *inter alia*, be consistent with the interests of consumers for it to succeed.[244] A similar focus on the increase of the well-being of consumers as the ultimate objective of the competition rules is also found in the case law on Article 101.[245]

Hence, the protection of consumer interest has always been a central concern in the case law on abuse of dominance.[246] Arguably, conceptualising the interests of the consumer as the ultimate objective of Article 102 is the only sensible approach.[247] Competition in the market exists for the benefit of consumers, and thus competition law, by definition, consists of rules benefiting one way or another the consumer. That is why it is claimed that competition law and consumer law in tandem can guarantee adequate protection for the consumer.[248] Leaving aside the compelling arguments in favour of treating consumer interests as an ultimate objective pursued by Article 102, this is also called for by the very essence of the provision which prohibits exploitative abusive conduct by dominant firms. This type of conduct refers by

395, 396/96P *Compagnie Maritime Belge Transports and Others v Commission* [2000] ECLI:EU:C:1998:518, Opinion of AG Fennelly, paras 117 and 132.

[243] See eg *Continental Can* (n 18), para 26; *British Airways*, Opinion of AG Kokott (n 146), para 68; Case C-95/04P *British Airways plc v Commission* [2007] ECLI:EU:C:2007:166, para 106; Case T-340/03 *France Télécom SA v Commission* [2007] ECLI:EU:T:2007:22, para 266, confirmed on appeal in C-202/07P *France Télécom* (n 109), para 105; C-280/08P *Deutsche Telekom* (n 236), para 176; *TeliaSonera* (n 216), para 24; *Post Danmark I* (n 236), para 20.

[244] *Irish Sugar* (n 242), para 189; C-95/04P *British Airways* (n 243), para 86; Case T-286/09 *Intel Corp. v Commission* [2014] ECLI:EU:T:2014:547, para 81.

[245] For clear statements to that effect see Joined Cases T-213, 214/01 *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v Commission* [2006] ECLI:EU:T:2006:151, para 115; Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECLI:EU:T:2006:265, paras 118, 171 and 273.

[246] Similarly Parret, 'Do we (Still) Know What we are Protecting?' (n 117) 24.

[247] Buttigieg, *Competition Law: Safeguarding the Consumer Interest* (n 71) 74 (fn 127).

[248] ibid 47.

definition to consumers who are at the end of the distribution chain. Even so, as will be illustrated in chapter 4, even in cases of exclusionary abuses it is clear that the EU courts consider consumer interest to be the ultimate major objective of Article 102.

That being said, the Commission and the EU courts understand the objective of protecting consumer interest in a broad manner.[249] In particular, the proxies they appear to employ include certain considerations that are inconsistent with the definition of consumer welfare in its technical economics sense, which is limited to effects on price and output.[250] For example, in the 2011 ICN survey, the Commission referred to the objective of consumer welfare as the benefits to consumers that 'include low prices, high quality products, a wide selection of goods and services, and innovation'.[251] In fact, it has already been emphasised that this objective must be distinguished from the consumer welfare goal, and is better described as the objective of protecting consumer interest. These are two distinguishable objectives for Article 102 with potentially different *in concreto* implications. The objective of protecting consumer interest includes a broader spectrum of concerns, including freedom of choice, high quality of goods and services, innovation, and consumer welfare in the narrow technical sense.

In this regard, the EU institutions consider that a 'Chicago-oriented' approach to the goals of Article 102, where consumer welfare and static efficiencies are treated as the only relevant concerns for its application, takes an unduly narrow view of the benefits of undistorted competition.[252] Through the promotion of the competitive process, they attempt to keep markets contestable, open and accessible to newcomers in order to protect present as well as

[249] See eg Margerthe Vestager, 'Protecting Consumers from Exploitation' (at the Chillin' Competition Conference, Brussels, 21 November 2016).

[250] cf Engelsing and others (n 24) 221. See also Cseres, 'The Controversies of the Consumer Welfare Standard' (n 25) 124.

[251] ICN, 'Competition Enforcement and Consumer Welfare' (n 22) fn 42.

[252] cf Wils (n 71) 414.

future consumers.[253] This approach is compatible with the assumption that increasing the incentives of non-dominant firms and of potential newcomers to invest and compete would generate dynamic efficiencies, which is also consistent with the long-standing understanding of the objective of internal market integration.

III. A Framework for Understanding the Objectives of Article 102

A. Broad Range of Goals

The analysis in this chapter illustrates that Article 102 responds to a broad range of goals,[254] arising from the EU's wider aims which, in turn, are inextricably linked to the internal market goal.[255] This multiplicity of objectives has been referred to as the 'multivalued tradition of European competition law'.[256] In fact, Article 102 is to be given content through analysis of its role in the scheme of the Treaties.[257] Therefore, the behaviour of dominant firms must be analysed with respect to a wide range of concerns, precisely because the Treaties (and thus Article 102) seek to implement a broad range of policies.[258]

The constitutional link of the competition rules to market integration is the peculiar EU perspective that determines the broad goals and reach of Article 102.[259] The link of Article 102 to the internal market is manifested in two different ways in the context of the goals pursued

[253] Laitenberger, 'Enforcing EU Competition Law' (n 159). Contrast Etro and Kokkoris (n 16) 35, arguing that EU's approach to exclusionary practices is 'linked to a naïve version' of the post-Chicago School, which considers that market failures are not necessarily self-correcting and that firms with substantial market power can take advantage of market imperfections.

[254] Jebsen and Stevens (n 201) 449.

[255] Joaquín Almunia, 'Competition Enforcement in the EU: Beyond the Integration of Markets' (at the Academy of European Law Trier, Luxembourg, 18 October 2012). Similarly Conor Talbot, 'Ordoliberalism and Balancing Competition Goals in the Development of the European Union' (2016) 61 Antitrust Bulletin 264.

[256] Parret, 'The Multiple Personalities of EU Competition Law' (n 130) 81. See also Talbot (n 255) 275.

[257] Jebsen and Stevens (n 201) 458.

[258] cf Ezrachi, 'Sponge' (n 1) 53.

[259] Behrens (n 115) 16.

by Article 102. Specifically, the internal market: (a) operates as a (hierarchically superior) standalone objective; and (b) functions as a tool for the identification of other objectives.

With regard to the identification of the economic objectives other than the completion of the internal market, the constitutional structure of the EU Treaties, and the position of Article 102 within this structure, demand and assume a plurality of goals approach.[260] The ultimate economic goal pursued by Article 102 is the protection of consumer interest, which is consistent with the constitutionally required plurality of goals approach. This is because the goal of protecting consumer interest is propelled through the intermediate goal of the protection of the competitive process (alias, the structure of the market), which, in turn, is protected through the use of multiple proxies (or intermediate goals of lower rank).

In this regard, a concern often voiced is the coexistence of the multiple objectives.[261] Nevertheless, this concern seems to be principally due to the lack of a systematic approach to the goals of Article 102 by the Commission and EU courts. In this context, it is not an unresolvable conceptual or practical issue. Indeed, the construction of the multi-level hierarchy of the relevant goals, to which the discussion now turns, provide a framework for a systematic understanding of the objectives pursued by Article 102.

B. Plurality of Goals in a Multi-Level Hierarchical Order

i. *Two Ultimate Objectives*

The above analysis has established that, consistently with EU primary law, Article 102 pursues two ultimate objectives, namely the integration of the internal market and the protection of consumer interest.

[260] Samkalden and Druker (n 202) 158; Gerber, 'Law and the Abuse of Economic Power in Europe' (n 202) 90.

[261] O'Donoghue and Padilla (n 10) 9. cf Akman, *The Concept of Abuse in EU Competition Law* (n 144) 141.

The objective of internal market integration expresses the EU's specific concern over avoiding market partitioning and suppression of parallel trade. Article 102 itself and the whole spirit of the Treaties require for the provision to be treated as a means to achieve the objective of the completion of the internal market. In this regard, the analysis of the case law in chapter 4 will demonstrate that Article 102 has been enforced against behaviours of dominant firms that have as their object or effect the obstruction of inter-State trade, treating them in a restrictive manner. Such behaviours are thus treated as 'naked restrictions', which are *prima facie* abusive and can only be justified on the basis of an objective justification or an efficiency defence. In any event, the promotion of internal market integration is linked to the interests of consumers in that the existence of an integrated market is a prerequisite for EU's economic growth, which, in turn, promotes the interests of consumers.

The second ultimate objective pursued by Article 102 is the protection of consumer interest. This can be said to be the 'economic goal' of Article 102 which is distinguishable from the 'integration goal', despite the fact that the common denominator of both these goals is the internal market. This is the result of the instrumental role that the EU Treaties assign to Article 102. Indeed, the fact that the prohibition contained in Article 102 is explicitly linked to the internal market entails that the internal market's broader goals must be taken into consideration in order to define the economic goal pursued by the provision.

Specifically, first, the position of Article 102 within the EU Treaties' structure and the very nature of the internal market, which is bound to be always an evolving and dynamic process, demand that Article 102 pursues multiple goals. Second, primary EU law provisions appear to assume that the ultimate economic objective of Article 102 should be concentrated around the protection of consumer interest. In any event, it has already been emphasised that competition is itself valueless, and, as the EU courts have stressed, the ultimate beneficiary of an effective competitive process is the consumer. In fact, there are numerous arguments in

favour of setting the protection of consumer interest as the ultimate goal of competition law, as opposed to promoting the interest of other groups of economic actors. Hence, Article 102 cannot but endeavour to ensure the protection of consumer interest.

Through the teleological method of interpretation, the EU courts succeeded in practically linking Article 102 to the internal market and reconciling the constitutional necessity of pursuing a plurality of objectives with the assumption that the ultimate economic objective of Article 102 should be focused on the interest of the consumer. This is achieved by designating the objective of protecting consumer interest as the ultimate economic goal of Article 102. This goal, in contrast to the narrow consumer welfare goal, denotes multiple goals (insofar as it encompasses a broad spectrum of proxies), all of which revolve around the promotion of (different prisms of) consumer benefit.

ii. *Protection of the Competitive Process*

The protection of the competitive process is identified as a goal of Article 102 in EU primary law and has repeatedly been confirmed and emphasised as such by the EU courts. The objective of preserving a competitive market process entails striving for maintaining a market structure that is favourable to effective competition. This alone, predisposes of a competition law regime that lacks faith in the ability of market forces to preserve effective competition and remedy market failures; one that distrusts the classical *laissez-faire* hypothesis of self-correcting market forces. This, however, does not necessarily equate the protection of the competitive process with the protection of non-dominant firms.

The EU courts have interpreted the goal of protecting the competitive process as an intermediate goal, ie as a vehicle to achieve the ultimate objectives pursued by Article 102.[262]

[262] This assertion is corroborated by the employed legal tests under Article 102, which are discussed in chapter 4.

Put differently, Article 102 is triggered when the competitive process is distorted, the latter being revealed by means of proxies, in order to protect the interest of the consumer and to promote the integration of the internal market. The protection of the competitive process is thus a flexible shorthand which expresses multiple proxies. The ultimate beneficiary of an effective competitive process is the consumer, and hence safeguarding the existence of the competitive process through proxies ensures the promotion of consumer interest. In this respect, the EU courts consider the interests of consumers as being about much more than just low prices, treating as relevant proxies: consumer choice and unrestricted market entry, dynamic efficiency and innovation, as well as consumer surplus and productive efficiency. Depending on the nature of the practice concerned and the facts of each individual case, certain of these proxies may be more relevant than others in order to protect consumer interest. The relevance of each proxy is ultimately manifested in the CJEU's selected test, which is illustrated in chapter 4. The effects on consumers are central in this framework, and the distortion of the competitive process is not established on the sole basis of the reduction of the number of competitors.

Moreover, the goal of protecting the competitive process implies that there is not always the need to identify a direct link between a business practice and the reduction of consumer welfare in order to find a breach of Article 102. This is because, first, Article 102 is not designed to protect exclusively the immediate interest of consumers, and, second, a requirement to show a concrete negative impact on final consumer would mean that most of the abusive practices arising along a supply chain would be insulated from competition law enquiry. Hence, through the promotion of the competitive process, the EU courts attempt to keep markets contestable, open, and accessible to newcomers in order to protect consumers.

In this context, protecting consumers is indeed above all.[263] However, this does not imply that the application of Article 102 is or should be based on a full-blown consumer welfare test.[264] The fact that the objective of protecting consumer interest entails the promotion of a plurality of (consumer-related) goals implies that the employed tests for the assessment of potentially abusive practices under Article 102 must be simple.[265] After all, there is no other technique to operationalise a plurality of goals approach than to rely on presumptions, ie, to design simple rules.[266] Protecting consumer interest therefore does mean that proof of consumer harm is required, but it does not always denote evidence of immediate and actual consumer harm; potential harm might suffice.[267] This is achieved in practice by advancing a plausible and consistent theory of consumer harm, establishing a sound causal link between the particular conduct and the consumer harm.[268] Thus, any test under Article 102 must be consistent with the theory of harm advanced, which, in turn, must be consistent with the goal of protecting consumer interest.

iii. *The Multi-Level Hierarchy of the Goals*

The construction of the multi-level hierarchy provides a satisfactory framework for the systematic understanding of the multi-goal approach pursued by Article 102. In fact, there is a multi-level hierarchy of goals under Article 102. Particularly, there exists a hierarchical classification at both a vertical and a horizontal level.

[263] See Laitenberger, 'Enforcing EU Competition Law' (n 159) 6.

[264] Schweitzer, 'Efficiency, Political Freedom and the Freedom to Compete' (n 177) 172.

[265] cf Evans (n 2) 167.

[266] Bailey (n 93) 362.

[267] Pardo and Allen (n 180) 223.

[268] Papandropoulos (n 181) 3.

At a vertical level, at the top of the hierarchy are the ultimate objectives pursued by Article 102, ie the twin ultimate objectives of integrating the internal market and protecting consumer interest. This is the preoccupation of the EU institutions when interpreting, enforcing and applying Article 102. This preoccupation is propelled through the intermediate goal of the protection of the competitive process (alias, the structure of the market). It is thus necessary to identify a distortion of the competitive process for Article 102 to come into play. In this regard, the ultimate objectives of Article 102 inform the identification of this distortion by determining the proxies/effects that would reveal it, and thus trigger the provision. It is indeed shown in chapter 4 that the Commission and the EU courts use a broad spectrum of proxies, all of which revolve around the promotion of different facets of consumer interest.

These multiple proxies are located at the bottom of this pyramidical framework but are of principal significance since they dictate the employed tests. Depending on the nature of the practice concerned and the facts of each individual case, each of these proxies have different merit, an issue ultimately manifested in the CJEU's selected test. This approach gives Article 102 the aptitude to serve coherently multiple goals, while granting it the necessary flexibility to adapt to abusive practices that do not fit neatly into existing categories.

Apart from the above-described three-stage pyramidical framework at the vertical level, there seems also to exist a hierarchical relationship at the horizontal level, ie between the two ultimate objectives of Article 102. Particularly, where there is an *in concreto* conflict of the internal market objective with the objective of protecting consumer interest, the former prevails, revealing thus the hierarchical primacy of the goal of internal market integration for

the enforcement of Article 102.[269] This conveys that in certain cases consumer interest is not the prime concern under Article 102.

IV. Concluding Remarks

The aim of Article 102 is not to protect competition against any distortions resulting from dominant firms' conduct, but to avoid competition from being distorted in such a way that it would prevent the achievement of the broader objectives of the EU Treaties.

The constitutional structure of the EU Treaties, and the position of Article 102 within this structure, demand a plurality of goals approach. The ultimate objectives pursued by Article 102 are the protection of the integrity of the internal market and the protection of consumer interest. This is consistent with the constitutionally mandated plurality of goals approach. Altogether, the chapter sets out a framework for understanding the goals of Article 102, demonstrating that there is a plurality of goals in a multi-level hierarchical order. Specifically, the ultimate goals are the promotion of market integration and the protection of consumer interests; these goals are propelled through the intermediate goal of the protection of the competitive process, which, in turn, is protected through the use of multiple proxies.

However, the *stricto sensu* objectives pursued by Article 102 that this chapter identified are not the full picture. In particular, there are non-economic public policy values, which may be relevant in the context of Article 102.

[269] This does not entail that the internal market is hierarchically superior to each and every policy in EU law. Arts 2 and 3 TEU convey a plurality of values and objectives, and economic integration is just one part of the map.

3. SOCIO-POLITICAL VALUES AND GENERAL PRINCIPLES OF EU LAW IN THE ANALYSIS OF ARTICLE 102

It has been argued that '[i]t is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws'.[1] In fact, research has shown that, despite the internationalisation of the discipline, there is significant and substantial divergence between the different competition law regimes, which reflects, *inter alia*, diverging normative and political choices.[2]

This chapter discusses socio-political values and general principles of EU law which are relevant in the analysis of Article 102. These values and principles can be systematised into three categories. The first category concerns values that indirectly guide the understanding of the goals pursued by Article 102 and may be reflected in its enforcement philosophy and the employed tests. The second category relates to values that may directly come into play in the application of Article 102 in an *ad hoc* manner. The third category comprises of three prominent general principles of EU law – namely, the principles of effectiveness, proportionality and non-discrimination – which operate as substantive principles of interpretation in the context of Article 102.

Finally, the chapter concludes by illuminating the functions of these values and principles in the analysis of Article 102. The next chapter then illustrates the way that the constitutionally demanded holistic approach is reflected in the rules applied by the EU courts

[1] Robert Pitofsky, 'The Political Content of Antitrust' (1979) 127 University of Pennsylvania Law Review 1051, 1051.

[2] David Gerber, 'Fairness in Competition Law: European and US Experience' (Conference on Fairness and Asian Competition Laws, Kyoto, March 2004) 1; Ken Heyer, 'A World of Uncertainty: Economics and the Globalization of Antitrust' (2005) 72 ALJ 375, 399-400; David Evans, 'Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules' (2009) 10 Chicago Journal of International Law 161, 171-2; Kent Bernard, 'Is Full Transatlantic Competition Law Convergence Realistic, or Even Desirable' (2015) CPI Antitrust Chronicle 1, 5; Ariel Ezrachi, 'Sponge' (2017) 5 JAE 49, 51.

to the unilateral conduct of dominant firms, showing that the designed rules ensure conformity with the economic goals pursued by Article 102 and consistency with EU's constitutional values and general principles.

I. Market Dominance and Inequality

A. General Remarks

Socio-political concerns that can potentially be relevant to the interpretation and enforcement of a rule relating to the unilateral conduct of dominant companies may include: i) the fear of concentrated economic power because it can lead to political interference; ii) the reduction in the range of private discretion for the safeguarding of equality of opportunities to participate in the market; iii) the favourable treatment of small firms, either under the belief that they can contribute to society's welfare in economic terms or irrespective of economic considerations; and iv) income redistribution.[3]

All these concerns are conceptually and practically linked to one another: they all relate to the adverse effects of high levels of inequality on a society's political, social and economic order. Part of this chapter focuses on these inequality-inspired concerns based on a two-fold consideration. First, the origins of competition law lie very much in concerns about concentration of wealth,[4] while other socio-political issues can only very remotely be relevant in the assessment of the unilateral conduct of dominant companies.[5] Second, economically

[3] cf Pitofsky (n 1).

[4] See Eleanor Fox and Lawrence Sullivan, 'Antitrust-Retrospective and Prospective: Where Are We Coming From? Where Are We Going?' (1987) 62 NYU L Rev 936, 977 and 981.

[5] The issue of unemployment is, however, also referred to in the context of assessing the approach to SMEs.

significant market power contributes to growing inequality, since the exercise of market power tends to raise the return to capital.[6]

The first of those concerns relates to the dangers that economic power poses to democracy.[7] In essence, the concern is that very concentrated economic power can invade the state, that is, market strength gives political strength which, in turn, can be exploited for economic and other purposes.[8] In this context, there can be no doubt that globally operating powerful firms can have direct effects on the political process and in the context of specific competition law investigations.[9] Additionally, evidence suggests that competition law can foster democracy by improving income distribution.[10] Even so, by now there is a large degree of consensus worldwide that this, in principle, legitimate concern does not imply that the objective of competition law is the elimination of market power *per se*. The *ratio* for not targeting market power is that, just as competition stimulates innovation, so does the expectation of being able to extract profits from investments in innovation, which are the result

[6] Jonathan Baker and Steven Salop, 'Antitrust, Competition Policy, and Inequality' (2015) 104 Geo LJ 1, 11-13; Sean Ennis, Pedro Gonzaga and Chris Pike, 'Inequality: A Hidden Cost of Market Power' (2019) 35 Oxford Review of Economic Policy 518, 520 and 539.

[7] See Edward Muller, 'Democracy, Economics Development, and Income Inequality' (1988) 53 American Sociological Review 50, 62; Tay-Cheng Ma, 'Antitrust and Democracy: Perspectives from Efficiency and Equity' (2016) 12 JCLE 233, 234. See also Massimiliano Vatiero, 'Dominant Market Position and Ordoliberalism' (2015) 62 International Review of Economics 291, 293, referring to the ordoliberal perspective, which emphasises the dangers that economic power poses to democracy.

[8] Henry Oliver, 'German Neoliberalism' (1960) 74 QJE 117, 127; Pitofsky (n 1) 1053; Baker and Salop (n 6) 6-10. See also Joseph Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers our Future* (W W Norton & Company 2012) 36 and 148-82.

[9] Frank Maier-Rigaud, 'On the Normative Foundations of Competition Law - Efficiency, Political Freedom and the Freedom to Compete' in Daniel Zimmer (ed), *The Goals of Competition Law* (5th ASCOLA Workshop, Edward Elgar 2012) 166. See also Luigi Zingales, 'Towards a Political Theory of the Firm' (2017) 31 Journal of Economic Perspectives 113, eloquently illustrating the real threat posed to the free market economy, economic prosperity and democracy by the interaction of concentrated corporate power and politics.

[10] Ma (n 7) 251, reaching this conclusion on the basis of an econometric model. On the positive effects of competition law enforcement on democracy see, *inter alia*, Walter Adams, 'Antitrust and a Free Economy' (1977) 46 AL Rev 794; David Barnes, 'Nonefficiency Goals in the Antitrust Law of Mergers' (1989) 30 William & Mary Law Review 787. Contrast Niels Peterson, 'Antitrust Law and the Promotion of Democracy and Economic Growth' (2013) 9 JCLE 593, 620, arguing that the effect of competition law on democracy is insignificant.

of the exercise of market power. Hence, the expectation to exercise market power has a pivotal role in maintaining the firms' incentives to invest, innovate, improve product quality and introduce new goods.[11] Consequently, there is no justification for setting the elimination of market power as the objective of competition law.

The second political objective of safeguarding equality of opportunities is related to the first one in the sense that it outlines the same fear of too much economic power being in the hands of too few people.[12] Thus, it reveals the same distrust of economic power.[13] However, the focus here is not on the risk to democratic institutions but on diversity and on the equal opportunity for the unestablished to participate in the market.[14] Certainly, inequality is a natural byproduct of a market economy in the sense that the market generates winners and losers. At the same time, however, inequality erodes the sense of a society giving everyone a fair opportunity to succeed.[15] Essentially, a competition policy protecting equality of opportunities entails a policy protecting the economic freedom to participate in the marketplace as an individual right.[16] In any event, it is argued that protecting opportunity and access for smaller firms is an efficient way to increase competition, and thus foster both efficiency and progressiveness.[17] In this regard, we should distinguish between protecting the equality of

[11] Massimo Motta, *Competition Policy: Theory and Practice* (CUP 2004) 58.

[12] See eg Bill Gates, 'Why Inequality Matters' (*Gates Notes*, 13 October 2014) <https://www.gatesnotes.com/Books/Why-Inequality-Matters-Capital-in-21st-Century-Review> accessed 6 November 2019, arguing that 'high levels of inequality are a problem' and that '[c]apitalism does not self-correct toward greater equality'.

[13] Frederick Rowe, 'The Decline of Antitrust and the Delusion of Models: The Faustian Pact of Law and Economics' (1984) 72 Geo LJ 1511, 1567.

[14] Fox and Sullivan (n 4) 944, claiming that this has traditionally been the main concern of competition law.

[15] Thomas Piketty, *Capital in the Twenty-First Century* (HUP 2014) 571, warning about the fact that growing inequality endangers the values of social justice on which democratic societies are grounded.

[16] Peter Behrens, 'The Ordoliberal Concept of "Abuse" of a Dominant Position and its Impact on Article 102 TFEU' in Fabiana Di Porto and Rupprecht Podszun (eds), *Abusive Practices in Competition Law* (10th ASCOLA Workshop, Edward Elgar 2018) 21.

[17] Fox and Sullivan (n 4) 987.

opportunity in this sense and protecting non-dominant firms *tout court*. Nevertheless, some commentators urge that protecting equality of opportunities can be a slippery objective, which may mean no more than protecting competitors (including non-efficient ones).[18]

The third listed objective is the favourable treatment of small firms (the so-called small- and medium-sized enterprises ('SMEs')) because of their difficulty in raising capital and their insufficient access to information. Such a policy objective in and of itself would mean that any exclusionary practice carried out by a dominant firm would be prohibited, regardless of both the potential advantageous effects on consumers and the rivals' efficiency.[19] This approach would obviously be irrational, not least because it would *de facto* target market dominance. It is, however, argued that economic evidence suggests that SMEs are the most fertile source of economic growth, innovation and employment,[20] and thus it is important to ensure free market access.[21] Be this as it may, it is one thing to regard the protection of SMEs as a policy goal of

[18] On this long-running debate about Article 102, see eg Christian Ahlborn and Carsten Grave, 'Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective' (2006) 2 CPI 197, 214; Laura Parret, 'The Multiple Personalities of EU Competition Law: Time for a Comprehensive Debate on its Objectives' in Daniel Zimmer (ed), *The Goals of Competition Law* (5th ASCOLA Workshop, Edward Elgar 2012) 67.

[19] See Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (Free Press 1993) 54, reproving this attitude.

[20] Steven Davis, John Haltiwanger and Ron Jarmin, 'Turmoil and Growth: Young Businesses, Economic Churning, and Productivity Gains' (Report, Ewing Marion Kauffman Foundation 2008) 6; Stacy Mitchell, 'The View from the Shop—Antitrust and the Decline of America's Independent Businesses' (2016) 61 Antitrust Bulletin 498, stressing the need to bring back into competition policy a commitment to SMEs because they deliver distinct consumer benefits. To that effect see also Commission, 'Towards a Single Market Act: For a Highly Competitive Social Market Economy' (Communication) COM(2010) 608 final, 4, 6 and 12; Commission, 'Minimizing Regulatory Burden for SMEs: Adapting EU Regulation to the Needs of Micro-Enterprises' (Report) COM(2011) 803 final; Cassey Lee and Bernadine Zhang Yuhua, 'SMEs, Competition Law and Economic Growth' (Commissioned by APEC, ISEAS-Yusof Ishak Institute 2015).

[21] Joseph Broadley, 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress' (1987) 62 NYU L Rev 1020, 1045; Frederic Scherer, 'Antitrust, Efficiency, and Progress' (1987) 62 NYU L Rev 998, 1012 and 1014. See also Council, 'The European Charter for Small Enterprises' (Annex III to the Conclusions of the Presidency of the Santa Maria Da Feira European Council of 19 and 20 June 2000) 12.

competition law and another thing SMEs being protected as an indirect and incidental consequence of the application of Article 102.[22]

Lastly, a putative socio-political objective of Article 102 is the equitable distribution of income. In fact, all legal policies have more or less significant consequences for the distribution of wealth.[23] For example, it has been forcefully argued by many commentators that the adoption of more permissive antitrust rules in the US during the past four decades has increased the 'wealth gap', ie the unequal distribution of wealth.[24] It is, therefore, thought that greater competition law enforcement would generally improve the distribution of income and wealth.[25] However, it has also been stressed that the pursuit of income redistribution through competition law enforcement is likely to have limited results and that other policies, such as tax and subsidy schemes, are more effective in promoting distributional goals.[26] In any event, although competition law is unlikely to take on the same importance as legal policies which have as their primary goal wealth distribution, it may certainly complement and support those policies.[27]

[22] cf Motta (n 11) 22.

[23] Herbert Hovenkamp, 'Antitrust Policy and Inequality of Wealth' (2017) CPI Antitrust Chronicle 1, recognising this despite the fact that he opposes the use of competition law as a wealth distribution device.

[24] For example see Eleanor Fox, 'We Protect Competition, You Protect Competitors' (2003) 26 WC 149, 152; Stiglitz, *The Price of Inequality* (n 8) 44-45; Barry Lynn, 'Killing the Competition: How the New Monopolies are Destroying Open Markets' (*Harper's Magazine*, February 2012) 32; Jonathan Baker, 'Economics and Politics: Perspectives on the Goals and Future of Antitrust' (2013) 81 Fordham Law Review 2175, 2184; Joseph Stiglitz, 'America Has a Monopoly Problem—and It's Huge' (*The Nation*, 23 October 2017); Douglas Irwin, 'Stigler on Monopolies: "Competition is a Tough Weed, Not a Delicate Flower"' (*Pro-Market*, 31 October 2017), stating that 'the major factor in the decline of competition has been governmental support of monopoly'.

[25] Anthony Atkinson, *Inequality: What Can be Done?* (HUP 2015) 126-7; Baker and Salop (n 6) 18.

[26] Kenneth Elzinga, 'The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?' (1977) 125 University of Pennsylvania Law Review 1191, 1196. cf Baker and Salop (n 6) 10, arguing that 'despite the benefits from redistribution, existing programs do not appear to have offset the growing inequality in [the American] society'. Contrast Daniel Crane, 'Antitrust and Wealth Inequality' (2016) 101 Cornell Law Review 1171, 1228, claiming that '[w]ealth inequality does not belong to antitrust law's domain'.

[27] Ma (n 7) 251, arguing that, 'although antitrust improves income distribution, which in turn promotes political democracy, it does not follow that antitrust alone is a sufficient redistributive policy'.

This could be achieved, for instance, by interpreting and enforcing the relevant competition rules consistently with these other legal policies.

B. EU Specific Remarks

It could legitimately be argued that EU competition law has the predisposition of including socio-political concerns, not least because of the historical context in which it was born and the constitutional nature of its rules.[28] As explained in chapter 1, the EU competition rules (including Article 102) are part of a legal order created to replace conflict with co-operation,[29] which, by definition, presupposes tolerance for national interests and adaptability to novel circumstances.[30] Also, influenced by the humanist values promoted by the German Ordoliberal School,[31] EU competition law is mandated with the concern about the potential misuse of accumulated economic power.[32] This entails a sceptical view of market forces, in the sense that 'self-regulated' markets can have undesirable outcomes.[33] More importantly, the EU

[28] For a good analysis of the historical factors influencing the drafting of Article 102 see Ekaterina Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart Publishing 2010) 13-21. See also Ezrachi 'Sponge' (n 2) 53-54, emphasising the constitutional nature of EU competition law.

[29] Hans Thorelli, 'Antitrust in Europe: National Policies After 1945' (1959) 26 University of Chicago Law Review 222, 223; David Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP 2001) 347.

[30] Michael Wise, 'Competition Law and Policy in the European Union' (2007) 9 OECD Journal of Competition Law and Policy 7, 60; Conor Talbot, 'Ordoliberalism and Balancing Competition Goals in the Development of the European Union' (2016) 61 Antitrust Bulletin 264, 270-1.

[31] Gerber, *Law and Competition in Twentieth Century Europe* (n 29) 263ff. See also Matthew Cole, 'Ordoliberalism and its Influence on EU Tying Law' (2015) 36 ECLR 255, 261, claiming that Ordoliberalism is the economic theory upon which Article 102 is based. cf Ahlborn and Grave (n 18) 206, arguing that, over time, Ordoliberalism has inevitably lost influence over EU competition policy. Contrast Behrens (n 16) 5-7, arguing that Article 102 still reflects Ordoliberal ideas, but this is a refined version of the original Freiburg School's learnings.

[32] David Gerber, 'Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe' (1994) 42 American Journal of Comparative Law 25, 82; Viktor Vanberg, 'The Freiburg School: Walter Eucken and Ordoliberalism' (2004) Freiburg Discussion Papers on Constitutional Economics 04/11, 12 <https://www.econstor.eu/bitstream/10419/4343/1/04_11bw.pdf> accessed 8 January 2019, asserting that the ordoliberals focused on economic power and its deprivation.

[33] Per Jebsen and Robert Stevens, 'Assumptions, Goals and Dominant Undertakings: The Regulation of Competition under Article 86 of the European Union' (1996) 64 ALJ 443, 452. cf Ernst-Joachim Mestmäcker, 'Competition Policy and Antitrust: Some Comparative Observations' (1980) 136 Zeitschrift für die Gesamte

competition rules are part of an overall Treaty framework, and hence must be given content through their role in the scheme of the Treaties.[34] Thus, the behaviour of dominant firms may be analysed with respect to a broader range of concerns, which may include the above-mentioned socio-political aims.[35]

Unquestionably, other legal policies, such as tax, subsidy schemes or labour, are better suited to effectively address issues of inequality and promote wealth distribution. In the EU, however, there only exists limited competence to pursue such other policies.[36] At the same time, the establishment of a 'highly competitive *social* market economy'[37] combined with the horizontal social clause enshrined in the Treaties,[38] demand a holistic approach to EU law. That is an approach where economic and social policies are reconciled and integrated into one overall policy. It can therefore be argued with some force that, under this holistic approach, Article 102 should contribute to, or be consistent with, the promotion of distributional goals.

That being said, an effective response to these socio-political values may not necessarily be one where Article 102 is called on to specifically address inequality. Adopting

Staatswissenschaft 387, 389, arguing that competition is the most effective instrument to decentralise economic power.

[34] In this vein see Ivo Samkalden and Irwin Druker, 'Legal Problems Relating to Article 86 of the Rome Treaty' (1966) 3 CML Rev 158; David Gerber, 'Law and the Abuse of Economic Power in Europe' (1988) 62 Tulane Law Review 57, 90.

[35] Jebsen and Stevens (n 33) 449. See also Barry Hawk, 'Article 82 and Section 2' in *OECD, Paper on Competition on the Merits* (DAF/COMP(2005)27, 30 March 2006), 251 <http://www.oecd.org/competition/abuse/35911017.pdf> accessed 6 January 2019, arguing that an exclusive focus on consumer welfare and efficiency is difficult under Article 102 given the market integration and fairness considerations expressed in the Treaty.

[36] The fundamental principle governing EU competences is the principle of conferral, which commands that the Union shall act only within the limits of the competences conferred upon it by the Member States and that competences not conferred upon the Union remain with the Member States. On the distribution of competences between the EU and its Member States, see Consolidated Version of the Treaty on the European Union [2012] OJ C326/13 (TEU), art 5; Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), arts 3-6.

[37] See TEU (n 36), art 3(3).

[38] See TFEU (n 36), art 9.

inequality as an explicit policy focus of the prohibition contained in Article 102 is not necessary for satisfying the constitutionally required holistic approach. The design of rules that are consistent with these values and an aggressive enforcement of the relevant provision would be sufficient and compatible with both the goals pursued by Article 102 and the constitutional requirement of a holistic approach to the interpretation of the competition rules.

In any event, the fact that a competition law system may promote objectives of political nature does not entail that politics may play a role in the application of the rules to specific cases.[39] Put simply, the use of competition law as a platform for the promotion of other policies ('instrumentalisation of competition law') is legitimate when this is clearly prescribed in, or follows from, provisions of constitutional nature. In this context, the most explicit and unique to the EU political objective is the long-term objective of complete market integration in an 'ever closer union'.[40] This is only incidentally discussed in this chapter, as it has been analysed in chapter 2.

II. A Holistic Approach under EU Law

The constitutional analysis of Article 102 in this thesis is based on the premises that the aim of the prohibition is not to protect competition against any distortions resulting from dominant firms' conduct; its aim is to avoid competition being distorted in such a way so as to prevent the achievement of the Treaties' broader objectives. Having already laid down a framework for the understanding of the goals pursued by Article 102 on the basis of this point, this chapter explores the relevance of socio-political values and general principles of EU law for the interpretation of Article 102.

[39] Laura Parret, 'Do we (Still) Know What we are Protecting?' (2009) TILEC Discussion Paper DP 2009-010, 6 <http://ssrn.com/abstract=1379342> accessed 8 January 2019.

[40] Claus-Dieter Ehlermann, 'The Contribution of EC Competition Policy to the Single Market' (1992) 29 CML Rev 257, 264ff.

It is argued that specific clauses in the Treaties mandate a holistic approach to the interpretation of Article 102. Particularly, Article 7 TFEU provides that 'the Union shall ensure *consistency* between its policies and activities, *taking all of its objectives into account*'.[41] Hence, being part of the rules regarding EU's competition policy, Article 102 must be interpreted in light of EU's wider normative values and general principles.

In this context, the following analysis starts by assessing non-market-oriented values, which either indirectly guide the goals under Article 102 or directly come into play as benchmarks on the basis of which EU institutions may support or oppose intervention under Article 102. The chapter then proceeds to explore the relevance of the principles of effectiveness, proportionality and non-discrimination in the substance of Article 102.

A. Indirect Relevance of Socio-Political Values under Article 102

i. *EU's Social Dimension: Integrating Economic and Social Policies*

The Lisbon Treaty came into force on 1 December 2009 and significantly amended the constitutional basis of the EU.[42] Of prominent – but contested – significance in this regard is the introduction to EU primary law of more socially motivated provisions and language,[43] often at the expense of market competition.[44] Particularly, the 50-year-old commitment to 'undistorted competition' has been moved from the Treaties 'proper' to a Protocol annexed to

[41] TFEU (n 36), art 7 (emphasis added).

[42] [2008] OJ C115/1.

[43] eg TFEU (n 36), art 9, establishing a horizontal social clause; Protocol No 26 on services of general interest annexed to the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] OJ C115/308, recognising the social usefulness of SGEI.

[44] On the relevance of this 'social push' to competition law see Alan Riley, 'The EU Reform Treaty and the Competition Protocol: Undermining EC Competition Law' (2007) 28 ECLR 703; Ben Van Rompuy, 'The Impact of the Lisbon Treaty on EU Competition Law: A Review of Recent Case Law of the EU Courts' (2011) CPI Antitrust Chronicle; Ioannis Lianos, 'Competition Law in the European Union after the Treaty of Lisbon' in Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos (eds), *The European Union after the Treaty of Lisbon* (CUP 2012).

the Treaties.[45] In this regard, although this makes no formal legal difference,[46] it suggests a weakening of the aggressively competitive focus of EU's overall policy.[47] These amendments appear to be highlighting that the EU is not just a market place but also a social agent.[48] This idea is certainly not novel: the EU has always struggled to reconcile and integrate the economic and the social.[49] Indeed, the EU institutions have often insisted on such an integrated policy and have always valued the social structure of the internal market.[50] In any event, at present with effect from 2009, EU primary law clearly favours a holistic approach, that is, one where economic and social policies are integrated rather than separated.[51]

a. A 'Highly Competitive Social Market Economy'

Stating the objectives of the EU, Article 3 TEU now provides, *inter alia*, that '[t]he Union shall establish an internal market', referring to a '*highly competitive social market economy*, aiming

[45] Protocol No 27 on the internal market and competition annexed to the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] OJ C115/309.

[46] TEU (n 36), art 51, providing that Protocols to the Treaties form an integral part thereof.

[47] See Nicolas Sarkozy, 'Conférence de Presse Finale à L'occasion du Conseil Européen à Bruxelles' (Paris, 23 June 2007) <http://www.ambafrance-uk.org/Conference-de-presse-finale-du,9147> accessed 9 January 2019, showing the heavy emphasis placed on this matter by the President of France at the time of the drafting of the Lisbon Treaty.

[48] In this vein eg Commission, 'Towards a Single Market Act' (n 20), 18-20.

[49] In this vein Claus Offe, 'The European Model of "Social" Capitalism: Can it Survive European Integration?' (2003) 11 Journal of Political Philosophy 437. cf Stephen Weatherill, *EU Consumer Law and Policy* (2nd edn, Edward Elgar 2013) 58-59, arguing that the Lisbon Treaty's amendments could be seen as having carried out an adjustment of the constitutional balance in favour of social policies and at the expense of unconstrained market competition.

[50] See eg Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECLI:EU:C:1999:430, paras 54-55; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECLI:EU:C:2007:722, paras 78-79; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECLI:EU:C:2007:809, paras 104-5; Commission, 'Towards a Single Market Act' (n 20), 4, claiming that 'the success of the European model depends on its ability to combine economic performance with social justice'. See also Gareth Davies, 'The Consumer, the Citizen, and the Human Being' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law* (Hart Publishing 2016), 337, eloquently stating that to 'deny the need for such integrated policy, in an unspoken parody of old Chicago economics, is to see the Union as a break with the achievements of its states, as a market which should not be social'.

[51] See eg TFEU (n 36), arts 7-13.

at full employment and social progress'.[52] The fact that Article 3(3) TEU conceives the internal market as an all-embracing concept, in the sense that concerns other than market competition are relevant for its successful establishment and proper functioning, must somehow be taken into consideration in the analysis under Article 102.[53]

This, however, leaves open the question concerning the meaning of the vague legal concept of a 'highly competitive social market economy'. This concept seems to have its origins in West Germany's social market economy.[54] This was an economic model that evolved during the Nazi German regime under the influence of a group of lawyers and economists,[55] the so-called Ordoliberals.[56] In essence, the concept was the result of a search for a post-Nazi order for West Germany.[57] Indeed, after the fall of the Third Reich in 1945, West Germany was left in economic and moral ruin.[58] In this context, the 'Social Market Economy' became

[52] See TEU (n 36), art 3(3) (emphasis added).

[53] See also TFEU (n 36), art 119, demanding 'the adoption of an economic policy which is based […] on the internal market', referring thus to Article 3(3) TEU which affirms that the EU should work to establish a highly competitive social market economy.

[54] See Alfred Müller-Armack, *Wirtschaftslenkung und Marktwirtschaft* (Kastell 1946) 88, where the German term 'Soziale Marktwirtschaft' first appeared in a publication. See also Ludwig Erhard, *Prosperity Through Competition* (Frederick Praeger 1958), who is regarded to be the father of the social market economy, because he introduced the concept into the political sphere. For an excellent account see Gerber, *Law and Competition in Twentieth Century Europe* (n 29) 266-334.

[55] Certain of the most important figures in the development of the concept include Franz Oppenheimer, Walter Eucken, Franz Böhm, Hans Grossmann-Doerth, Alfred Müller-Armack, Ludwig Erhard, Wilhelm Röpke, Alexander Rüstow, and Constantin von Dietze. On the intellectual similarities and differences between these leading personalities see Oliver (n 8) 117-9; Cole (n 31) 256-8.

[56] See Gerber, *Law and Competition in Twentieth Century Europe* (n 29) 236-7, explaining that the term 'Ordoliberal' has been attributed to a broad stream of thought, featuring the basic ideas of the Freiburg School, but also the 'pure' economic liberalism of Friedrich von Hayek. Despite the difficulties with the term 'neo-liberals', the Freiburg School was the most influential, while other groups either evolved from it or were much influenced by it. cf Vanberg (n 32) 1-2.

[57] Heinz Rieter and Matthias Schmolz, 'The Ideas of German Ordoliberalism 1938-1945: Pointing the Way to a New Economic Order' (1993) 1 European Journal of the History of Economic Thought 87, 87 and 98, explaining that an important background in the development of the social market economy model was that all the main figures shared an involvement in the anti-Nazi opposition and a desire to plan the rebuilding of Germany after the war.

[58] For a discussion of the postwar economic situation see Herbert Giersch, Karl-Heinz Paqué and Holger Schmieding, *The Fading Miracle: Four Decades of Market Economy in Germany* (CUP 1992) 16-44.

the political programme of the party in power in West Germany from 1949 to 1966,[59] which implemented the model for it to become the cornerstone of what is known as the 'German economic miracle'.[60]

West Germany's commitment to a social market economy, just as the one present in Article 3(3) TEU, refers to a viable economic and socio-political alternative to the Scylla of *laissez-faire* capitalism and the Charybdis of centrally planned socialism.[61] This model, which evolved from Freiburg School's Ordoliberalism,[62] aspires to combine private enterprise with state intervention in order to establish a competitive process that would maintain a balance between a high rate of economic growth, low levels of unemployment, good working conditions, social welfare and public services.[63] On this approach, it is the responsibility of the state to ensure simultaneously a functioning competitive order and social balance, by granting

[59] Nicola Giocoli, 'Competition versus Property Rights: American Antitrust Law, the Freiburg School, and the Early Years of European Competition Policy' (2009) 5 JCLE 747, 775. See also Lawrence White, *The Clash of Economic Ideas* (CPU 2012) 235, explaining that the larger liberal-conservative Christian Democratic Union (CDU) needed the votes of the Free Democratic Party to form a majority coalition.

[60] This refers to the surprisingly quick recovery of West Germany's economy after the catastrophe of the Nazi regime and World War II. On the link between the social market economy model and the economic recovery of West Germany see Giocoli (n 59) 775; Cole (n 31) 257. cf Manfred Streit, 'Economic Order, Private Law and Public Policy: The Freiburg School of Law and Economics in Perspective' (1992) 148 JITE 675, 696; Wolfgang Kerber and Sandra Hartig, 'The Rise and Fall of the German Miracle' (1999) 13 Critical Review 337, 343, focusing on the political acceptance of the concept.

[61] James Van Hook, *Rebuilding Germany: The Creation of the Social Market Economy, 1945-1957* (CUP 2004) 185. The socio-economic imperative of the model is often labelled the 'Third Way', see eg Oliver (n 8) 119; Ahlborn and Grave (n 18) 198. cf Kerber and Hartig (n 60) 342; Massimiliano Vatiero, 'The Ordoliberal Notion of Market Power' (2010) 6 EC J 689, 706, arguing that it is a different form of liberalism rather than a 'third way' between capitalism and socialism.

[62] Gerber, *Law and Competition in Twentieth Century Europe* (n 29) 237, explaining that the terms 'Ordoliberalism' and 'social market economy' are rightly used interchangeably, although the supporters of the social market economy placed greater emphasis on the equitable distribution of market benefits throughout the society.

[63] cf ibid 238, stating that 'Böhm, Eucken, Erhard, and others who were associated with the drive to assure a democratic society and a market-based economy portrayed competition law as the key to the social market economy and the social market economy as the key to a new future for Germany'.

equal opportunity and protection to those unable to enter the free market labour force (because of old-age, disability or unemployment), as well as to foster distributive justice.[64]

Obviously, by placing social policy on par with economic policy, social market economies challenge the perception that the capitalist system is inherently antagonistic to social goals or to a political economy characterised by greater economic equality.[65] Nonetheless, as emphasised in an essay already in 1957:

> [t]he Social Market Economy is not primarily an economic order, but a leading idea or programme. An order is a concrete realisation, but a leading idea gives direction for human action.[66]

Therefore, the social market economy model is not a defined economic order, but an adjustable holistic and democratic social order that unifies supposedly conflicting objectives, namely economic freedom and social justice.[67] Central to this socially committed market economy is the establishment of a genuine performance-based competition, which exists when the competition rules ensure that, under conditions of equal opportunity, the best performance is rewarded.[68] In other words, the state must, through measures that adhere to market principles, create a legal environment where a healthy level of competition prevails.[69]

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[64] Marcus Marktanner, 'Addressing the Marketing Problem of the Social Market Economy' in Christian Glossner and David Gregosz (eds), *60 Years of Social Market Economy: Formation, Development and Perspectives of a Peacemaking Formula* (Konrad-Adenauer-Stiftung 2010) 172.

[65] cf Steven Hill, *Europe's Promise: Why the European Way is the Best Hope in an Insecure Age* (UCP 2010) 19-24.

[66] Konrad Zweig, *The Origins of the German Social Market Economy: The Leading Ideas and their Intellectual Roots* (Adam Smith Institute 1980), 7, translating a quotation from H-J Seraphim in a paper written in German in 1957.

[67] Alfred Müller-Armack, 'The Social Market Economy as an Economic and Social Order' (1978) 36 Review of Social Economy 325, 326.

[68] Vatiero (n 7) 305. See also Marktanner (64) 174, claiming that '[t]he Social Market Economy's value system is based on market efficiency that rests on equal opportunity'.

[69] Giocoli (n 59) 770; Talbot (n 30) 267.

Hence, EU's commitment to an internal market based on a highly competitive social market economy is, first and foremost, an engagement to a holistic societal order. This is an order where economic and social policies are integrated for the EU to both achieve the outlined in Article 3 TEU objectives and comply with the prescribed in Article 2 TEU founding values. This holistic approach is fully consistent with the whole framework of the Treaties, and, especially so, with the TFEU's horizontal clauses.

b. Horizontal Clauses

Horizontal clauses are those provisions in the EU Treaties that have an overarching character, in the sense that they must be taken into account in all areas of EU's activities. Their purpose is to streamline the Union's actions in a manner that would ensure consistency between different policies so as not to jeopardise the pursued objectives of one another.[70] Put differently, the aim is the safeguarding of certain values and objectives that are regarded to be central to EU's overall policy, irrespective of the area or activity concerned.[71]

It has rightly been noted that in post-Lisbon's EU law three distinct levels of horizontal clauses can be identified.[72] To start with, EU's fundamental values relating to 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights' could function as horizontal clauses.[73] In fact, even if more specific horizontal clauses enshrined in the Treaties regulate the same subject matter, these more general provisions will

[70] Pascale Vielle, 'How the Horizontal Social Clause can be Made to Work: The Lessons of Gender Mainstreaming' in Niklas Bruun, Klaus Lörcher and Isabelle Schömann (eds), *The Lisbon Treaty and Social Europe* (Hart Publishing 2012) 109-10, explaining that the general idea of horizontal clauses originated from the gender mainstreaming approach expressed in what used to be Art 3(2) EC Treaty. In essence, the provision recognised that sex equality can only be reached when all EU's activities and policies are directed towards this particular goal.

[71] Rikki Holtmaat, 'Horizontal Clauses' in Christa Tobler (ed), *The Lisbon Treaty* (Europa Institute of Leiden University 2008) 40.

[72] ibid.

[73] See TEU (n 36), art 2, outlining the values on which the Union is founded. See also TFEU (n 36), art 3(1), providing that '[t]he Union's aim is to promote peace, its values and well-being of its people'.

still provide interpretative direction to the special ones.[74] Second, on a more concrete level, general principles of EU law are apt to act as overarching principles that run through all of the activities of the Union. These general principles include, *inter alia*, the principles of effectiveness, proportionality and non-discrimination, which are discussed specifically in the context of the interpretation of Article 102 further down in this chapter.[75] Finally, of most relevance in this regard is the third level of horizontal clauses comprising a set of express provisions which oblige the EU to ensure consistency of its different policies. The analysis now turns to the discussion of these particular provisions.

These provisions are included into the introductory part (Title II) of the TFEU under the title 'Provisions Having General Application'.[76] Particularly, Article 7 TFEU provides that 'the Union *shall* ensure *consistency* between its policies and activities, *taking all of its objectives into account*'.[77] Moreover, the TFEU enumerates a series of principles and goals that should always be taken into consideration by the EU institutions, irrespective of the actual topic of the policy or activity. Specifically, Title II refers to the following goals: the promotion of gender equality,[78] the promotion of employment and other social aims,[79] the combating of

[74] Vienna Convention on the Law of Treaties [1969] 1155 UNTS 331, art 31. See eg Case C-386/08 *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECLI:EU:C:2010:91, paras 40-43, reaffirming the customary and binding character of Article 31 of the Vienna Convention for the EU institutions.

[75] Given the scope of this chapter, other (general) principles of EU law are not discussed considering that they are of less relevance for the substantive assessment under Article 102.

[76] TFEU (n 36), arts 7-17.

[77] ibid art 7 (emphasis added). This is mandatory language in treaty interpretation, and thus the Union has an obligation to take into account the stated objectives.

[78] ibid art 8.

[79] ibid art 9.

any form of discrimination,[80] the protection of the environment and the promotion of sustainable growth,[81] consumer protection,[82] animal welfare, and respect of traditions[83].[84]

Important in this context is the so-called horizontal social clause contained in Article 9 TFEU, which states that:

> [i]n defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

The said horizontal social clause must be understood in context with the enshrined in Article 3(3) TEU model of a highly competitive social economy. Indeed, Article 9 TFEU is perceived as the link between the general integration goal set out in the introductory provisions of the TEU and the Union's specific tasks and powers as outlined in the TFEU.[85] Thus, Article 9 TFEU instructs the implementation of the goal of an internal market based on a highly competitive social market economy into all EU activities and acts, including to the interpretation and enforcement of the competition rules.[86] This approach strengthens the

[80] ibid art 10.

[81] ibid art 11.

[82] ibid art 12.

[83] ibid art 13.

[84] See also ibid arts 14-17, covering services of general economic interest, the principles of good governance and transparency, personal data protection, and the respect of churches and religious associations under their national law status.

[85] Nikolaus Dimmel, 'A Study on Art 9 TFEU: Horizontal Social Clause' (Commissioned by EASPD, EU 2014) 24-28.

[86] cf Dagmar Schiek and others, 'EU Social and Labour Rights and EU Internal Market Law' (Commissioned by the European Parliament's Committee on Employment Affairs (EMPL), EU 2015), 16, stressing that '[t]he EU is now premised on an integrated approach to economic and social policies, and pursues socio-economic integration as a holistic aim'.

constitutionally required penetration of the goals laid down in Article 3(3) TEU into the interpretation of Article 102.

Nevertheless, just as with the goal of constructing an internal market based on a highly competitive social market economy, the potential relevance of these horizontal provisions for the interpretation of Article 102 is challenging. This stems above all from the use of vague legal terms (eg, 'high level' and 'adequate'),[87] and from the ambiguous purpose of the Union's duty to 'take into account',[88] 'aim to',[89] 'pay full regard to',[90] or 'take care that'[91].[92] Even so, without setting measurable objectives or targets, especially Articles 7 and 9 TFEU expressly demand the integration of social policy matters into all of EU policies as a general goal. As a result, the analysis under Article 102 shall, insofar as this is possible, incorporate certain of these social concerns. In any event, at the very least, Article 102 must be interpreted consistently with policies of a social nature, that is, in a manner that would not contravene the latter's objectives.

Overall, before concretely exploring the potential relevance of this analysis for the interpretation of Article 102, two conclusions may be drawn at this point. First, the horizontal clauses enshrined in the TFEU mandate a holistic approach to the interpretation of Article 102, thus providing a firmer legal basis for the conclusion that Article 102 must be interpreted in light of EU's wider normative values and principles. Second, the inclusion in the Treaties of the horizontal social clause may support the argument for a greater socio-economic balance

[87] TFEU (n 36), art 9.

[88] ibid art 7.

[89] ibid art 8.

[90] ibid art 13.

[91] ibid art 14.

[92] cf Dimmel (n 85) 32.

post-Lisbon, giving prominence to the Union's commitment to employment and social balance.[93] As the following section illustrates, a market-oriented approach may indirectly contribute to the improvement of inequality and unemployment, and thus to the establishment of a highly competitive social market economy.

ii. *SMEs' Role and the Promotion of Entrepreneurship*

SMEs appear to play a crucial role in the design and development of EU's overall economic policy.[94] The reason for this does not seem to be what Bork described as 'the uncritical sentimentality in favor of the small guy'.[95] On the contrary, this approach is rather based on the utilitarian perception that EU's economic success heavily depends on the growth of SMEs.[96] In fact, the Commission considers SMEs and entrepreneurship to be of pivotal importance in ensuring economic growth, job creation, innovation and social integration in the EU.[97] Hence, the EU institutions over the years have adopted numerous distinct measures in order to support SMEs' growth and encourage entrepreneurship.[98]

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[93] cf Commission 'Reforming Europe for the 21st Century: Commission Adopts its Formal Opinion before the Intergovernmental Conference' (IP/07/1044, Brussels, 10 July 2007). See also Albertine Veldman and Sybe de Vries, 'Regulation and Enforcement of Economic Freedoms and Social Rights: A Thorny Distribution of Sovereignty' in van den Brink Ton and others (eds), *Soveignty in the Shared Legal Order of the EU* (Intersentia 2015) 65, arguing that the Lisbon Treaty considerably strengthened the social face of the EU.

[94] See eg Council, 'The European Charter for Small Enterprises' (n 21); Commission, *Thinking Big for Small Businesses: What the EU does for SMEs* (EU 2011); Commission, 'Single Market Act II: Together for a New Growth' (Communication) COM(2012) 573 final, 20; Commission, 'Staff Working Document accompanying the Report on Competition Policy 2018' SWD(2019) 297 final, 32. See also Commission, 'Recommendation Concerning the Definition of Micro, Small and Medium-Sized Enterprises' [2003] OJ L124/36, regarding the definition of SMEs.

[95] Bork (n 19) 54.

[96] Commission, 'Towards a Single Market Act' (n 20) 12; Commission, *Thinking Big for Small Businesses* (n 94) 1; Commission, 'An Action Plan to Improve Access to Finance for SMEs' (Communication) COM(2011) 870 final, 1; Commission, 'Commission Gives Boost to Start-ups in Europe' (Press Release, Strasbourg, 22 November 2016); Commission, 'Single Market Integration and Competitiveness Report' (2016) 54.

[97] For example see Commission, 'Minimizing Regulatory Burden for SMEs' (n 20) 2; Commission, *Thinking Big for Small Businesses* (n 94) 11 and 16-18.

[98] For a rich source of material see DG GROW's website (https://ec.europa.eu/growth/smes_en).

Specifically, a comprehensive framework for the EU policy on SMEs has been crafted.[99] This framework is grounded on the necessity to give full consideration to SMEs at the early stage of policy making (the 'think small first' principle) and on promoting an entrepreneurial spirit among EU citizens.[100] This assists in the development of SMEs-friendly legislation, which, in turn, helps effectuate one of EU's stated goals, namely to create a business friendly environment for existing SMEs and potential entrepreneurs.[101] In this context, the Commission has proposed a series of legislative and soft law measures and has adopted decisions under the state aid rules in order to facilitate SMEs' economic growth and their prospect for innovation.[102] These initiatives and decisions help SMEs and new entrepreneurs, in particular, by: improving their access to finance,[103] simplifying the regulatory and fiscal environment in which they operate,[104] enabling them to create new business models and sell

[99] Commission, '"Think Small First": A "Small Business Act" for Europe' (Communication) COM(2008) 394 final (Small Business Act).

[100] ibid 3-4.

[101] Commission, 'EUROPE 2020: A Strategy for Smart, Sustainable and Inclusive Growth' (Communication) COM(2010) 2020 (EUROPE 2020), 4, 15, 19, 30. This 10-year strategy proposed on 3 March 2010 for advancement of the EU's economy contains seven flagship initiatives, six of which aim to help SMEs achieve sustainable growth.

[102] See eg Commission Regulation (EU) 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L187/1, art 1(1)(b), exempting from prior notification aids to SMEs in the form of investment aid, operating aid and SMEs' access to finance.

[103] Commission, 'An Action Plan to Improve Access to Finance for SMEs' (n 96); Commission, '2007-2013 Competitiveness and Innovation Framework Programme (CIP)', provided for financial instruments, which helped SMEs raise equity and debt financing; Commission, '2014-2020 Programme for the Competitiveness of Enterprises and SMEs (COSME)', aims to make it easier for SMEs to access loans and equity finance. See also Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions [2011] OJ L48/1, strengthening businesses' rights to prompt payment in order to protect SMEs in particular against late payment and to improve their competitiveness.

[104] Commission, 'Minimizing Regulatory Burden for SMEs' (n 20); Commission, 'Entrepreneurship 2020 Action Plan: Reigniting the Entrepreneurial Spirit in Europe' (Communication) COM(2012) 795 final, 10-19.

goods or provide services across borders,[105] and presenting business opportunities offered by the transition to a green economy.[106]

The reason for EU's commitment to support SMEs development and entrepreneurial potential is primarily linked to their key role in shaping EU's economy.[107] Starting with SMEs, there are several reasons why they are regarded as the backbone of EU's economy.[108] First, SMEs represent the largest statistical group of businesses in the EU.[109] They also create the vast majority of new jobs and provide for most of the total private sector employment in the EU.[110] Additionally, based on a logic that replicates Arrow's economic model, SMEs in the EU are treated as an important source of innovation.[111] Finally, in accordance with the objective of constructing an internal market based on a highly competitive social market economy, SMEs are treated as main drivers for integration in the EU.[112] For the exact same reasons, the EU is

[105] Commission, 'Horizon 2020: The Framework Programme for Research and Innovation' (Communication) COM(2011) 808, providing for an 'SME Instrument' offering funding and support for innovation projects that help SMEs grow and expand their activities into other countries; Commission, 'EU Budget for 2021-2027: Commission Welcomes Provisional Agreement on Horizon Europe, the Future EU Research and Innovation Programme' (Press Release, Brussels, 20 March 2019), welcoming the fact that Horizon 2020 will be succeeded by Horizon Europe.

[106] Commission, 'Green Action Plan for SMEs: Enabling SMEs to Turn Environmental Challenges into Business Opportunities' (Communication) COM(2014) 440 final. See also Asel Doranova and others, 'Green Action Plan for SMEs: Implementation Report' (Commissioned by the Commission, EU 2018).

[107] In this vein Commission, 'Towards a Single Market Act' (n 20) 12; Commission, *Thinking Big for Small Businesses* (n 94) 1; Commission, 'Minimizing Regulatory Burden for SMEs' (n 20), 2.

[108] Council, 'The European Charter for Small Enterprises' (n 21) 7; Commission, *Thinking Big for Small Businesses* (n 94) 1, emphasising that Europe's 23 million SMEs are the lifeblood of Europe's economy.

[109] Commission, 'Minimizing Regulatory Burden for SMEs' (n 20) 2, stating that as of 2011 SMEs represented over 99% of all businesses in the EU, of which 92% were micro-enterprises.

[110] Commission, 'Small and Medium-Sized Enterprises: Key for Delivering More Growth and Jobs' (Communication) COM(2007) 592 final; Commission, 'An Action Plan to Improve Access to Finance for SMEs' (n 96), 1; Commission, 'Entrepreneurship 2020 Action Plan' (n 104), stipulating that new companies, especially SMEs, create more than 4 million new jobs every year in Europe. Commission, 'Do SMEs Create More and Better Jobs?' (MEMO/12/11, Brussels, 16 January 2012), stating that, in the past five years, SMEs have created around 85% of new jobs and provided two-thirds of the total private sector employment in the EU.

[111] Commission, 'Horizon 2020' (n 105) 9, claiming that SMEs have significant innovation potential and they have the agility to bring revolutionary technological breakthroughs and service innovation to the market.

[112] Small Business Act (n 99) 2.

committed to widely and actively promote entrepreneurship given that new market entrants are likely to be SMEs.[113]

That being said, SMEs are often prevented from achieving their full growth and potential due to their size. First, they often lack the financial resources to compete on equal terms and find it difficult to access the necessary funds for growth and innovation. Second, they are the first to be affected by regulatory, fiscal and administrative market barriers, and are the most sensitive to changes in the business environment. Third, the smaller a firm is, the more it faces constraints to innovation or to the commercialisation of its innovations. In order therefore to address these structural problems, the best possible environment for SMEs' competitiveness needs to be created. Hence, the above-described initiatives are placing SMEs in the forefront of EU policy-making so that they can unveil their key role in the EU's economy as the main drivers of economic growth, employment, innovation and social integration.

It is important to note here that this approach is fully compatible with both the highly competitive social market economy envisaged in Article 3(3) TEU and the horizontal clauses contained in the TFEU. By placing SMEs and entrepreneurship at the centre of policy-making, the EU is indirectly addressing socio-political concerns, such as inequality, unemployment, and even social or gender exclusion. First, the adoption of measures supporting SMEs itself is a strategy for inclusive growth, and thus promotes the redistribution of wealth. Second, being the most important sources of employment in the EU, SMEs promote Article 9 TFEU's objective of a 'high level of employment'. Finally, in encouraging people to become entrepreneurs, the Commission targets particularly certain groups, such as women, migrants,

[113] Commission, 'Europe's Next Leaders: the Start-up and Scale-up Initiative' (Communication) COM(2016) 733 final.

seniors or social economy enterprises[114].[115] Here again, economic and social policies are integrated into a holistic approach where entrepreneurship is supported in order to address, *inter alia*, other public policy concerns, such as gender inequality and social discrimination.

Arguably, therefore, EU's policy choice to create a supportive environment for SMEs emanates from provisions of constitutional nature, namely Article 3(3) TEU and Articles 7-13 TFEU. This is because of the (actual or perceived) beneficial by-products of such a policy, ie improved distribution of income, employment growth, overall social balance, and increased innovation. In any event, this approach is clearly compatible with (if not deriving from) EU's constitutional peculiarity of aiming to create a highly competitive social market economy.

This implies that the interpretation and enforcement of the competition rules should, at the very least, not disregard the key role of SMEs in shaping EU's economy. In fact, the Commission had previously stressed that a SMEs-friendly policy would only be successful if:

> [a]t the same time, European and national competition rules [are] vigorously applied to make sure that small businesses have every chance to enter new markets and compete on fair terms.[116]

Thus, the competition rules could be enforced so as to keep markets open and accessible to SMEs and newcomers. In this context, for example, the Commission has recently approved under the state aid rules an Irish scheme to reduce the taxation of employee share options for SMEs.[117] Interestingly, as of late 2019, the design of a new strategy for SMEs is co-led by two

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[114] Commission, 'Social Business Initiative: Creating a Favourable Climate for Social Enterprises, Key Stakeholders in the Social Economy and Innovation' (Communication) COM(2011) 682 final, 2, defining a social enterprise as 'an operator in the social economy whose main objective is to have a social impact rather than make a profit for their owners or shareholders'. It must be stressed that, according to the Commission, social economy entities are mostly SMEs.

[115] Small Business Act (n 99) 5-6; Commission, 'Social Business Initiative' (n 114) 9-10; Commission, 'Entrepreneurship 2020 Action Plan' (n 104) 24-27.

[116] Council, 'The European Charter for Small Enterprises' (n 21) 12.

[117] *SME-focussed, Share-based Incentive Scheme - Key Employee Engagement Programme* (Case SA.47947) [2017] OJ C/121/2018. See also *Enterprise Management Incentives Scheme* (Case SA.26104) [2009] OJ

of the Commission's executive vice-presidents, one of whom is also responsible for the competition portfolio.[118] This development illustrates the ongoing importance of SMEs in EU policy-making, while also indicating the interaction of competition policy with SMEs' growth.

In fact, Margrethe Vestager has not only been re-appointed as Commissioner for Competition for a second term, but has also been designated as one of the executive vice-presidents taking on responsibility for the 'a Europe fit for the digital age' agenda. This is interesting, not least because during her first term the Commission particularly targeted perceived abusive practices by industrial giants in the tech sector.[119] There is also every indication that the Commission will continue the same trend.[120] Moreover, Commissioner Vestager has specifically communicated that, when considering regulation for the digital sector, her policy will draw on the insights gained from the Commission's enforcement of the competition rules during her previous term.[121] Particularly, she signals her anxiety that quasi-

C/235/2009; *Tax Reduction of Employee Share Option* (Case SA.47144) [2017] OJ C/254/2017; *The Key Employee Engagement Programme* (Case SA.53028) [2019] OJ C/277/2019.

[118] See Ursula von der Leyen, 'Mission Letter to Margrethe Vestager (Executive Vice-President-designate for a Europe fit for the Digital Age)' (Brussels, 10 September 2019) <https://ec.europa.eu/commission/sites/beta-political/files/mission-letter-margrethe-vestager_2019_en.pdf> accessed 13 November 2019, 5.

[119] *Google Search (Shopping)* (Case AT.39740) [2007] C(2017) 4444 final, imposing a fine of €2.42 billion on Google for abusing dominance as search engine; *Google Android* (Case AT.40099) [2018] C(2018) 4761 final, fining Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine; Commission, 'Antitrust: Commission Fines Google €1.49 Billion for Abusive Practices in Online Advertising' (Press Release, 20 March 2019); *Qualcomm (Exclusivity Payments)* (Case AT.40220) [2018] C(2018) 240, fining Qualcomm €997 million for abuse of dominance in LTE baseband chipsets which prevented competition on the merits; *Qualcomm (Predation)* (Case AT.39711) [2019] C(2019) 5361, fining Qualcomm €242 million for engaging in predatory pricing; Commission, 'Antitrust: Commission Opens Investigation into Possible Anti-competitive Conduct of Amazon' (Press Release, 17 July 2019); Commission, 'Antitrust: Commission Imposes Interim Measures on Broadcom in TV and Modem Chipset Markets' (Press Release, 16 October 2019).

[120] Foo Yun Chee and Paresh Dave, 'Exclusive: Google's Jobs Search Draws Antitrust Complaints from Rivals' (*Reuters*, 13 August 2019) <https://www.reuters.com/article/us-eu-google-antitrust-exclusive/exclusive-googles-jobs-search-draws-antitrust-complaints-from-rivals-idUSKCN1V30IX> accessed 18 November 2019; Lydia Beyoud and Aoife White, 'Facebook's Libra Currency Gets European Union Antitrust Scrutiny' (*Bloomberg*, 20 August 2019) <https://www.bloomberg.com/news/articles/2019-08-20/facebook-s-libra-currency-gets-european-union-antitrust-scrutiny> accessed 18 November 2019. See also Margrethe Vestager, 'European Parliament Hearing' (Speech, 8 October 2019).

[121] See Matthew Kirk and Francesco Liberatore, 'Towards Competition Law Based Regulation and Policy for the EU Digital Economy?' (*Global IP & Technology Law Blog*, 16 September 2019)

monopolistic tech companies inhibit promising ideas by small firms based on their economic power rather than their merit, thus blocking a path that delivers innovation to consumers.[122] For this reason, she expressly opposed an approach that would lead to the application of less stringent rules in the context of EU competition law.[123]

In this context, the Commission acknowledges the dynamic capacities of small enterprises in answering to new market needs, considering that competition law tends to safeguard economic opportunities for SMEs by ensuring open markets.[124] Indeed, SMEs rely heavily on online tools, and may therefore be disproportionately affected by abuses of dominant undertakings in this area. It may be expected that the digital economy's tools will continue to grow in importance for SMEs, making abuses in e-commerce a key area for the Commission's competition law enforcement.

Having unveiled the interconnection between Article 3(3) TEU's highly competitive social market economy, the TFEU's horizontal clauses, and the commitment to support SMEs and entrepreneurship, the issue to consider next is their potential relevance for the interpretation and enforcement of Article 102.

<https://www.iptechblog.com/2019/09/towards-competition-law-based-regulation-and-policy-for-the-eu-digital-economy/> accessed 18 November 2019.

[122] Margrethe Vestager, 'Shaping Competition Policy in the Era of Digitisation' (Speech, Brussels, 17 January 2019); Margrethe Vestager, 'New Technology as a Disruptive Global Force' (Speech at the Youth and Leaders Summit, Paris, 21 January 2019). See also Margrethe Vestager, 'Security and Trust in a Digital World' (Speech at CCBE Standing Committee, Copenhagen, 13 September 2019), referring to the ability of such firms 'to undermine democracy' and 'harm the fundamental values of our society'.

[123] Margrethe Vestager, 'The Champions Europe Needs' (Speech at the WELT Economic Summit, Berlin, 9 January 2019); Rochelle Toplensky, 'Vestager: French-German Antitrust Push would have Cleared Google' (*Financial Times*, 31 March 2019) <https://www.ft.com/content/676e24c6-509a-11e9-b401-8d9ef1626294> accessed 18 November 2019.

[124] See Johannes Laitenberger, 'Competition Enforcement in Digital Markets: Using our Tools Well and a Look at the Future' (Speech at the 14th Annual Conference of the GCLC, Brussels, 31 January 2019), 4-5.

iii. *Relevance for Article 102*

The above analysis about the constitutional peculiarities of the EU is a far cry from being determinative of what it entails at the detailed level of interpretation and application of Article 102. This is because the content of the EU Treaties, just as with most constitutional arrangements, are an incomplete contract leaving space for interpretative choices. Nevertheless, the Treaties do provide some guidance: they require the integration of economic and social policies for the completion of an internal market which has a 'social' element. This, in turn, provides more obvious support for the holistic perspective of Article 102, since, according to the scheme of the Treaties, its role is to achieve the integration of the internal market. Denying such an integrated policy would not sit comfortably with the text of the Treaties. More importantly, ignoring the relevance of the holistic approach to EU law for the interpretation of Article 102 would contradict the historical and political context in which EU competition law was created and has developed ever since.

Clearly, the commitment to a highly competitive social market economy in the context of establishing an internal market must guide the goals that Article 102 is constitutionally mandated to pursue. This is a direct consequence of the finding that Article 102 is part of a system which is employed as a means to achieve the integration of the internal market.[125] Article 102 therefore is a tool that must be interpreted and enforced in such a manner that it would either directly assist in the promotion of an internal market based on a highly competitive social market economy or – at the very least – be consistent with the individual particularities of this goal.

[125] See Commission, 'Towards a Single Market Act' (n 20) 4, stressing that the internal market 'is not an end in itself. It is a tool for implementing other policies'. This is clear at the constitutional level from Arts 2 and 3 TEU – and this has always been true (see the original Art 2 EEC).

However, the question that arises is related to the unclear normative quality of both the concept of a highly competitive social market economy and the TFEU's horizontal clauses for the analysis under Article 102. That is, it is necessary to discuss their potential relevance for the interpretation and enforcement of Article 102. To start with, it must be stressed that there are natural limits to a provision that prohibits the abusive unilateral conduct of dominant firms. Put simply, the effects of the enforcement of such a rule on certain policy areas can be weak and statistically insignificant, or even fully irrelevant. For example, regardless of the adopted interpretative choices or the intensity of its enforcement, Article 102 cannot be expected to meaningfully affect gender equality, child protection or animal welfare.[126]

Even so, the prohibition contained in Article 102 may, depending on its interpretation and the intensity of its enforcement, have an effect of varying degree on certain distinctive elements of a highly competitive social market economy. Most notably, these include the equality-related socio-political concerns that have been outlined in this chapter. In fact, to the extent that competition law can restrain the concentration of wealth in the hands of a few firms, it may effectively enhance wealth distribution and protect SMEs.[127] According to research, a competition policy concerned about improving income distribution would also foster democracy.[128] Needless to say, on this approach, a loss of a certain degree of economic efficiency would be acceptable in order to ensure an internal market based on a highly competitive social market economy.[129]

[126] See Article 3(3) TEU that refers to these socio-political goals under the point which provides that '[t]he Union shall establish an internal market'. See also Arts 8, 10, 11, and 13 TFEU.

[127] cf Ennis, Gonzaga and Pike (n 6) 539, showing that market power may contribute substantially to wealth inequality, and that policies that enhance competition can reduce inequality.

[128] Ma (n 7) 251, proving that an equity-based antitrust can have a significant effect on inequality, and lower inequality can significantly promote democracy.

[129] cf ibid 239.

In the context of Article 102, however, this cannot lead to a *contra legem* interpretation that would entail the *de facto* targeting of market power. This arises effortlessly from the very wording of the provision, which does not target dominance *per se* but stipulates the prohibition of the abuse of dominance. Moreover, targeting market dominance would itself contradict the concept of a highly competitive social market economy, as well as the policy choice to actively promote entrepreneurship. This is so not least because it would eliminate the firms' incentives to compete for market dominance on the basis of performance. Consequently, irrespective of the wording of Article 102, attempting to eliminate market power would not sit comfortably with an internal market committed to both a social market economy and a highly competitive one.

That being said, there are specific approaches to Article 102 that could effectively respond to inequality-related concerns while being in tune with the wording of the provision. In this regard, to the extent that competitive markets are conducive to the more even distribution of income, competition law could be employed to contribute to this objective simply by making markets more competitive.[130] To this end, Article 102 could account for inequality concerns in the context of both its enforcement philosophy and its substantive interpretation.

With regard to its enforcement philosophy, first of all, the Commission could exercise its prosecutorial discretion to prioritise cases that would benefit the less advantaged EU citizens. The Commission could, for instance, systematically direct its limited resources towards products and/or sectors that are most relevant and sensitive for middle- and lower-

[130] See Lina Khan and Sandeep Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and its Discontents' (2017) 11 Harvard Law and Policy Review 235, 294; Ennis, Gonzaga and Pike (n 6) 518. Contrast Crane (n 26) 1228, arguing that 'there is no reason to expect that more competitive markets will increase equality'

class consumers, such as healthcare products, the pharma sector, and supermarket retailing.[131] It might also attach a lower priority to the enforcement of Article 102 against a conduct that would likely benefit the disadvantaged.

In a similar vein, second, the Commission could adopt a sufficiently interventionist approach, recognising both the concerns about wealth inequality and the fact that economically significant market power contributes to it.[132] In this regard, the Commission would take into account wealth inequality when striking the balance between the costs of under-enforcement versus over-enforcement, thus recognising greater harm from the exercise of market power.[133]

Such an aggressive and interventionist enforcement philosophy would also be consistent with the important functions of SMEs for the economy and society.[134] This is because it would potentially increase the incentives of non-dominant firms to enter the market, invest and compete. This may be particularly valuable 'in a market environment where barriers to enter foreign markets frequently remain significant';[135] and such a market environment is still prevailing in the EU. This approach would also be consistent with the economic goals of Article 102, as outlined in chapter 2.

As a matter of substance, an approach that effectively responds to inequality concerns is one where Article 102 directly challenges dominant firms' pricing, especially when the

[131] cf Baker and Salop (n 6) 18.

[132] cf Ennis, Gonzaga and Pike (n 6) 539, showing that market power both increases wealth of the richest population and weakens the income of the poorest population.

[133] cf Baker and Salop (n 6) 21.

[134] See generally Lee and Yuhua (n 20) 11, stating that SMEs carry a range of important functions for the economy and society at large by, *inter alia*, introducing new ideas and processes, claiming niche markets or simply providing goods and services in socially important contexts.

[135] Heike Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing 2008) 162.

conduct is one of a super-dominant or quasi-monopolistic firm and/or targets less advantaged consumers.[136] With regard to the issue of directly controlling dominant firms' pricing, it must be underlined that under EU law a dominant firm that exploits its position by charging supra-competitive prices may be found to violate Article 102.[137] Such a pricing exploitation may be challenged under both Article 102(a) and Article 102(c). That is, both the excessive pricing and the discriminatory pricing of a dominant firm may amount to an abuse of a dominant position.[138] In this regard, despite the Commission's understandable reluctance to act as price regulator,[139] it has intervened against excessive pricing in certain instances, such as, for example, in the pharma sector.[140]

Furthermore, promoting the goal of consumer interests through consumer-related proxies under Article 102 is compatible with the previously identified socio-political concerns. In any event, the way that the EU institutions actually incorporate the social element of the internal market into the interpretation of Article 102 is explained in the next chapter. Suffice

[136] Commission, 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' (Communication) [2009] OJ C45/7 (Priorities Paper), paras 20 and 30, saying that 'the stronger the dominant position, the higher the likelihood that conduct protecting that position leads to anti-competitive foreclosure', and that 'exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains'.

[137] According to the wording of s 2 of the Sherman Act 1890, excessive pricing is not prohibited in the US. See eg Michal Gal, 'Monopoly Pricing as an Antitrust Offense in the U.S. And the EC: Two Systems of Belief about Monopoly?' (2004) 49 Antitrust Bulletin 343.

[138] See generally Niamh Dunne, 'Regulating Prices in the European Union' (2018) 37 Yearbook of European Law 344. On excessive pricing see Liyang Hou, 'Excessive Prices within EU Competition Law' (2011) 7 EC J 47. On discriminatory pricing see Motta (n 11) 491-511.

[139] Commission, 'XXVIIth Report on Competition Policy' (1997), 29 (point 77), stipulating that 'the Commission is not and does not wish to act as a price regulator'; Margerthe Vestager, 'Protecting Consumers from Exploitation' (at the Chillin' Competition Conference, Brussels, 21 November 2016), stressing that '[t]he last thing we should be doing is to set ourselves up as a regulator, deciding on the right price'.

[140] Commission, 'Antitrust: Commission Opens Formal Investigation into Aspen Pharma's Pricing Practices for Cancer Medicines' (Press Release, 15 May 2017). See also Vestager, 'Protecting Consumers from Exploitation' (n 139), emphasising the Commission's 'responsibility to the public' to address excessive pricing, especially in sectors and products that are vital to the consumer, such as in the pharmaceutical industry; OECD, 'Excessive Pricing in Pharmaceutical Markets: Note by the European Union' (DAF/COMP/WD(2018)112, 23 November 2018) <https://one.oecd.org/document/DAF/COMP/WD(2018)112/en/pdf> accessed 15 November 2019.

to say here that designing rules that would promote the interests of the consumer while also giving due regard to SMEs' ability to effectively compete in the market is consistent with the EU's constitutional framework.[141]

B. Direct Relevance of Socio-Political Values under Article 102

The previous section illustrated the first technique for the incorporation of socio-political values into the analysis of Article 102. This concerned their indirect relevance in guiding the pursued goals, and thus affecting the enforcement choices and the design of the relevant rules. On the basis of the constitutionally required holistic approach to EU competition law, this section deals with the socio-political values that act as *ad hoc* benchmarks on the basis of which EU institutions may support or oppose an intervention under Article 102. This is a different technique to incorporate socio-political values into the analysis of Article 102: rather than being indirectly relevant, socio-political values come directly into play leading to the *ad hoc* non-application of Article 102.

In this context, this section first discusses the accommodation of services of general economic interest ('SGEI') into the analysis conducted under Article 102. Then, it turns to consider the existence of a *Wouters*-like rule under Article 102. Hence, the section explores the possibility of balancing non-competition objectives against a restriction of competition.

i. *SGEI under Article 106(2) TFEU*

Article 102 is addressed to undertakings and, in principle, applies to anticompetitive conduct engaged in by undertakings on their own initiative. Nevertheless, EU's particular feature of being a market without a state generates one of its competition law peculiarities, namely the concern about the compatibility of the Member States' activities with the rules of competition

[141] cf Ma (n 7) 251, emphasising that 'differences in democracy levels across countries can at least be partially explained by differences in their antitrust performance in reducing income inequality through consumer and small business protection'.

law. Indeed, Member States often intervene in economic matters for socio-political reasons.[142] However, this state involvement in economic activities may distort competition and may contradict both the goal of establishing an internal market and the principle of an open market economy with free competition.[143]

Thus, in order not to deprive the EU competition rules of their effectiveness, the principle of sincere cooperation enshrined in Article 4(3) TEU requires Member States to avoid introducing or maintaining in force measures that may render ineffective the competition rules applicable to undertakings.[144] In this vein, Article 106(1) TFEU provides that:

> [i]n the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary […] in particular to those rules provided for in […] Articles 101 to 109.

The provision imposes a prohibition addressed to Member States, which ensures their adherence to, *inter alia*, the competition rules.[145] Moreover, Article 106(1) TFEU is a 'reference rule', that is, it may only be applied in combination with other Treaty provisions. In this regard, Article 106(1) TFEU has particularly been applied in conjunction with Article 102 in order to determine whether the granting of exclusive or special rights to an undertaking by a Member State has led to an abuse of dominance which may be attributed to that Member State.[146] The case law on a Member State's liability under Article 106(1) TFEU read together

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[142] For a discussion see OECD, 'Regulating Market Activities by the Public Sector' (DAF/COMP(2004)36, 1 February 2015) <http://www.oecd.org/regreform/sectors/34305974.pdf> accessed 17 November 2019.

[143] See especially TFEU (n 36), art 119. See also Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* [2003] ECLI:EU:C:2003:430, para 47, stressing the importance of what is now Art 119 TFEU.

[144] In this vein eg Case C-13/77 *SA G.B.-INNO-B.M. v Association des détaillants en tabac (ATAB)* [1977] ECLI:EU:C:1977:185, para 31. For a good discussion of the relevant case law see Joined Cases C-94 and C-202/04 *Cipolla and Others* [2006] ECLI:EU:C:2006:76, Opinion of AG Maduro, paras 31-40.

[145] According to its wording, the provision is not limited in its scope only to the competition rules.

[146] See eg Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECLI:EU:C:1991:161; Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and Others* [1991] ECLI:EU:C:1991:254; Case C-

with Article 102 raises very interesting and complicated legal issues.[147] However, these issues lie outside the scope of this thesis.

Of relevance, rather, is Article 106(2) TFEU. The provision restricts the scope of application of the competition rules in an attempt to strike a balance between the market-oriented objectives of EU competition law and the Member States' interest in providing quality, safe and affordable SGEI. Specifically, Article 106(2) TFEU stipulates that:

> [u]ndertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject […] in particular to the rules on competition, *in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them*. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.[148]

The issue at stake here is to ensure the ability of Member States to organise certain matters of public interest in their own territory in a manner that better fits the geographical, social or cultural situations of their citizens.[149] Indeed, the EU project relies heavily on a market-oriented policy to ensure that citizens have access to the widest possible choice of goods and services, at the lowest price, and encourage innovation. However, the masters of the Treaties consider that market forces alone do not adequately address EU's social and territorial cohesion, which seems to be a primary concern to them.[150]

179/90 *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECLI:EU:C:1991:464; Case C-18/88 *Régie des télégraphes et des téléphones v GB-Inno-BM SA* [1991] ECLI:EU:C:1991:474; Case C-320/91 *Criminal proceedings against Paul Corbeau* [1993] ECLI:EU:C:1993:198; Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] ECLI:EU:C:2008:376; Case C-553/12P *Commission v Dimosia Epicheirisi Ilektrismou AE (DEI)* [2014] ECLI:EU:C:2014:2083.

[147] For an attempt to make sense of the case law see Richard Whish and David Bailey, *Competition Law* (8th edn, OUP 2015) 234-47.

[148] TFEU (n 36), art 106(2) (emphasis added).

[149] Protocol No 26 (n 43), art 1.

[150] See Commission, 'XXVIIth Report on Competition Policy' (n 139), 38 (points 96-98).

For this reason, the EU Treaties establish SGEI as 'shared values of the Union', thus recognising their important social usefulness.[151] The intense political sensitivity of the issue is revealed by the fact that the Lisbon Treaty further reinforces the commitment of the EU and the Member States to support undertakings providing SGEI.[152] Particularly, the newly adopted Protocol No 26 annexed to the Treaties[153] emphasises the 'essential role and the wide discretion of national, regional and local authorities' in the provision of SGEI,[154] while redundantly confirming that EU law does not affect the Member States' competence to control the provision of non-economic services of general interest.[155] In essence, all these provisions attempt to temper the conflict between the EU and the national social arrangements, by stressing that, in accordance with the principle of subsidiarity, Member States are entitled to a wide discretionary space when providing, executing and organising SGEI.[156]

In this context, Article 106(2) TFEU shows tolerance to national interests by allowing for a derogation from the competition rules. The underlying idea here is that an undertaking that has been entrusted with the performance of SGEI may not effectively do so if it is subjected to a fully competitive market.

According to the provision, only undertakings entrusted with SGEI or having the character of a revenue-producing monopoly may justify what would otherwise amount to an

[151] TFEU (n 36), art 14; Protocol No 26 (n 43), art 1.

[152] ibid, introducing a new legal basis for legislation concerning SGEI and interpretative provisions aimed at emphasising the importance attached by Member States to SGEI. See also Charter of Fundamental Rights of the European Union [2012] OJ C326/391 (CFREU), art 36, stipulating that the EU recognises and respects access to SGEI.

[153] See TEU (n 36), art 51, providing that Protocols to the Treaties form an integral part thereof.

[154] See CFREU (n 152), art 36, reiterating this point.

[155] Protocol No 26 (n 43), art 2.

[156] See also TEU (n 36), art 5(3); and Protocol No 2 on the application of the principles of subsidiarity and proportionality annexed to the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] OJ C115/206.

infringement of the competition rules. None of these concepts are defined in the TFEU. Starting with undertakings having the character of a revenue-producing monopoly, suffice to say that they refer to monopolies created in order to raise revenue for the state.[157] As to SGEI, according to the Commission, the term refers to 'services of economic nature which the Member States or the [Union] subject to specific public service obligations by virtue of a general interest criterion'.[158] According to the relevant case law, the Member States enjoy a wide discretion in defining what they regard as SGEI.[159] The EU institutions, however, outlined certain characteristics of a SGEI, namely they must be made available: continuously, transparently, at a specified quality, at an affordable and uniform tariff, and to all consumers in the relevant territory of the Member State.[160] Examples of such services may include: the operation of a universal postal service;[161] the provision in certain sectors of non-economically viable services

[157] Whish and Bailey (n 147) 250.

[158] Commission, 'Green Paper on Services of General Interest' COM(2003) 270 final, para 17. For a similar definition see Commission, 'A Quality Framework for Services of General Interest in Europe' (Communication) COM(2011) 900 final, 3.

[159] Case T-17/02 *Fred Olsen, SA v Commission* [2005] ECLI:EU:T:2005:218, paras 215-228; Case T-289/03 *British United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd v Commission* [2008] ECLI:EU:T:2008:29.

[160] Commission, 'Green Paper on Services of General Interest' (n 158), paras 50-64; *BUPA* (n 159), paras 10-12; Case C-265/08 *Federutility and Others v Autorità per l'energia elettrica e il gas* [2010] ECLI:EU:C:2009:640, Opinion of AG Colomer, paras 54-55.

[161] eg *Criminal proceedings against Paul Corbeau* (n 146), para 15; Joined Cases C-147, 148/97 *Deutsche Post AG* [2000] ECLI:EU:C:2000:74, para 44.

(eg, mooring services in ports);[162] waste processing;[163] pension schemes fulfilling a social function;[164] ambulance services;[165] and the provision of private medical insurance.[166]

Even so, Article 106(2) TFEU does not exempt undertakings entrusted with SGEI *per se* from the competition rules. The provision provides for a derogation from the application of the competition rules for these undertakings only to the extent that the application of competition law would obstruct the performance, in law or in fact, of the tasks assigned to them. Additionally, it is not possible to rely on this derogation if the development of trade would be affected to such an extent that it would be contrary to the interest of the EU. Indeed, being a derogation from the application of Articles 101 and 102, the CJEU has ruled that Article 106(2) TFEU must be construed narrowly and interpreted strictly.[167] More importantly, the issue of whether the application of competition law would obstruct the performance of the tasks assigned to an undertaking performing SGEI must be assessed on the basis of the *in concreto* circumstances of each particular case.

Ultimately, the scope of the derogation contained in Article 106(2) TFEU depends on the CJEU's appreciation of the proper degree of discretion that should be left to Member States in this area. As is shown below, considering that Article 106(2) TFEU is a derogation from the

[162] Case C-266/96 *Corsica Ferries France v Gruppo Antichi Ormeggiatori del porto di Genova and Others* [1998] ECLI:EU:C:1998:306, para 45.

[163] Case C-203/96 *Chemische Afvalstoffen Dusseldorp and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [1998] ECLI:EU:C:1998:316, para 67; Case C-209/98 *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v Københavns Kommune* [1998] ECLI:EU:C:2000:279, para 75.

[164] *Albany* (n 50), para 105.

[165] Case C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECLI:EU:C:2001:577, para 55.

[166] *BUPA* (n 159), paras 206-7; Case C-437/09 *AG2R Prévoyance v Beaudout Père et Fils SARL* [2011] ECLI:EU:C:2011:112, paras 80-81.

[167] Case 127/73 *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior* [1974] ECLI:EU:C:1974:25, para 19; Case C-157/94 *Commission v Netherlands* [1997] ECLI:EU:C:1997:499, para 37.

Treaty rules, it may be argued that the EU courts have showed willingness to accept claims that undertakings were shielded from the competition rules by virtue of that provision.

In *Corbeau*, for example, the Court of Justice acknowledged that the Belgian Post Office was entrusted with a SGEI, and that, pursuant to its universal postal service obligation, it might be necessary for it to benefit from a restriction of competition in order to be able to offset less profitable activities against profitable ones.[168] The interesting aspect about this judgment is that the Court applied Article 106(1) TFEU in conjunction with Article 102 without identifying a separate abusive conduct by the undertaking concerned.[169] This suggests that the mere creation of dominance resulting from the conferral of exclusive rights would lead to the infringement of Article 102. Such an approach naturally broadens the protection offered by Article 106(2) TFEU.[170]

In the *Corsica Ferries* case the Court considered mooring operation to be SGEI, emphatically pointing out that mooring groups were obliged to provide at any time and to any user universal mooring service, for reasons of public safety in port waters.[171] Consequently, pursuant to Article 106(2) TFEU, including in the price a component designed to cover the cost of maintaining the universal mooring service is not incompatible with Article 106(1) TFEU read together with Article 102.[172]

[168] *Corbeau* (n 146), paras 15 and 17-18.

[169] ibid paras 13-21. See also José Luis Buendia Sierra, *Exclusive Rights and State Monopolies under EC Law: Article 86 (former Article 90) of the EC Treaty* (Andrew Read tr, OUP 1999) para 5.103.

[170] Ariel Ezrachi, *EU Competition Law: An Analytical Guide to the Leading Cases* (5th edn, Hart Publishing 2016) 349.

[171] *Corsica Ferries France* (n 162), para 45.

[172] ibid paras 46-47.

The widening of the protection provided by Article 106(2) TFEU to undertakings entrusted with SGEI is also evidenced in *Albany*.[173] The Court was faced with the question of whether the exclusive right conferred on a sectoral pension fund to manage a supplementary pension scheme could fall within Article 106(2) TFEU. The Court was quick to assert that by exercising the exclusive rights granted to it, the dominant undertaking would be led to abuse its dominant position.[174] Thus, the focus, once again, was on the possible application of the derogation provided under Article 106(2) TFEU.[175] In this regard, the Court pointed out that the supplementary pension scheme fulfilled an essential social function within the Dutch pension system,[176] concluding that the removal of the exclusive right conferred on the sectoral pension fund might render impossible the performance of the SGEI entrusted to it under economically acceptable conditions.[177]

In a similar vein, in *Deutsche Post* the Court held that Article 106(2) TFEU justified the grant by a Member State to its postal operators of a statutory right to charge internal postage on international re-mail.[178] According to the Court, if Deutsche Post were obliged to deliver mail to German residents outside Germany without any provision allowing for financial compensation, then the economically balanced performance of this task would be jeopardised.[179]

[173] *Albany* (n 50).

[174] ibid paras 94-97.

[175] ibid para 98.

[176] ibid para 105.

[177] ibid para 111.

[178] *Deutsche Post* (n 161), paras 41-54.

[179] ibid para 50.

Furthermore, in *Entreprenørforeningens Affalds* it was accepted that the derogation provided in Article 106(2) TFEU may successfully apply in order to effectively deal with environmental considerations.[180] The Court even refused to conduct a proportionality analysis *stricto sensu*, emphasising that a measure that would have had a less restrictive effect on competition would not necessarily ensure the same positive environmental impact.[181]

Finally, other cases where the core of the judgments was concerned with Article 106(2) TFEU include *Ambulanz Glöckner*[182] and *AG2R Prévoyance*[183]. In *Ambulanz Glöckner* the Court accepted that a national law protecting providers of emergency ambulance services against competition from independent operators could be justified under Article 106(2) TFEU, insofar as this was necessary for the performance of their task under economically acceptable conditions.[184] More recently, the Court in *AG2R Prévoyance* held that the derogation from the competition rules could also apply to an exclusive right granted to a provident society in order to manage a scheme for the supplementary reimbursement of healthcare costs.[185]

All in all, the EU seems to be offering a sufficiently accommodating treatment to economic services with an important social dimension under Article 102. As a result, Member States are also allowed a wide discretionary space to promote values of socio-political nature via the market, without the constraints imposed by Article 102.[186] It remains to be seen whether

[180] *FFAD* (n 163), para 83.

[181] ibid para 80.

[182] *Firma Ambulanz Glöckner* (n 165).

[183] *AG2R Prévoyance* (n 166).

[184] *Firma Ambulanz Glöckner* (n 165), paras 51-65.

[185] *AG2R Prévoyance* (n 166), paras 66-81.

[186] For an even wider discretionary space allowed to Member States see Case C-364/92 *SAT Fluggesellschaft mbH v Eurocontrol* [1994] ECLI:EU:C:1994:7, para 30; Case C-343/95 *Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)* [1997] ECLI:EU:C:1997:160, paras 22-25; Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECLI:EU:C:1999:28, Opinion of AG Jacobs, para 314; Case C-113/07P *SELEX Sistemi Integrati SpA v Commission* [2009] ECLI:EU:C:2009:191, paras 66-85,

the post-Lisbon framework for SGEI, which appears to be intended to convince the EU courts to leave an even wider margin for the Member States, would lead to a looser application of Article 102 to undertakings entrusted with SGEI.

For the time being, Article 106(2) TFEU embodies values of socio-political importance to Member States, which may act as *ad hoc* benchmarks against which EU institutions may exceptionally oppose competition law intervention so as to safeguard these values. Article 106(2) TFEU corroborates the holistic approach already discussed. Under Article 106(2) TFEU, however, socio-political values directly come into play by determining the *in concreto* application of Article 102 in specific cases, rather than indirectly guiding its interpretation and enforcement. These are two distinct techniques for incorporating socio-political values into the analysis conducted under Article 102.

ii. *Wouters Doctrine and Objective Justification*

The EU courts have also embraced the direct relevance of non-market-related values outside the scope of Article 106(2) TFEU, ie irrespective of whether the undertakings concerned are entrusted with SGEI. Particularly, in a series of Article 101 judgments, the EU courts weighed restrictive competitive effects of agreements or decisions against the non-economic benefits resulting from them.[187]

This is well illustrated by the *Wouters* judgment, which concerned the conformity with Article 101 of a rule of the Dutch Bar Council prohibiting the partnership between lawyers and

according to which Article 102 is not applicable to activities relating to the exercise of public powers or official authority.

[187] See Whish and Bailey (n 147) 138-40, arguing that this jurisprudence recognises the idea of 'regulatory ancillarity', referring to the fact that the restrictions of competition in these cases were ancillary to a regulatory function. Specifically, this case law provides for a balancing of restrictions of competition against regulatory rules adopted for non-competition reasons. For a general discussion of the concept of ancillarity under Article 101(1) see Commission, 'Guidelines on the Application of Article 81(3) of the Treaty' [2004] OJ C101/97, paras 28-31.

non-lawyers.[188] Mr Wouters wished to practice as a lawyer in a firm of accountants, and thus challenged the rule claiming that it is contrary to Article 101(1).[189] The Court of Justice, issuing an Article 267 TFEU judgment, started by highlighting the anticompetitive effect of a rule prohibiting multi-disciplinary partnerships.[190] However, it went on to hold that such a rule may not infringe Article 101(1) insofar as it 'is necessary for the proper practice of the legal profession' in the Netherlands.[191] Specifically, the Court stressed the need to take into account the rule's objective, which is to guarantee integrity and experience in the provision of legal services and the sound administration of justice.[192] This establishes that values of public interest that are of non-economic nature may be balanced against an identified competitive restriction.[193] In cases where the former outweighs the latter, Article 101(1) would not apply at all.[194]

The *Wouters* doctrine, according to which proportionate regulatory rules fulfilling non-economic values fall outside the scope of Article 101(1), has been confirmed by subsequent judgments. Particularly, in *Meca-Medina* the Court held that the anti-doping rules adopted by the International Olympic Committee and the International Swimming Federation fulfilled the

[188] Case C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECLI:EU:C:2002:98 (*Wouters*).

[189] ibid paras 24-38.

[190] ibid paras 84-95.

[191] ibid para 107.

[192] ibid para 97.

[193] cf Commission, 'White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty' [1999] OJ C132/1 (White Paper for Modernisation), para 57, claiming that the purpose of Article 101(3) is 'to provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations'. Perhaps, then, non-economic values are to be considered under Article 101(1).

[194] See Giorgio Monti, 'Article 81 EC and Public Policy' (2002) 39 CML Rev 1057. cf Ian Forrester, 'Where Law Meets Competition: Is Wouters Like a Cassis de Dijon or a Platypus' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2004: The Relationship Between Competition Law and the (Liberal) Professions* (Hart Publishing 2006).

legitimate objectives of 'safeguarding equal chances for athletes, athletes' health, the integrity and objectivity of competitive sports, and ethical values in sports'.[195] The Court went on to conclude that the restrictive effects on competition that are inherent in these rules are proportionate, and hence do not infringe Article 101(1).[196]

A similar approach can be seen in *OTOC*, where the Court conducted a balancing exercise between the legitimate objective pursued by regulations that guaranteed the quality of services offered by accountants and the involved restriction of competition.[197] In this case, however, the regulations failed the proportionality test, thus falling within the scope of Article 101(1).[198] In a similar vein, in *API* the Court held that rules that fixed mandatory minimum tariffs for road transport in Italy are unsuitable and disproportionate to the objective of ensuring road safety.[199] In certain other cases, the Court lays down the principles to be followed and recognises the legitimate objectives of regulations adopted by undertakings, leaving for the national court to assess whether the involved competitive restrictions go beyond what is necessary to achieve their objectives.[200]

Even though this case law concerns Article 101, the reasoning process is clearly transplantable to situations under Article 102. In fact, in certain of these cases the parties involved are, most likely, dominant players in their respective markets. To the extent that the

[195] Case C-519/04P *David Meca-Medina and Igor Majcen v Commission* [2006] ECLI:EU:C:2006:492, para 43.

[196] ibid paras 46-55. See Stephen Weatherill, 'Anti-Doping Revisited: The Demise of the Rule of "Purely Sporting Interest"?' (2006) 27 ECLR 645, 651ff, emphasising the Court's use of the proportionality test instead of the General Court's holding that such rules are outside the scope of the competition rules.

[197] Case C-1/12 *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência* [2013] ECLI:EU:C:2013:127, paras 94-95.

[198] ibid paras 96-100.

[199] Joined Cases C-184 to 187, 194, 195 and 208/13 *API – Anonima Petroli Italiana SpA and Others v Ministero delle Infrastrutture e dei Trasporti and Others* [2014] ECLI:EU:C:2014:2147, paras 46-57.

[200] eg Case C-136/12 *Consiglio nazionale dei geologi and Autorità garante della concorrenza e del mercato* [2013] ECLI:EU:C:2013:489, paras 52-57.

values and interests considered under this case law are not specific to Article 101, there is no rational reason to exclude non-economic variables from the analysis under Article 102. Hence, the *Wouters* doctrine offers a tool allowing the EU courts to balance restrictions of competition against a range of values of public interest under both Articles 101 and 102.[201]

Indeed, the CJEU has previously addressed claims by dominant firms that their particular course of action is justified by public interest considerations of non-economic nature. In particular, in both *Hilti* and *Tetra Pak II*, the undertakings concerned attempted to justify their allegedly abusive tying practices on grounds of safety and public health considerations.[202] In both cases, the General Court held that in the particular circumstances of these cases:

> it is clearly not the task of an undertaking in a dominant position to take steps on its own initiative to eliminate products which, rightly or wrongly, it regards as dangerous […].[203]

In *Hilti* particularly, this was so because in the relevant Member State there existed laws in relation to these issues as well as public authorities vested with powers to enforce them.[204] However, in none of these cases the EU courts excluded, as a matter of principle, the relevance of these or similar non-economic considerations. On the contrary, the General Court considered at length the dominant firms' claims relating to safety and public health before concluding that the relevant practices constituted abuses.[205] In any event, based on these judgments, the

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[201] cf Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP 2017) 108, naming this a '*Cassis*-inspired approach' to stress the functional similarities between the approach in *Wouters* and the *Cassis de Dijon* formula encountered in free movement law. On the similarities between *Wouters* and free movement law see also Rosemary O'Loughlin, 'EC Competition Rules and Free Movement Rules: An Examination of the Parallels and their Furtherance by the ECJ Wouters Decision' (2003) 24 ECLR 62.

[202] Case T-30/89 *Hilti AG v Commission* [1991] ECLI:EU:T:1991:70, para 33; Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECLI:EU:T:1994:246 (*Tetra Pak II*), para 79.

[203] T-30/89 *Hilti* (n 202), para 118, upheld on appeal in Case C-53/92P [1994] ECLI:EU:C:1994:77; T-83/91 *Tetra Pak II* (n 202), paras 83-84 and 138, upheld on appeal in Case C-333/94P [1996] ECLI:EU:C:1996:436 (*Tetra Pak II*).

[204] T-30/89 *Hilti* (n 202), para 118. Similarly see in the context of Article 101, Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.* [2013] ECLI:EU:C:2013:71, para 20.

[205] T-30/89 *Hilti* (n 202), paras 102-119; T-83/91 *Tetra Pak II* (n 202), paras 136-141.

Commission has affirmed that non-economic concerns of this kind are directly relevant in the context of objectively justifying a conduct under Article 102, in the following terms:

> [t]he question of whether conduct is objectively necessary and proportionate must be determined on the basis of factors external to the dominant undertaking. *Exclusionary conduct may, for example, be considered objectively necessary for health or safety reasons related to the nature of the product in question*. However, proof of whether conduct of this kind is objectively necessary must take into account that it is normally the task of public authorities to set and enforce public health and safety standards.[206]

Hence, depending on the circumstances of each case, values not related to market competition may be directly relevant to the assessment of the unilateral conduct of a dominant firm. In this regard, successful reliance on such non-economic considerations would lead to the *ad hoc* exclusion of the application of Article 102. However, a successful claim based on such considerations would be an exceptional occasion.

Altogether, the *Wouters* doctrine and the concept of objective justification under Article 102 reflect the holistic approach to competition law insofar as they include values unrelated to market competition in the analysis of the competition rules. In this context, just as under the framework of Article 106(2) TFEU, these values come directly into play in *ad hoc* manner potentially leading to the exclusion of the application of Article 102.[207] The direct relevance of non-economic considerations in the application of Article 102 provides a certain degree of flexibility and displays tolerance to national public interests. Indeed, the fact that socio-political values act as *ad hoc* benchmarks in the analysis of Article 102 entails that they cannot be *a*

[206] Priorities Paper (n 136), para 29 (emphasis added).

[207] cf Weatherill, *The Internal Market as a Legal Concept* (n 201) 108-9, arguing that functionally *Albany* and *Wouters* 'share an ambition to prevent a rigid application of competition law serving to disable pursuit of other distinct and worthwhile objectives'.

priori specified in an exhaustive manner.[208] However, it should be recalled that only exceptionally they would lead to a derogation from the application of Article 102.[209]

C. General Principles of EU Law as Principles of Interpretation under Article 102

The analysis so far has unveiled the constitutionally required holistic approach to the interpretation and application of Article 102, as well as the fact that values external to market competition may be relevant to the analysis under Article 102, either indirectly or directly. This section purports to illuminate the role of three prominent general principles of EU law, namely the principles of effectiveness, proportionality, and non-discrimination, on the substantive assessment of Article 102. The selection of these particular principles in this context is not random; on the contrary, it is based on the fact that they act as substantive principles of interpretation under Article 102.[210] In essence, they ensure the practical functionality of the holistic approach and the plurality of goals pursued by Article 102.

i. *Principle of Effectiveness*

The principle of effectiveness has been recognised by the CJEU as a principle of EU law.[211] The principle is usually referred to in the context of the allocation of competences between the

[208] cf ibid 109, concluding in this regard that '[t]he internal market is malleable as a legal concept'.

[209] For a relatively recent unsuccessful claim based on the *Wouters* doctrine see T-90/11 *Ordre national des pharmaciens (ONP) and Others v Commission* [2014] ECLI:EU:T:2014:1049, para 348.

[210] cf Jacques Steenbergen, 'Proportionality in Competition Law and Policy' (2008) 35 Legal Issues of Economic Integration 259, 260.

[211] eg Joined Cases C-46, 48/93 *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen/Secretary of State for Transport, ex parte Factortame and Others* [1996] ECLI:EU:C:1996:79, para 95. In this vein see Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 418. On the distinction between general principles of EU law and other principles see Michael Wimmer, 'The Dinghy's Rudder: General Principles of European Union Law through the Lens of Proportionality' (2014) 20 European Public Law 331, 333. cf Max Hjärtström and Julian Nowag, 'General Principles of EU Law in EU Antitrust Law' in Katja Ziegler, Päivi Neuvonen, Violeta Moreno-Lax (eds), *Research Handbook on General Principles of EU Law* (Edward Elgar *forthcoming*), claiming that 'it might appear important to distinguish such principles from general principles of EU law'.

EU and the Member States.[212] Specifically, it requires national laws to ensure the full effectiveness of EU law.[213] This entails that domestic laws (both procedural and substantive) of the Member States must not make it impossible or excessively difficult to enforce rights deriving from EU law.[214]

However, the principle of effectiveness of EU law also assumes an important function at the level of the EU. For instance, it has also been used as a substantive interpretative guide in the context of the public enforcement of the competition rules themselves, ie, irrespective of their application at national level.[215] Particularly, the EU courts have sometimes claimed to favour a particular interpretative result over another on the basis of the *effet utile* of Article 102.[216] The underlying idea of this principle of interpretation is that when called to select from

[212] For example see Sacha Prechal, 'Competence Creep and General Principles of Law' (2010) 3 Review of European Administrative Law 5, 16.

[213] eg Case C-453/99 *Courage and Crehan* [2001] ECLI:EU:C:2001:465, para 29; Joined Cases C-295 to 298/04 *Manfredi and Others* [2006] ECLI:EU:C:2006:461, para 60; Case C-439/08 V*laamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW* [2010] ECLI:EU:C:2010:739, paras 56-64; Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECLI:EU:C:2011:389, paras 24-29; Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others* [2013] ECLI:EU:C:2013:366, paras 23-27; Case C-557/12 *Kone AG and Others v ÖBB-Infrastruktur AG* [2014] ECLI:EU:C:2014:1317, paras 21 and 33; Case C-74/14 *Eturas and Others* [2016] ECLI:EU:C:2016:42, paras 32-37. cf Case C-373/17P *Agria Polska sp. z o.o. and Others v Commission* [2018] ECLI:EU:C:2018:756, para 87, holding that it is 'not for the Commission to make up for any shortcomings in judicial protection at national level by opening an investigation requiring considerable resources where the likelihood of finding an infringement of Articles 101 and 102 TFEU is low'.

[214] ibid. See Hjärtström and Nowag (n 211), arguing that the principle of effectiveness is placed at the starting point at the expense of procedural autonomy. See also Denis Edwards, 'The Impact of the EU law Principle of Effectiveness' (*Solicitors Journal*, 19 June 2012) <https://www.ftbchambers.co.uk/sites/default/files/the-impact-of-the-eu-law-principle-of-effectiveness.pdf> accessed 17 November 2019, stressing that the principle of effectiveness can have a significant impact beyond procedural law, on the substantive law of the Member States.

[215] See eg Case C-521/09P *Elf Aquitaine SA v Commission* [2011] ECLI:EU:C:2013:644, para 120; Case C-617/13P *Repsol Lubricantes y Especialidades and Others v Commission* [2016] ECLI:EU:C:2016:416, paras 68-69; Cases C-231 to C-233/11P *Commission v Siemens Österreich and Others et Siemens Transmission & Distribution and Others/Commission* [2014] ECLI:EU:C:2014:256, para 59; Case C-625/13P *Villeroy & Boch AG v Commission* [2017] ECLI:EU:C:2017:52, para 152.

[216] T-30/89 *Hilti* (n 202), para 119; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECLI:EU:C:2011:83 (*TeliaSonera*), para 58.

several interpretative choices, priority should be given to the one that ensures the full effectiveness of the provision.[217]

In this vein, relevant is the overall constitutional structure of EU law, which demands a multi-goal and holistic approach to Article 102. Taking into account these constitutional peculiarities under an *effet utile* approach, there is no other technique to operationalise them in practice than to rely on presumptions and benchmarks that form simple rules.[218] Naturally, these rules must promote the goals pursued by Article 102 and be consistent with the identified above equality-related socio-political concerns. However, the employed tests for the assessment of potentially abusive practices must remain simple in order to ensure that Article 102 is fully effective in both protecting consumer interest and complying with other values of socio-political nature. This is further developed in chapter 4.

ii. *Principle of Proportionality*

Article 5(4) TEU now states that '[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'.[219] Even so, long before the explicit recognition of the principle in what is now Article 5(4) TEU, the CJEU had established proportionality as a general principle of EU law.[220] Proportionality is considered to be the most important and widely used general principle of EU law.[221] In fact,

[217] cf Koen Lenaerts and José Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 CML Rev 1629.

[218] cf Evans (n 2) 167; David Bailey, 'Presumptions in EU Competition Law' (2010) 31 ECLR 362, 367-8; Maurice Stucke, 'Reconsidering Antitrust's Goals' (2012) 53 Boston College Law Review 551, 618-24.

[219] See also Protocol No 2 (n 156); CFREU (n 152), arts 49(3) and 52(1).

[220] eg Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECLI:EU:C:1970:114, paras 4 and 14; Case C-331/88 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and Others* [1990] ECLI:EU:C:1990:391, para 13.

[221] For example Juergen Schwarze, *European Administrative Law: Revised 1st Edition* (Sweet & Maxwell 2006) 664-5; Alison Young and Gràinne de Búrca, 'Proportionality' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart Publishing 2017) 133.

due to its versatility, the principle of proportionality has been applied in many different contexts, serving multiple roles under varying degrees of judicial review.[222] This holds true in the context of competition law as well, where the principle has assumed diverging and varying roles both in the procedural and the substantive assessment of competition law.[223]

The analysis in this section, however, is limited to the role of the principle of proportionality in the substantive assessment of Article 102. In this context, proportionality has a peculiar function.[224] First, it is used to limit private power, antithetically to its conventional role of protecting against public power. Additionally, contrary to its usual function of providing a ground for review of acts by the EU and the Member States, proportionality is used in this regard as a tool guiding the interpretation and application of Article 102.

As already explained, the EU courts have accepted that the safeguarding of public policy considerations may lead to the non-application of Article 102. According to the case law, these considerations are not specified, but come into play in an *ad hoc* manner, and may include, *inter alia*, issues relating to employment, industrial policy, safety and public health, and the environment. They can also be extended to cover cases dealing with the integrity of the legal profession and sports. This entails that these socio-political values become part of the analysis of Article 102, without being precisely framed and delimitated. Certainly, this provides for flexibility and adaptability, which are essential parameters of the Union's development. However, it also entails a certain degree of legal uncertainty.

[222] Wolf Sauter, 'Proportionality in EU Law: A Balancing Act' (2013) 15 CYELS 439, 445ff. For a recent judgment based on an action brought before the General Court to annul a request for information issued by the Commission on the grounds that it infringed the principle of proportionality see Case T-371/17 *Qualcomm, Inc. and Qualcomm Europe, Inc. v Commission* [2019] ECLI:EU:T:2019:232, paras 112-66.

[223] For a discussion see Sauter (n 222).

[224] Similarly Hjärtström and Nowag (n 211).

The EU courts have achieved to incorporate socio-political values in the analysis of Article 102 through, *inter alia*, the eloquent use of the principle of proportionality. Indeed, both under Article 106(2) TFEU read together with Article 102 and under the objective justification doctrine, the proportionality principle constitutes a balancing exercise of public policy considerations against possible restrictions of competition. In this assessment, the focus is on the legitimacy of the aim and the necessity of the restriction.[225] Within this setting, therefore, a unilateral conduct of a dominant firm that restricts competition may fall outside the scope of Article 102 because the restriction is proportionate to the benefit it provides for society.

Of particular interest is the recognition by the EU courts' case law of the doctrines of objective justification and efficiency defence in the analysis of Article 102.[226] Article 102 is not drafted to include a justification or a defence so that a conduct would be admitted or excused, either along the lines of Article 101(3) or more broadly. This creates a conceptual problem insofar as any justification or defence for the unilateral conduct of a dominant firm must be incorporated into the concept of abuse.[227] Be this as it may, despite the fact that a two-stage analysis is explicitly identified only in Article 101, the EU courts have progressively developed a similar two-stage analytical framework for Article 102.[228] Hence, a *prima facie* abusive behaviour can still be justified on grounds of objective justification and efficiencies.

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[225] cf Sauter (n 222), 330-2.

[226] T-30/89 *Hilti* (n 202), paras 46 and 102-19; Case T-228/97 *Irish Sugar v Commission* [1999] ECLI:EU:T:1999:246, para 189; Case C-95/04P *British Airways plc v Commission* [2007] ECLI:EU:C:2007:166, para 86; Case T-286/09 *Intel Corporation v Commission* [2014] ECLI:EU:T:2014:547, paras 81, 94 and 173; Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECLI:EU:C:2012:172 (*Post Danmark I*), para 41; Case C-23/14 *Post Danmark A/S v Konkurrencerådet* [2015] ECLI:EU:C:2015:651 (*Post Danmark II*), paras 31 and 47; Case C-413/14P *Intel Corporation v Commission* [2017] ECLI:EU:C:2017:632, para 140. See also *Romanian Power Exchange/OPCOM* (Case AT.39984) [2014] OJ C134/7, paras 186-229.

[227] Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Hart Publishing 2012) 115-20.

[228] Contrast Dimitris Riziotis, 'Efficiency Defence in Article 82 EC' in Mark-Oliver Mackenrodt, Beatriz Conde Gallego and Stefan Enchelmaier (eds), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* (Springer 2008) 90.

In this regard, both the Commission and the CJEU seem to regard the two doctrines as being separate defences within Article 102. On the one hand, the efficiency defence under Article 102 is viewed by the EU institutions as modelled upon Article 101(3).[229] Hence, the proportionality assessment in this context is limited to the scope of Article 101(3), which only considers as relevant economic efficiencies benefiting the consumer.[230] On the other hand, the objective justification doctrine must be based on factors external to the dominant firm, such as public health and safety considerations.[231] It may therefore be compared to the *Wouters* doctrine in the sense that it allows for issues unrelated to market competition to come into play in the application of Article 102, thus providing more room for balancing.[232]

Hence, while the efficiency defence incorporates economic efficiencies and consumer surplus in the analysis of Article 102, the objective justification mechanism ensures the direct relevance of public policy considerations. Altogether, they operationalise the multi-goal and holistic approach to Article 102. That being said, it is the principle of proportionality that grounds and governs these judge-created legal constructs. Put simply, these defences derive from a proportionality-based logic and the principle of proportionality is the decisive tool in determining whether Article 102 is applicable or not. Within this setting, the principle of proportionality acts as an interpretative principle ensuring the practical functionality of the holistic approach and the plurality of goals pursued by Article 102.

[229] Case T-193/02 *Laurent Piau v Commission* [2005] ECLI:EU:T:2005:22, paras 117-9; Priorities Paper (n 136), paras 28-31.

[230] Similarly Hjärtström and Nowag (n 211).

[231] Priorities Paper (n 136), para 29. See similarly Julian Nowag, *Environmental Integration in Competition and Free-Movement Laws* (OUP 2017) 240-6.

[232] cf Monti (n 194) 1086.

iii. *Principle of Non-Discrimination*

Another prominent general principle of EU law acting as substantive principle of interpretation in the context of Article 102 is the principle of non-discrimination.[233] The non-discrimination principle may come into play in the assessment of a dominant firm's unilateral conduct in two scenarios.[234] The first scenario is laid down in Article 102(c) and concerns the assessment of price discrimination and the application of dissimilar trading conditions. The second scenario concerns the discrimination based on nationality or residence, where the non-discrimination principle is most relevant, dictating to a large extent the interpretation of Article 102.

Article 102(c) specifically stipulates that an abuse may consist in 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. Clearly therefore pricing discrimination or other types of discriminatory commercial practices may infringe Article 102.[235] Hence, the non-discrimination principle is directly relevant in this context. Nevertheless, the Commission and the EU courts are reluctant to establish an infringement of Article 102 on the basis solely of discrimination.[236] Typically, a more detailed analysis of the economic effects is required in order to conclude that a dominant firm's discriminatory behaviour is abusive within the meaning of Article 102.[237] The reason is that such discriminatory conduct may, depending on the circumstances of the case, have positive effects on both consumer welfare and income redistribution.[238] In this context, the impact of the non-discrimination principle on Article 102

[233] Hjärtström and Nowag (n 211).

[234] ibid.

[235] See Pablo Ibáñez Colomo, 'Exclusionary Discrimination under Article 102 TFEU' (2014) 51 CML Rev 141.

[236] *Post Danmark I* (n 226), para 30; Case C-525/16 *MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência* [2018] ECLI:EU:C:2018:270, paras 25-26.

[237] *Post Danmark I* (n 226), para 44; *MEO – Serviços de Comunicações e Multimédia SA* (n 236), para 31.

[238] William Bishop, 'Price Discrimination under Article 86: Political Economy in the European Court' (1981) 44 MLR 282, 289; Derek Ridyard, 'Exclusionary Pricing and Price Discrimination Abuses under Article 82: An

is obscured by its consumer-related goals and its concern about income redistribution. This is reflected in the applicable rules to the discriminatory practices of dominant firms, which are discussed in the next chapter.

Even so, the effect of the non-discrimination principle is more notable in the assessment of discriminatory practices on the grounds of nationality under Article 102.[239] In fact, on several occasions, the Commission and the EU courts have condemned under Article 102 discriminatory pricing based on the nationality or residence of the purchasers.[240] Clearly, the reason is the link of competition law to the integration of the internal market, which constitutes the peculiarly EU perspective determining the interpretation of Article 102.[241] It has already been explained in chapter 2 that one of the ultimate objectives pursued by Article 102 is the promotion of internal market integration. Consequently, the non-discrimination principle assumes in this context the highly instrumental role of protecting the internal market. Within this setting, the integration goal takes precedence over direct consumer-related concerns in the context of Article 102.

III. Functions of Values and Principles External to Market Competition

This chapter discussed the constitutional structure of the EU, demonstrating that the latter demands a holistic approach to Article 102. This constitutionally mandated holistic approach

Economic Analysis' (2002) 23 ECLR 286, 287-8; EAGCP, 'An Economic Approach to Article 82' (Brussels, July 2005) (EAGCP Report), 30-33.

[239] TFEU (n 36), art 18; CFREU (n 152), art 21(2).

[240] eg Case 155/73 *Giuseppe Sacchi* [1974] ECLI:EU:C:1974:40, para 17; Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECLI:EU:C:1978:22, paras 232-4; Case 7/82 *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission* [1983] ECLI:EU:C:1983:52, para 56; Case C-18/93 *Corsica Ferries Italia Srl v Corpo dei Piloti del Porto di Genova* [1994] ECLI:EU:C:1994:195, para 45; Case T-128/98 *Aéroports de Paris v Commission* [2000] ECLI:EU:T:2000:290, paras 201-2, upheld in Case C-82/01P [2002] ECLI:EU:C:2000:617; Case T-139/98 *Amministrazione Autonoma dei Monopoli di Stato (AAMS) v Commission* [2001] ECLI:EU:T:2001:272, para 80; *1998 Football World Cup* (Case IV/36.888) Commission Decision 2000/12/EC [2000] OJ L5/55, paras 87-88; *Romanian Power Exchange/OPCOM* (AT.39984) (n 226), para 230.

[241] Behrens (n 16) 10.

entails that socio-political values external to market competition may affect both the general interpretation and enforcement of Article 102 and its *ad hoc* application.

In this context, two distinct techniques for incorporating such values into the analysis of Article 102 have been identified. The first technique incorporates specific socio-political values in the analysis of Article 102 in an indirect manner. Under this technique, inequality-related concerns generally guide the interpretation and enforcement of Article 102. In other words, equality-related values influence the design of the relevant rules and the Commission's enforcement philosophy, thus satisfying the constitutionally demanded consistency between EU's policies. However, considerations unrelated to market competition also come directly into play in the application of Article 102. Particularly, certain non-specified socio-political values come directly into play in the context of a proportionality analysis, exceptionally leading to the *ad hoc* exclusion of the application of Article 102. Overall, both techniques reflect the holistic approach to Article 102 insofar as they allow socio-political concerns unrelated to market competition to find their way into the analysis of Article 102.

The relevance of socio-political values in the analysis of Article 102 does not contradict or replace the provision's economic objectives that have been identified in chapter 2. In fact, to the extent that equality-related values are indirectly relevant for the interpretation of Article 102, the holistic approach is guiding the objectives pursued by the provision through the requirement of consistency between EU's policies. Turning to the direct relevance of socio-political values, the practical amalgamation of the holistic approach with the ultimate goals pursued by Article 102 is ensured via the application of the principles of effectiveness, proportionality and non-discrimination. It must also be noted that the indirect relevance of equality and the *ad hoc* nature of the considerations that may exclude the application of Article 102, clearly preclude the possibility of viewing them as goals pursued by Article 102.

The following chapter turns to the EU courts' case law, exploring the actual reflection of the multi-goal and holistic approach in the applicable rules under Article 102.

4. CONSTITUTIONAL PECULIARITIES AND APPLICABLE RULES

This chapter focuses on the interpretation and application of Article 102 by the EU courts to demonstrate the reflection of the identified special constitutional features of the EU in the relevant case law.[1]

It begins by illustrating the operation of the multi-goal framework that has been set out in chapter 2. According to this framework, there is a multi-level hierarchy of goals under Article 102. At the vertical level, at the top of the hierarchy are the two ultimate objectives pursued by Article 102, namely the integration of the internal market and the protection of consumer interest. However, there also seems to exist a hierarchical relationship at the horizontal level (ie, between the two ultimate goals of Article 102), where the objective of market integration appears to be higher-ranking. In this context, it is first shown that the assertion about the standalone and hierarchically superior nature of the internal market integration objective is adequately supported by the relevant case law. Following this, the EU courts' approach to exclusionary abuses is employed as a case-study in order to exemplify, via the applied tests, that the EU courts consider consumer interest as one of the ultimate objectives pursued by Article 102.[2]

The chapter then explains the manner that the constitutionally required multi-goal and holistic approach to Article 102 is reconciled in practice. In this regard, it shows that the designed rules ensure conformity with the economic goals pursued by Article 102 and consistency with EU's constitutional values. This reconciliation is thus manifested in the EU

[1] The decisional practice of the Commission, especially the most recent one, is also consulted.

[2] Exploitative abusive practices are only incidentally assessed due to the relative scarcity of relevant cases.

courts' substantive interpretation of Article 102.[3] Finally, the chapter concludes by emphasising that the functionality and effectiveness of this framework is ensured through the design of clear and simple rules.

I. Internal Market Integration

A. Standalone Objective

The CJEU has from the outset treated EU competition policy as a powerful tool to achieve the goal of market integration.[4] This had an inevitable and significant impact on the outcome of certain cases on abuse of dominance, revealing that the integrity of the internal market is a standalone objective pursued by Article 102.

Indeed, the Court of Justice in its early Article 102 cases has applied the prohibition contained in the said provision to territorial restrictions practiced by dominant firms. Particularly, in *Suiker Unie* a dominant sugar refinery was found to have violated Article 102 by threatening to cease sugar supply unless the distributors complied with its restrictive export

[3] It has been explained in chapter 3 that this is also manifested in the Commission's enforcement philosophy, but the analysis in this chapter is limited to the substantive interpretation of Article 102.

[4] For example in the context of Article 101 see Joined Cases 56, 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966] ECLI:EU:C:1966:41, p 340, holding that 'an agreement […] which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental objecti[ves] of the [EU]. The Treaty, whose preamble and content aim at abolishing the barriers between States, […] could not allow undertakings to reconstruct such barriers. Article [101](1) is designed to pursue this aim'; Case 19/77 *Miller International Schallplatten GmbH v Commission* [1978] ECLI:EU:C:1978:19, para 7, holding that a clause prohibiting exports (ie, an obligation to sell on the domestic market) constitutes, by its very nature, a restriction on competition; Case C-319/82 *Société de Vente de Ciments et Bétons de l'Est SA v Kerpen & Kerpen GmbH und Co. KG* [1983] ECLI:EU:C:1983:374, para 6, holding that a contract that imposes on the purchaser restrictions on the territory into which goods can be resold has as its object the prevention of competition within the internal market. See also Commission Regulation (EU) 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1, art 4(b); Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements [2010] OJ L335/36, art 5(d)-(g); Commission Regulation (EU) 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements [2010] OJ L335/43, art 4(c).

policy.[5] Similarly, in *United Brands* the Court of Justice considered that a contractual obligation imposed by United Brands on wholesalers not to sell bananas while they were still green had the effect of partitioning the market along national lines, and thus infringed Article 102.[6] Therefore, the Court intends to prevent commercial practices that may partition the internal market. In this context, the abolition of barriers to cross-border trade is also achieved via the application of the prohibition on abuse of dominance, and thereby the process of integrating the internal market is inextricably linked to Article 102.[7]

In this regard, explicit export bans imposed by dominant undertakings are clearly prohibited by Article 102. Even so, consistently with the *effet utile* principle, Article 102 has also been applied to practices of dominant firms that artificially altered the conditions of competition in a way that induced traders to give priority to the national market.[8] For example, in two cases concerning the market for motor cars the Commission had found infringements of Article 102,[9] condemning in particular the partitioning of national markets to prevent sales of

[5] Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission* [1975] ECLI:EU:C:1975:174 (*Suiker Unie*), paras 396-400.

[6] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECLI:EU:C:1978:22 (*United Brands*), paras 157-61.

[7] For recent Commission decisions illustrating this see *Upstream Gas Supplies in Central and Eastern Europe* (Case AT.39816) [2018] OJ C(2018) 3106 final (*Gazprom*), para 61; *AB InBev Beer Trade Restrictions* (Case AT.40134) [2019] C(2019) 3465 final, paras 89-93. On a case concerning misleading advertising see also Case C-373/90 *X* [1992] ECLI:EU:C:1992:17, para 12, stating that 'parallel imports enjoy a certain amount of protection in [EU] law because they encourage trade and help reinforce competition'.

[8] See eg *United Brands* (n 6); *BPB Industries plc* (Case IV/31.900) Commission Decision 89/22/EEC [1988] OJ L10/50, upheld in Case T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission* [1993] ECLI:EU:T:1993:31, paras 119-22; *AAMS* (Case IV/36.010-F3) Commission Decision 98/538/EC [1998] OJ L252/47, upheld in Case T-139/98 *Amministrazione Autonoma dei Monopoli di Stato (AAMS) v Commission* [2001] ECLI:EU:T:2001:272; *Deutsche Post AG — Interception of Cross-Border Mail* (Case COMP/C-1/36.915) Commission Decision 2001/892/EC [2001] OJ L331/40. Similarly in the context of Article 102 see Case C-551/03P *General Motors BV v Commission* [2006] ECLI:EU:C:2006:229, para 68; Case T-450/05 *Automobiles Peugeot SA and Peugeot Nederland NV v Commission* [2009] ECLI:EU:T:2009:262, para 47.

[9] Richard Whish and David Bailey, *Competition Law* (8th edn, OUP 2015) 714, explaining that the market of motor vehicles has been rather slow to grow and integrate, mainly due to differing tax and distribution systems and the fact that not all Member States drive on the same side of the road.

vehicles from low- to high-priced Member States.[10] Similarly, the Commission fined the world's biggest beer brewer for hindering cheaper imports of its Jupiler beer from the Netherlands into Belgium.[11]

In *General Motors* the Commission had found the prosecuted firm to have abused its dominant position by charging excessive prices for producing the required documentation for driving its cars in Belgium.[12] On appeal, the Court of Justice annulled the Commission's decision on the basis of the temporal and factual circumstances of the case,[13] but emphasised that such a conduct would in principle be condemned because it has the effect of curbing parallel imports by neutralising the possibility for more favourable level of prices applying in other sales areas in the EU.[14] On the contrary, in the similar case of *British Leyland* the Court of Justice upheld the Commission's decision that the dominant firm had abusively refused to supply national type-approval certificates for its vehicles imported from the continent.[15] This was regarded to be part of a strategy aiming at discouraging parallel imports into the UK. Particularly, the Court justified its finding by holding that the conduct in question created barriers to the re-importation of vehicles from Member States other than the UK, thereby reducing intra-EU trade and producing a market-partitioning effect.[16]

[10] *General Motors Continental* (Case IV/28.851) Commission Decision 75/75/EEC [1975] OJ L29/14; *BL* (Case IV/30.615) Commission Decision 84/379/EEC [1984] OJ L207/11.

[11] *AB InBev Beer* (n 7).

[12] Case 26/75 *General Motors Continental NV v Commission* [1975] ECLI:EU:C:1975:150, para 1.

[13] ibid paras 16-24.

[14] ibid paras 11-12.

[15] Case 226/84 *British Leyland Public Limited Company v Commission* [1986] ECLI:EU:C:1986:421, paras 16 and 24.

[16] ibid paras 21 and 24.

In a similar vein, the Commission issued a decision finding that AB InBev had abused its dominant position on the Belgian beer market by restricting cross-border sales of its Jupiler beer.[17] This restriction of parallel trade, however, was achieved via more indirect means than explicit bans on cross-border trade.[18] Particularly, the company: i) limited the volumes of Jupiler beer supplied to a wholesaler in the Netherlands;[19] ii) changed the packaging of some of its Jupiler beer products supplied in the Netherlands to make these products harder to sell to Belgian consumers;[20] iii) refused to sell other popular AB InBev's products unless retailers agreed to limit their imports of less expensive Jupiler beer from the Netherlands;[21] and iv) offered customer promotions to a Dutch retailer conditional upon the retailer not offering the same promotions to its customers in Belgium.[22] The overall aim was to maintain higher prices in Belgium by hindering cheaper imports of Jupiler beer products from the Netherlands.[23] Hence, the conduct was treated as a deliberate overall strategy of territorial restriction, where supermarkets and wholesalers were impeded from buying Jupiler beer at lower prices in the Netherlands to import it into Belgium.[24]

The Commission's decisional practice also shows that any conduct by a dominant firm that entails the *de facto* compartmentalisation of the internal market may violate Article 102

[17] *AB InBev Beer* (n 7).

[18] ibid para 2.

[19] ibid paras 174-8.

[20] ibid paras 179-89.

[21] ibid paras 190-5.

[22] ibid paras 196-7.

[23] ibid paras 94-96.

[24] ibid paras 206-14, concluding that 'the four practices […] taken together constitute a single and continuous infringement of Article 102'.

since it contradicts the economic interpenetration desired by the Treaties.[25] In *Lithuanian Railways*, for example, the incumbent state-owned rail company in Lithuania was found to act in breach of Article 102 because it dismantled a public rail infrastructure connecting Lithuania and Latvia.[26] The Commission explicitly linked the decision's outcome to its persistent efforts to complete the internal market for rail services.[27] In this context, the Commission considers that the enforcement of Article 102 advances this aim by ensuring that 'regulatory barriers are not replaced by anti-competitive behaviour of dominant rail companies that would prevent the EU from achieving its ultimate goals for rail transport'.[28] A very similar approach can also be identified in the energy sector,[29] where the Commission has adopted a series of decisions imposing either fines[30] or legally binding commitments[31], with the ultimate aim of creating a truly integrated internal market for energy in the EU.[32]

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[25] For the same approach in the context of Article 101 see Case C-551/03P *General Motors BV v Commission* [2006] ECLI:EU:C:2005:639, Opinion of AG Tizzano, para 71.

[26] *Baltic Rail* (Case AT.39813) [2017] C(2017) 6544 final.

[27] ibid paras 114-26 and 323.

[28] Commission, 'Antitrust: Commission Fines Lithuanian Railways €28 Million for Hindering Competition on Rail Freight Market' (Press Release, 2 October 2017).

[29] For recent actions to achieve a fully-integrated internal energy market see eg Commission, 'Energy: Successful Energy Cooperation for Central and South-Eastern European Countries Continues' (Press Release, 9 September 2016); Commission, 'State aid: Commission Approves Public Support for Natural Gas Interconnector between Greece and Bulgaria' (Press Release, 8 November 2018).

[30] Commission, 'Antitrust: Commission Fines BEH Group € 77 Million for Blocking Access to Key Natural Gas Infrastructure in Bulgaria' (Press Release, 17 December 2018).

[31] *Swedish Interconnectors* (Case COMP/39.351) [2010] OJ C142/28; *BEH Electricity* (Case AT.39767) [2015] OJ C202/2; *Gazprom* (n 7); *DE/DK Interconnector* (Case AT.40461) [2018] C(2018) 8132 final. See also Commission, 'Antitrust: Commission Invites Comments on Transgaz Commitments Concerning Natural Gas Exports from Romania' (Press Release, 21 September 2018), stating that 'Transgaz has offered commitments that would allow commercially meaningful export capacities from Romania to be made available'.

[32] Commission, 'Antitrust: Commission Increases Electricity Trading Capacity on the Swedish Borders' (Press Release, 14 April 2010), including a statement by the Competition Commissioner at the time who claimed that 'the commitments offered by Svenska Kraftnät […] show the importance of integrating Europe's energy markets'; Commission, 'Antitrust: Commission Accepts Commitments by Bulgarian Energy Holding to Open Up Bulgarian Wholesale Electricity Market' (Press Release 10 December 2015), where Commissioner Vestager claims that the decision will end '[t]erritorial restrictions that divide energy markets along national lines prevent[ing] us from achieving a true European Energy Union'; Commission, 'Antitrust: Commission Fines BEH Group' (n 30), stating that the 'decision is another example of how enforcement of EU competition rules complements legislative action to ensure open and competitive gas markets in the EU, in line with the Energy Union objectives'; Commission,

The internal market logic under which the EU institutions necessarily operate is also manifested in the context of two distinct issues relating to Article 102. First, it is expressed in the test that the EU courts have endorsed as appropriate for establishing excessive pricing under Article 102. Second, it is also revealed in the EU courts' interpretation of the condition relating to effects on trade between Member States contained in Article 102.

In the relatively scarce cases addressing excessive pricing, the CJEU has established a two-stage test to assess whether a price charged by a dominant firm is exploitative under Article 102.[33] Specifically, it must first be determined whether the difference between the costs actually occurred and the price charged is excessive, and, then, it must be determined whether the excessive price is either unfair in itself or when compared to competing products.[34] In this regard, the CJEU has recognised that comparing between different geographic markets is an appropriate method for assessing whether a price is excessive and unfair within the meaning of Article 102.[35] In fact, in a rare preliminary reference ruling on the criteria to be applied in

'Antitrust: Commission Imposes Binding Obligations on Gazprom to Enable Free Flow of Gas at Competitive Prices in Central and Eastern European Gas Markets' (Press Release, 24 May 2018), emphasising that the decision 'obliges Gazprom to take positive steps to […] help realise a true internal market for energy in Europe'; Commission, 'Antitrust: Commission Imposes Binding Obligations on TenneT to Increase Electricity Trading Capacity between Denmark and Germany' (Press Release, 7 December 2018), stressing the importance of creating 'an integrated Energy Union where energy flows freely across borders'.

[33] Particularly see 26/75 *General Motors Continental* (n 12), paras 12-24; *United Brands* (n 6), paras 235-68; *British Leyland* (n 15), paras 25-34. With regard to the Commission's decisional practice see *Deutsche Post* (COMP/C-1/36.915) (n 8), paras 159-67. For a rejection of complaint of excessive port charges see *Scandlines Sverige AB v Port of Helsingborg* (Case COMP/A.36.568/D3) [2004], paras 98ff; for a rejection of complaint of excessive airport charges see *Ryanair/DAA-Aer Lingus* (Case COMP/39.886) [2008] C(2013) 6986 final, paras 81-89.

[34] *United Brands* (n 6), para 252; Case C-177/16 *Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v Konkurences padome* [2017] ECLI:EU:C:2017:689 (*AKKA/LAA*), para 36. See also *Scandlines Sverige* (COMP/A.36.568/D3) (n 33), para 103; *Ryanair/DAA-Aer Lingus* (COMP/39.886) (n 33), para 82.

[35] *United Brands* (n 6), para 236-9; Case 395/87 *Ministère Public v Jean-Louis Tournier* [1989] ECLI:EU:C:1989:319, para 43; Joined Cases 110 and 241-242/88 *François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others* [1989] ECLI:EU:C:1989:326 (*SACEM*), para 30; Case C-351/12 *OSA — Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.* [2014] ECLI:EU:C:2014:110 (*OSA*), paras 87 and 92. cf *United Brands* (n 6), para 253; *AKKA/LAA* (n 34), para 37, holding that other methods may also be employed. For a Commission decision using an alternative benchmark to determine abusive excessive pricing see *Deutsche Post* (COMP/C-1/36.915) (n 8), paras 159-66.

this context,[36] the Court of Justice stated that the methodology of comparison across Member States 'must be considered valid', and that a significant and persistent price difference is indicative of an abuse of dominance.[37] In *AKKA/LLA* the Court reached this conclusion despite AG Wahl's Opinion, which indicated the potential flaws of such a method and favoured the idea of combining a number of methods.[38] Be this as it may, the method of comparing across Member States expresses an internal market rationale under which the EU institutions unavoidably operate.[39] Hence, this is another manifestation of the objective of internal market integration in the context of the application of Article 102.

Turning to the jurisdictional condition for the application of Article 102 concerning the effect on trade between Member States, its understanding by the EU courts also reflects the (constitutionally sound) preoccupation of the EU judiciary with the objective of integrating the internal market.[40] Particularly, the condition is met whenever a practice is capable of constituting a threat to freedom of trade between Member States in a manner 'which might

[36] For preliminary reference judgments also addressing excessive pricing see Case 30/87 *Corinne Bodson v SA Pompes funèbres des régions libérées* [1988] ECLI:EU:C:1988:225, paras 22-33; *Tournier* (n 35), paras 35-46; *SACEM* (n 35), paras 21-33; Case C-323/93 *Société Civile Agricole du Centre d'Insémination de la Crespelle v Coopérative d'Elevage et d'Insémination Artificielle du Département de la Mayenne* [1994] ECLI:EU:C:1994:368 (*Crespelle*), paras 23-27; Case C-52/07 *Kanal 5 Ltd and TV 4 AB v Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa* [2008] ECLI:EU:C:2008:703, paras 24-41; *OSA* (n 35), paras 87-92.

[37] *AKKA/LLA* (n 34), para 38.

[38] Case C-177/16 *Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v Konkurences padome* [2017] ECLI:EU:C:2017:689 (*AKKA/LLA*), Opinion of AG Wahl, paras 39-43.

[39] Alfonso Lamadrid, 'On Excessive Pricing and Subjectivity: The CJEU's Judgment in Case C-177/16 AKKA/LAA' (*Chillin'Competition*, 28 September 2017) <https://chillingcompetition.com/2017/09/28/on-excessive-pricing-and-subjectivity-the-cjeus-judgment-in-case-c-17717-akkalaa/> accessed 21 December 2019.

[40] Vasiliki Brisimi, *The Interface between Competition and the Internal Market: Market Separation under Article 102 TFEU* (Hart Publishing 2014) 28-39, concluding that the link between market integration and Article 102 is echoed in the jurisdictional requirement of 'effect on inter-state trade'. Similarly, in the context Article 101, see eg *Miller International Schallplatten* (n 4), para 7; Joined Cases C-89, 104, 114, 116, 117 and 125 to 129/85 *Ahlström Osakeyhtiö and Others v Commission* [1993] ECLI:EU:C:1994:12, para 176; T-176/95 *Accinauto SA v Commission* [1999] ECLI:EU:T:1999:100, para 104, reiterating the settled case law according to which 'by its nature, a clause designed to prevent a buyer from reselling or exporting goods he has bought is liable to partition the markets and consequently to affect trade between Member States'.

harm the attainment of the objectives of [the internal] market […], *in particular by partitioning the national markets*'.[41]

Altogether, the approach of the EU's institutions to these cases expresses the EU's specific concern over avoiding market partitioning and suppression of parallel trade.[42] Indeed, Article 102 has often been applied to prohibit practices of dominant firms which either aimed at restricting cross-border trade or had the effect of partitioning national markets. According to the EU courts' case law and the Commission's decisional practice, an alleged abuse within the meaning of Article 102 may consist of partitioning the internal market through any form of territorial restriction.[43] The EU institutions thus treat the integration of the internal market as a standalone objective of Article 102.

B. Hierarchically Superior Objective

It has been explained in chapter 2 that the interpretation of the Treaties as a whole would justify treating the integration of the internal market not only as a standalone ultimate objective pursued by Article 102 but also as its prime objective.

The hierarchical primacy of the objective of internal market integration in the context of Article 102 seems to be supported by the EU courts. Two broad issues may clarify this. The

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[41] Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission* [1979] ECLI:EU:C:1979:138, para 17 (emphasis added). See also *inter alia* Case C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECLI:EU:C:2001:577, para 47; Case C-407/04P *Dalmine SpA v Commission* [2006] ECLI:EU:C:2007:53, para 89; *AKKA/LLA* (n 34), paras 26-27.

[42] On this specific concern see *AB InBev Beer* (n 7), paras 234-41, where the Commission imposed a supplementary remedy on the dominant firm consisting of providing mandatory food information on products for sale in Belgium, France and the Netherlands for the next five years in order to enhance the possibility of parallel trade. See also Joined Cases C-468 to 478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* [2008] ECLI:EU:C:2008:180 (*Sot Lélos*), Opinion of AG Colomer, para 88, stressing that the free movement case law is relevant, at least inasmuch as it concerns practices on the part of dominant firms which have the aim or effect of partitioning national markets.

[43] For example *AB InBev Beer* (n 7), paras 89-93, stating that partitioning of the internal market by restricting cross-border trade is an abuse 'by nature'; Joined Cases C-468 to 478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* [2008] ECLI:EU:C:2008:504 (*Sot Lélos*), para 66.

first one follows from the implication in the *Sot Lélos* ruling that parallel trade enjoys a favourable treatment even when this may set at risk consumer interest. The second issue concerns the EU courts' stricter approach to above-cost pricing by dominant firms when the integration of Member States' economies is at stake, ie, when the practices in question have the supplementary effect of restricting cross-border trade.

i. *Sot Lélos: Parallel Trade and Consumer Interests*

Sot Lélos arose out of a series of questions referred to the Court of Justice by the Greek Competition Authority in a reference for a preliminary ruling.[44] The gist of the case was a dispute between GlaxoSmithKline ('GSK') and a number of independent Greek wholesalers of prescription medicines regarding refusal to supply and supply of restricted quantities of medicines, effectively limiting the wholesalers' ability to export to Member States in which medicines were sold for higher prices than in Greece.[45] Thus, the substantive legal issue was the application of Article 102 to a refusal to supply aiming at restricting parallel trade in the pharmaceutical sector.

A particular point in AG Jacobs' Opinion in this case is relevant to the present discussion.[46] In the context of assessing the highly peculiar nature of the pharmaceutical sector,[47] AG Jacobs emphasised that parallel trade in pharmaceutical products does not necessarily benefit the ultimate consumer or the Member States (as primary purchasers of such products), especially in Member States where the costs of pharmaceuticals are subsidised by

[44] Case C-53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] ECLI:EU:C:2005:333 (*Syfait*).

[45] ibid paras 5-19.

[46] Case C-53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] ECLI:EU:C:2004:673 (*Syfait*), Opinion of AG Jacobs.

[47] ibid paras 76-99.

public/state-sponsored insurance.[48] AG Jacobs thus concluded that 'a restriction of supply by a dominant pharmaceutical undertaking in order to limit parallel trade is capable of justification'.[49] However, he immediately qualified this conclusion by stressing that it is highly unlikely that any other sector would exhibit similar characteristics; and that, even in the pharmaceutical sector, a conduct by a dominant firm that would in a clearer and direct manner partition the internal market would not be open to a similar line of defence.[50] According to AG Jacobs, therefore, parallel trade holds a prominent position as a motor for the integration of markets in the EU. In this regard, his conclusion was mainly motivated by the fact that GSK's conduct had a limited contribution to the degree of market partitioning.[51]

In any event, the Court in *Syfait* ruled that it had no jurisdiction to answer the referred questions because the Greek Competition Authority is not a court or tribunal within the meaning of Article 267 TFEU, and hence dismissed the case on procedural grounds.[52] The Greek Court of Appeal, however, considered that it was necessary to have answers to the questions referred in *Syfait* in order to deliver its judgments, and thus referred the same questions to the Court of Justice.[53]

In *Sot Lélos* the Court held that refusing to supply pharmaceuticals to wholesalers with the admitted purpose to restrict competition constitutes an abuse under Article 102, which can only be defended by convincing reasons of objective justification.[54] AG Colomer in his

[48] ibid paras 96-99.

[49] ibid para 101.

[50] ibid paras 102-3.

[51] ibid para 103.

[52] *Syfait* (n 44), paras 37-38.

[53] *Sot Lélos* (n 43), para 23.

[54] ibid paras 36-39.

Opinion also proposed the exact same approach.[55] This is interesting because the first part of AG Colomer's Opinion reads like a manifesto against the current 'formalistic approach' of the EU courts and in favour of an 'effects-based approach' to Article 102;[56] and the latter approach typically associates infringements of the provision exclusively with harm to consumer welfare.[57]

Be this as it may, GSK attempted to justify its conduct by arguing that parallel trade brings no genuine benefit to the ultimate consumer in terms of price.[58] In contrast to AG Jacobs' analysis in *Syfait*, the Court in *Sot Lélos* seemed unimpressed by this argument, considering it irrelevant,[59] and holding that:

> there can be no escape from the prohibition laid down in [Article 102 TFEU] for the practices of an undertaking in a dominant position which are aimed at avoiding all parallel exports from a Member State to other Member States, practices which, by partitioning the national markets, neutralise the benefits of effective competition […].[60]

Article 102 therefore may not be interpreted in such a way as to allow a dominant pharmaceutical company not to place its medicines on the market at all in a Member State.[61] Consistently with AG Colomer's Opinion, the Court seems to have considered that a more lenient approach to a dominant firm's conduct aiming at the restriction of parallel exports would run counter to the established in Article 34 TFEU principle of free movement of goods

[55] *Sot Lélos*, Opinion of AG Colomer (n 42), paras 120-1.

[56] ibid paras 55-74.

[57] For instance see Douglas Melamed, 'Antitrust Law is Not That Complicated' (2017) 130 Harvard Law Review 163, 166, claiming that '"competition on the merits" means conduct that on balance increases output'. cf Kati Cseres, 'The Controversies of the Consumer Welfare Standard' (2006) 3 CML Rev 121, 151-2, arguing that 'the primacy of market integration among the policy goals of European competition law does not hold anymore'.

[58] *Sot Lélos* (n 43), para 45.

[59] ibid para 57.

[60] ibid para 66.

[61] ibid para 68.

and the corresponding case law.[62] Indeed, although the prohibition contained in Article 34 TFEU cannot be invoked against undertakings, the obligation not to impede freedom of trade between Member States applies to them by virtue of Articles 101 and 102.[63]

That being said, the Court accepted that a dominant supplier may take reasonable and proportionate measures to protect its legitimate commercial interests, including refusing orders that are out of the ordinary.[64] This has been understood as displaying 'the general message […] that the Court will not pursue market integration as a non-negotiable priority'.[65] In this regard, however, the Court did not reach its conclusion on the basis of the risks to consumer interest, nor did it assess the actual or potential effects of the conduct on consumer interest.[66] Rather, it considered that a dominant firm's conduct preventing parallel trade operates under a presumption of illegality which may only be rebutted if proved that it is a measure protecting legitimate commercial interests. This approach focuses on cross-border trade rather than on

[62] *Sot Lélos*, Opinion of AG Colomer (n 42), para 88.

[63] In the context of Article 101 see eg Joined Cases 96 to 102, 104 to 105, 108 and 110/82 *NV IAZ International Belgium and others v Commission* [1983] ECLI:EU:C:1983:310, paras 23-27; *Ahlström* (n 40), para 176; *Accinauto* (n 40), para 104; Case C-306/96 *Javico International and Javico AG v Yves Saint Laurent Parfums SA (YSLP)* [1998] ECLI:EU:C:1998:173, paras 13-14; C-551/03P *General Motors BV* (n 8), paras 67-69; Joined Cases C-501, 513, 515 and 519/06P *GlaxoSmithKline Services Unlimited v Commission* [2009] ECLI:EU:C:2009:610, paras 61-62; Joined Cases C-403 and 429/08 *Football Association Premier League and Others* [2011] ECLI:EU:C:2011:631, para 139, holding that agreements aimed at partitioning national markets according to national borders or making the interpenetration of national markets more difficult are considered to restrict competition by object, ie no analysis of the produced effects on the market is required for such agreements to be found to infringe Article 101(1). See also *Guess* (Case AT.40428) [2018] C(2018) 8455 final, para 135; *Ancillary Sports Merchandise* (Case AT.40436) [2019] C(2019) 2172 final, paras 110-1; *Character Merchandise* (Case AT.40432) [2019] C(2019) 5087 final, paras 80-83.

[64] *Sot Lélos* (n 43), paras 69-77.

[65] Stephen Weatherill, *Cases & Materials on EU Law* (12th edn, OUP 2016) 499.

[66] cf *GlaxoSmithKline* (n 63), paras 62-63, rejecting in the same context the requirement of consumer harm as a prerequisite for finding a breach of EU competition law.

consumer interest.[67] Indeed, had the Court taken into account consumer interest, it would have not presumed GSK's conduct illegal in the context of this particular market.[68]

This implies that preventing restrictions to cross-border trade takes precedence over direct consumer-related concerns in the context of Article 102.[69] Therefore, parallel trade enjoys a favourable treatment even when this may set at risk the interest of consumers. Ultimately, however, the promotion of internal market integration is regarded to be to the benefit of consumers: the creation and existence of a large and integrated market is a prerequisite for EU's economic growth, which, in turn, promotes consumer interest.[70] In light of the integration goal, the emphasis on the need to preserve a competitive market structure under Article 102 is sensible, since 'there can be no competition without competitors'.[71]

Overall, the fact that restrictions on parallel trade are presumptively abusive under Article 102, irrespective of the effects on consumers, suggests that the objective of integrating the internal market is a hierarchically superior objective compared to the other ultimate objective pursued by Article 102, ie the protection of consumer interest.

ii. *Discriminatory and Excessive Pricing under a Market Partitioning Angle*

The hierarchical primacy of the objective of market integration over the protection of the consumer interest is further supported by the application of Article 102 to certain types of practices on the part of dominant firms that are harmful to the integration of the internal market.

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[67] cf Massimo Motta, *Competition Policy: Theory and Practice* (CUP 2004) 14.

[68] cf *Syfait*, Opinion of AG Jacobs (n 46), paras 90-92.

[69] cf Anca Daniela Chirita, 'Undistorted, Un(fair) Competition, Consumer Welfare and the Interpretation of Article 102 TFEU' (2010) 33 WC 417, 430.

[70] Samkalden and Druker (n 34) 9.

[71] Iliana Nunez Osorio, '"A Test to Ban Rebates": Which Test is Applicable to Rebates under Article 102 TFEU?' (2012) 33(2) ECLR 91, 93.

Particularly, the approach of the Commission and the EU courts to discriminatory practices and excessive pricing exemplifies this.

Starting with discrimination, it was explained in chapter 3 that the principle of non-discrimination typically does not feature as a sole source of a finding of infringement under Article 102.[72] Indeed, as explained further down in this chapter, price discrimination is traditionally subject to a legality rule under Article 102.[73] That is, such a commercial practice is *prima facie* lawful when operated by a dominant firm. The legality rule in this context displays consumer interest because a discriminatory conduct, even when carried out by a dominant firm, may have beneficial effects on consumer welfare and result in progressive redistribution.[74] This rule, however, shifts to a presumption of illegality when the discriminatory pricing of the dominant firm is based on the place of residence or nationality of the buyer.

In *United Brands*, for example, the dominant firm was found to have abused its dominant position in the market for bananas by, *inter alia*, imposing discriminatory prices.[75] Specifically, the firm charged the lowest price for bananas destined for Ireland and the highest for those heading to West Germany.[76] Despite the potentially undesirable redistributive effects associated with legally preventing such a pricing policy,[77] the practice was condemned because

[72] eg Case C-525/16 *MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência* [2018] ECLI:EU:C:2018:270 (*MEO*), paras 25-26.

[73] eg Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECLI:EU:C:2012:172 (*Post Danmark I*), para 30.

[74] EAGCP, 'An Economic Approach to Article 82' (Brussels, July 2005) (EAGCP Report), 30-33; Chiara Fumagalli, Massimo Motta and Claudio Calcagno, *Exclusionary Practices: The Economics of Monopolisation and Abuse of Dominance* (CUP 2018) 127-35.

[75] *United Brands* (n 6), paras 204-34.

[76] ibid paras 209-13.

[77] Whish and Bailey (n 9) 809, stating that 'this would benefit the Germans at the expense of the Irish'.

the variations of the prices for bananas in the different Member States were 'obstacles to the free movement of goods'.[78] The Court made its motivation clear in the following passage of its judgment:

> a rigid partitioning of national markets was thus created at price levels, which were artificially different, placing certain distributor/ripeners at a competitive disadvantage, since compared with what it should have been, competition had thereby been distorted.[79]

Similarly, in *Irish Sugar* the principal supplier of sugar in Ireland was found to have infringed Article 102 by offering selective rebates to customers that were located near the border of Northern Ireland, ie only to those who could purchase cheaper sugar from the UK.[80] This practice amounted to abusive discriminatory pricing aiming at reducing imports of cheaper retail packets from northern Ireland into Ireland.[81] The General Court stressed in particular that:

> the influence of the pricing policy of operators active principally on a neighbouring market […] on that of operators active on another national market is the very essence of [an internal] market. Anything which restricts that influence must therefore be regarded as an obstacle to the achievement of that [internal] market and prejudicial to the outcome of effective and undistorted competition.[82]

The same strict approach is adopted by the EU institutions to non-pricing discriminatory practices of dominant firms when such discrimination is based on nationality or residence.[83] For example, in *OPCOM* the Commission found the operator of the exclusive power exchange

[78] *United Brands* (n 6), para 232.

[79] ibid para 233.

[80] *Irish Sugar plc* (Case IV/34.621, 35.059/F-3) Commission Decision 97/624/EC [1997] OJ L258/1, confirmed on this point in Case T-228/97 *Irish Sugar plc v Commission* [1999] ECLI:EU:T:1999:246, paras 173-93.

[81] T-228/97 *Irish Sugar* (n 80), para 179.

[82] ibid para 185.

[83] eg Case 155/73 *Giuseppe Sacchi* [1974] ECLI:EU:C:1974:40, para 17; Case 7/82 *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission* [1983] ECLI:EU:C:1983:52, paras 54-56; *1998 Football World Cup* (Case IV/36.888) Commission Decision 2000/12/EC [2000] OJ L5/55, paras 87-88; *AAMS* (n 8), paras 80 and 102.

in Romania to have abused its dominant position, by discriminating on the basis of nationality and place of establishment on the market for services facilitating short-term trading in electricity.[84] Specifically, OPCOM's VAT requirement discriminated against non-Romanian EU traders who were already established and registered for VAT in another Member State, because, contrary to domestic traders who only needed one VAT registration, EU traders were required to obtain a second VAT registration for Romania.[85] This conduct was considered an artificial national barrier to trade which hampered the completion of the internal market in energy,[86] a market where 'integration with neighbouring countries is at an early stage'.[87] The Commission's central concern was thus the advancing of internal market integration, through the promotion of free movement and inter-State trade.

This approach differs substantially from the pronouncement of the Court of Justice that the mere finding of discrimination would not be sufficient to find an abuse.[88] In fact, price discrimination is subject to a presumption of legality under Article 102.[89] On the contrary, charging discriminatory prices with the aim or the effect to prevent parallel trade is *prima facie* incompatible with Article 102.[90] Hence, a conduct that is subject to a legality rule, and thus deemed *prima facie* lawful even when implemented by a dominant firm, is subject to a

[84] *Romanian Power Exchange/OPCOM* (Case AT.39984) [2014] OJ C134/7, para 230.

[85] ibid para 129.

[86] Commission, 'Statement by Vice-President Joaquín Almunia on Antitrust Decisions on Power Exchanges' (Statement, 5 March 2014).

[87] *Romanian Power Exchange/OPCOM* (AT.39984) (n 84), para 36.

[88] *MEO* (n 72), paras 25-26.

[89] *Post Danmark I* (n 73), para 30.

[90] For other similar cases where price discrimination based on nationality or residence has been treated as *prima facie* abusive under Article 102 see eg *Tetra Pak II* (Case IV/31043) Commission Decision 92/163/EEC [1992] OJ L72/1, para 154-5 and 160, confirmed in Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECLI:EU:T:1994:246, paras 160-73, upheld on appeal in Case C-333/94P [1996] ECLI:EU:C:1996:436; Case C-18/93 *Corsica Ferries Italia Srl v Corpo dei Piloti del Porto di Genova* [1994] ECLI:EU:C:1994:195, para 45; Case T-128/98 *Aéroports de Paris v Commission* [2000] ECLI:EU:T:2000:290, paras 201-2, upheld in Case C-82/01P [2002] ECLI:EU:C:2002:617; *AAMS* (n 8), para 80.

prohibition rule if it entails the partitioning of the internal market. This approach is motivated by internal market considerations, which are deemed sufficient to convert the legality rule for discrimination to a presumption of illegality when the latter is based on nationality. To the extent, however, that discriminatory practices are subject to a legality rule because this better protects consumer interest, the significantly stricter approach to discrimination based on nationality points to the hierarchically superior nature of the objective of market integration in the context of Article 102.

Turning to excessive pricing, it must be stressed that the Commission has rarely enforced Article 102 to standalone excessive pricing cases.[91] This is so despite the fact that Article 102 explicitly prohibits dominant firms from 'imposing unfair purchase or selling prices'.[92] This is because of both the practical difficulties and the conceptual concerns involved in pursuing such investigations.[93] In practical terms, it is troublesome to set a standard for the identification of the dividing line between high and excessive prices, and thus to design a administrable legal test for exploitative pricing.[94] Unsurprisingly, therefore, the relevant rule

[91] On the renewed interest of NCAs in pursuing excessive pricing investigations see *Incremento Prezzo Farmaci Aspen* (Case A480) AGCM decision of 29 September 2016, where the Italian competition authority imposed a fine on Aspen for excessive pricing; *Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK* (Case CE/9742-13) CMA decision of 7 December 2016, where the UK's competition authority found that that Pfizer and Flynn had set excessively high prices; CMA, 'Pharmaceutical Company Accused of Overcharging NHS' (Press Release, 16 December 2016), where the CMA has issued a statement of objections alleging that Actavis UK has breached and continues to breach UK and EU competition law by charging excessive and unfair prices; CMA, 'Drug Company Accused of Abusing its Position to Overcharge the NHS' (Press Release, 21 November 2017), stating that the UK competition authority has provisionally found that Concordia abused its dominant position to overcharge the NHS by millions for an essential thyroid drug; CNMC, 'La CNMC incoa expediente sancionador contra el grupo Aspen y su distribuidor en España Deco Pharma por posibles prácticas abusivas' (Press Release, 3 February 2017), where the Spanish competition authority announced that it started a sanction procedure against Aspen for imposing excessive prices.

[92] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), art 102(c).

[93] Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (3rd edn, Sweet & Maxwell 2010) 237-44; Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart Publishing 2013) 733-6.

[94] David Evans and Jorge Padilla, 'Excessive Prices: Using Economics to Define Administrable Legal Rules' (2005) 1 JCLE 97; Claudio Calcagno and Mike Walker, 'Excessive Pricing: Towards Clarity and Economic Coherence' (2010) 6 JCLE 891, 909-10.

remains poorly defined within the body of Article 102 case law, thereby preventing companies from anticipating when their pricing policy is exploitative.[95] Additionally, in conceptual terms, dominant firms should also be permitted to fully take part in the competitive process,[96] even to charge high prices so as not to reduce their investments incentives.[97] Hence, the Commission's focus has traditionally been to exclusionary abuses[98] under the fear of acting as price regulator, and thus taking the place of the market.[99]

Even so, Article 102 has been actively enforced against excessive pricing that additionally involved market partitioning.[100] In the *Gasprom* case, for instance, the Commission adopted a commitment decision, obliging Gazprom to take positive steps to further integrate gas markets in Central and Eastern Europe, and thus assist in the creation of a

[95] Romano Subiotto, David Little, and Romi Lepetska, 'The Application of Article 102 TFEU by the European Commission and the European Courts' (2008) 9 JECLP 476, 480 and 482; Sophie Lawrance, Edwin Bond, and Matthew Hunt, 'AKKA/LAA, Coty, Hoffmann La Roche II and Others: A Survey of Cases at the Intersection between Competition Law and IP Law in the Past Year' (2018) 9 JECLP 537, 539.

[96] This is consistent with the following stipulations of the Treaties: Consolidated Version of the Treaty on the European Union [2012] OJ C326/13 (TEU), art 3(3), demanding the establishment of a highly competitive economy; TFEU (n 92), art 26(2), stipulating that the free movement of goods, persons, services and capital shall be ensured; TFEU (n 92), art 119, emphasising the principle of an open market economy with free competition. See Tjarda van der Vijver, 'Article 102 TFEU: How to Claim the Application of Objective Justifications in the Case of *prima facie* Dominance Abuses?' (2013) 4 JECLP 121, 129, arguing that this should be the starting point.

[97] Massimo Motta and Alexandre de Streel, 'Exploitative and Exclusionary Excessive Prices in EU Law' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2003: What is an Abuse of a Dominant Position?* (Hart Publishing 2006) 108-9; cf Ariel Ezrachi and David Gilo, 'Are Excessive Prices Really Self-Correcting?' (2009) 5 JCLE 249, 268, challenging the perception that excessive prices are self-correcting. Contrast *Sot Lélos*, Opinion of AG Colomer (n 42), para 113, finding 'the argument that the loss of income […] acts as a disincentive misleading, since it is aimed only at seducing public opinion'.

[98] See eg Commission, 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' (Communication) [2009] OJ C45/7 (Priorities Paper), paras 1 and 7, stipulating that the document relates only to exclusionary conduct by dominant firms; Commission, 'Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services' (Communication) [2018] OJ C159/1, focusing on exclusion in the context of the sectoral rules on dominance.

[99] Margerthe Vestager, 'Protecting Consumers from Exploitation' (at the Chillin' Competition Conference, Brussels, 21 November 2016), warning that competition authorities should not take the place of the market. See also Wolf Sauter, 'A Duty of Care to Prevent Online Exploitation of Consumers? Digital Dominance and Special Responsibility in EU Competition Law' (2019) JAE 11-12, arguing that '[s]olving the exclusion puzzle after all leads to self-correcting markets, rendering direct protection of consumers superfluous'.

[100] *General Motors Continental* (IV/28.851) (n 10); *Chiquita* (Case V/26.699) [1976] OJ L95/1; *BL* (IV/30.615) (n 10); *Deutsche Post* (COMP/C-1/36.915) (n 8).

true internal market for energy.[101] In the context of its preliminary assessment, the Commission found that the two major aspects of Gazprom's alleged abuse consisted of partitioning the internal market and of pursuing an exploitative pricing policy.[102] Particularly, it appeared that Gazprom executed an overall strategy of market segmentation via the implementation of a set of territorial restrictions, which had both stopped customers from reselling gas across borders and allowed Gazprom to charge high prices in certain countries.[103] In this regard, the Commission seemed persuaded that those prices were also exploitative under Article 102(a).[104] In a similar vein, the Commission opened its first ever formal investigation into concerns about excessive pricing practices in the pharmaceutical industry, in a case which the alleged abuse appears to also consist of partitioning the internal market contrary to Article 102.[105]

All in all, the significantly stricter approach to discrimination based on nationality coupled with the Commission's readiness to enforce Article 102 against excessive pricing that additionally involves market partitioning, further supports that the EU institutions view market integration as the prime objective pursued by Article 102. Consequently, the protection of the integrity of the internal market is a hierarchically superior standalone goal of Article 102.

II. Protection of Consumer Interest: Exclusionary Abuses as a Case-Study

Having established that the integration of the internal market is an ultimate and hierarchically superior goal of Article 102, this section turns to the second ultimate objective pursued by the

[101] *Gazprom* (n 7).

[102] ibid paras 38-88.

[103] ibid paras 61 and 79.

[104] ibid paras 62-79.

[105] Commission, 'Antitrust: Commission Opens Formal Investigation into Aspen Pharma's Pricing Practices for Cancer Medicines' (Press Release, 15 May 2017), stating that '[t]he Commission has information that, for example, to impose such price increases, Aspen has threatened to withdraw the medicines in question in some Member States and has actually done so in certain cases'.

prohibition of abuse of dominance. In this regard, the case law on exclusionary abuses is employed as a case-study to show that the EU courts deem consumer interest to be an ultimate objective of Article 102.[106] Particularly, the spectrum of legal rules applied to exclusionary practices are set out below so as to reveal that they reflect a broad spectrum of consumer-related proxies, which ensure the protection of different manifestations of consumer interest. This, in turn, entails a multi-goal approach under Article 102.

The fact that the legal tests to establish liability under Article 102 vary from one practice to another means that each of these proxies have different merit depending on the nature of the practice concerned and the facts of each individual case. More importantly, this approach ensures the practical functionality of Article 102. First, it gives the provision the aptitude to serve multiple objectives. Second, it operationalises the multi-goal and holistic approach to Article 102. Finally, third, it grants Article 102 the necessary flexibility to adapt to scenarios that do not fit neatly into existing categories.

A. A Spectrum of Tests under Article 102

It is evident from the relevant case law that there is not a unique legal test to establish liability under Article 102. Rather, there exists a spectrum of conduct-specific rules for the assessment of exclusionary practices by dominant firms.[107] It seems thus appropriate to group the different types of practices based on their legal treatment under Article 102. In this context, certain practices on the part of dominant firms are subject to a presumption of illegality, certain others

[106] The reason to focus on exclusionary practices is that Article 102 has predominately been applied to these forms of conduct. Certainly, the fact that Article 102 covers exploitative practices is the most obvious manifestation of the provision's objective to protect consumer interest. However, the scarcity of cases addressing exploitative abuses obstructs the ability to draw meaningful conclusions regarding the operation of the relevant test.

[107] Eirik Østerud, *Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law: The Spectrum of Tests* (Kluwer Law 2010) 49-54.

are subject to an *in concreto* evaluation of their (anti-)competitive impact, and others are subject to a legality rule.[108]

i. *Presumption of Illegality*

a. Predatory Pricing

A dominant firm may abuse its dominant position by engaging in a strategy of predatory pricing. This strategy consists of two phases, namely the profit-sacrifice phase and the recoupment phase ('Arreda-Turner rule').[109] At the first phase, the dominant firm reduces its prices to a loss-making level in order to exclude its actual competitors from the market and/or prevent the entrance of potential competitors. Having achieved the intended foreclosure of its competitors, the dominant firm is then able to raise its prices above the competitive level, thereby recouping its initial losses. The underlying concern with predation is that it might eliminate equally efficient (albeit financially weaker) competitors from the market, and hence harm consumers in the long run.[110]

In an attempt to simplify the assessment of predatory pricing, in its early case law the Court of Justice laid down two clear rules by using two cost benchmarks, namely average variable costs ('AVC') and average total costs ('ATC').[111] The first rule is that where a dominant firm sells its products or services at prices that are below its AVC, the firm is

[108] Pablo Ibáñez Colomo, 'Legal Tests in EU Competition Law: Taxonomy and Operation' (2019) 10 JECLP 424, 425-8, drawing a similar classification.

[109] Phillip Areeda and Donald Turner, 'Predatory Pricing and Related Practices under Section 2 of the Sherman Act' (1975) 88 Harvard Law Review 697, proposing a test that has been highly influential in competition law thinking.

[110] Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECLI:EU:C:1991:286 (*AKZO Chemie*), para 72. See also Commission, 'DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses' (Brussels, December 2005) (Discussion Paper), paras 93-133.

[111] *AKZO Chemie* (n 110), paras 71-72; Case C-333/94P *Tetra Pak International SA v Commission* [1996] ECLI:EU:C:1996:436 (*Tetra Pak II*), para 41. For an explanation of the different cost benchmarks see Alison Jones and Brenda Sufrin, *EU Competition Law* (6th edn, OUP 2014) 390-1.

presumed to be acting abusively.[112] Even so, the dominant firm may put forward a justification for its below-cost selling by arguing, for example, that it intended to dispose of old stock or that the pricing policy at issue was part of a temporary sales promotion.[113] The second rule is that where the prices of a dominant firm are above AVC but below ATC, the firm is guilty of abusive predation only if it is established that the pricing policy in question is part of a plan which is aimed at eliminating a competitor.[114] Therefore, a dominant firm's pricing policy that is found to be predatory based on the above set of tests is subject to a presumption of illegality. This is because the pricing policy is irrational and/or serves no economic purpose other than the exclusion of competitors.[115]

The EU courts have also accepted that different cost standards than the AVC and ATC may be applied in this regard, so as to better reflect the peculiarities of certain sector-specific industries.[116] For example, in *Post Danmark I* the Court of Justice did not object the use by the Danish competition authority of average incremental costs ('AIC') as the relevant benchmark.[117] In fact, in certain industries fixed costs are extremely high while variable costs

[112] *AKZO Chemie* (n 110), para 71; C-333/94P *Tetra Pak II* (n 111), paras 41-42.

[113] Case C-202/07P *France Télécom SA v Commission* [2009] ECLI:EU:C:2009:214, para 109. See also Priorities Paper (n 98), fns 19 and 43, stipulating that a dominant firm may rebut the presumption of predation by showing either that it is making revenue on the other side of the market, or that the *ex ante* decision to engage in the conduct was taken in good faith, ie it reasonably expected that the activity would be profitable.

[114] *AKZO Chemie* (n 110), para 72; C-333/94P *Tetra Pak II* (n 111), paras 41-42; Case T-340/03 *France Télécom SA v Commission* [2007] ECLI:EU:T:2007:22, paras 130 and 195, upheld on appeal in C-202/07P (n 113), paras 33 and 36. For a recent Commission decision in this regard see *Qualcomm (Predation)* (Case AT.39711) [2019] OJ C375/25, para 13.

[115] cf Gregory Werden, 'The "No Economic Sense Test" for Exclusionary Conduct' (2005) 31 J Corp L 293, 303.

[116] eg T-340/03 *France Télécom* (n 114), paras 131-54, upheld on appeal in Case C-202/07P (n 113). See also *Deutsche Post AG* (Case COMP/35.141) Commission Decision 2001/354/EC [2001] OJ L125/27, paras 35-36.

[117] *Post Danmark I* (n 73), para 38. See also *Qualcomm (Predation)* (n 114), para 13, where the Commission employed the Long Run Average Incremental Cost ('LRAIC') benchmark.

are low (eg, in the telecommunications industry), and hence it is reasonable to adjust the cost benchmarks accordingly.[118]

Even so, in addition to the *AKZO* test for predation, the ruling in *Post Danmark I* sets out a complementary framework for identifying predatory pricing.[119] According to this framework, where a firm holding a dominant position prices above its AIC but below ATC it will be found to have abused its position if 'that pricing policy, without objective justification, produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers' interests'.[120] Abusive predation can thus be established even where a dominant firm charges prices between AIC (or AVC) and ATC and an eviction strategy cannot be established. Hence, *Post Danmark I* supplemented the *AKZO* formula by extending the ground for intervention against below-cost pricing.[121]

b. Exclusivity Arrangements

Dominant firms may violate Article 102 by implementing exclusivity arrangements, such as exclusive dealing and exclusivity rebates. These practices comprise of exclusivity agreements and rebates having an equivalent object or effect, including rebates conditional upon exclusivity or quasi-exclusivity and rebate schemes that set individual targets corresponding to the customers' needs.[122] In other words, it concerns any agreement or discount which is

[118] See eg Commission, 'Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector' [2009] OJ C265/2, paras 110-6, considering LRAIC as the appropriate standard in the telecommunications sector.

[119] *Post Danmark I* (n 73).

[120] ibid para 44.

[121] Ekaterina Rousseva and Mel Marquis, 'Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU' (2013) 4 JECLP 32, 36.

[122] Colomo, 'Legal Tests in EU Competition Law' (n 108) 427.

conditional on the customer's obtaining all or most of its requirements from the undertaking in a dominant position.[123]

This is important because exclusivity rebates share common features with price-based conduct and exclusive dealing practices. This hybrid nature of exclusivity rebates has led to controversy as to the appropriate standard for their assessment in both EU competition law and US antitrust law.[124] The EU courts have essentially equated exclusivity rebates with exclusive dealing by highlighting that, unlike predatory pricing, the primary competition law concern in this context is the requirement of exclusivity rather than the price at which a firm sells its products or provides its services.[125]

According to a consistent line of case law, any dealing by a dominant firm that is explicitly or implicitly conditional upon (quasi-)exclusivity is, by its very nature, capable to distort the competitive process.[126] The EU judiciary has therefore introduced a presumption of

[123] For two decisions of the Commission concerning exclusivity payments see *Google Android* (Case AT.40099) [2018] C(2018) 4761 final, para 1188; *Qualcomm (Exclusivity Payments)* (Case AT.40220) [2018] C(2018) 240.

[124] See eg US Department of Justice, 'Competition and Monopoly: Single-firm Conduct under Section 2 of the Sherman Act (2008), <www.usdoj.gov/atr/public/reports/236681.htm> accessed 10 September 2018 (withdrawn); Jonathan Jacobson, 'A Note on Loyalty Discounts' (2010) Antitrust Source 1; Hans Zenger, 'Loyalty Rebates and the Competitive Process' (2012) 8 JCLE 717; Joshua Wright, 'Simple but Wrong or Complex but More Accurate? The Case for an Exclusive Dealing-Based Approach to Evaluating Loyalty Discounts' (Speech at the Bates White 10th Annual Antitrust Conference, Washington DC, June 2013); Hans Zenger, '*Intel* and the Future of Article 102' (CRA Competition Memo, June 2014) <http://ecp.crai.com/ecp/assets/Intel_and_the_future_of_Article_102.pdf> accessed 10 September 2018.

[125] eg Case C-549/10P *Tomra Systems ASA and Others v Commission* [2012] ECLI:EU:C:2012:221, paras 73-75 and 80; Case T-286/09 *Intel Corp. v Commission* [2014] ECLI:EU:T:2014:547, paras 99, 107-8 and 152. cf James Venit, 'Case T-286/09 *Intel Corp. v Commission* - The Judgment of the General Court: All Steps Backward and No Steps Forward' (2014) 10 EC J 203, 227; Damien Geradin, 'Loyalty Rebates after *Intel*: Time for the European Court of Justice to Overrule *Hoffman-La Roche*' (2015) 11 JCLE 579, 581, arguing that it is inconsistent to treat exclusivity rebates more strictly than these other forms of pricing behaviours.

[126] *Suiker Unie* (n 5), para 518; Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECLI:EU:C:1979:36 (*Hoffmann-La Roche*), paras 89-90; Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECLI:EU:C:1983:313 (*Michelin I*), para 71; T-65/89 *BPB Industries* (n 8), para 120, upheld on appeal in Case C-310/93P [1995] ECLI:EU:C:1995:101; Case T-219/99 *British Airways plc v Commission* [2003] ECLI:EU:T:2003:343, paras 244-5, upheld on appeal in Case C-95/04P [2007] ECLI:EU:C:2007:166; Case T-57/01 *Solvay SA v Commission* [2009] ECLI:EU:T:2009:519, paras 316-7 and 365; Case T-66/01 *Imperial Chemical Industries Ltd v Commission* [2010] ECLI:EU:T:2010:255, paras 296 and 315; Case T-155/06 *Tomra Systems ASA and Others v Commission* [2010] ECLI:EU:T:2010:370, para 209, upheld on appeal in C-549/10P

illegality for these practices, considering them *prima facie* abusive under Article 102.[127] In practice, this means that exclusivity agreements and rebates that have economic effects akin to exclusive dealing are deemed to distort the competitive process regardless of their specific effects on the market.[128] Thus, contractually obliging a buyer to purchase exclusively or quasi-exclusively from the dominant supplier or offering a substantial rebate on condition of exclusive purchasing is not regarded to be competition on the merits under Article 102.

The rationale for subjecting exclusivity arrangements by a dominant firm to a presumption of illegality is that such arrangements tie customers to the dominant firm on the basis solely of its market power.[129] Indeed, a firm that is said to enjoy such economic strength that it is able 'to behave to an appreciable extent independently of its competitors, customers and ultimately its consumers',[130] presumably operates in a market where it is also an unavoidable trading partner.[131] This entails that competitors cannot compete for the full supply of a customer but only for part of it (ie, the contestable share).[132] Under these circumstances, implementing exclusivity arrangements might make it impossible for a rival to effectively compete for the contestable share of the market.[133] Exclusivity arrangements thus deprive

(n 125); Case C-23/14 *Post Danmark A/S v Konkurrencerådet* [2015] ECLI:EU:C:2015:651 (*Post Danmark II*), para 27; T-286/09 *Intel* (n 125), para 85.

[127] eg *Hoffmann-La Roche* (n 126) para 90; T-155/06 *Tomra* (n 126), para 209, upheld on appeal in C-549/10P (n 125); T-286/09 *Intel* (n 125), paras 72, 73, 80-88, 102-106 and 143; Case C-413/14P *Intel Corp. v Commission* [2017] ECLI:EU:C:2017:632, para 137.

[128] ibid. cf Pablo Ibáñez Colomo, '*Intel* and Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy' (2014) LSE Legal Studies Working Paper 29/2014, <http://ssrn.com/abstract=2530878> accessed 21 January 2018, 4, arguing that this is not an accurate assumption.

[129] Eg *Hoffmann-La Roche* (n 126), para 89; C-413/14P *Intel* (n 127), para 137.

[130] *United Brands* (n 6), para 65. See also *Hoffmann-La Roche* (n 126), para 39.

[131] *Hoffmann-La Roche* (n 126), para 41; T-155/06 *Tomra* (n 126), para 269.

[132] This may be because the dominant undertaking is the only firm having the production capacity to satisfy the whole share of the demand. In this vein see T-286/09 *Intel* (n 125), paras 90-93, 103, 141, 178.

[133] Richard Whish, '*Intel v Commission*: Keep Calm and Carry on!' (2014) 6 JECLP 1, 2. cf Alison Jones, 'Distinguishing Legitimate Price Competition from Unlawful Exclusionary Behaviour: Reconciling and Rationalising the Case-law' (2015), King's College London Law School Research Paper 2015-29,

customers of their ability to choose their supplier(s) according to their needs and simultaneously deprive competitors of their ability to present in an effective manner their products or services to customers.[134] This is not considered to be competition on the merits because it is the result of the firm's market power, rather than being achieved via the dominant firm's superior performance.

In the context of the application of Article 102 to exclusivity rebates,[135] however, the Court of Justice has clarified that the presumption of illegality may be rebutted independently of the dominant firm's possibility to advance an efficiency claim and/or an objective justification.[136] In particular, the Court in *Intel* held that a dominant firm may submit arguments that its conduct is not capable of having anticompetitive effects in the specific market context.[137] If these arguments are sufficiently substantiated, the presumption of illegality is rebutted and the Commission must address the evidence and establish anticompetitive effects based on a full analysis of all the relevant circumstances.[138] This consists of a market analysis that must cover the extent of the dominant position, the coverage of the rebate, the duration and amount of the rebate, as well as the existence of a strategy aiming to foreclose

<http://ssrn.com/abstract=2614413> accessed 10 September 2018, 5, arguing that this approach is liable to chill aggressive low-cost pricing.

[134] *Hoffmann-La Roche* (n 126), para 90; *Michelin I* (n 126), paras 85-86; T-286/09 *Intel* (n 125), paras 72-73, 76-77, 86 and 90.

[135] The expression 'exclusivity rebates' better describes the legal concern with this form of commercial practice. The terms 'loyalty' and 'fidelity' are potentially misleading and slippery, since any rebate granted by any firm, whether dominant or not, has the purpose and the potential effect to induce loyalty. It would, however, be incompatible with the aims of competition policy to apply the strict treatment of exclusivity rebates to any payment schedule granted by a dominant firm that rewards larger orders with lower prices. Hence, this category only includes rebates that have effects akin to exclusive dealing.

[136] C-413/14P *Intel* (n 127), para 140.

[137] ibid 138.

[138] ibid 138-40.

competitors.[139] In the context of this analysis, the as-efficient competitor ('AEC') test is a relevant proxy that cannot be disregarded *a priori*.[140]

The judgment in *Intel*, however, upheld the principle that exclusive dealing and rebates conditional upon exclusivity are *prima facie* prohibited under Article 102 without the need to carry out a market analysis.[141] In practical terms, therefore, offering exclusivity rebates still carries significant legal risks for dominant market players.[142] Specifically, a dominant firm would have to overcome a presumption of illegality, and, even then, the Commission may establish a distortion of the competitive process on the basis of an analysis of all the circumstances of the case.

c. Tying

Dominant firms may also infringe Article 102 by conditioning, either *de jure* or *de facto*, the acquisition of one product or service to the acquisition of another.[143] Tying thus refers to a commercial practice by which a firm sells different products or services together, thereby inducing or requiring customers to purchase both these products or services. This can be

[139] ibid 139. See also *Google Android* (AT.40099) (n 123), para 1189. cf Massimiliano Kadar, 'Article 102 and Exclusivity Rebates in a Post-Intel World: Lessons from the Qualcomm and Google Android Cases' (2019) 10 JECLP 439, 443, claiming that the judgment of the Court of Justice in *Intel* will not have a 'revolutionary' impact on the Commission's decisional practice, because the Commission has always assessed the capability of rebates to restrict competition.

[140] *Post Danmark II* (n 126), paras 58 and 61; C-413/14P *Intel* (n 127), para 147.

[141] For subsequent decisions of the Commission recalling that exclusivity arrangements are subject to a presumption illegality under Article 102 see *Google Android* (AT.40099) (n 123), para 1188; *Qualcomm (Exclusivity Payments)* (n 123).

[142] Commission, 'Antitrust: Commission Imposes Interim Measures on Broadcom in TV and Modem Chipset Markets' (Press Release, 16 October 2019), informing that the Commission issued an interim measures decision in a case where the dominant firm is, at first sight, infringing Article 102 by implementing, *inter alia*, exclusivity arrangements.

[143] TFEU (n 92), art 102(d).

achieved by different means, such as through contractual arrangements, by granting discounts or via the technological amalgamation of two different products.[144]

According to the relevant case law, the following conditions must be fulfilled for a tying practice to be found abusive within the meaning of Article 102: the tying and tied products must constitute two separate products; the undertaking concerned must be dominant in the market for the tying product; and the undertaking concerned must not give customers a choice to obtain the tying product without the tied product.[145] Such a practice has traditionally been considered to have an inherently exclusionary nature or, to put it differently, to be by its very nature capable of foreclosing competitors and restricting competition.[146] Thus, tying practices are subject to a presumption of illegality, being considered *prima facie* incompatible with Article 102 regardless of their impact on the competitive process.[147]

In this regard, it is contended that a tying practice enables a dominant undertaking to leverage its position of dominance from the market where it holds this position to the tied product's market where it faces competition.[148] This is because a firm that possesses such a market power affording it the ability to behave independently of all other market actors has the capacity to harm competition even in adjacent markets.[149] Tying is thus considered to have an inherently exclusionary effect because it deprives customers of choice, prevents suppliers

[144] Case T-201/04 *Microsoft Corp v Commission* [2007] ECLI:EU:T:2007:289, paras 963 and 967-9.

[145] T-201/04 *Microsoft* (n 144), paras 842, 859, 862, 864, 867, 869 and 1144-67.

[146] Case T-30/89 *Hilti AG v Commission* [1991] ECLI:EU:T:1991:70, paras 100-1; T-83/91 *Tetra Pak II* (n 90), paras 136-7, confirmed on appeal in C-333/94P (n 111), para 37. See also *Microsoft (Tying)* (Case COMP/C-3/39.530) [2009] OJ C242/2 (*Microsoft II*), para 34.

[147] T-201/04 *Microsoft* (n 144), para 868. See also *Microsoft* (Case COMP/C-3/37.792) [2004] OJ L32/23, para 841; *Google Android* (AT.40099) (n 123), para 749. cf T-201/04 *Microsoft* (n 144), paras 1041, 1043 and 1060-77.

[148] T-83/91 *Tetra Pak II* (n 90), para 135; T-201/04 *Microsoft* (n 144), paras 1019 and 1327.

[149] Discussion Paper (n 110), paras 180-1.

entering the market, and allows a dominant firm to expand in adjacent but related markets by shielding itself from effective competition.[150] Similarly to exclusivity rebates, tying is objectionable under Article 102 because its market outcome is deriving from the dominant firm's market power and is unrelated to the dominant firm's investments in innovation, creativity or superior efficiency.

ii. *Evaluation of Specific Competitive Impact*

a. Residual Category of Rebates

The EU judiciary has divided rebates offered by dominant firms into three segments, namely exclusivity (alternatively, loyalty or fidelity) rebates, quantity rebates, and other conditional rebates which may have a 'loyalty-inducing effect'.[151] According to this categorisation, thus, a residual category of rebates has been identified, which comprises of standardised rebate schemes that are neither solely based on volume nor formally conditional upon exclusivity, but where the mechanism for granting those rebates 'may also have a fidelity-building effect'.[152]

Such a rebate may be one where a dominant firm grants financial incentives which are not linked to any obligation to obtain all or a given proportion of supplies from it, but, instead, subjects the discounts to the attainment of sales objectives.[153] In this regard, if the threshold level of the contested rebate matches the amount of units the buyer would anyhow purchase over the course of the year it would amount to a *de facto* exclusivity rebate. If this is not the case, then it must be examined whether the rebate in question leads either to prices which are

[150] T-83/91 *Tetra Pak II* (n 90), paras 137 and 213; T-201/04 *Microsoft* (n 144), para 1088.

[151] *Post Danmark II* (n 126), paras 27-29. See also T-286/09 *Intel* (n 125), paras 75-78.

[152] Case T-203/01 *Manufacture Française des Pneumatiques Michelin v Commission* [2003] ECLI:EU:T:2003:250 (*Michelin II*), para 59; T-219/99 *British Airways* (n 126), para 272; *Post Danmark II* (n 126), para 28. See also T-286/09 *Intel* (n 125), para 78.

[153] See eg *Michelin I* (n 126), para 72; T-219/99 *British Airways* (n 126), para 275.

below the dominant firm's production costs or to the exclusion of an equally efficient competitor.[154]

In any event, the abusive nature of such a rebate is established on the basis of an assessment of 'all the circumstances' relating to the case.[155] Until recently, however, the EU courts had not voiced in a systematic manner the factors that must be taken into account in the context of the analysis of 'all the circumstances'. Hence, the criticism that it was sufficient to identify some factors hinting at the 'loyalty-inducing' nature of the scheme to establish a *prima facie* violation of Article 102 seemed legitimate.[156] In *Post Danmark II*, however, the Court clarified that under the 'all the circumstances' standard one must conduct a full effects-based analysis of the rebate in its market context.[157] Contrary thus to the findings in *Michelin II* and *British Airways*,[158] the *in concreto* capability of standardised rebates to distort the competitive process must be evaluated under Article 102.

In this connection, much turns on the facts of the case. For example, rebates granted by dominant firms operating in a highly regulated market should expect greater scrutiny, while the approach would presumably be more lenient in the context of an open and dynamic market.[159] The factors that must be examined under this analysis include: the extent of the

[154] cf C-413/14P *Intel* (n 127), paras 134, refraining from defining less efficient competitors in purely static cost-efficiency terms, describing them rather as those that are 'less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation'.

[155] eg *Michelin I* (n 126), para 73; *Michelin II* (n 152), para 60; T-219/99 *British Airways* (n 126), paras 270-1; *Imperial Chemical* (n 126), paras 299-303; T-155/06 *Tomra* (n 126), paras 214-5, upheld on appeal in C-549/10P (n 125), para 71; *Post Danmark II* (n 126), para 29.

[156] Pablo Ibáñez Colomo, '*Post Danmark II*, or the Quest for Administrability and Coherence in Article 102 TFEU' (2015) LSE Legal Studies Working Paper 15/2015, <http://ssrn.com/abstract=2636407> accessed 10 September 2018, 15.

[157] *Post Danmark II* (n 126), paras 29-50.

[158] In particular see *Michelin II* (n 152), para 241; T-219/99 *British Airways* (n 126), para 288.

[159] Konstantinos Sidiropoulos, '*Post Danmark II*: A Clarification of the Law on Rebates under Article 102 TFEU' (*European Law Blog*, 11 December 2015) <http://europeanlawblog.eu/?p=3013> accessed 10 May 2016, arguing that this is economically sensible and the very essence of a proper effects-based analysis.

dominant position and the particular conditions of competition prevailing on the relevant market;[160] the *modus operandi* of the scheme;[161] the share of the market covered by the challenged rebate;[162] and the existence of a strategy aiming to exclude from the market competitors that are at least as efficient as the dominant firm.[163] Consequently, the (un)lawfulness of this type of rebates depends on the evaluation of their effects in the specific market context.

b. Margin Squeeze

The term 'margin squeeze' describes the conduct of a vertically integrated dominant firm that engages in a strategy which favours its own downstream operations to the detriment of the other players operating on a downstream market. This occurs where a firm is dominant in the upstream market and supplies a key input to undertakings that compete with it in a downstream market.

An abusive margin squeeze is determined by reference to the unfair spread between wholesale and retail prices, regardless of whether these prices are themselves excessive, discriminatory or predatory.[164] The result of the unfairness of the spread of these vertically

[160] Of relevance, for instance, are the barriers to entry, the significance of economies of scale and scope, and the portion of the market that is (non-)contestable.

[161] Relevant elements in this regard include: its retroactive or incremental nature, the conditions and arrangements for granting it, its duration, and its amount.

[162] C-413/14P *Intel* (n 127), para 139. Contrast T-155/06 *Tomra* (n 126), paras 231-42, upheld on appeal in C-549/10P (n 125), paras 42 and 46; T-286/09 *Intel* (n 125), paras 116-20 and 194; *Post Danmark II* (n 126), paras 73-74, holding that 'the possible smallness of the parts of the market which are concerned by the practices at issue is not a relevant argument'. For criticisms against this disturbing aspect of the case law see Whish, '*Intel v Commission'* (n 133) 2. See also Zenger, 'Loyalty Rebates' (n 124) 750, arguing that exclusivity rebates tend to lower prices rather than generating anticompetitive effects where foreclosure covers too small a part of the market to actually marginalise the dominant undertaking's rivals.

[163] *Post Danmark II* (n 126), paras 35, 39, 40 and 46.

[164] Case T-271/03 *Deutsche Telekom AG v Commission* [2008] ECLI:EU:T:2008:101, para 167; Case C-280/08P *Deutsche Telekom AG v Commission* [2010] ECLI:EU:C:2010:603, para 255; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECLI:EU:C:2011:83 (*TeliaSonera*), paras 32 and 34; Case T-398/07 *Kingdom of Spain v Commission* [2012] ECLI:EU:T:2012:173, para 67.

related prices is that the vertically integrated dominant firm is able to drive out of the market or marginalise its downstream competitors, and thereby improve the competitive position of its own downstream operations.[165] Put simply, a dominant firm may infringe Article 102 if it supplies an essential input for the production of a product both to its own subsidiary and to other rivals in a downstream market, and manipulates the relationship of its upstream and downstream prices so as to squeeze the profits of its downstream competitors and improve the position of its subsidiary.

According to the case law, the components of the test for establishing a margin squeeze are: the identification of an upstream and a downstream market;[166] the existence of a vertically integrated firm holding a dominant position on the upstream market and being active on the downstream market;[167] the setting of upstream and downstream prices by the dominant firm at levels that would allow an insufficient margin for an equally efficient competitor to perform profitably in the downstream market;[168] and the absence of an efficiency and/or objective justification.[169]

Hence, an abusive margin squeeze exists only when it is demonstrated that the practice implemented by the dominant firm has '*an anticompetitive effect* which may potentially exclude *competitors who are at least as efficient* as the dominant firm'.[170] The crucial question

[165] C-280/08P *Deutsche Telekom* (n 164), paras 252-54; *TeliaSonera* (n 164), para 80; *Spain v Commission* (n 164), para 93.

[166] *TeliaSonera* (n 164), para 87; *Spain v Commission* (n 164), para 38.

[167] ibid.

[168] Case T-5/97 *Industrie des Poudres Sphériques v Commission* [2000] ECLI:EU:T:2000:278, para 180; T-271/03 *Deutsche Telekom* (n 164), para 237, on appeal in C-280/08P (n 164), paras 177, 252-53; *TeliaSonera* (n 164), paras 32-46, 64-66, 74 and 112; *Spain v Commission* (n 164), paras 67-68.

[169] *TeliaSonera* (n 164), para 76.

[170] *TeliaSonera* (n 164), para 64 (emphasis added). See also Case T-851/14 *Slovak Telekom v Commission* [2018] ECLI:EU:T:2018:929, para 255.

thus is whether the downstream operation of the vertically integrated firm could itself operate profitably in case it was charged the same input prices as the competitor.[171] However, it has also been held that a pricing policy that forces an equally efficient rival to sell at a loss on the downstream market is not abusive in itself.[172] Rather, it is necessary to consider the economic and legal context in which the practice is implemented, including the extent of the dominant position and the features of the relevant market, so as to establish an anticompetitive effect.[173]

c. Refusal to Deal

It is well-established in EU competition law that, as a matter of principle, an undertaking enjoys the freedom to choose its trading partners, irrespective of its market power.[174] This is a direct manifestation of the, recognised in EU primary law, freedom to conduct a business.[175] However, as it was held in the *Magill* case, under certain 'exceptional circumstances', a dominant firm may be breaching Article 102 by refusing to deal.[176]

The 'exceptional circumstances' under which a dominant firm's refusal to deal will be contrary to Article 102 were further specified in subsequent judgments.[177] First, two distinct

[171] *Slovak Telekom* (n 170), paras 230-4, 243 and 252-5.

[172] C-280/08P *Deutsche Telekom* (n 164), para 250.

[173] *Slovak Telekom* (n 170), paras 151-3 and 259. See also C-280/08P *Deutsche Telekom* (n 164), para 255; *TeliaSonera* (n 164), para 69, holding that the indispensability of the input for downstream rivals may also be taken into account.

[174] Joined Cases C-241, 242/91P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* [1995] ECLI:EU:C:1995:98 (*Magill*), para 46; Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint* [1998] ECLI:EU:C:1998:569, para 44.

[175] Charter of Fundamental Rights of the European Union [2012] OJ C326/391 (CFREU), art 16.

[176] *Magill* (n 174), para 50. See also eg Case C-170/13 *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland Gmb* [2015] ECLI:EU:C:2015:477, para 47; *Slovak Telekom* (n 170), para 144. For a case where the dominant firm was required to provide information to its trading partners under the applicable regulations see eg T-486/11 *Orange Polska S.A., formerly Telekomunikacja Polska S.A. v Commission* [2015] ECLI:EU:T:2015:1002, confirmed on appeal in C-123/16P [2018] ECLI:EU:C:2018:590.

[177] *Oscar Bronner* (n 174), paras 39-41; Case C-418/01 *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2000] ECLI:EU:C:2004:257 (*IMS Health*), paras 36-38 and 52; T-201/04 *Microsoft* (n 144), para 332.

markets must be identified, namely an upstream market where the firm that refuses to supply enjoys a dominant position, and a downstream market in which the supply is refused.[178] Second, the refusal of the dominant firm must concern a product or a service the supply of which is indispensable for carrying on the business in question.[179] In this regard, the dominant firm must have either withdrawn access to a physical input or refused to deal with a would-be competitor on a neighbouring market.[180] Furthermore, in particular in cases where the relevant input is an intangible asset protected by IP rights,[181] for the refusal to infringe Article 102 it must also prevent the appearance of a new product for which there is potential consumer demand.[182] Finally, the refusal must be likely to exclude all competition in the secondary market.[183]

Consequently, a refusal to deal by a dominant firm requires an *in concreto* examination of the effects of the refusal in question, and a balancing of conflicting considerations.[184] Particularly, the supplied input must, at the very least, be indispensable to compete on the

[178] Joined Cases 6, 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* [1974] ECLI:EU:C:1974:18 (*Commercial Solvents*), para 22. cf *IMS Health* (n 177), para 44, holding that this condition is satisfied with the mere finding of a 'a potential or even a hypothetical upstream market'.

[179] *Commercial Solvents* (n 178), paras 24-25; Case 311/84 *Centre belge d'études de marché - Télémarketing (CBEM) v SA Compagnie* [1985] ECLI:EU:C:1985:394, para 26; *Oscar Bronner* (n 174), paras 40-46; *Slovak Telekom* (n 170), paras 115-21. On the requirement of indispensability see also T-201/04 *Microsoft* (n 144), paras 369-436.

[180] ibid.

[181] See also T-201/04 *Microsoft* (n 144), paras 283-90, discussing the approach to intangible property that is not protected by IP rights without, however, reaching a conclusion as to whether the relevant test would be the same.

[182] *Magill* (n 174), para 54; *IMS Health* (n 177), paras 48-49. See also T-201/04 *Microsoft* (n 144), para 647, holding that this condition is also satisfied where there is a limitation of technical development.

[183] *Magill* (n 174), paras 30 and 56; *Oscar Bronner* (n 174), paras 27, 38 and 41; *IMS Health* (n 177), para 52; *Slovak Telekom* (n 170), para 115. cf T-201/04 *Microsoft* (n 144), para 563, holding that what matters is whether the 'refusal at issue is liable to, or is likely to, eliminate all *effective* competition on the market'. Hence, it is not 'necessary to demonstrate that all competition on the market would be eliminated'. See also *ARA Foreclosure* (Case AT.39759) [2016] C(2016) 5586, paras 112-3.

[184] *Oscar Bronner* (n 174), paras 39-41; *IMS Health* (n 177), paras 36-38 and 52; T-201/04 *Microsoft* (n 144), para 332; *Huawei* (n 176), paras 42 and 56. For a recent Commission decision illustrating this see *ARA Foreclosure* (n 183), paras 74-121.

relevant market for a dominant firm to infringe Article 102 via a refusal to deal. What is more, in cases involving a refusal to license a copyright or a patent, the indispensability criterion is not sufficient to trigger liability under Article 102. In this context, evidence must be provided that additionally shows that the refusal in question prevents the emergence of a new product.[185] Therefore, the relevant test for the assessment of a refusal to deal under Article 102 clearly requires an analysis of the specific competitive impact of the practice. However, it additionally calls for evidence either that the input is indispensable or that both the input is indispensable and the refusal of its supply obstructs the appearance of a new product.[186]

iii. *Presumption of Legality*

a. Quantity Rebates

In the context of the EU courts' three-fold classification of rebates for the purposes of Article 102, quantity rebates are subject to a legality rule under Article 102, meaning that they are deemed *prima facie* lawful when offered by dominant firms.[187] Quantity rebates are standard rebates for buying large quantities, ie, discounts which are solely linked to the volume of purchases made from the undertaking occupying a dominant position. These types of rebates represent cost savings, such as distribution and packaging savings, which the dominant firm is entitled to pass on to customers in the form of lower prices. The Court of Justice in *Post Danmark II* clarified that for a rebate to qualify as a quantity discount it must satisfy three

[185] cf *Huawei* (n 176), paras 48-56, showing that this condition may not fully apply when the patent at issue is essential to a standard established by a standardisation body.

[186] Colomo, 'Legal Tests in EU Competition Law' (n 108) 427-8, calling this an 'enhanced effects test' and contrasting it to the standard analysis of effects in cases of non-exclusivity rebates and margin squeeze.

[187] eg Case C-163/99 *Portuguese Republic v Commission* [2001] ECLI:EU:C:2001:189, para 50; *Michelin II* (n 152), para 58; T-219/99 *British Airways* (n 126), para 246, on appeal in C-95/04P (n 126), para 84; T-155/06 *Tomra* (n 126), para 212; *Post Danmark II* (n 126), para 27.

cumulative conditions: be at once volume-based, standardised and incremental.[188] Therefore, the legality rule applies only insofar as the rebates are given in respect of each individual order and reflect the dominant firm's actual cost savings.

It follows that quantity rebates can only be found unlawful if the authority or claimant provide convincing evidence that the rebates in question bear no relationship with the economies of scale made by the dominant firm. In instances where such evidence is provided, the presumption is rebutted and the capability of the rebates to harm the competitive process must be assessed. For example, in *Portugal v Commission* the Court accepted that the rebates offered by the State-owned airport operator were crafted in a way that favoured incumbent operators and were not justified by economies of scales or other cost savings, despite the fact that they were formally based on volume.[189] The EU courts thus enshrined a rebuttable presumption of legality for quantity rebate schemes implemented by dominant firms.

b. Exclusionary Discrimination

A dominant firm may attempt to exclude its competitors by implementing discriminatory practices, including discriminatory pricing and the application of dissimilar trading conditions.[190]

In this regard, selective low pricing has been found to be an exclusionary abuse within the meaning of Article 102. Such a practice consists of the selective diminution of a dominant undertaking's prices as part of a plan to exclude a rival from the market. Contrary to predation

[188] The case concerned a retroactive standardised rebate scheme and the Court treated it as belonging to the residual third category of rebates: *Post Danmark II* (n 126), para 28. See also Zenger, 'Loyalty Rebates' (n 124) 722, who was vindicated on this point.

[189] *Portugal v Commission* (n 187), paras 52-53. See also *Michelin II* (n 152), para 75.

[190] TFEU (n 92), art 102(c).

cases, when a dominant firm engages in selective price cuts it prices above its costs.[191] Thus, insofar as the underlying logic of the prohibition of predation does not apply, the emphasis of the legal analysis is on the conduct's selectiveness which is aiming at eliminating competitors.[192] However, the EU courts have not always been consistent as to the legal treatment of such a pricing policy.

The issue arose in *Compagnie Maritime Belge*, which concerned a liner conference collectively holding a market share of over 90% and only one competitor.[193] The conduct involved the combination of the scheduling by the conference of its sailings at the same time as its competitor and the offering of lower (albeit not predatory) prices for shipping. The Court found that the purpose of this practice was to eliminate the one and only competitor from the market, and hence constituted an abuse of collective dominance.[194] Similarly, in *Irish Sugar* the dominant firm offered favourable prices to certain retailers that were viewed as most vulnerable to imports while also holding over 88% of the market.[195] The General Court upheld the Commission's condemnation of this practice but suggested that in such cases it is necessary to consider all the circumstances, in particular whether there is a plan of eliminating competition.[196]

This is a strict approach to discriminatory pricing. However, these cases involved exceptional circumstances, such as the very high market shares of the undertakings concerned,

[191] On the economics of such a conduct see Fumagalli, Motta and Calcagno (n 74) 140-3.

[192] Ariel Ezrachi, *EU Competition Law: An Analytical Guide to the Leading Cases* (5th edn, Hart Publishing 2016) 205.

[193] Joined Cases C-395, 396/96P *Compagnie Maritime Belge Transports and Others v Commission* [2000] ECLI:EU:C:2000:132, para 119.

[194] ibid paras 112-19.

[195] T-228/97 *Irish Sugar* (n 80), paras 173 and 186.

[196] ibid para 114.

the intention to eliminate all competition, the fact that a number of practices were implemented that had the cumulative effect of eliminating competition, and the lack of any efficiency rationale.[197] Indeed, in *Post Danmark I* the Grand Chamber of the Court of Justice clarified that:

> charging different customers different prices for goods or services whose costs are the same or, conversely, charging a single price to customers for whom supply costs differ, *cannot of itself* suggest that there exists an exclusionary abuse.[198]

The ruling in *Post Danmark I* thus asserted that the charging of discriminatory pricing is not itself abusive. Similarly, in *MEO* it has been re-affirmed that the mere finding of discrimination would not be sufficient to find an abuse within the meaning of Article 102.[199] In this context, the Court highlighted that even where discrimination would affect the trading partner's costs and profits, the effect might be too small to deduce that it is 'capable of having any effect on the competitive position of that operator'.[200]

To the extent therefore that discrimination alone does not distort the competitive process, price discrimination is subject to a presumption of legality under Article 102.[201] Price discrimination may, however, be abusive if evidence suggests an exclusionary effect on an 'as efficient competitor'.[202] Moreover, selective price cuts may be abusive if it is established that they produce an actual or likely exclusionary effect 'to the detriment of competition and,

[197] O'Donoghue and Padilla (n 93) 339-42.

[198] *Post Danmark I* (n 73), para 30 (emphasis added).

[199] *MEO* (n 72), paras 25-26.

[200] ibid para 34.

[201] Colomo, 'Legal Tests in EU Competition Law' (n 108) 427, rightly emphasising that 'it is not abusive for a dominant firm to price aggressively (whether it does so selectively or across the board), provided that the prices charged remain above [ATC]'.

[202] *Post Danmark I* (n 73), para 38; *MEO* (n 72), para 31.

thereby, of consumers' interests'.[203] This would require rebutting the presumption of legality and establishing a distortion of the competitive process based on an analysis of all the circumstances.[204]

B. Efficiency Claims and Objective Justification

Article 102 lacks an explicit provision stipulating the possibility for a dominant firm to put forward a defence or justification for its conduct. However, it is now well established that a dominant firm may always advance a plea of efficiency defence and/or objective justification in order to defend itself against a *prima facie* finding of abusive conduct.[205] In fact, despite certain initial contradictory statements,[206] the EU judiciary allows dominant firms to escape the application of the prohibition expressed in Article 102 by claiming efficiency or public interest considerations.[207]

It has been explained that the EU institutions seem to regard the two doctrines as being separate defences within Article 102.[208] In the context of the efficiency defence, a dominant firm may argue that its conduct is based on criteria of economic efficiency and is consistent

[203] *Post Danmark I* (n 73), para 44. See also *Post Danmark I* (n 73), paras 34-39; *MEO* (n 72), para 31, highlighting that it is necessary to take into account in particular the possible existence of a strategy aiming to exclude a competitor.

[204] As explained above, however, discriminatory pricing by dominant firms is subject to a presumption of illegality when it involves the partitioning of the internal market.

[205] Tjarda van der Vijver, 'Objective Justification and Article 102 TFEU' (2012) 35 WC 55, 65-68.

[206] See Joined Cases T-191, 212 to 214/98 *Atlantic Container Line AB and Others v Commission* [2003] ECLI:EU:T:2003:245, para 1112.

[207] For example see *United Brands* (n 6), para 184; *CBEM* (n 179), paras 26-27; T-30/89 *Hilti* (n 146), paras 115-9; T-83/91 *Tetra Pak II* (n 90), para 220; *Magill* (n 174), para 55; T-228/97 *Irish Sugar* (n 80), paras 189; T-340/03 *France Télécom* (n 114), para 217; T-201/04 *Microsoft* (n 144), paras 1091-167; C-95/04P *British Airways* (n 126), paras 69 and 85-87; *TeliaSonera* (n 164), paras 75-76; *Post Danmark I* (n 73), paras 40-41; C-413/14P *Intel* (n 127), para 140.

[208] cf van der Vijver, 'Article 102 TFEU: How to Claim the Application of Objective Justifications' (n 96), 121-2, arguing that there are three sources of defence, namely one based on legitimate business behaviour, one concerning efficiency considerations, and one relating to public interest concerns.

with the interests of consumers.[209] In this regard, the efficiency defence incorporates a second analytical step into Article 102 comparable to the one existing in Article 101(3), in which the analysis focuses on economic efficiencies and consumer surplus. As to objective justification, this mechanism ensures the ability of dominant firms to justify their conduct on the basis of non-economic considerations, such as public health, safety and environmental protection.[210] Overall, a dominant firm may put forward efficiency or public interest claims so as to defend itself from a *prima facie* finding of abusive conduct, regardless of whether this finding is based on a presumption of illegality or on an evaluation of the specific competitive impact of the conduct.

C. Tests Reflecting a Plurality of Consumer-Related Objectives

The case law on exclusionary abuses shows that there is a spectrum of tests under Article 102. In other words, the legal tests to establish liability under Article 102 vary from one practice to another. All these tests, however, have one particular element in common, namely they are all designed to promote the ultimate objective of protecting consumer interest. This is achieved by means of multiple consumer-related proxies, each of which expresses different forms of consumer harm, thereby denoting the plurality of goals pursued by Article 102.

In this context, the EU courts consider the interests of consumer as being about much more than just low prices, treating as relevant proxies in this respect: consumer choice and unrestricted market entry, dynamic efficiency and innovation, as well as consumer surplus and productive efficiency.[211] It is apparent from the applied tests under Article 102 that, depending

[209] C-95/04P *British Airways* (n 126), para 86; *TeliaSonera* (n 164), paras 31 and 75-76; *Post Danmark I* (n 73), paras 40-41; C-413/14P *Intel* (n 127), para 140.

[210] T-30/89 *Hilti* (n 146), paras 115-9; T-83/91 *Tetra Pak II* (n 90), paras 83-84 and 138. See also *CECED* (Case IV.F.1/36.718.) Commission Decision 2000/475/EC [2000] OJ L187/47, paras 55-63.

[211] Eugene Buttigieg, *Competition Law: Safeguarding the Consumer Interest: A Comparative Analysis of US Antitrust Law and EC Competition Law* (Wolters Kluwer 2009) 382.

on the nature of the practice concerned and the facts of each individual case, certain of these proxies are more relevant than others in the zeal for protecting consumer interest.

First, in certain instances, having in mind that competition in the market means a structure of decentralised economic power, the EU courts consider that diminishing the available choices to an unacceptable level might be more troubling than the effects of a conduct on prices.[212] In this regard, consumer choice exists only insofar as there are reasonable options of suppliers to choose from. Hence, protecting consumer choice entails ensuring unrestricted market entry, namely securing the freedom of non-dominant firms to access the market and trade on the merits without artificial obstacles constructed by dominant firms.[213]

In cases concerning exclusivity rebates and tying practices, for example, the designed tests are predominantly based on consumer choice and unrestricted market entry. According to the case law, these practices tie customers to the dominant firm, thereby denying both consumer choice and rivals' market presence.[214] The EU courts have enshrined a presumption of illegality for these business practices, considering that the competitive process will, in principle, be distorted. This approach is based on the assumption that the implementation of tying and exclusivity rebates on the part of dominant firms is a manifestation of inefficient behaviour exhibited by firms lacking the motivation to use their resources efficiently due to the absence of effective competitive pressure.[215] In other words, the dominant firms' preference for these practices and their potential impact on the market are considered to be the product of market

[212] cf Eleanor Fox and Lawrence Sullivan, 'Antitrust-Retrospective and Prospective: Where Are We Coming From? Where Are We Going?' (1987) 62 NYU L Rev 936, arguing that '[a]ntitrust is rooted in a preference for pluralism, freedom of trade, access to markets, and freedom of choice'.

[213] cf Eleanor Fox, 'What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect' (2002) 70 ALJ 371, 395.

[214] eg *Hoffmann-La Roche* (n 126), para 90; T-83/91 *Tetra Pak II* (n 90), paras 137. See also *Microsoft* (COMP/C-3/37.792) (n 147), para 835.

[215] cf van der Vijver, 'Article 102 TFEU: How to Claim the Application of Objective Justifications' (n 96) 129.

power, rather than being the result of competition on the merits.[216] In this context, therefore, the prevailing proxies are consumer choice and unrestricted market entry, but other proxies are also relevant, such as the different forms of efficiencies and innovation.[217]

Similarly, consumer choice and unrestricted market entry are the focal points on the basis of which the Court of Justice dismissed the argument that the possibility of recouping loses must been shown for establishing predatory pricing under Article 102.[218] Specifically, the Court in *France Télécom* held that:

> the lack of any possibility of recoupment of losses is not sufficient to prevent the undertaking concerned reinforcing its dominant position, in particular, following the withdrawal from the market of one or a number of its competitors, so that the degree of competition existing on the market, already weakened precisely because of the presence of the undertaking concerned, is further reduced and *customers suffer loss as a result of the limitation of the choices available to them*.[219]

Second, in certain other instances, the identification of a distortion of the competitive process is based primarily on the actual or prospective effects of the examined conduct on innovation and dynamic efficiency. That is to say, in certain cases innovation and dynamic efficiency are the critical proxies that guide the assessment of the dominant firm's conduct. Examples of dominant firms' conduct that are assessed in this way involve the refusal to supply goods or

[216] This is implicit in T-83/91 *Tetra Pak II* (n 90), paras 137 and 213; T-201/04 *Microsoft* (n 144), para 1088; *Imperial Chemical* (n 126), para 315, holding that these practices 'are not based on an economic transaction which justifies this burden or benefit'.

[217] See T-201/04 *Microsoft* (n 144), para 1159, clarifying that relevant efficiencies are not confined to economic considerations in terms of price and cost but may consist of technical improvements in the quality of the goods or services. In the context of assessing the merits of efficiency claims see C-95/04P *British Airways plc* (n 126), para 86; *Post Danmark I* (n 73), paras 40-41; C-413/14P *Intel* (n 127), para 140.

[218] Paul Nihoul, 'Freedom of Choice: The Emergence of a Powerful Concept in European Competition Law' (2012) 3 Concurrences Review 55, 59.

[219] C-202/07P *France Télécom* (n 113), para 112 (emphasis added).

services,[220] the refusal to access an essential facility,[221] and the refusal to license IP rights to prevent the development of a new product or to limit the development of a new market.[222]

It is well-established in EU competition law that an undertaking enjoys the freedom to choose its trading partners, irrespective of its market power. AG Jacobs has described the relevant considerations in this context in the following terms:

> [i]n the long term it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus, while competition [would increase] in the short term it would be reduced in the long term. Moreover, the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits.[223]

In principle, thus, a dominant firm cannot be obliged to supply others with goods or services.[224] Depending on the facts of the case, however, it is sometimes appropriate to restrict, with the appropriate compensation, the dominant undertaking's freedom to refuse to supply a trading partner. This is the case, for instance, where: i) access to a facility is a precondition for competition on a related market for goods or services for which there is a limited degree of interchangeability;[225] ii) the exercise of IP rights by a firm holding a monopoly over a product, service or facility will lead to a permanent restriction of competition on a related market;[226] iii)

[220] eg *Commercial Solvents* (n 178); Case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission* [2009] ECLI:EU:T:2009:317.

[221] eg *Slovak Telekom* (n 170).

[222] eg *Magill* (n 174).

[223] Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint* [1998] ECLI:EU:C:1998:264, Opinion of AG Jacobs, para 57.

[224] Case 238/87 *AB Volvo v Erik Veng (UK) Ltd* [1988] ECLI:EU:C:1988:477, para 11.

[225] eg C-280/08P *Deutsche Telekom* (n 164), para 234.

[226] eg *Magill* (n 174).

duplication of the facility is impossible or extremely difficult owing to physical or geographical constraints or is highly undesirable for reasons of public policy;[227] or iv) the cost of duplicating a facility constitutes itself an insuperable barrier to entry.[228] Consequently, under certain exceptional circumstances, a dominant firm may infringe Article 102 by refusing to deal, but this would require an *in concreto* examination of all the relevant circumstances of the case.

The most pertinent relevant proxies in these cases are innovation and dynamic efficiencies. Indeed, the assessment is focused on the effects of the conduct in question on efficiencies resulting from R&D and innovation, which may lead to the introduction of new or improved products or processes. In this regard, by considering alongside the impact of the imposition of an obligation to supply on investment in innovation and the consumer harm generated by a refusal to supply (in terms of preventing the introduction of innovative goods of services and/or stifling likely follow-on innovations) the EU courts protect the interests of present and future consumers.[229] This is so irrespective of the ultimate outcome in each individual case, ie whether the *in concreto* result is the affirmation of the freedom to deal or the imposition of an obligation to supply. An obligation to supply in this context would be an attempt to secure an open and accessible market environment in order to encourage dynamic efficiencies.[230]

The predominantly employed proxies in all the above-mentioned tests are concentrated on market effects other than near-term efficiencies associated with price, output and production costs. Therefore, it is not always necessary to identify a direct link between a business practice

[227] eg *E.ON Gas* (Case COMP/39.317) [2010] C(2010) 2863 final, paras 36-41.

[228] cf *Oscar Bronner*, Opinion of AG Jacobs (n 223), para 66.

[229] T-201/04 *Microsoft* (n 144), paras 648, 656 and 658.

[230] cf Heike Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing 2008) 162.

and the reduction of consumer surplus in order to find a breach of Article 102. The EU courts have generally dismissed the importance of consumer welfare in terms of price and output effects; and, in fact, have never explicitly used the term in an Article 102 case.[231] Nevertheless, consumer surplus and production efficiency are not wholly irrelevant in Article 102 cases. On the contrary, they are taken into account across the spectrum of the designed legal tests.

First, certain tests under Article 102 are focused on the structure of cost and profitability, thereby taking into account the actual or likely results of the conduct under investigation on price and/or output. The most obvious examples of such unilateral exclusionary practices are predatory pricing and margin squeeze. Particularly, the legal frameworks for analysing both these pricing policies have as benchmarks the dominant firm's production costs and the price charged for the product or service.[232] Hence, the effects on near term productive efficiencies and the immediate interests of consumers in terms of price and output are examined. However, other consumer-related proxies are also considered in this context. For instance, in the case of predatory pricing, consumer choice is also a relevant proxy to the extent that it is not necessary to prove the possibility of recoupment in order to establish an abusive predatory pricing practice.

Similarly, near-term efficiencies associated with price, output and production costs are the predominant proxies underpinning the presumption of legality for the assessment of quantity rebates and price discrimination under Article 102. Starting with quantity rebates, they fall in principle outside the scope of Article 102 because they reflect cost savings made by a dominant firm in the context of a particular transaction. These savings may safely be regarded to stem from the dominant firm's superior efficiency, and hence the dominant firm is entitled

[231] Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Hart Publishing 2012) 135.

[232] Similarly on excessive pricing see *United Brands* (n 6), paras 248-52.

to pass them on to customers in the form of lower prices. As regards price discrimination, charging differentiated prices alone is regarded compatible with Article 102 because it entails cost savings which may result in an increase of output.[233] This may potentially allow new consumer/customers to be reached and increase market participation.[234] Hence, price discrimination has exclusively beneficial effects to allocative and productive efficiencies when it is not part of an exclusionary device.

Finally, the proxies of consumer surplus and production efficiencies directly come into play in all Article 102 cases in the context of assessing efficiency claims. The relevant efficiencies, however, are not confined to economic considerations in terms of price and cost but may also consist of technical improvements in the quality of the goods or services.[235] In this regard, one may legitimately question the usefulness of the consumer surplus proxy when applied, for example, to multi-sided platforms usually resulting in 0€ markets for final consumers.[236] In any event, consumer surplus and production efficiency remain relevant, despite the fact that the EU courts have refused to accept consumer welfare as the primary goal pursued by Article 102 and consistently placed value on other aspects of consumer interest, including choice and innovation.[237]

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[233] cf Fumagalli, Motta and Calcagno (n 74) 191, arguing that it may also give greater incentives to invest and thereby resulting in dynamic efficiency gains.

[234] ibid. The fact that price discrimination is subject to legality rule under Article 102 is compatible with the economic interpenetration desired by the EU Treaties because it may lead to increasing market participation.

[235] eg T-201/04 *Microsoft* (n 144), para 1159. This is consistent with the provision of Article 101(3) TFEU, which has been used as a model for the progressive development by the CJEU of a second stage of analysis under Article 102.

[236] cf Ariel Ezrachi, 'EU Competition Law Goals and the Digital Economy' (2018) Oxford Legal Studies Research Paper 17/2018, <https://ssrn.com/abstract=3191766> accessed 6 January 2019, 6; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition Policy for the Digital Era' (Report commissioned by the Commission, EU 2019) 20-22.

[237] cf Victoria Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' (2015) CL Rev 131, 151-2.

All in all, the different proxies that the EU institutions employ to find a distortion of the competitive process under Article 102 are expressing different forms of consumer harm. This denotes the plurality of consumer-related objectives pursued by Article 102, which ensures the protection of aggregate consumer interest. In this regard, the EU institutions consider that a 'Chicago-oriented' approach to Article 102, where consumer welfare and static efficiencies are the only relevant concerns for its application, takes an unduly narrow view of the benefits of undistorted competition.[238] Hence, via the protection of the competitive process, the EU institutions seek to keep markets contestable, open and accessible to newcomers so as to protect consumer interest.[239]

III. Multi-Goal and Holistic Approach Reconciled

The analysis so far has unveiled that the applied tests to unilateral practices of dominant firms reflect the multi-goal approach to Article 102. Particularly, the provision is triggered when the competitive process is distorted, and this is revealed by means of multiple proxies which ensure the integrity of the internal market and the protection of consumer interest. This section purports to show that the substantive interpretation of Article 102 is consistent with the constitutionally required holistic approach that has been discussed in chapter 3. In this regard, the designed tests are compatible with the requirement of integrating social policies into Article 102 insofar as they incorporate values external to market competition.

[238] cf Wouter Wils, 'The Judgment of the EU General Court in Intel and the so-called "More Economic Approach" to Abuse of Dominance' (2014) 37 WC 405, 414.

[239] Johannes Laitenberger, 'Enforcing EU Competition Law: Principles and Illustrations' (at the Institut d'études européennes, Université Libre de Bruxelles, Brussels, 29 May 2018); Crémer, de Montjoye and Schweitzer (n 236) 14. Contrast Federico Etro and Ioannis Kokkoris, 'Toward an Economic Approach to Article 102 TFEU' in Federico Etro and Ioannis Kokkoris (eds), *Competition Law and the Enforcement of Article 82* (OUP 2010) 35, arguing that EU's approach to exclusionary practices is 'linked to a naïve version' of the post-Chicago School, which considers that market failures are not necessarily self-correcting and that firms with substantial market power can take advantage of market imperfections.

A. Internal Market Integration and Socio-Political Concerns

Article 102 promotes the integration of markets in the EU by prohibiting restrictions on cross-border trade. In practice, this means removing barriers to entry for dominant firms' rivals, thus allowing a pluralistic market structure with diversified sources of supplies.[240] In particular, pursuing the objective of internal market integration in the context of Article 102 ensures open and accessible markets with better prices and enhanced choice for consumers. In fact, allowing for the existence of more buyers and sellers through the application of Article 102 combined with the EU initiatives creating a supportive market environment for SMEs improve the opportunities of small businesses to enter new markets and compete on fair terms.

This approach integrates social policies into Article 102, consistently with Article 7 TFEU, Article 9 TFEU, and the commitment to a highly competitive social market economy. First, insofar as the application of Article 102 makes sure that small businesses participate in market competition, it promotes inclusive growth and redistribution of wealth. Second, enabling SMEs to effectively present their product and services on the market promotes Article 9 TFEU's objective of a 'high level of employment', since they are the most important source of employment in the EU. Finally, this approach gives due regard to the key role of SMEs in shaping EU's economy.

In certain cases, however, a dominant firm's practice that prevents parallel trade may have desirable redistributive effects. This is the case, for example, when a dominant firm charges higher prices to consumers in prosperous Member States and offers lower prices to those located in poorer Member States.[241] Prohibiting such a pricing policy under Article 102

[240] cf Pinar Akman, 'The Role of "Freedom" in EU Competition Law' (2014) 34 LS 183, 211, arguing that this may have led to the misinterpretation of the relevant case law as being exclusively concerned with the maintenance of rivalry.

[241] See *United Brands* (n 6), 209-13, where the firm charged the lowest price for bananas destined for Ireland and the highest for those heading to West Germany.

based on a finding of a market partitioning effect may result in transferring wealth from poorer consumers to richer ones, since consumers located in poorer Member States would have to pay a higher proportion of their income.[242] Even so, redistribution of income and other socio-political values are not wholly irrelevant in this context. Particularly, practices of dominant firms that restrict parallel trade may be found compatible with Article 102 as long as they are reasonable and proportionate to ensure a legitimate economic or public interest.[243] Hence, claims based on redistributive justice or on securing an adequate and continuous supply of products may rebut the *prima facie* illegality of a practice that limits parallel trade.[244]

Altogether, pursuing the internal market objective under Article 102 complements policies that specifically aim to achieve wealth redistribution and other equality-related objectives. Therefore, the objective of protecting the integrity of the internal market is reconciled with the constitutionally required holistic approach to Article 102, since pursuing this economic objective is consistent with promoting policies of social nature.

B. Protection of Consumer Interest and Equality-Related Concerns

Similarly, pursuing the objective of protecting consumer interest through multiple consumer-related proxies under Article 102 is compatible with the promotion of the socio-political concerns that have been identified in chapter 3.

First, the objective of protecting consumer interest may overall help address inequality in the context of the application of Article 102. This is so to the extent that Article 102 does not permit a dominant firm's conduct that would harm consumers while benefiting wealthy

[242] See Whish and Bailey (n 9) 808-9, criticising the judgment in *United Brands* on this ground.

[243] cf TFEU (n 92), art 36.

[244] *Sot Lélos* (n 43), paras 69-77.

businesses and shareholders.[245] It must be stressed in this context that protecting consumer interest may in principle increase inequality in instances where customers or consumers are wealthier than suppliers.[246] However, it is rather hard to imagine circumstances in which a dominant firm would be less well-off than its consumers. In any event, consistently with the definition of dominance,[247] the Commission has tended to enforce Article 102 against firms holding extreme market power, where their unequal and asymmetrical position compared to both their rivals and their customers and consumers were guaranteed.[248]

Second, protecting consumer interest through multiple consumer-related proxies under Article 102 incidentally protects SMEs from strategic and inefficient conduct where a dominant firm invests in an exclusionary fight. This is the case, for example, when a dominant firm charges predatory prices, grants exclusivity rebates, or implements tying practices. In such cases, SMEs' economic freedom would be eliminated as a result of a dominant firm's significant market power, rather than being the result of competition on the merits and superior performance. It is worth recalling that under a socially committed market economy the

[245] Jonathan Baker and Steven Salop, 'Antitrust, Competition Policy, and Inequality' (2015) 104 Geo LJ 1, 16-17.

[246] Daniel Crane, 'Antitrust and Wealth Inequality' (2016) 101 Cornell Law Review 1171, 1175.

[247] *United Brands* (n 6), para 65. cf *Virgin/British Airways* (Case IV/D-2/34.780) Commission Decision 2000/74/EC [2000] OJ L30/1, which is the only finding of dominance under Article 102 where the firm held a market share of below 40%. See also Priorities Paper (n 98), para 14, stipulating that 'dominance is not likely if the undertaking's market share is below 40 % in the relevant market'.

[248] For the most recent enforcement actions see eg *Google Search (Shopping)* (Case AT.39740) [2007] C(2017) 4444 final; *Google Android* (n 123); Commission, 'Antitrust: Commission Fines Google €1.49 Billion for Abusive Practices in Online Advertising' (Press Release, 20 March 2019); *Qualcomm (Exclusivity Payments)* (n 123); *Qualcomm (Predation)* (n 114); *AB InBev Beer* (n 7); Commission, 'Antitrust: Commission Opens Formal Investigation into Aspen Pharma's Pricing Practices' (n 105); Commission, 'Antitrust: Commission Opens Investigation into Possible Anti-competitive Conduct of Amazon' (Press Release, 17 July 2019); Commission, 'Antitrust: Commission Imposes Interim Measures on Broadcom' (n 142). For an example of a Commission decision rejecting a complaint that was based on the identification of dominance in a narrowly defined market see *Greek Horse Race Betting* (Case AT.40265) [2016] C(2016) 5841 final. For a case where judicial review guaranteed the high threshold for the identification of dominance see Case T-691/14 *Servier SAS and Others v Commission* [2018] ECLI:EU:T:2018:922, para 1607, annulling the Commission's finding of dominance in a narrowly defined relevant market. See also Margerthe Vestager, 'Defining Markets in a New Age' (at the Chillin' Competition Conference, Brussels, 9 December 2019), announcing that the Commission is currently reviewing the Notice on market definition.

competition rules must ensure a performance-based competition, where performance based on merits is rewarded. Thus, prohibiting these practices is justifiable in this context.[249] Be this as it may, by incidentally protecting SMEs, Article 102 also indirectly promotes the SMEs' beneficial by-products of improved distribution of income, employment growth, and overall social balance.

Third, insofar as improving income distribution can promote democracy, the application of Article 102 may safeguard the latter through the channel of protecting consumer interest.[250] In fact, pursuing the objective of protecting consumer interest under Article 102 could reduce income inequality, which, in turn, could promote democracy.[251] The broad understanding of the ultimate objective of protecting consumer interest also gives due regard to the ability of small businesses to compete in the market, thereby indirectly addressing the democratic threat posed by the existence of market dominance.[252] Hence, the broad understanding of the goals pursued by Article 102 is consistent with the need to preserve the conditions for democracy in the EU.[253]

Overall, the designed tests for assessing the unilateral conduct of dominant firms are consistent with the constitutionally required holistic approach to Article 102. Particularly, the employed tests are compatible with equality-related socio-political concerns, and thus Article

[249] cf Conor Talbot, 'Ordoliberalism and Balancing Competition Goals in the Development of the European Union' (2016) 61 Antitrust Bulletin 264, 267.

[250] cf Tay-Cheng Ma, 'Antitrust and Democracy: Perspectives from Efficiency and Equity' (2016) 12 JCLE 233, 257.

[251] ibid 251.

[252] Lina Khan and Sandeep Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and its Discontents' (2017) 11 Harvard Law and Policy Review 235, 270 and 275-6; Ganesh Sitaraman, 'Unchecked Power: How Monopolies have Flourished—and Undermined Democracy' (*New Republic*, 29 November 2018) <https://newrepublic.com/article/152294/unchecked-power> accessed 25 December 2019; Naomi Lamoreaux, 'The Problem of Bigness: From Standard Oil to Google' (2019) 33 Journal of Economic Perspectives 94.

[253] cf Joseph Stiglitz, 'America Has a Monopoly Problem—and It's Huge' (*The Nation*, 23 October 2017), arguing that competition law is 'really about the nature of our society and democracy'.

102 indirectly accounts for inequality and other social-political concerns. Therefore, Article 102 assists in the promotion of an internal market based on a highly competitive social market economy through the requirement of consistency between EU's policies.

C. Objective Justification

It has already been explained in chapter 3 that the judge-created legal construct of objective justification also reflects the constitutionally mandated holistic approach to Article 102. This is because advancing an objective justification under Article 102 enables public policy considerations that are unrelated to market competition to find their way into the analysis. Particularly, it involves weighing the identified competitive restriction of a dominant firm's conduct against the non-economic benefits resulting from it. Hence, this offers a tool allowing the EU institutions to balance restrictions of competition against a range of values of public interest under Article 102.

Issues relating to, *inter alia*, employment, industrial policy, safety, public health, and the environment come directly into play in the context of a proportionality analysis, exceptionally leading to the *ad hoc* exclusion of the application of Article 102. Consequently, the objective justification mechanism ensures that Article 102 is interpreted and enforced in a manner that would not in the specific context contravene other distinct objectives that are pursued by the EU. This provides for the *ad hoc* reconciliation of the economic objectives of Article 102 with other policies of social nature that the EU is committed to pursue.

IV. EU Constitutional Peculiarities and the Necessity of Clear Rules

The discussion documented that the relevant case law reflects the constitutional requirements of a multi-goal and holistic approach to Article 102. Particularly, the employed tests enable Article 102 to simultaneously pursue its economically oriented objectives and promote other socio-political concerns that are compatible with EU's commitment to a highly competitive

social market economy. The designed rules thus permit Article 102 to operate according to the constitutional role imposed on it by the Treaties, namely as a means to achieve the Treaties' broader objectives.

In this regard, the designed rules under Article 102 protect both the integrity of the internal market and the multiple facets of consumer interest. Moreover, the same rules ensure the incorporation of socio-political values unrelated to market competition into the analysis of Article 102. This is manifested in the context of both the consistency of the rules with inequality-related concerns and the availability of the objective justification tool. The former ensures that the application of Article 102 does not contradict policies of social nature, while the objective justification confirms that the application of Article 102 in a particular case should not disproportionally disable socio-political aims. This framework contributes to the establishment of an internal market based on a highly competitive social market, thereby reconciling the market-oriented objectives of Article 102 with policies of a social nature.

The practical functionality of this multi-goal and holistic approach to Article 102 is based on the reliance on presumptions that form clear rules.[254] In fact, the legal tests are based on presumptions that reflect the objectives pursued by Article 102 and account for the Treaties' broader objectives. First, practices of dominant firms that partition the internal market are subject to a presumption of illegality because Article 102 aims primarily to protect the integrity of the internal market. Second, certain practices on the parts of dominant firms are presumed to be either legal or illegal based on the normative choices of the EU Treaties. On the one hand, quantity rebates and discriminatory pricing are presumed to be legal because economic theory and practical experience dictate that they promote both consumer interest and redistributive

[254] cf Wils, 'The Judgment of the EU General Court in Intel' (n 238) 422. See also Stucke (218) 620, arguing that competition authorities and courts must blend the pursued goals 'into clearer rules and presumptions' in order to operationalise multiple goals in a systematic manner.

justice. On the other hand, predatory pricing, exclusivity arrangements, and tying practices are presumed to be illegal, because in the overwhelming majority of cases they produce exclusionary effects resulting from the dominant firm's market power rather than from its superior performance. These illegality rules are thus justified because they are protecting consumer interest while also being compatible with the commitment to a highly competitive social market economy. Finally, certain other practices are subject to legal tests that are based on a case-by-case evaluation of multiple elements but are also conduct-specific tests so as to ensure the effective enforcement of Article 102.[255]

Generally, designing rules that rely on presumptions in the context of applying the prohibition on abuse of dominance appeases the predictability and administrability concerns.[256] Particularly, introducing presumptions provides for clear, foreseeable and administrable rules, and thereby for legal certainty and velocity in the decision-making process.[257] This, in turn, ensures conformity of the rules with fundamental rule-of-law principles.[258] First, presumptions

[255] On the point that effectiveness and clarity of the rules are valid rationales for introducing presumptions see Case C-97/08P *Akzo Nobel NV and Others v Commission* [2009] ECLI:EU:C:2009:262, Opinion of AG Kokott, para 71, stressing that '[t]he effective enforcement of competition law requires clear rules'; Case C-90/09P *General Química SA and Others v Commission* [2011] ECLI:EU:C:2010:517, Opinion of AG Mazák, para 61, stating that the functions of presumptions 'is to facilitate the effective enforcement of competition law while promoting legal certainty'.

[256] David Bailey, 'Presumptions in EU Competition Law' (2010) 31 ECLR 362, 366; Wils, 'The Judgment of the EU General Court in Intel' (n 238) 422 and 431. cf Ioannis Lianos, 'Categorical Thinking in Competition Law and the "Effects-based" Approach in Article 82 EC' in Ariel Ezrachi (ed), *Article 82: Reflections on its Recent Evolution* (Hart Publishing 2009) 35, claiming that '[c]lassification is inherent in the legal process and constitutes an essential feature of the analytical framework of Article 102'.

[257] See OECD, 'Safe Harbours and Legal Presumptions in Competition Law: Background Note' (DAF/COMP(2017)9, 9 November 2017) <https://one.oecd.org/document/DAF/COMP(2017)9/en/pdf> accessed 26 December 2019, paras 62-70; OECD, 'Executive Summary of the Roundtable on Safe Harbours and Legal Presumptions in Competition Law' (DAF/COMP/M(2017)2/ANN1/FINAL, 27 September 2018) <https://one.oecd.org/document/DAF/COMP/M(2017)2/ANN1/FINAL/en/pdf> accessed 26 December 2019, 2.

[258] On the fundamental principle of legal certainty see eg CFREU (n 175), art 47; Case 52/69 *J. R. Geigy AG v Commission* [1972] ECLI:EU:C:1972:73, para 21; Case C-55/91 *Italian Republic v Commission* [1993] ECLI:EU:C:1993:832, para 66; Case C-199/03 *Ireland v Commission* [2005] ECLI:EU:C:2005:548, para 69; Case C-158/06 *Stichting ROM-projecten v Staatssecretaris van Economische Zaken* [2007] ECLI:EU:C:2007:370, para 25; C-280/08P *Deutsche Telekom* (n 164), para 202; *TeliaSonera* (n 164), para 44. On the fundamental principle mandating the duty to reach decisions within reasonable time see eg TFEU (n 92), arts 24(4) and 20(2)(d); CFREU (n 175), art 41; Case C-270/99P *Z v European Parliament* [2001] ECLI:EU:C:2001:180, Opinion of AG Jacobs, para 40; Joined Cases C-74, 75/00P *Falck SpA and Acciaierie di Bolzano SpA v Commission* [2002]

enable stakeholders to predict which commercial practice is (un)lawful under Article 102. This is important because effective competition can only exist if the market players can assess in advance and with reasonable certainty whether their conduct violates Article 102.[259] Moreover, the existence of clear rules plays an instructive role by incentivising and shaping the conduct of dominant firms.[260] Second, presumptions assist decision-makers by providing operational criteria for the enforcement of Article 102, thus conserving resources and reaching decisions within reasonable time.[261] In this regard, final rulings must be speedy so as to both serve justice for the parties in a particular case[262] and also avoid situations where anticompetitive practices are not investigated at all or are tardily punished for lack of resources.[263]

These presumptions, however, are not conclusive or determinative.[264] They rather establish a *prima facie* case that a particular form of conduct is either legal or illegal under

ECLI:EU:C:2002:524, para 140. See also Cyril Ritter, 'Presumptions in EU competition Law' (2018) 6 JAE 189, 200-2.

[259] Especially in the context of a regime that requires firms to conduct a self-assessment of their commercial practices: see Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, art 1(3).

[260] Ritter (n 258) 208.

[261] Bailey, 'Presumptions in EU Competition Law' (n 256), 363 and 367-8; Paul Nihoul, 'The Ruling of the General Court in *Intel*: Towards the End of an Effect-based Approach in European Competition Law?' (2014) 5 JECLP 521, 529.

[262] In view of the contemporary situation in the markets, justice delayed is almost certainly justice denied. See for example Commission, 'Antitrust: Commission Fines US Chipmaker Qualcomm €242 Million for Engaging in Predatory Pricing' (Press Release, 18 July 2019), stating that the promising challenger of the dominant firm was eliminated in the meantime. cf Commission, 'Antitrust: Commission Imposes Interim Measures on Broadcom' (n 142), ordering interim measures for the first time since 2001.

[263] Ritter (n 258) 212, stating that these are situations of false acquittals (ie, under-enforcement) carrying substantial cost to the public, and that the use of presumptions plays a key role in reducing this cost; Johannes Laitenberger, 'Accuracy and Administrability go Hand in Hand' (at the CRA Conference, Brussels, 12 December 2017), 7, arguing that this is 'the largest part of false acquittals'.

[264] On the compatibility of the use of presumptions in competition law cases with the presumption of innocence see eg Joined Cases T-144, 147 to 150 and 154/07 *ThyssenKrupp Liften Ascenseurs NV and Others v Commission* [2011] ECLI:EU:T:2011:364, para 114; Case C-521/09P *Elf Aquitaine SA v Commission* [2011] ECLI:EU:C:2011:620, para 62; Case C-501/11P *Schindler Holding Ltd and Others v Commission* [2013] ECLI:EU:C:2013:522, para 107, stressing that presumptions are only acceptable if they are rebuttable. See also Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone* [2009] ECLI:EU:C:2009:110, Opinion of AG Kokott, para 93; Case C-74/14 *"Eturas" UAB and Others v Lietuvos*

Article 102.[265] The Commission may therefore rebut a presumption of legality by providing convincing evidence that a presumptively lawful conduct is anticompetitive in a given economic and legal context. Conversely, a dominant firm may rebut a finding of *prima facie* illegality by arguing that its conduct is either legitimate business behaviour or promotes efficiency and/or public considerations.[266] Hence, the legal rules provide for exceptions, qualifications, caveats and rebuttals. In practice, this entails that the designed legal rules are flexible in order to allow for Article 102 to adapt to factual scenarios that do not fit neatly into existing categories.[267]

Even so, the presumptions upon which the rules are grounded do not merely serve predictability and administrability, they also secure the functionality of the constitutionally demanded multi-goal and holistic approach to Article 102.[268] In other words, the employed presumptions serve the core of the normative content of Article 102. Particularly, Article 102 is constitutionally required to pursue the objectives of integrating the internal market and protecting consumer interest, while also being consistent with EU's social policies. This entails that dominant firms' behaviour may be analysed with respect to a broad range of concerns. In practical terms, however, this would be an impossible task if the designed rules failed to simultaneously ensure conformity with the economic goals pursued by Article 102 and

Respublikos konkurencijos taryba [2016] ECLI:EU:C:2015:493, Opinion of Szpunar, paras 97-99. See also CFREU (n 175), art 48(1).

[265] This is consistent with the principle of unfettered evaluation of evidence: see eg *Dalmine* (n 41), para 63; Case C-469/15P *FSL Holdings and Others v Commission* [2017] ECLI:EU:C:2017:308, para 38.

[266] Ritter (n 258) 197, calling this 'a burden-shifting presumption'.

[267] ibid 193. See eg Sauter (n 99) 6, emphasising that the arguments for the legal treatment of discrimination are less valid in the online world.

[268] Laitenberger, 'Accuracy and Administrability go Hand in Hand' (n 263) 13, stressing that '[a]ccuracy without administrability is meaningless. Administrability without accuracy is pointless'.

consistency with EU's constitutional values. Indeed, the only technique to draw the strands of the Treaties' normative choices together is reliance on presumptions that form clear rules.[269]

The current tests for the assessment of the unilateral conduct of dominant firms ensure the practical functionality of Article 102 because they are based on presumptions that form clear legal rules. Particularly, Article 102 pursues multiple (and potentially conflicting policy objectives), which are synthesised into clear rules that the market participants can follow and that the authorities can effectively enforce. This gives the provision the aptitude to serve a plurality of economic objectives and operationalises the multi-goal and holistic approach to Article 102. Moreover, the use of multiple consumer-related proxies for evaluating a distortion of the competitive process allows Article 102 to be enforced against potential abuses that are otherwise difficult to classify.[270]

Consequently, the employed tests must remain clear so as to ensure that Article 102 is fully effective in both protecting consumer interest and complying with values of socio-political nature. This is particularly relevant for reaching uniform and predictable outcomes in the peculiar institutional setting under which Article 102 is to be enforced. The following chapter thus explores the particularities of this institutional setting.

[269] cf David Evans, 'Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules' (2009) 10 Chicago Journal of International Law 161, 167; Stucke (n 218) 618-24.

[270] See eg Bundeskartellamt, 'Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources' (Press Release, 7 February 2019); Bundeskartellamt, 'Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing' (Case Summary, 15 February 2019), where the German competition authority found Facebook's violation of the data protection rules to also constitute an exploitative abusive conduct. See also Laitenberger, 'Accuracy and Administrability go Hand in Hand' (n 263) 5-6.

5. INSTITUTIONAL SETTING AND ENFORCEMENT OF ARTICLE 102

The analysis in the previous three chapters focused on the influence of EU's constitutional peculiarities on the interpretation of abuse of dominance under Article 102, concluding that the multi-goal and holistic approach to the provision necessarily require the design of clear rules. This picture is, however, incomplete to the extent that it neglects the institutional setting under which Article 102 is to be enforced. Indeed, no matter how satisfactorily the substantive rules are designed, the objectives pursued by Article 102 would not amount to much in practical terms without mechanisms for its effective enforcement.

This chapter thus turns to the discussion of the institutional setting and enforcement arrangements concerning the EU competition rules.[1] Starting by describing the evolution of the institutional setting from the initially centralised public enforcement by the Commission to the subsequent system of parallel competences,[2] it emphasises the aptness of centralised enforcement to shape a common competition policy across the EU and the reasons for the transition to a decentralised enforcement model. The chapter then reviews the current enforcement structure, referring to the institutions involved in the enforcement of Article 102. Subsequently, the analysis turns to the legal instruments established to ensure the effective enforcement and uniform interpretation of Article 102.

The chapter concludes by arguing that these legal instruments are insufficient in themselves to secure simultaneously effectiveness, uniformity, and predictability within the described institutional framework. This is the result of the complex institutional relationships

[1] The same rules govern the enforcement of both Article 101 and Article 102, and thus reference will be made to both these provisions. The emphasis, however, will still be on the enforcement of Article 102.

[2] This refers to the independent competence of the Commission, the administrative authorities of the Member States and the national courts to enforce Articles 101 and 102. See Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 (Reg 1/2003), rec 22, arts 4-6; Commission, 'Notice on Cooperation within the Network of Competition Authorities' [2004] OJ C101/43 (ECN Notice), para 1.

within and between the multiple administrative and judicial bodies that are involved in the application of Article 102. In this institutional context, the employed tests must remain clear so as to permit Article 102 to effectively and consistently pursue its objectives across the EU.

I. Institutional Setting and Policy Design

The discussion in chapter 1 clarified that Articles 101 and 102 have been conceived as fundamental in serving the wider aims of the EU ever since the Treaty of Rome that established the EEC.[3] Even so, the EU Treaties do not determine the arrangements for the enforcement of these competition rules. Rather, they contain certain provisions indicating the basic features of the enforcement system, which are to be established through the adoption of secondary law. In this regard, the current enforcement scheme of Articles 101 and 102 is primarily set out in Regulation 1/2003,[4] which replaced the longstanding Regulation 17/62.[5]

The Treaty provisions relating to the enforcement of Articles 101 and 102, which remained substantively unchanged through the successive Treaties' amendments,[6] place public enforcement of these rules in the forefront and suggest that the Commission should assume the

[3] The numbering of relevant Treaty provisions, which were initially laid down in Articles 85 to 89 of the 1957 Treaty establishing the EEC, changed over time, but their content remained substantively unchanged. Thus, so as to avoid confusion, the current Treaty numbering and naming is used even where referring to times when earlier versions of the Treaties were in force.

[4] Reg 1/2003 (n 2). Reg 1/2003 was part of a 'modernisation package' consisting of: Commission Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18; ECN Notice (n 2); Commission, 'Notice on the Cooperation between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC' [2004] OJ C127/13 (Notice on the Cooperation with National Courts); Commission, 'Notice on the Handling of Complaints by the Commission under Articles 81 and 82 of the EC Treaty' [2004] OJ C101/65; Commission, 'Notice on Informal Guidance Relating to Novel Questions Concerning Articles 81 and 82 of the EC Treaty that Arise in Individual Cases (Guidance Letters)' [2004] OJ C101/78; Commission, 'Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty' [2004] OJ C101/81; Commission, 'Guidelines on the Application of Article 81(3) of the Treaty' [2004] OJ C101/97.

[5] Council Regulation (EEC) No 17 of 6 February 1962 First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ Spec Ed 87 (Reg 17).

[6] A ro A substantive modification is the addition of a third paragraph in what is now Article 105 TFEU, confirming the (irrelevant for Article 102) powers of the Council and the Commission with regard to block exemption regulations.

leading role in this regard. Particularly, Article 105(1) TFEU stipulates that the Commission 'shall ensure the application of the principles laid down in Articles 101 and 102', and that it must do so 'in cooperation with the competent authorities in the Member States'.[7] The exact pattern of cooperation is not foreseen, but Article 103(1) TFEU empowers the Council (on a proposal from the Commission and after consulting the European Parliament) to adopt implementing regulations or directives. Article 103 TFEU appears to be giving also a central role to Commission's proceedings by stipulating that the adopted legislation should be designed, in particular, to ensure compliance through fines and to define the respective functions of the Commission and the CJEU.[8] For a transitional period until the entering into force of the implementing secondary law, Article 104 TFEU entrusted the national competition authorities ('NCAs') with applying Articles 101 and 102.

Thus, the provisions of the Treaty focus on public enforcement of Articles 101 and 102 by the Commission. The Treaty is silent on the potential use of Article 102 in litigation between private parties in the national courts (private enforcement).[9] However, it does not rule out the option of an enforcement system where NCAs and national courts would play a role alongside the Commission.[10] Consistently to the Treaty provisions, the first implementing regulation adopted pursued to Article 103 TFEU focused exclusively on public enforcement with no reference at all to private enforcement. Moreover, Regulation 17 formally recognised the

[7] cf Consolidated Version of the Treaty on the European Union [2012] OJ C326/13 (TEU), art 17(1), conferring on the Commission a general supervisory role with regard to the application of EU law. See also Case T-24/90 *Automec Srl v Commission* [1992] ECLI:EU:T:1992:97, para 74, stressing that Art 105(1) TFEU reflects the Commission's general supervisory task in the area competition law.

[8] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), art 103(2)(a) and (d).

[9] Contrast TFEU (n 8), art 101(2), providing the only reference in the Treaties to private enforcement of the EU competition rules.

[10] Joanna Goyder and Albertina Albors-Llorens, *Goyder's EC Competition Law* (5th edn, OUP 2009) 503.

competence of NCAs to enforce Article 102 in its entirety,[11] in contrast to the monopoly granted to the Commission over the application of Article 101(3) that effectively incapacitated NCAs with regard to the enforcement of Article 101.[12]

Hence, the repeated statement that Regulation 17 had established a centralised enforcement system is not accurate to the extent that it refers to Article 102.[13] In formal terms, the centralised nature of the enforcement regime was only reflected in the notification and authorisation system for Article 101(3). Indeed, considering also the fact that the EU judiciary had proclaimed that Article 102 has direct effect and grants actionable rights as early as 1974,[14] there did not seem to be any legal obstacles related to the enforcement of Article 102 at national level. Yet, just as with the enforcement of Article 101, the application of the prohibition of abuse of dominance by NCAs and national courts was negligible until the entry into force of Regulation 1/2003.[15] Consequently, the enforcement of Article 102 was *de facto* centralised under Regulation 17, since the enforcement of the provision was carried out exclusively by the Commission under the judicial supervision of the EU courts.

The reasons for this *de facto* centralisation of enforcement essentially portray the rationale justifying the provision that established the Commission's monopoly in granting

[11] Reg 17 (n 5), art 9(3).

[12] ibid arts 4-9(1).

[13] cf ibid art 9(3), which provided that NCAs would be deprived of their competence to deal with a particular case if the Commission initiated its own proceedings in that case.

[14] Case 127/73 *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior* [1974] ECLI:EU:C:1974:25, paras 15-17. See also Case C-282/95P *Guérin automobiles v Commission* [1997] ECLI:EU:C:1997:159, para 39.

[15] In particular see Wouters Wils, 'Ten Years of Regulation 1/2003: A Retrospective' (2013) 4 JECLP 293, 296; Barry Rodger, 'The Empirical Data Part 1: Methodology, Case-Law, Courts and Processes' in Barry Rodger (ed), *Competition Law: Comparative Private Enforcement and Collective Redress Across the EU* (Wolters Kluwer 2014); Barry Rodger, 'The Empirical Data Part 2: Provisions Relied Upon, Remedies and Success' in Barry Rodger (ed), *Competition Law: Comparative Private Enforcement and Collective Redress Across the EU* (Wolters Kluwer 2014).

individual exemptions under Article 101(3). At the time of the enactment of Regulation 17/62 it was feared that the consistent enforcement of Article 101(3) would be jeopardised had it been shared with the Member States' authorities.[16] Indeed, until the 1990s competition law was of reduced importance in many Member States.[17] Most of them lacked an effective authority disposing the necessary resources and legal powers to enforce the EU competition rules at a time when their domestic competition laws were only starting to emerge.[18] Moreover, it was considered that the task of granting derogations from Article 101(1) involves an assessment of complex economic situations and a margin of discretion, which if left to NCAs would entail the intrusion of national interests that would endanger the Treaties' objectives.[19] These considerations are also pertinent in the assessment of the unilateral conduct of dominant firms, an area where the underpinning theories of harm are regarded to be rather weak because of the contradictory insights provided by the different economic theories.[20]

Even so, the practical problems and understandable lack of confidence with regard to the application of Article 102 at national level served as an opportunity for the Commission to favour its own policy choices. The fact that the Commission was the only institution to impose financial penalties on dominant firms enabled it to shape the development of Article 102 largely

[16] See eg Commission, 'XXIXth Report on Competition Policy' (1999), points 21-22. See also Claus-Dieter Ehlermann, 'Implementation of EC Competition Law by National Anti-Trust Authorities' (1996) 17 ECLR 88, 94, arguing that 'the sole responsibility to grant exemptions under Article [101(3) TFEU] is to a large extent a "natural" monopoly of the Commission'.

[17] David Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP 2001) 393-413.

[18] John Temple Lang, 'General Report on the Application of Community Competition Law on Enterprises by National Courts and National Authorities' (Commissioned by the Commission, FIDE Congress 1998) 3.

[19] See eg Commission, 'XXIIIrd Report on Competition Policy' (1993), point 190. See also Wouters Wils, 'Notification, Clearance and Exemption in EC Competition Law: An Economic Analysis' (1999) 24 EL Rev 139, 154; Claus-Dieter Ehlermann, 'The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution' (2000) 37 CML Rev 537, 537-8; Wouters Wils, *Principles of European Antitrust Enforcement* (Hart Publishing 2005) 6-7.

[20] cf Penelope Papandropoulos, 'Implementing an Effects-based Approach under Article 82' (2008) Concurrences 1, 2.

independently of the Member States, the Council, and the European Parliament.[21] Also, the centralised enforcement of Article 102 ensured the uniform application of the provision across the EU, thus effectively striving to integrate the internal market.

As a result, deliberately or not, after approximately four decades of centralised competition law enforcement a common regulatory philosophy had been developed.[22] What is more, in parallel with the development of the substantive competition law at the EU level, the competition law framework of the Member States gradually transformed.[23] By the end of the 1990s, all Member States had aligned their competition law provisions to the corresponding EU provisions and most of them had created NCAs.[24] Hence, the expansion of national competition laws based on the wordings of Articles 101 and 102 and the increased resources and experience of NCAs led to the increased willingness and ability of NCAs to work more closely with the Commission.[25]

These developments coincided with the Commission's eagerness to modernise the enforcement structure and procedures regarding Articles 101 and 102.[26] First, the Commission

[21] Lee McGowan, 'Safeguarding the Economic Constitution: The European Commission and Competition Policy' in Neill Nugent (ed) *At the Heart of the Union* (Macmillan 2000) 148, describing competition policy as the 'first truly supranational policy' of the EU, because of the Commission's autonomous operation in this area.

[22] Commission, 'White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty' [1999] OJ C132/1 (White Paper for Modernisation), para 4. See also Hans Vedder, 'Spontaneous Harmonisation of National (Competition) Laws in the Wake of the Modernisation of EC Competition Law' (2004) 1 CL Rev 5, 9, emphasising the common competition culture that had been developed across the EU.

[23] Temple Lang, 'General Report on the Application of Community Competition Law' (n 18) 4.

[24] Imelda Maher, 'Alignment of Competition Laws in the European Community' (1996) 16 Yearbook of European Law 223; Ute Zinsmeister and others, 'The Application of Articles 85 and 86 of the EC Treaty by National Competition Authorities' (1999) 20 ECLR 275; Sebastian Eyre and Martin Lodge, 'National Tunes and a European Melody? Competition Law Reform in the UK and Germany' (2000) 7 Journal of European Public Policy 63.

[25] For an account of these developments see Giorgio Monti, *EC Competition Law* (CUP 2007) 401-4.

[26] White Paper for Modernisation (n 22). See John Temple Lang, 'Decentralised Application of Community Competition Law' (1999) 22 WC 3, 20, explaining that the developments at national level allowed the implementation of the proposals for the modernisation of enforcement. See also Wils 'Ten Years of Regulation 1/2003' (n 15) 293-5, describing the origins of this modernisation process.

considered that it was unwise to maintain the centralised system of enforcement in view of both the overload of cases and the limited autonomy allowed to set enforcement priorities.[27] Moreover, the Commission was convinced that NCAs are often better placed to enforce Articles 101 and 102.[28] Second, the operation of a centralised system of enforcement seemed unfeasible as a result of the expected major enlargement in 2004,[29] which would significantly increase the workload of the Commission's Directorate General for Competition ('DG COMP').[30] The Commission thus envisaged a transition to a true decentralised enforcement system in which NCAs and national courts would actually enforce Articles 101 and 102 in their entirety.[31]

Ultimately, Regulation 17 was replaced by Regulation 1/2003 with effect from 1 May 2004.[32] The most important change consisted in the replacement of the notification and authorisation system for Article 101(3) with a directly applicable exception system.[33] In this way, the only legal restriction to the decentralised enforcement of Articles 101 and 102 was eliminated. Moreover, Regulation 1/2003 enhanced the role of NCAs and, in contrast to the previous legal framework, explicitly recognised the role of national courts in the private

[27] White Paper for Modernisation (n 22), paras 43-45.

[28] ibid paras 46-47. See also *Automec* (n 7), para 77, confirming the Commission's power to set enforcement priorities.

[29] Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia [2003] OJ L236/1, confirming the simultaneous accession of ten European countries on 1 May 2004, which is the largest expansion of the EU to date.

[30] White Paper for Modernisation (n 22), paras 4-5 and 21-23.

[31] ibid paras 82-100 and 138. See Tim Wißmann, 'Decentralised Enforcement of EC Competition Law and the New Policy on Cartels: The Commission White Paper of 28th of April 1999' (2000) 23 WC 123,149-53; Rein Wesseling, 'The Draft Regulation Modernising the Competition Rules: The Commission is Married to One Idea' (2001) 26 EL Rev 357, 377-8, criticising the Commission for not having given any serious consideration to the four other alternative options that were presented in the White Paper for Modernisation.

[32] Reg 1/2003 (n 2), art 45.

[33] ibid rec 4 and art 1.

enforcement of the competition rules.[34] As to the actual impact of this legal framework, it has generally been described as successful in achieving the objective of decentralised application of the EU competition rules.[35]

However, it can be reasonably maintained that the remarkable results of Regulation 1/2003 in achieving the decentralised enforcement of the competition rules are largely due to the centralised institutional setting which was *de facto* inflicted for forty years. NCAs and national courts felt confident to enforce the EU competition rules because they could take advantage of the long experience of enforcement at the EU level. In the case of Article 102, for example, its application at the EU level led to the existence of a body of decisional practice and case law, which clarified many aspects of the provision. The EU courts' case law was of great assistance in this context insofar as it systematised potentially abusive practices into categories and designed clear tests for their legal evaluation. This resulted in the elaboration of a set of rules that were accepted by Member States as being fundamental for the proper functioning of the internal market.[36]

Consequently, the Commission and the EU courts shaped the substantive law in a manner that subsequently facilitated adherence to the designed EU competition policy in a decentralised enforcement framework. That being said, it may still be questioned whether multiplying the number of authorities that are competent to enforce EU competition law would

[34] ibid arts 3(1) and 5-6. See also ibid rec 7, explicitly referring to the role of national courts in applying the EU competition rules in litigation between private parties.

[35] See eg Commission, 'Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives' (Communication) COM(2014) 453, paras 7-9 and 43-44. See also Wils 'Ten Years of Regulation 1/2003' (n 15) 295-301; Isolde Goggin, 'Making Competition Authorities More Effective Enforcers' (2017) 8 JECLP 549.

[36] In this vein White Paper for Modernisation (n 22), paras 1-4; Reg 1/2003 (n 2), rec 1.

lead to the stated objectives of effective enforcement and uniform interpretation.[37] With this in mind, Regulation 1/2003 envisages mechanisms for securing effectiveness and uniformity. These mechanisms are important components of the current enforcement system to which the analysis now turns.

II. Enforcement Structure and Institutional Settings

The analysis in the previous chapters focused on the enforcement of Article 102 at the EU level, ie by the Commission. This, however, is only a part of the enforcement makeup in the EU. The existing enforcement structure in the EU is a decentralised one in which the responsibility of enforcing Article 102 is shared between the Commission, the NCAs and the national courts. Regulation 1/2003 not only entrusts NCAs and national courts with the power to apply Article 102 in parallel with the Commission,[38] it also obliges them to do so when applying their national competition laws to a dominant firm's conduct that is capable of affecting trade between Member States.[39] In this context, the public enforcement of Article 102 is carried out by the Commission and the NCAs, while national courts are primarily responsible for the private enforcement of the provision. Therefore, there are multiple enforcers embedded in divergent settings.

This section maps out the complex institutional framework for the decentralised enforcement of Article 102. This framework includes the Commission with its complicated decision-making processes, and the multiple enforcement authorities existing in the Member States with their diverging institutional models and procedures. This analysis will eventually

[37] Michael Paulweber, 'The End of a Success Story? The European Commission's White Paper on the Modernisation of the European Competition Law: A Comparative Study about the Role of the Notification of Restrictive Practices within the European Competition and the American Antitrust Law' (2000) 23 WC 3, 37-41.

[38] Reg 1/2003 (n 2), arts 1 and 4-6.

[39] ibid art 3(1).

unveil the mismatch between the complicated institutional setting and the necessity of ensuring effective enforcement and uniform interpretation of Article 102.

A. Decentralised Public Enforcement

Regulation 1/2003 provides for a decentralised system of public enforcement in which the Commission and the NCAs, forming together the European Competition Network ('ECN'),[40] have parallel competence to apply Article 102.[41] All authorities are recognised as independent from one another and may autonomously pursue infringements of Article 102.[42] In this context, the decisions adopted by the Commission are subject to legal review by the EU courts, while the decisions issued by NCAs are judicially reviewed by the corresponding national courts. This structure consists of multiple enforcement authorities with differing enforcement systems and procedures.

i. *Public Enforcement at EU Level*

The Commission remains the key enforcer of Article 102. Particularly, its responsibility is not limited to conducting its own investigations of alleged infringements of Article 102 and taking the necessary decisions to maintain or restore the proper functioning of competition in the internal market.[43] Being the guardian of the Treaties,[44] the Commission also assumes the additional responsibilities of safeguarding consistency and developing policy in the area of

[40] Reg 1/2003 (n 2), rec 15, stating that the Commission and the NCAs 'should form together a network of public authorities applying the [EU] competition rules in close cooperation'. See ECN Notice (n 2), establishing the foundations of the functioning of the ECN. See also Council and Commission, 'Joint Statement on the Functioning of the Network of Competition Authorities' (10 December 2002, 15435/02 ADD 1) (Joint Statement on ECN), setting out the main principles governing the ECN in a document of political nature, which was adopted on the day that Reg 1/2003 was agreed.

[41] ECN Notice (n 2), para 1.

[42] Joint Statement on ECN (n 40), paras 7 and 11.

[43] TFEU (n 8), art 105, establishing the Commission's leading role in ensuring the application of the principles laid down in Articles 101 and 102.

[44] TEU (n 7), art 17(1).

competition law.[45] The details of the Commission's key role in the context of the decentralised enforcement of Article 102 will be discussed further down in this chapter. The emphasis in this section is on the Commission's institutional model.[46]

In this regard, the Commission in principle enforces Article 102 as an integrated public authority.[47] Particularly, DG COMP is the segment that carries out the operational aspect of law enforcement,[48] and the final formal decision is adopted by the College of Commissioners upon the proposal of the Commissioner responsible for competition policy.[49] In practice, however, the substance of the decision-making process within the Commission involves numerous actors and is subject to multiple influences of diverging nature, which operate at different stages of the process.[50]

To start with, the investigation of a case is allocated to the relevant Unit within DG COMP and is managed by a case team. However, other actors within the Commission may play a pivotal role throughout the entire procedure of the application of Article 102 in concrete cases. Particularly, first, the Chief Economist assists in evaluating the economic impact of the Commission's actions by providing guidance on methodological issues of economics and

[45] Joint Statement on ECN (n 40), para 9; ECN Notice (n 2), paras 43 and 50. See eg Case 13/61 *Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn* [1962] ECLI:EU:C:1962:11, 51; Case C-234/89 *Stergios Delimitis v Henninger Bräu AG* [1991] ECLI:EU:C:1991:91, para 44; *Automec* (n 7), paras 73-74, 77 and 85; Case C-119/97P *Union française de l'express (Ufex), formerly Syndicat français de l'express international (SFEI), DHL International and Service CRIE v Commission* [1999] ECLI:EU:C:1999:116, para 88; Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECLI:EU:C:2000:689, paras 46, 48, 50-52 and 57, confirming the Commission's additional responsibilities in this regard.

[46] Procedures fall outside the scope of this chapter. See generally Nicholas Khan, *EU Antitrust Procedure* (6th edn, Sweet & Maxwell 2012).

[47] Rules of Procedure of the Commission of 8 December 2000 [2000] OJ L308/26, arts 1 and 2.

[48] DG COMP is administratively organised in Directorates, each consisting of three to five Units. See Rules of Procedure of the Commission (n 47), art 21.

[49] TFEU (n 8), art 250(1), stipulating that '[t]he Commission shall act by a majority of its Members'. See also Rules of Procedure of the Commission (n 47), art 8.

[50] See generally Rules of Procedure of the Commission (n 47), arts 22 and 23.

econometrics.[51] Second, the Commission's Legal Service is consulted on all drafts, proposals or documents in order to ensure the legality of the Commission's actions and decisions.[52] Third, the Commission's draft decisions are discussed with representatives of NCAs within the Advisory Committee, leading to an opinion that the Commission 'shall take the utmost account of'.[53] Finally, the Directorate General, in agreement with the Commissioner, may also decide to appoint a Peer Review Team to review the case and issue internal recommendations.[54]

Furthermore, the adoption of a formal decision in a particular case by the Commission does not necessarily conclude the dispute. The Commission's decisions are subject to external legal review by the judicial institution of the EU, the Court of Justice of the European Union ('CJEU').[55] This EU institution comprises of two judicial bodies, namely the General Court and the Court of Justice, which must guarantee the principle of effective judicial protection.[56] This entails that the decisions of the Commission are subject to a full judicial review, which includes an unlimited jurisdiction in respect of the proportionality of the imposed sanctions.[57] In this regard, it is possible to bring an action against a decision of the Commission before the

[51] The position of Chief Economist was created in 2003. See generally Lars-Hendrik Röller and Pierre Buigues, 'The Office of the Chief Competition Economist at the European Commission' (May 2005) <https://ec.europa.eu/dgs/competition/economist/officechiefecon_ec.pdf> accessed 11 February 2020. See Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart Publishing 2013) 70, speculating that its creation was linked to the process of reviewing and reforming Article 102.

[52] Rules of Procedure of the Commission (n 47), art 23, providing that consultation of the Legal Service is compulsory.

[53] Reg 1/2003 (n 2), art 14; ECN Notice (n 2), paras 56 and 58-68.

[54] Commission, 'Proceedings for the Application of Articles 101 and 102 TFEU: Key Actors and Checks and Balances' (13 October 2011) <https://ec.europa.eu/competition/antitrust/key_actors_en.pdf>, 2.

[55] TFEU (n 8), art 263.

[56] TEU (n 7), art 19(1). See eg Case C-69/10 *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration* [2011] ECLI:EU:C:2011:524, para 49, holding that effective judicial protection is a general principle of the EU. See also Charter of Fundamental Rights of the European Union [2012] OJ C326/391 (CFREU), art 47, giving expression to the general principle of effective judicial protection.

[57] Reg 1/2003 (n 2), rec 33 and art 31.

General Court on points of fact and of law,[58] and subsequently appeal the General Court judgment on points of law in front of the Court of Justice.[59] The decisions issued by the Commission must therefore be clearly and sufficiently reasoned so as to ensure the possibility of conducting effective judicial control over their legality.[60] This is so notwithstanding the fact that the EU courts generally limit the intensity of their review and are reluctant to replace their own assessment of facts for the Commission's complex economic evaluation, thus granting a margin of appraisal to the Commission when its decision involves complex economic and technical matters.[61]

ii. *Public Enforcement at National Level*

NCAs and national courts are entrusted with the power to apply Article 102 in parallel to the Commission.[62] Each NCA is responsible for the public enforcement of Article 102 within its own Member State under the judicial supervision of the competent national courts. In a way this enhances the effective enforcement of Article 102 insofar as NCAs are better placed to regulate national markets due to their familiarity with the characteristics of local markets.[63] For

[58] TFEU (n 8), art 256(1). See eg Case T-348/94 *Enso Española SA v Commission* [1998] ECLI:EU:T:1998:102, paras 62-64; Joined Cases T-25/95 etc *Cimenteries CBR and Others v Commission* [2000] ECLI:EU:T:2000:77, para 719, acknowledging the very broad scope of judicial review that the General Court undertakes.

[59] Protocol No 3 on the Statute of the Court of Justice of the European Union annexed to the Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] OJ C115/308, arts 56 and 58.

[60] TFEU (n 8), art 296(b).

[61] See eg Case 42/84 *Remia BV and others v Commission* [1985] ECLI:EU:C:1985:327, paras 34-35; Case T-95/96 *Kish Glass & Co. Ltd v Commission* [2000] ECLI:EU:T:2000:93, para 64; Case C-12/03P *Commission v Tetra Laval BV* [2005] ECLI:EU:C:2005:87, paras 38-39; Case T-201/04 *Microsoft Corp v Commission* [2007] ECLI:EU:T:2007:289, paras 87-89; Case C-272/09P *KME Germany AG, KME France SAS and KME Italy SpA v European Commission* [2011] ECLI:EU:C:2011:810, para 94. Similarly for a non-competition law case see Case C-459/00P(R) *Commission v Laboratoires pharmaceutiques Trenker SA* [2001] ECLI:EU:C:2001:217, paras 82-83. See also José Luís da Cruz Vilaça, 'The Intensity of Judicial Review in Complex Economic Matters: Recent Competition Law Judgments of the Court of Justice of the EU' (2018) 6 JAE 173, 186, arguing that this point remains true despite recent developments.

[62] Reg 1/2003 (n 2), arts 5 and 6.

[63] cf ibid rec 6. In this vein Temple Lang, 'Decentralised Application of Community Competition Law' (n 26).

this purpose, NCAs are empowered to take a number of alternative decisions in order to conclude their investigations.[64] In quantitative terms, NCAs have become the primary public enforcers of Articles 101 and 102, since NCAs investigate many more alleged violations of these provisions than the Commission.[65] This has led to a significant increase in the scale of enforcement, with NCAs being a key pillar of the application of Article 102.

Despite the importance of NCAs for the enforcement of Article 102, EU law does not impose specific requirements regarding the institutional design of NCAs and the decision-making procedures thereof.[66] These issues are governed by the principle of institutional autonomy subject to the EU law principle of effectiveness.[67] Namely, while Member States are legally required to designate competition authorities in such a way that would ensure the effective enforcement of Articles 101 and 102, the design of these authorities is left to the discretion of each Member State.[68] In other words, diversity in the composition of NCAs is recognised under Regulation 1/2003 so long as NCAs are capable to effectively carry out their

[64] ibid art 5, stipulating that NCAs may require that an infringement is brought to an end, order interim measures, accept commitments, impose sanctions, or decide that there are no grounds for action on their part.

[65] For the relevant statistics see https://ec.europa.eu/competition/ecn/statistics.html.

[66] Commission, 'Enhancing Competition Enforcement by the Member States' Competition Authorities: Institutional and Procedural Issues' [2014] SWD(2014) 231 final, para 9. cf Miguel Sousa Ferro, 'Institutional Design of National Competition Authorities: EU Requirements' (1 November 2017) <https://ssrn.com/abstract=3077495> accessed 12 February 2020, 12-24, arguing that EU law imposes wide-ranging obligations upon Member States regarding the institutional design of their NCAs, and that these obligations are based primarily on the principle of effectiveness.

[67] eg Case C-439/08 *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW* [2010] ECLI:EU:C:2010:739, paras 56-63, holding that the principle of effectiveness limits the principle of institutional autonomy. The result of this limitation was that the designated NCAs must be granted the right to intervene in appeals concerning their own decisions. Similarly for national regulatory authorities ('NRAs') see eg Case C-82/07 *Comisión del Mercado de las Telecomunicaciones v Administración del Estado* [2008] ECLI:EU:C:2008:143, para 24; Case C-85/14 *KPN BV v Autoriteit Consument en Markt (ACM)* [2015] ECLI:EU:C:2015:610, para 53; Case C-424/15 *Xabier Ormaetxea Garai and Bernardo Lorenzo Almendros v Administración del Estado* [2016] ECLI:EU:C:2016:780, para 30.

[68] Reg 1/2003 (n 2), art 35.

enforcement functions. Member States may thus entrust the enforcement of Article 102 exclusively to an administrative authority or to both judicial and administrative authorities.[69]

Indeed, the multiple enforcement authorities existing in the Member States follow diverging institutional models and procedures. Particularly, two institutional models can be distinguished among the NCAs.[70] First, the most common model is the administrative model, where a single administrative authority investigates cases and takes enforcement decisions.[71] However, there are variations in the internal structures of the authorities in the different Member States.[72] For example, in certain Member States there is a functional separation between the investigative and decision-making activities of the single administrative institution,[73] while other Member States follow a more unitary structure.[74] Second, a minority of Member States operate a judicial model, whereby an administrative authority conducts the

[69] ibid art 35(1)-(2). See also *Xabier Ormaetxea* (n 67), paras 36-37, clarifying that Member States may create multi-sectoral regulators by merging NCAs with NRAs. cf Commission, 'Ten Years of Antitrust Enforcement under Regulation 1/2003' (n 35), para 26, stating that the Commission 'has closely followed instances where NCAs were merged with other regulators'.

[70] ECN Notice (n 2), para 2.

[71] Commission, 'Enhancing Competition Enforcement' (n 66), para 10; ECN, 'Decision-Making Powers Report' (31 October 2012) <https://ec.europa.eu/competition/ecn/decision_making_powers_report_en.pdf> accessed 12 February 2020, 6-8.

[72] ibid. See also Commission, 'Report on the Functioning of Regulation 1/2003' (Staff Working Paper) [2009] SEC(2009) 574 final, para 192, stating that, until recently certain Member States followed the 'dual' administrative model, ie one body was in charge of the investigation into cases, and subsequently handed them over to another body in charge of decision-making. They have now all moved to the single administrative model.

[73] Yet again, within this structure, there may be significant differences in terms of internal organisation between the different bodies. For example, in France and Spain a full functional separation between investigative and decision-making bodies has been set up, where their respective competences are carried out independently from one another.

[74] Under this structure, there are no different bodies carrying out the different steps in the procedure, although there may be different divisions (eg, a competition department and a legal department) inside these authorities that deal with separate aspects of the same case. For more details see ECN, 'A Look Inside the ECN: Its Members and Its Work' (ECN Brief Special Issue, December 2010) <https://ec.europa.eu/competition/ecn/brief/05_2010/brief_special.pdf>.

investigation and then brings the cases before a judicial authority entrusted with the power to take decisions imposing fines and/or finding infringements.[75]

Irrespective of the selected institutional model, decisions of NCAs are subject to judicial review, commonly including more than one tier of appeal.[76] In this regard, the principle of effectiveness and numerous other general principles and fundamental rights recognised by EU law call for the availability of legal remedies against the decisions of NCAs.[77] Put simply, the judicial control over the legality of decisions issued by NCAs is a mandatory requirement of EU law.[78] Moreover, national courts are empowered to apply Articles 101 and 102 pursuant to Article 6 of Regulation 1/2003.[79] Hence, national courts may be called upon to apply Article 102 as appellate courts hearing appeals against decisions taken by the NCAs of their Member State.[80]

That being said, the rules and conditions for the judicial control of NCAs' decisions are largely governed by national procedural law, subject to the principle of effectiveness.[81] Specifically, the national procedural rules must not make the judicial review of decisions

[75] Commission, 'Enhancing Competition Enforcement' (n 66), para 11; ECN, 'Decision-Making Powers Report' (n 71) 9-10.

[76] For more details on the judicial review of decisions of NCAs in the various Member States see ECN, 'Decision-Making Powers Report' (n 71) 18-28, 35-36 and 47-48.

[77] See especially TEU (n 7), art 4(3), establishing the principle of sincere cooperation in carrying out the tasks which flow from the EU Treaties; CFREU (n 56), art 47, setting out the principle of effective judicial protection; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR as amended) [1950] <https://www.echr.coe.int/Documents/Convention_ENG.pdf>, art 6(1), providing for the right to a fair trial; *KME Germany* (n 61), para 92, recognising the principle of effective judicial protection as a general principle of EU law. By analogy see *Xabier Ormaetxea* (n 67), para 36, holding that an effective right of appeal must be available against decisions of NRAs. Not subjecting decisions of NCAs to judicial review would also jeopardise the effectiveness of the reference procedure laid down in Art 267 TFEU.

[78] Similarly Ferro (n 66) 23.

[79] For an overview of the numerous judgments of national courts applying the EU competition rules see the Commission's database: https://ec.europa.eu/competition/elojade/antitrust/nationalcourts/.

[80] Notice on the Cooperation with National Courts (n 4), para 2.

[81] cf ibid para 10(c).

adopted by NCAs excessively difficult or practically impossible. In this regard, at the core of an adequate standard of review is the full evaluation of the factual analysis conducted by the NCA and the examination of whether the legal conclusions are supported by a convincing analysis of the evidence.[82] Other than this, however, Member States are free to define remedies and procedures. Pursuant to this freedom, for instance, certain Member States have entrusted the review of NCAs' decisions to specialised competition law courts, while in other Member States this task is carried out by ordinary civil courts.[83]

B. Private Enforcement in National Courts

A major role is attributed to national courts in the enforcement of Article 102. The analysis so far has shown that national courts may have two distinct roles in the context of public enforcement, namely they may act as NCAs and they are conducting the judicial review of NCAs' decisions in their respective Member States. In addition to these roles, national courts carry out the private enforcement of Articles 101 and 102.[84] That is, national courts must deal with any litigation between private parties that is based on Article 102.

This decentralisation of enforcement is based on the EU principle of direct effect. Particularly, in the landmark *Van Gend den Loos* judgment the Court of Justice established that EU law may have direct effect and be invoked by individuals before national courts subject to

[82] cf *A. Menarini Diagnostics S.r.l. v. Italy* App no 43509/08 (ECtHR, 21 September 2011), paras 57-67, holding that the guarantees flowing from the right to a fair trial laid down in Art 6 ECHR would be respected if decisions of the competition authorities are subject to judicial review on points of law and fact, and the courts have the power to verify the proportionality of the imposed sanction and change it if necessary. See Francesco Munari, 'Antitrust Enforcement After the Entry into Force of Regulation No. 1/2003: The Interplay between the Commission and the NCAs and the Need for an Enhanced Role of National Courts' in Bernardo Cortese (ed), *EU Competition Law: Between Public and Private Enforcement* (Wolters Kluwer 2014) 120, arguing that lower standards of review by national courts than the ones envisaged by the EU courts should not be acceptable.

[83] Whilst in the UK there is a specialised court (the Competition Appeal Tribunal (CAT)) for hearing appeals against decisions of the NCA, in most Member States the judicial review is carried out by regular courts: see ECN, 'Decision-Making Powers Report' (n 71) 20-24.

[84] Reg 1/2003 (n 2), rec 7; Notice on the Cooperation with National Courts (n 4), paras 2, 5 and 10(b).

certain conditions.[85] According to this judgment, for primary EU law provisions to produce direct effect they must be sufficiently clear and precisely stated, not conditional on further implementation, and confer rights to individuals.[86] In this regard, the EU courts have progressively clarified that what is now Article 102 satisfies these conditions, thereby producing direct effect and creating rights for individuals.[87] National courts must thus ensure the effective protection of those rights under conditions that may not be less favourable than those governing the protection of comparable rights under national law.[88] In this context, Article 102 may be invoked both as a defence against a claim and as a legal basis for claims concerning injunctive relief (including interim relief) and/or damages.[89]

Of most importance in this regard is the right of individuals to secure damages, ie to bring claims seeking compensation for the harm suffered by anticompetitive conduct.[90] An infringement of Article 102 may clearly be detrimental to the integrity of the internal market,

[85] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1, 12-13. See also Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66, 593-4, establishing the doctrine of primacy of EU law; Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* [2003] ECLI:EU:C:2003:430, para 48, holding that the primacy of EU law requires any provision of national law that contravenes an EU rule to be disapplied, regardless of whether it was adopted before or after that rule.

[86] ibid.

[87] eg *Belgische Radio* (n 14), paras 16; Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECLI:EU:C:1990:257, paras 19-21; *Guérin automobiles* (n 14), para 39; Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECLI:EU:C:2001:465, para 23; Joined Cases C-295 to 298/04 *Manfredi and Others* [2006] ECLI:EU:C:2006:461, para 39; Case C-557/12 *Kone AG and Others v ÖBB-Infrastruktur AG* [2014] ECLI:EU:C:2014:1317, para 20; Case C-595/17 *Apple Sales International and Others v MJA* [2018] ECLI:EU:C:2018:854, para 35.

[88] eg *Courage* (n 87), para 29; *Manfredi* (n 87), para 62; Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECLI:EU:C:2011:389, para 24; Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others* [2013] ECLI:EU:C:2013:366, para 27.

[89] On the different types of private enforcement and the corresponding ways in which Articles 101 and 102 can be invoked in litigation between private parties see Francis Jacobs and Thomas Deisenhofer, 'Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart Publishing 2003) 189.

[90] Katherine Holmes, 'Public Enforcement or Private Enforcement? Enforcement of Competition Law in the EC and UK' (2004) 25 ECLR 25, 30, suggesting that the main role of private enforcement is to provide compensation to those who suffered harm.

to the economy and to consumers at large. However, abusing a dominant position also causes concrete harm to specific victims. It may, for example, lead to reduced profits for competitors, as well as to higher prices for the direct and indirect customers of the dominant firm and for the competitors' customers. While public enforcement serves the injunctive and penal/deterrent objectives by ending abusive conduct and punishing dominant firms, it cannot remedy the financial losses resulting from the dominant firm's conduct.[91]

The right to damages for infringements of Article 102 emanates therefore from the need to ensure the full effectiveness of the provision.[92] The EU courts have indeed established that any citizen or business has a right to full compensation for the harm caused to them by an infringement of Articles 101 and 102, and that national courts should ensure the effectiveness of this right.[93] This entails that both follow-on actions and stand-alone actions for damages may be brought.[94] That is, it is not necessary that the alleged infringement is or has been the object of public enforcement proceedings.[95] In this context, private enforcement complements public enforcement, since national courts pursue the compensatory objective of enforcement,

[91] cf Commission, 'European Commission Green Paper on Damages Actions for Breach of EC Treaty Anti-trust Rules: Frequently Asked Questions' (MEMO/05/489 Brussels, 20 December 2005).

[92] Ioannis Lianos, Peter Davis and Paolisa Nebbia, *Damages Claims for the Infringement of EU Competition Law* (OUP 2015) 19.

[93] *Courage* (n 87), paras 24-27; *Manfredi* (n 87), paras 59-61; *Pfleiderer* (n 88), paras 28-29; Case C-199/11 *Europese Gemeenschap v Otis NV and Others* [2012] ECLI:EU:C:2012:684, paras 41-43; *Bundeswettbewerbsbehörde* (n 88), paras 21-23; *Kone* (n 87), paras 21-23.

[94] Follow-on actions are actions brought after a competition authority has concluded its proceedings finding an infringement of Article 101 or Article 102. Stand-alone actions refer to alleged infringements that neither are nor have been the object of public enforcement proceedings.

[95] *Apple Sales* (n 87), para 36. See Reg 1/2003 (n 2), rec 7. See also Commission, 'Green Paper: Damages Actions for Breach of the EC Antitrust Rules' [2005] COM(2005) 672 final, 4; Commission, 'Green Paper on Damages Actions: Frequently Asked Questions' (n 91); Neelie Kroes, 'The Green Paper on Antitrust Damages Actions: Empowering European Citizens to Enforce their Rights' (Speech, Brussels, 6 June 2006), 5, showing the Commission's eagerness to promote stand-alone actions under the assumption that public authorities do not have the resources to reach decisions in every private dispute.

potentially enhance the deterrent value of Article 102,[96] and may even bring anticompetitive behaviour to an end.[97]

The exercise of the EU right to damages is in principle governed by national rules.[98] This is consistent with the EU courts' pronouncements that it is for the national legal systems to determine the procedural conditions and remedies for the exercise of substantive EU rights where there is no harmonised procedural legislation in place.[99] This had led to 'total underdevelopment' of damages actions for breaches of competition law, in the sense that there had been little recourse to national courts in order to obtain compensation.[100] Indeed, the procedural divergence in the different Member States made damages actions costly and complex, especially for consumers and SMEs.[101]

[96] Wouters Wils, 'Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future' (2017) 40 WC 3, 18, noting that follow-on actions increase the deterrent value of Articles 101 and 102 by increasing the scale of punishment.

[97] Clifford Jones, 'Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check' (2004) 27 WC 13, 21-24. cf Munari 'Antitrust Enforcement After the Entry into Force of Regulation No. 1/2003' (n 82) 122; Wils 'Private Enforcement of EU Antitrust Law' (n 96) 18-22, arguing that public enforcement is inherently superior to private enforcement for deterring and punishing anticompetitive behaviours.

[98] Notice on the Cooperation with National Courts (n 4), paras 9-10. See *Courage* (n 87), para 29; *Manfredi* (n 87), paras 62 and 64; *Kone* (n 87), para 24.

[99] eg Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECLI:EU:C:1976:188, para 5; Joined Cases C-6 and 9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECLI:EU:C:1991:428, paras 42-43; Case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* [1995] ECLI:EU:C:1995:437, para 12; Case C-261/95 *Rosalba Palmisani v Istituto nazionale della previdenza sociale (INPS)* [1997] ECLI:EU:C:1997:351, para 27; Case C-13/01 *Safalero Srl v Prefetto di Genova* [2003] ECLI:EU:C:2003:447, para 49. See Max Hjärtström and Julian Nowag, 'EU Competences and the Damages Directive: The Continuum Between Minimum and Full Harmonisation' in Magnus Strand, Vladimir Bastidas and Marios Iacovides (eds), *EU Competition Litigation: Transposition and First Experiences of the New Regime* (Hart Publishing 2019) 3, stressing the distinction between substantive and procedural matters.

[100] Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules' (31 August 2014, Commissioned by the Commission) (Ashurst Report) <https://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf> accessed 13 February 2020, 1. For the respective situation in the US see Clifford Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* (OUP 1999), documenting that private actions largely outnumber public enforcement proceedings.

[101] Ashurst Report (n 100) 119.

In order to remove the main obstacles to effective compensation and guarantee a minimum protection across the EU, a series of legislative and soft law measures were adopted at the EU level.[102] Directive 2014/104/EU (the 'damages directive') is particularly important in this regard insofar as it provides a harmonised basis across the EU, thereby facilitating private actions for damages.[103] The analysis of the damages directive falls outside the scope of this thesis,[104] but it is worth mentioning that it provides for the binding effect of public enforcement decisions,[105] and that it facilitates access to evidence relating to infringements of Articles 101 and 102.[106] Although these measures may have a significantly positive effect to purely compensatory follow-on actions for damages, they would have a limited impact to

[102] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1; Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L201/60, inviting Member States to introduce collective redress mechanisms, including actions for damages; Commission, 'On Quantifying Harm in Actions for Damages based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union' (Communication) [2013] OJ C167/19, recalling the main existing principles that may help courts and parties to deal with quantifying harm in antitrust damages actions; Commission, 'Practical Guide on Quantifying Harm in Actions for Damages based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union' (Staff Working Document) [2013] SWD(2013) 205, illustrating the types of harm normally caused by anticompetitive practices and offering an overview of the main methods and techniques available to quantify such harm in practice; Commission, 'Guidelines for National Courts on how to Estimate the Share of Overcharge which was Passed on to the Indirect Purchaser' (Communication) [2019] OJ C267/4, offering guidelines for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser. See also Regulation (EU) 1382/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Justice Programme for the period 2014 to 2020 [2013] OJ L354/73, on the basis of which the Commission operates a grants programme for training of national judges in EU competition law.

[103] Dir 2014/104/EU (n 102). See also Commission, 'Green Paper: Damages Actions' (n 95); Commission, 'White Paper on Damages Actions for Breach of the EC Antitrust Rules' [2008] COM(2008) 165 final; Commission, 'Proposal for a Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union' [2013] COM(2013) 404 final, on the basis of which the damages directive was adopted.

[104] For a concise review of the damages directive see Wils 'Private Enforcement of EU Antitrust Law' (n 96) 25-40.

[105] Dir 2014/104/EU (n 102), art 9, providing that final decisions of NCAs and national courts should be used as irrefutable proof for the purposes of an action for damages brought in a court in the same Member State, and that it should constitute at least *prima facie* evidence where the action for damages is brought in a court of another Member State.

[106] ibid art 5.

stand-alone actions.[107] Particularly, few plaintiffs would have the willingness and resources to mount actions where they bear the burden of identifying the breach, especially if a complex economic analysis must be deployed to prove harm.

In any event, the directive leaves intact the institutional autonomy of Member States to determine the courts that will carry out the private enforcement activity. National rules may therefore attribute the complex tasks of identifying and quantifying damages either to specialised competition law courts or to ordinary civil courts. This means that this activity may be carried out across the EU by courts with diverse levels of experience and expertise in the area of competition law.[108]

III. Effective Enforcement and Uniform Interpretation

The decentralised enforcement of Article 102 and the lack of a federal competition law system entail that there must be some form of coordination between the various institutions. In fact, there are a series of instruments in place to ameliorate the quality of the decentralised application of Article 102. These instruments promote the effective enforcement and the uniform interpretation of Article 102.

This section starts by highlighting the significance of effectiveness and uniformity in the application of Article 102, as well as the associated practical challenges. It then proceeds to outline the tools that assist in the implementation of an efficient decentralised enforcement of Article 102.

[107] Wils 'Private Enforcement of EU Antitrust Law' (n 96) 39, arguing that this is the intended effect of the damages directive.

[108] See the Commission's database: https://ec.europa.eu/competition/elojade/antitrust/nationalcourts/. For an analysis of the implications of this heterogeneity see Ariel Ezrachi, 'The European Commission Guidance on Article 82 EC: The Way in which Institutional Realities Limit the Potential for Reform' (2009) Oxford Legal Studies Research Paper 27/2009 <http://ssrn.com/abstract=1463854> accessed 13 February 2020, 27.

A. Significance and Practical Challenges

The significance of ensuring the effective enforcement and uniform interpretation of Article 102 cannot be overstated. First, the importance of effective enforcement stems from the fact that Article 102 is central to the project of integrating the internal market. Second, the exigency of uniform interpretation is implied by the fact that the implementation of Article 102 pertains to an exclusive competence of the EU.[109] The execution of this exclusive EU competence was voluntarily delegated to national authorities so that both the EU and the Member States would share this responsibility. Under these circumstances, it is a basic condition for the integration of the internal market that Article 102 is effectively enforced and applied in the same manner across the EU.[110] In any event, effective enforcement and uniform interpretation are essential conditions for safeguarding the rule of law throughout the EU, because they ensure equal justice and legal certainty.[111]

The EU institutions have repeatedly stressed the significance of effective enforcement and uniform interpretation of the EU competition rules.[112] Regulation 1/2003 was itself conceived to promote effective enforcement.[113] Particularly, the decentralised scheme serves the effective enforcement of the competition rules, since it allocates cases to the authorities that

[109] TFEU (n 8), art 3(1)(b).

[110] cf Chris Townley and Alexander Türk, 'The Constitutional Limits of EU Competition Law: United in Diversity' (2019) 64 Antitrust Bulletin 235, 236-7, noting that diversity is important and that there must be a balance between coherence and respect for local preferences.

[111] *Stergios Delimitis* (n 45), para 47; *Masterfoods* (n 45), para 51.

[112] eg Case 14/68 *Walt Wilhelm and others v Bundeskartellamt* [1969] ECLI:EU:C:1969:4, paras 6-9; *Masterfoods* (n 45), paras 50-52; Case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., devenue Netia SA* [2011] ECLI:EU:C:2010:743, Opinion of AG Mazák, para 14; Commission, 'XXIXth Report' (n 16), foreword by Mario Monti and point 26; White Paper for Modernisation (n 22), paras 82-107; European Parliament, 'Resolution on the Commission White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty' [1999] (COM(1999) 101 – C5-0105/1999-1999/2108(COS)), paras 4-6; Joint Statement on ECN (n 40), paras 20-24; Reg 1/2003 (n 2), recs 1 and 22; Commission, 'Ten Years of Antitrust Enforcement under Regulation 1/2003' (n 35), paras 23-46.

[113] White Paper for Modernisation (n 22), paras 41-47; Reg 1/2003 (n 2), preamble.

are better placed to act while simultaneously enabling the Commission to target the most serious anticompetitive practices. However, effective enforcement is unthinkable if the Commission, the NCAs and the national courts in the various Member States adopt diverging interpretations of Article 102.[114] Uniform interpretation is in fact regarded a *sine qua non* for achieving an effective enforcement of Article 102.

Even so, the EU enforcement system gives rise to practical challenges in terms of securing effective enforcement and uniform interpretation. To start with, the existence of a plurality of enforcement bodies may itself lead to fragmentation. First, the system of parallel competences may lead to duplication of enforcement or to under-enforcement.[115] Second, the Commission and the NCAs may set diverging enforcement priorities based on different interests. Third, the internal capacities of certain NCAs and national courts may not match the aspiration of effective enforcement and uniform interpretation. As regards the NCAs, they are not equal in terms of political independence, resources and expertise, thus potentially leading to a varying intensity of enforcement and diverging interpretations.[116] Similarly, the involvement of national courts may create risks to the efficient decentralised enforcement of Article 102. Indeed, certain national courts have little experience in applying competition law, but judicial independence prevents the imposition of aggressive control mechanisms.

[114] Reg 1/2003 (n 2), art 16. Similarly see Bernardo Cortese, 'Defining the Role of Courts and Administrative Bodies in Private Enforcement in Europe: United in Diversity?' in Bernardo Cortese (ed), *EU Competition Law: Between Public and Private Enforcement* (Wolters Kluwer 2014) 154.

[115] Monti, *EC Competition Law* (n 25) 417.

[116] Ian Forrester, 'The Modernisation of EC Antitrust Policy: Compatibility, Efficiency, Legal Security' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Hart Publishing 2001) 106, noting that certain NCAs have few resources and/or expertise; Alan Riley, 'EC Antitrust Modernisation: The Commission Does Very Nicely—Thank You! Part 2: Between the Idea and the Reality of Decentralisation under Regulation 1' (2003) 24 ECLR 657, 659-61, stressing the concern about the independence of certain NCAs.

B. Control Mechanisms and Safety Valves

The outlined above practical challenges entail that it is necessary to establish a certain degree of coordination between the EU institutions responsible for enforcing Article 102 and the corresponding national institutions. In this respect, there are control mechanisms in place to promote effective enforcement and uniform interpretation. The discussion will now focus on the substance of these mechanisms, before explaining that the latter would have been valueless for the effective enforcement and uniform interpretation of Article 102 if the applied rules to abuse of dominance were unclear and overly complicated.

i. *Effective Enforcement*

a. Coordination of Enforcement within the ECN

The decentralised enforcement of Article 102 under Regulation 1/2003 carries the risk of parallel enforcement actions on the part of the Commission and the NCAs. Accordingly, there must be a legal framework for the allocation of cases between them and for the subsequent coordination of enforcement. This division of work is carried out by the Commission and the NCAs within the ECN, which is the forum dedicated to the effective enforcement of the EU competition rules.[117]

The basic principle is that each case should be taken up by either a single NCA, or several NCAs acting jointly, or the Commission.[118] In order to decide which authority or authorities should act in a particular case it must be determined which of them are better placed to do so.[119] A single NCA is well placed to act if only one Member State is substantially

[117] Joint Statement on ECN (n 40), para 5; ECN Notice (n 2), para 1.

[118] ECN Notice (n 2), para 5. See also Joint Statement on ECN (n 40), para 16, stipulating that '[c]ases will be dealt with by a single competition authority as often as possible'.

[119] ECN Notice (n 2), paras 6-15. For a discussion of the concept of 'well placed authority' see Silke Brammer, 'Concurrent Jurisdiction under Regulation 1/2003 and the Issue of Case Allocation' (2005) 42 CML Rev 1383, 1388.

affected by an allegedly anticompetitive practice, and the NCA is capable of issuing an appropriate remedy and obtain the relevant information.[120] Where this is not the case, the members of the ECN must either seek to agree between them which authority is best placed to successfully deal with the case or coordinate their action and seek to designate one competition authority as the lead institution.[121] The Commission is deemed to be better placed when the practices under investigation affect more than three Member States or when the case raises issues of particular EU interest or new competition law issues.[122]

In practice, however, the ECN will operate to re-allocate cases, since a case will be initially taken up by the authority that either received a complaint or started an *ex-officio* procedure.[123] Re-allocation of a case would be envisaged at the outset of a procedure where that authority considers that it is not well-placed to act or where other authorities also consider themselves well-placed to act.[124] In order therefore to address possible re-allocation issues in an efficient and quick manner, all the members of the ECN are obliged to notify each other of an intended or commenced investigation.[125] This enables the detection of multiple procedures at an early stage and ensures that cases are dealt with by a well-placed authority after the initial allocation and until the completion of the proceedings.[126]

In addition to the procedure followed within the ECN for the initial (re-)allocation of a case, Regulation 1/2003 also stipulates mechanisms for the coordination of enforcement at

[120] ECN Notice (n 2), paras 8-10.

[121] ibid paras 11-13.

[122] ibid paras 14-15.

[123] ibid paras 6-7.

[124] ibid.

[125] ibid paras 16-17; Reg 1/2003 (n 2), art 11(2) and (3).

[126] ECN Notice (n 2), para 19.

subsequent stages. Particularly, Article 13 of the said regulation provides a legal basis for suspending proceedings or rejecting a complaint on the grounds that another authority is dealing, or has previously dealt, with the same case.[127] Consistently, however, with the system of parallel competences, which entails that decisions of NCAs do not bind other NCAs, a NCA is entitled to suspend or terminate its proceedings but it has no obligation to do so.[128] Hence, a NCA remains in principle free to carry out its own investigation independently of other NCAs. Such a situation, however, may trigger the Commission's decision to initiate proceedings in relation to this case, which would relieve all NCAs of their competence to act under the same legal basis and against the same set of facts.[129]

These mechanisms provide for the coordination of enforcement between the members of the ECN. In this regard, they promote the effective public enforcement of Article 102 in an institutional setting of multiple enforcement authorities. On the contrary, a similar formal coordination mechanism is not set up for the private enforcement by national courts.

b. Cooperation between the Commission, NCAs and National Courts

EU law envisages a broad scope of cooperation between the institutions involved in the enforcement of the competition rules. This cooperation facilitates the effective enforcement of Article 102 and is not confined to the members of the ECN. Particularly, Regulation 1/2003 also foresees the cooperation between competition authorities and national courts, thus promoting the overall effective enforcement of Article 102.

Starting with public enforcement, Article 11(1) of Regulation 1/2003 provides for the close cooperation of the Commission and the NCAs. This is further specified in the said

[127] ibid paras 21 and 24. See also Reg 1/2003 (n 2), rec 18.

[128] ECN Notice (n 2), para 22.

[129] Reg 1/2003 (n 2), art 11(6); ECN Notice (n 2), paras 50-57.

regulation. First, Article 12 stipulates that exchanges of information may take place between an NCA and the Commission and between and amongst NCAs.[130] Second, Article 22 provides that a NCA may be asked to carry out inspections or any other fact-finding measures in its own territory on behalf and for the account of either another NCA or the Commission.[131] Finally, Article 14 shapes the Advisory Committee as a body made up by representatives of NCAs, which must be consulted prior to the adoption of a Commission decision or any competition law measure and must also function as a forum for the discussion of important cases of NCAs.[132] Overall, these mechanisms of cooperation are designed to facilitate the effective handling of cases by all ECN members.

In order to improve the overall enforcement of the EU competition rules, Regulation 1/2003 also provides for the cooperation between the national courts and the public enforcement agencies.[133] The Commission seems particularly committed to cooperate with national courts when the latter apply Articles 101 and 102 and has set out the details of this cooperation in a soft law instrument that builds on Article 15 of Regulation 1/2003.[134] In this regard, national courts may request that the Commission transmit information in its possession or give an opinion on questions concerning the application of Article 102.[135] The Commission may also on its own initiative decide to intervene as *amicus curiae* in proceedings before

[130] See ECN Notice (n 2), paras 26-30.

[131] See ibid paras 29-30.

[132] See ibid paras 58-68.

[133] Reg 1/2003 (n 2), art 15 and rec 21.

[134] Notice on the Cooperation with National Courts (n 4). See Commission, 'Amendments to the Commission Notice on the Cooperation between the Commission and Courts of the EU Member States in the Application of Articles 81 and 82 EC' [2005] OJ C256/5 (Communication), stipulating the amendments made to the Notice in 2015 for aligning the rules applicable to the disclosure of documents in the Commission's file with the rules of the damages directive. See also text to n 102.

[135] Reg 1/2003 (n 2), art 15(1); Notice on the Cooperation with National Courts (n 4), paras 21-30. This is a codification of previous case law: Joined Cases C-174 and 189/98P *Kingdom of the Netherlands and Gerard van der Wal v Commission* [2000] ECLI:EU:C:2000:1, para 25.

national courts.[136] As to NCAs, they are also empowered to submit observations to the national courts of their own Member State on issues relating to the application of Article 102.[137] Finally, national courts on their part must assist the Commission with a view to facilitating its role in the enforcement of the competition rules, in particular, by submitting to the Commission copies of any relevant judgments.[138]

All these legal mechanisms are manifestations of the mutual duty of loyal cooperation imposed on both the EU institutions and the Member States in the area of competition law.[139] In this regard, they are indeed indispensable for the effective enforcement of Article 102 with a view to attaining the objectives of the EU Treaties.

c. ECN Plus

The above-described mechanisms are insufficient in themselves to achieve an effective enforcement of Article 102. Particularly, a truly effective enforcement of Article 102 is only feasible if all the institutions enforcing the prohibition are equipped with adequate guarantees of independence, resources, and enforcement and sanctioning powers.[140] In the absence of harmonised EU rules in this regard, these issues are governed by the principle of autonomy. In this context, certain national rules prevent NCAs from having the necessary guarantees so as to effectively enforce the EU competition rules.[141] This inevitably undermines the decentralised

[136] Reg 1/2003 (n 2), art 15(3); Notice on the Cooperation with National Courts (n 4), paras 31-35.

[137] Reg 1/2003 (n 2), art 15(3).

[138] ibid art 15(2). See Notice on the Cooperation with National Courts (n 4), paras 36-41, providing an even broader role for national courts in this regard.

[139] Case C-429/07 *Inspecteur van de Belastingdienst v X BV* [2009] ECLI:EU:C:2009:359, para 21; Case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., devenue Netia SA* [2011] ECLI:EU:C:2011:270, para 26, explicitly pointing out that the cooperation obligations imposed by Reg 1/2003 are manifestations of this principle. Similarly see Case T-339/04 *France Télécom SA v Commission* [2007] ECLI:EU:T:2007:80, paras 78 and 86.

[140] Commission, 'Implementation Plan' (Staff Working Document) [2017] SWD(2017) 116 final.

[141] Goggin (n 35), describing the very peculiar Irish system.

system of parallel powers for the enforcement of Article 102 and eradicates any attempt to achieve effective enforcement throughout the EU.[142]

The awareness of the problems caused by the divergent national laws in the various Member States led to the adoption of Directive 2019/1 (the 'ECN plus directive'),[143] the provisions of which must be transposed in the national legal orders by 4 February 2021.[144] The ECN plus directive introduces minimum harmonisation rules granting common investigative and enforcement powers to NCAs, which mirror the Commission's enforcement regime.[145] More specifically, the ECN plus directive includes provisions ensuring that NCAs: act independently and impartially;[146] have sufficient resources to carry out their tasks;[147] have the necessary powers to gather all relevant evidence;[148] and have adequate tools to impose proportionate and deterrent sanctions for breaches of the EU competition rules.[149]

This reform is arguably capable to elevate NCAs to become effective enforcers of the EU competition rules, thus bringing a level playing field among all ECN members.[150] It is therefore a milestone in the development of competition law enforcement. That being said,

[142] Commission, 'Ten Years of Antitrust Enforcement under Regulation 1/2003' (n 35), paras 24-42. cf Brammer (n 119) 1402-8.

[143] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L11/3 (ECN plus directive).

[144] ibid art 34(1).

[145] The substance of the ECN plus directive falls outside the scope of this chapter. For an analysis of the directive's provisions see Wouter Wils, 'Independence of Competition Authorities: The Example of the EU and its Member States' (2019) 42 WC 149, emphasising the issue of independence of the Commission and the NCAs.

[146] ECN plus directive (n 143), art 4.

[147] ibid art 5.

[148] ibid arts 6-12.

[149] ibid arts 13-23.

[150] Of course, for some Member States this reform would translate to a non-reform in practice insofar as their NCAs already enjoy Commission-like powers.

however, institutional and procedural divergence remains, especially in the context of the application of Articles 101 and 102 by national courts.

ii. *Uniform Interpretation*

The foundations for the uniform interpretation of Article 102 in a decentralised system of enforcement were already established as a result of the initially centralised enforcement at the EU level. Particularly, the forty years of centralised enforcement enabled the Commission and the EU courts to formulate sufficiently clear and precise legal tests for the assessment of the various potentially abusive practices of dominant firms. To the extent thus that NCAs and national courts are expected to follow the EU courts' extensive case law and the Commission's wide-ranging decisional practice, the uniform interpretation of Article 102 throughout the EU could have been contemplated.[151]

That being said, however, the existing case law and decisional practice is not sufficient to guarantee the uniform interpretation of Article 102 within the decentralised institutional setting in which the provision must be enforced. First, the centrally generated legal rules do not and cannot cover all factual scenarios. Online markets, for instance, are posing unprecedented challenges to the interpretation of Article 102.[152] Second, the involvement in the enforcement of Article 102 of diverse national institutions that are embedded in different

[151] To that effect White Paper for Modernisation (n 22), para 3.

[152] See eg Autorité de la Concurrence and Bundeskartellamt, 'Competition Law and Data' (10 May 2016) <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.html> accessed 18 April 2020; Heike Schweitzer and others, 'Modernising the Law on Abuse of Market Power: Report for the Federal Ministry for Economic Affairs and Energy (Germany)' (29 August 2018) <https://ssrn.com/abstract=3250742> accessed 18 April 2020; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition Policy for the Digital Era' (Report commissioned by the Commission, EU 2019); Autorité de la Concurrence, 'The Autorité de la Concurrence's Contribution to the Debate on Competition Policy and Digital Challenges' (19 February 2020) <https://www.autoritedelaconcurrence.fr/sites/default/files/2020-03/2020.03.02_contribution_adlc_enjeux_numeriques_vf_en.pdf> accessed 18 April 2020; Andriani Kalintiri and Ryan Stones, 'FIDE Congress 2020 – EU Competition Law and the Digital Economy: United Kingdom Report' (2019) CLS Research Paper 2019/06, <https://openaccess.city.ac.uk/id/eprint/23431/> accessed 18 April 2020; José Marino García García and Pablo Ibáñez Colomo, 'Competition Law and Policy in the Digital Economy: Report From Spain' (28 January 2020) <https://ssrn.com/abstract=3527032> accessed 18 April 2020.

political, institutional and procedural settings may lead to the influence of illegitimate national interests, and thus to divergent interpretations.[153] This is particularly relevant because certain national interests are tolerated in the context of Article 102.[154] In order therefore to ensure the uniform interpretation of Article 102 against this backdrop, a number of control mechanisms are set up with the overall effect to allow the EU institutions to retain a leading role in the interpretation of substantive law.

The Commission occupies a central position within this framework. First of all, the Commission controls the decision-making practice of NCAs. In this regard, NCAs are barred from taking decisions that would run counter to existing Commission decisions.[155] Moreover, the Commission possesses the drastic power to takeover cases from NCAs and initiate its own proceedings at any stage of the procedure.[156] It would exercise this power, in particular, when NCAs envisage conflicting decisions in the same case or decisions in conflict with existing EU case law, or when a similar legal issue has arisen in several Member States and there is need for a Commission decision so as to develop EU competition policy.[157] To that end, NCAs must inform the Commission about the substance of any envisaged decisions prior to their adoption.[158] Finally, the Court of Justice has confirmed the Commission's role as guarantor of

[153] See eg Or Brook and Kati Cseres, 'Member States' Interest in the Enforcement of EU Competition Law: A Case Study of Article 101 TFEU' in Marton Varju (ed), *Between Compliance and Particularism: Member State Interests and European Union Law* (Springer 2019) 170, arguing that the decentralised enforcement has led to fragmentation among the Member States, because of the incorporation of national interest into the enforcement of EU competition law.

[154] See eg Reg 1/2003 (n 2), art 3(2)-(3); Case T-30/89 *Hilti AG v Commission* [1991] ECLI:EU:T:1991:70, paras 102-119; Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECLI:EU:T:1994:246 (*Tetra Pak II*), paras 136-141; Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECLI:EU:C:1999:430, paras 105 and 111.

[155] Reg 1/2003 (n 2), art 16(2).

[156] ibid art 11(6).

[157] ECN Notice (n 2), para 54.

[158] Reg 1/2003 (n 2), art 11(4)-(5).

uniform application by holding that the Commission alone is empowered to make findings of inapplicability for Article 102 and precluding NCAs from doing so.[159]

In a similar vein, the Commission assists in safeguarding the uniform interpretation of Article 102 when it is applied by national courts. Specifically, national courts cannot hand out judgments running counter to a decision adopted by the Commission on the same set of facts.[160] They must also avoid issuing judgments that would conflict with a contemplated decision on the part of the Commission.[161] To that end, a national court may have to stay its proceedings until the case in question has reached a final conclusion at the EU level.[162] Additionally, it is arguable that national courts are not allowed to declare that certain conduct is not abusive under Article 102, since the Court of Justice has held that the power to make such a negative finding of inapplicability is bestowed exclusively to the Commission.[163] Finally, the Commission is, in any event, allowed to initiate its own proceedings to investigate a case that has already been dealt with by a national court.[164]

The central position of the Commission in this regard is not limited in monitoring the enforcement by national institutions. The Commission performs additional tasks in the context

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[159] *Prezes Urzędu* (n 139), paras 27-30. See Giorgio Monti, 'Legislative and Executive Competences in Competition Law' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (OUP 2014) 116, criticising the judgment for focusing exclusively on the Commission's powers at the expense of the corresponding powers of the NCAs.

[160] Reg 1/2003 (n 2), art 16(1); Notice on the Cooperation with National Courts (n 4), para 13. See also Reg 1/2003 (n 2), rec 22, suggesting that national courts are not bound by commitment decisions adopted by the Commission.

[161] Reg 1/2003 (n 2), art 16(1); Notice on the Cooperation with National Courts (n 4), para 12.

[162] Notice on the Cooperation with National Courts (n 4), paras 12-14. See also *Stergios Delimitis* (n 45), para 52; *Masterfoods* (n 45), paras 41 and 55-57.

[163] cf Tjarda van der Vijver, 'Article 102 TFEU: How to Claim the Application of Objective Justifications in the Case of *prima facie* Dominance Abuses?' (2013) 4 JECLP 121, 132, rightly arguing that the *Tele2 Polska* ruling should be read as an account of the relationship between the Commission and the NCAs, ie it does not affect national courts.

[164] *Masterfoods* (n 45), para 48. See White Paper for Modernisation (n 22), para 102, explicitly referring to this. cf Monti *EC Competition Law* (n 25) 438, claiming that it is not clear whether the Commission may begin its own proceeding under these circumstances because Reg 1/2003 do not provide for this.

of its wider responsibility to elaborate EU's competition policy in a consistent way across the EU. First, it publishes soft law instruments so as to clarify the applicable legal tests and the policy direction.[165] In this regard, the Commission has adopted the Priorities Paper for Article 102, which will be discussed in the following chapter.[166] Second, the Commission is empowered to assist dominant firms that are planning a particular conduct but are uncertain about the competition law implications.[167] The primary purpose of these tasks is to enhance legal certainty for stakeholders in the context of a regime which requires dominant firms to conduct a self-assessment of their commercial practices.[168] Even so, the inevitable corollary is the promotion of uniformity.[169] Hence, they could potentially be important tools in the endeavour to ensure the uniform interpretation of Article 102.

More generally, the cooperation mechanisms established under Regulation 1/2003 for the effective enforcement of Articles 101 and 102 are of great importance in preserving the uniform interpretation of Article 102. First, the practical success of the control mechanisms for the preservation of uniform interpretation depend heavily on the close cooperation of all the institutions involved in the enforcement of Article 102. Particularly, the Commission cannot

[165] This is based on TFEU (n 8), art 105(1); *Masterfoods* (n 45), para 46. See Reg 1/2003 (n 2), art 33. cf Wolfgang Weiß, 'After Lisbon, can the European Commission Continue to Rely on 'Soft Legislation' in its Enforcement Practice?' (2011) 2 JECLP 441, 447, arguing that the Commission's practice of adopting soft law instruments that functionally amend the legal rules raise concerns relating to the Lisbon Treaty's requirements of democratically legitimate decision-making.

[166] Commission, 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' (Communication) [2009] OJ C45/7 (Priorities Paper).

[167] Reg 1/2003 (n 2), art 9, under which firms are able to offer commitments to the Commission promising to modify their behaviour when the Commission intents to take action against them; Reg 1/2003 (n 2), art 10, empowering the Commission to adopt decisions finding that Article 102 is not applicable to a practice in order to promote legal certainty; Reg 1/2003 (n 2), rec 38, suggesting that the Commission may offer informal guidance to firms where a case gives rise to genuine uncertainty. See also Guidance Letters (n 4).

[168] Reg 1/2003 (n 2), art 1(3).

[169] See Notice on the Cooperation with National Courts (n 4), paras 8 and 27, stating that national courts may seek guidance in Commission notices and guidelines when applying the EU competition rules.

perform its monitoring role if the national institutions fail to inform it about ongoing cases. More importantly, second, the cooperation mandated by Regulation 1/2003 leads in practice to a large degree of voluntary convergence.[170] This might not have been possible on the basis of legal instruments alone due to the political sensitivity as to the limits of EU powers to control economic policy.

In any event, the judicial institution of the EU holds the most prominent position in establishing and preserving the uniform interpretation of Article 102. This is because the CJEU is entrusted with the interpretative monopoly with regard to the meaning of EU law by virtue of Article 19(1) TEU in conjunction with Articles 267(3) and 344 TFEU.[171] The most important legal mechanism in this regard is the preliminary ruling reference, which establishes the direct cooperation between the national and EU judiciaries so as to ensure a uniform interpretation of EU law by national courts.[172] In fact, the closest the Commission can get to influencing national courts is to act as *amicus curiae* providing its non-binding opinion pursuant to Article 15(3) of Regulation 1/2003.[173] On the contrary, the CJEU has interpretative authority over national courts under the reference procedure set forth in Article 267 TFEU.[174]

The reference procedure offers to national institutions carrying out judicial functions the possibility to resolve any doubt as to the correct interpretation of Article 102 in specific

[170] See ECN, 'Results of the Questionnaire on the Reform of Member States (MS) National Competition Laws After EC Regulation No. 1/2003' (22 May 2013) <https://ec.europa.eu/competition/ecn/convergence_table_en.pdf> accessed 17 February 2020.

[171] Similarly Linda Senden, *Soft Law in European Community Law* (Hart Publishing 2004) 373.

[172] TFEU (n 8), art 267.

[173] Notice on the Cooperation with National Courts (n 4), paras 19 and 29.

[174] ibid para 29. See generally Gareth Davies, 'Abstractness and Concreteness in the Preliminary Reference Procedure' in Niamh Nic Shuibhne (ed), *Regulating the Internal Market* (Edward Elgar 2006) 210–45. cf Gareth Davies, 'Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-Constitutionalisation' (2018) 24 ELJ 358, 359 and 372-4, arguing that it is not plausible to understand the CJEU as having definitive interpretative authority over EU law, and advocating instead interpretative pluralism.

cases pending before them.[175] Particularly, a national court is entitled under Article 267 TFEU to formulate and refer questions to the Court of Justice regarding the interpretation of Article 102 if a dispute on its interpretation arises.[176] A national court is in principle free to decide whether or not to use the reference procedure.[177] It has, however, a genuine obligation to refer a question for a preliminary ruling if there is no judicial remedy available under national law against the judgment that it will deliver.[178] In this regard, the failure of a last-instance court to comply with the obligation to lodge a preliminary reference may result in the liability of the Member State concerned.[179]

Be this as it may, a preliminary ruling issued by the Court of Justice pursuant to Article 267 TFEU is binding to the referring national court as regards the provided interpretation of EU law.[180] Moreover, such a ruling produces effects beyond the specific case concerned insofar as the existence of a precedent from the Court of Justice removes the obligation of last-instance

[175] On the concept of 'court or tribunal' having the competence to refer a preliminary question pursuant to Article 267 TFEU see eg Case 61/65 *G. Vaassen-Göbbels (a widow) v Management of the Beambtenfonds voor het Mijnbedrijf* [1966] ECLI:EU:C:1966:39, 273; Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* [1997] ECLI:EU:C:1997:413, para 23; Case C-205/08 *Umweltanwalt von Kärnten v Kärntner Landesregierung* [2009] ECLI:EU:C:2009:767, para 35. See Case C-67/91 *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and others* [1992] ECLI:EU:C:1992:330, paras 22ff, declaring admissible the application for a preliminary ruling submitted by the Spanish competition authority. Contrast Case C-53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] ECLI:EU:C:2005:333 (*Syfait*), paras 21-38, holding that the Greek competition authority does not meet the requirements to be considered a court or tribunal within the meaning of Article 267 TFEU.

[176] TFEU (n 8), art 267(1)(a).

[177] ibid art 267(2).

[178] ibid art 267(3).

[179] TFEU (n 8), art 258; Case C-154/08 *Commission v Kingdom of Spain* [2009] ECLI:EU:C:2009:695, paras 64-66. The national court's failure to fulfil this obligation may also give rise to actions for damages against the Member State concerned: Case C-46 and 48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECLI:EU:C:1996:79, paras 51-57; Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECLI:EU:C:2003:513, paras 36 and 59.

[180] eg Case 52/76 *Luigi Benedetti v Munari F.lli s.a.s.* [1977] ECLI:EU:C:1977:16, para 26; Case C-69/85 *Wünsche Handelsgesellschaft GmbH & Co. v Federal Republic of Germany* [1986] ECLI:EU:C:1986:104, para 13; Case C- 446/98 *Fazenda Pública v Câmara Municipal do Porto* [2000] ECLI:EU:C:2000:691, paras 49-50; Case C-173/09 *Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa* [2010] ECLI:EU:C:2010:581, paras 29-30.

courts to refer the matter for a preliminary ruling.[181] Thus, the interpretative rulings provided by the Court of Justice produce binding legal effects for any national institution for which they are relevant, including administrative authorities.[182] This entails that the last word on the legal interpretation of Article 102 lies with the Court of Justice.

It must be stressed, however, that uniform interpretation does not mean uniform results in every single case across the EU. Indeed, the Court of Justice provides a binding interpretation of EU law but carries out this function in a way that respects the jurisdiction and judicial autonomy of the referring court.[183] Particularly, national courts have sole authority to apply the interpretative principles to the particular facts and to interpret national law, and thus to determine the outcome of a case.[184] In this regard, both the interpretation of Article 102 by the EU courts and secondary EU law offer space for divergent outcomes in the assessment of the unilateral conduct of firms. First, the interpretation of Article 102 by the EU courts allows divergent results through the *in concreto* appreciation of efficiency claims and objective justifications.[185] Second, NCAs and national courts are allowed to apply national law of a stricter or different character in controlling unilateral conduct.[186]

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[181] eg Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECLI:EU:C:1982:335, paras 13-21; Case C-495/03 *Intermodal Transports BV v Staatssecretaris van Financiën* [2005] ECLI:EU:C:2005:552, paras 33 and 39.

[182] Case C-453/00 *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* [2004] ECLI:EU:C:2004:17, paras 20-28; Case C-2/06 *Willy Kempter KG v Hauptzollamt Hamburg-Jonas* [2008] ECLI:EU:C:2008:78, paras 19-26.

[183] For a discussion see Daniele Domenicucci, 'Preliminary Rulings and Competition Law: Some Reflections for National Judges' in Bernardo Cortese (ed), *EU Competition Law: Between Public and Private Enforcement* (Wolters Kluwer 2014) 194-203.

[184] *Costa v E.N.E.L.* (n 85); Case C-83/91 *Wienand Meilicke v ADV/ORGA F. A. Meyer AG* [1992] ECLI:EU:C:1992:332, paras 23-31.

[185] eg T-30/89 *Hilti* (n 154), paras 102-119; Case C-95/04P *British Airways plc v Commission* [2007] ECLI:EU:C:2007:166, para 86.

[186] Reg 1/2003 (n 2), art 3(2)-(3). See also Notice on the Cooperation with National Courts (n 4), para 6.

IV. Institutional Setting and the Necessity of Clear Rules

The legal instruments that have been established for promoting the effective enforcement and uniform interpretation of the EU competition rules are necessary but insufficient conditions for the implementation of an efficient decentralised enforcement of Article 102. The complex institutional setting within which Article 102 is to be enforced additionally dictates the formulation of clear rules for the assessment of the unilateral conduct of dominant firms. Indeed, this institutional framework produces certain elements of uncertainty that can only be remedied through the design of clear legal tests under Article 102.

First, the lack of clear rules for the assessment of abuse of dominance would raise concerns in the enforcement of Article 102 at the EU level. The analysis conducted above portrayed the intricate process of decision-making at the EU level. Undoubtedly, the numerous internal and external to the Commission checks and balances are significant in ensuring that all relevant views and evidence are properly taken into account and that the assessment proposed by DG COMP is factually and legally sound. At the same time, however, it brings into the decision-making a number of actors that have diverging agendas and their own configuration of expertise and capacities.

In this regard, the conflicting visions within mainstream economic theory regarding the competitive effects of the different unilateral practices by dominant firms may create a situation where the diverging insights provided from the different actors involved generate confusion as to the legality of a conduct under Article 102. This may, in turn, entail the random and inconsistent intrusion of political considerations into the analysis. Moreover, the institutional makeup within the Commission and the subsequent judicial review by the EU courts may

overly delay the final determination of cases.[187] This may result in the irremediable elimination or weakening of promising competitors of the dominant firm, while also contradicting the EU institutions' duty to reach decisions within reasonable time.[188]

The lack of clear tests for the assessment of dominant firms' practices under Article 102 could also adversely affect the judicial review of the Commission's decisions. The EU courts have traditionally adopted a careful approach to the scope and intensity of their review of the Commission's decisions in complex economic and technical matters.[189] The lack of clear and predictable criteria could therefore lead to the further relaxation of the EU courts' judicial scrutiny. Granting, however, a large margin of appreciation to the Commission in this context could directly contradict the foreseen in the EU Treaties institutional balance, ie, the EU version of the separation of powers.[190]

Second, the absence of clear rules for the evaluation of a dominant firm's conduct would put at risk the efficient decentralised enforcement of Article 102. This is the result of both the existing institutional and procedural diversity at national level, as well as the fact that Member States are permitted to impose stricter rules in relation to unilateral restrictions of competition. This setting is prone to diverging interpretations of Article 102, which may lead to the lack of a level playing field for dominant firms across the EU and may trigger forum

[187] eg *Intel* (Case COMP/37.990) [2009] D(2009) 3726 final, a case where the Commission procedure started in 2000 and has still to come to a final determination.

[188] On the point that the failure to adjudicate within a reasonable time constitutes a breach of a fundamental right see eg CFREU (n 56), art 47; Case C-50/12P *Kendrion NV v Commission* [2013] ECLI:EU:C:2013:771, paras 72-107; Case C-58/12P *Groupe Gascogne SA v Commission* [2013] ECLI:EU:C:2013:770, paras 72-103; Case C-40/12P *Gascogne Sack Deutschland GmbH v Commission* [2013] ECLI:EU:C:2013:768, paras 80-102.

[189] See text to n 61. cf Marc van der Woude, 'Judicial Control in Complex Economic Matters' (2019) 10 JECLP 415, 422-3, arguing that the manifest error formula that the EU courts employ to review complex economic and technical matters does not entail a limitation of the intensity of their review; it rather implies that the EU courts cannot substitute their own views to those of the Commission.

[190] See TEU (n 7), art 13(2).

shopping.[191] The existing institutional setting therefore dictates prudence as to the design of the rules to be applied to the unilateral conduct of dominant firms.

In particular, the heterogeneous private litigation scene in the EU raises acute practical challenges because of the limited capacity of certain national courts to hear competition law cases.[192] This is further exacerbated by the fact that national courts do not benefit from a formal coordination mechanism similar to the ECN. In order thus to avoid divergent interpretation of Article 102 and an unleveled playing field, the employed tests for the assessment of potentially abusive practices must be clear. Indeed, national courts would obtain real assistance from consulting the relevant EU case law only if it offers clear tests which they can apply to concrete cases. Conversely, the formulation of overly complicated tests under Article 102 may raise insurmountable obstacles to its uniform interpretation.

After all, the constitutionally mandated multi-goal and holistic approach to the interpretation of Article 102 should not be neglected. The multiple objectives and social-political values that are relevant to Article 102 must be taken into account also at national level. In doing so, however, NCAs and national courts may reach diverging results by applying Article 102 in different ways. This could create legal confusion for the additional reason that EU law allows national rules regulating the unilateral conduct of firms in a stricter manner than Article 102.[193] In the absence therefore of a clear perception as to the ambit of the prohibition of abuse of dominance, the efficient decentralised enforcement of Article 102 may be compromised. This may, in turn, create legal uncertainty considering especially the fact that

[191] In this vein Ezrachi 'The European Commission Guidance on Article 82' (n 108) 29.

[192] ibid 27.

[193] See text to n 186.

the regime relies on market players self-assessing the compatibility of their commercial conduct with Article 102.[194]

Undoubtedly, there are control mechanisms in place to avoid divergent interpretations of Article 102 by NCAs and national courts. However, the frequent use of these mechanisms would stand at odds with the very existence of a decentralised system of enforcement and would undermine the effective enforcement of Article 102 in practice. If the Commission, for example, constantly exercised its extreme power to remove a case from a NCA, it would deny NCAs the ability to enforce Article 102, thereby contradicting the system of decentralised enforcement. Hence, the Commission must use this control mechanism in really exceptional circumstances. Similarly, national courts that are called upon to apply Article 102 should not incessantly consult the Court of Justice on the basis of Article 267 TFEU. Doing so would be inconsistent with the national courts' power to enforce Article 102. Moreover, the use of the preliminary reference procedure increases the amount of time needed to reach a final conclusion, which may be particularly damaging in industries that are undergoing rapid change. This is even more damaging considering that private competition law actions before national courts are usually already very lengthy.

Overall, the existing enforcement framework is designed to ensure simultaneously the involvement of various decision-makers and the uniform interpretation of Article 102. This calls for aligning the capacity of multiple enforcers embedded in diverging institutional settings with the aspiration of preserving an effective decentralised system of enforcement with uniform interpretation and predictable outcomes. In this regard, there is no other manner to match

[194] Reg 1/2003 (n 2), art 1(3).

capacity with aspiration within this complex institutional framework than to rely on clear rules under Article 102.

Consequently, both the constitutional peculiarities of the EU and the institutional framework within which Article 102 is to be enforced dictate the design of clear rules for the assessment of the unilateral conduct of dominant firms. This, in turn, entails that any attempt to inject more economic analysis into Article 102 should be consistent with its natural limitations, which stem from the constitutional and institutional peculiarities attached to it.

6. INTEGRATING ECONOMIC ANALYSIS INTO LEGAL THINKING

The discussion so far has focused on EU's most noticeable constitutional and institutional peculiarities and their implication for the interpretation of the concept of abuse under Article 102. Having in mind these peculiarities, this chapter is dedicated to the proper role of economics in the understanding of the concept of abuse and in the design of the legal tests applied under Article 102.

The analysis aims to illustrate that there are certain natural limitations to the interpretation of Article 102, which stem in particular from EU's peculiar constitutional and institutional framework. By extension, these limitations inform and restrict the injection of economic analysis into the interpretation of Article 102. Any shift thus to a more economics-oriented approach to abuse of dominance should be compatible with EU's constitutional foundations and institutional realities. This entails that adjustments to the employed legal tests that are based on economic arguments should be assessed in relation to both their aptness to pursue the multi-goal and holistic approach that the EU Treaties prescribe for Article 102 and their functionality within the existing institutional setting. Hence, the relevant debate is often misguided to the extent that it concentrates on the quantity rather than the quality of the employed economic analysis.

The chapter starts by discussing in general terms the relevance and limitations of economic analysis in the context of Article 102. It proceeds to provide an account of the Commission's attempt to introduce a more economically inspired approach to abuse of dominance, followed by an analysis of the challenges posed by both the substance of this new approach and the legal nature of the document containing it.[1] In this regard, the discussion

[1] Commission, 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' (Communication) [2009] OJ C45/7 (Priorities Paper).

illustrates the practical, legal, constitutional and institutional challenges that are attached to the 'more economics approach', while also displaying the weak legal status of the Commission's document. The chapter concludes by elucidating the limitations linked to the interpretation of the concept of abuse of dominance, arguing that more economic analysis may be injected into Article 102 only to the extent that this is translated into workable and clear legal rules that are consistent with the constitutional and institutional peculiarities prevailing in the EU, as described in chapters 2 to 5

I. Economic Analysis and Article 102

The influence of economics in interpreting and guiding the enforcement of the competition rules is no longer controversial. It is now widely accepted that economic analysis is inescapable in competition law, since it leads to greater precision in the enforcement of the law.[2] Economic analysis is in fact the only suitable tool providing an improved understanding of market realities based on a systematic examination and presentation of lessons of practical experience.[3]

As a result, economics is generally used in the area of competition law for defining relevant markets, evaluating entry barriers, analysing competitive effects, and quantifying economic harm and damages. Moreover, companies, attorneys and economic consultants are increasingly using economic models and econometric tools to present competition authorities and courts with sophisticated economic analyses that purport to show the pro- or

[2] For discussions see William Kovacic and Carl Shapiro, 'Antitrust Policy: A Century of Economic and Legal Thinking' (2000) 14 Journal of Economic Perspectives 43; Lawrence White, 'The Growing Influence of Economics and Economists on Antitrust: An Extended Discussion' (2010) 5 Economics, Management and Financial Markets 26.

[3] Ioannis Lianos, 'Categorical Thinking in Competition Law and the "Effects-based" Approach in Article 82 EC' in Ariel Ezrachi (ed), *Article 82: Reflections on its Recent Evolution* (Hart Publishing 2009) 36; Pablo Ibáñez Colomo, '*Intel* and Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy' (2014) LSE Legal Studies Working Paper 29/2014, <http://ssrn.com/abstract=2530878> accessed 21 January 2018, 5-6.

anticompetitive effects of particular deals or practices. Overall, economics is rightly considered to be the 'unavoidable companion' of any reasoning regarding competition law and policy.[4]

That being said, however, the translation of economics into rules of law requires a certain degree of simplification. On the one hand, economic analysis of a business practice may be composed of an unlimited set of variables, making policy conclusions impossible. On the other hand, fundamental rule-of-law principles, such as legal certainty and velocity in the decision-making process, put limits on the ways that competition rules can be designed. In this context, a competition law regime cannot but take into account a diminished set of variables and frame them as formal legal rules or standards that would ensure the feasibility of adjudication.[5] The process of selecting the particular variables that are relevant for the design of the legal rules involves trade-offs between sufficient accuracy and error costs, on the one hand, and clarity, predictability and enforcement costs, on the other.[6]

Even so, it must be stressed that the formal nature of the designed legal rules does not necessarily mean that the employed rules are divorced from economic reasoning. The prime role of economics in the context of competition law does not derive from the use of purely quantitative analysis for assessing an allegedly anticompetitive practice. In fact, using

[4] Mario Monti, 'The Application of Community Competition Law by the National Courts' (Speech at the Europäische Rechtsakademie, Trier, 27 November 2000).

[5] Timothy Muris, 'Improving the Economic Foundations of Competition Policy' (2003) 12 George Mason Law Review 1, 6-8.

[6] See eg Paul Joskow, 'Transaction Cost Economics, Antitrust Rules, and Remedies' (2002) 18 Journal of Law, Economics and Organization 95, 97-100; Johannes Laitenberger, 'Striking the Right Balance in the Enforcement of Competition Rules' (Speech, Tallinn, 20 September 2017). cf Ken Heyer, 'A World of Uncertainty: Economics and the Globalization of Antitrust' (2005) 72 ALJ 375, 383, noting that these trade-offs are implicit in that they are not incorporated into the analysis. On the specific trade-off between under-enforcement and over-enforcement see William Kolasky, 'What is Competition? A Comparison of U.S. and European Perspectives' (2004) 49 Antitrust Bulletin 29, 40-42, claiming that US enforcers are more willing to tolerate under-enforcement so as to avoid chilling competition. Contrast Cyril Ritter, 'Presumptions in EU competition Law' (2018) 6 JAE 189, 212; Johannes Laitenberger, 'Accuracy and Administrability go Hand in Hand' (Speech at the CRA Conference, Brussels, 12 December 2017), 7, arguing that under-enforcement is potentially more serious than over-enforcement. cf Johannes Laitenberger, 'Competition and Innovation' (Speech at the CRA annual conference, Brussels, 9 December 2015), 8, implying that markets must remain contestable for innovation to flourish.

economic analysis may not translate into a requirement to establish, with the assistance of economic models, concrete negative competitive effects.[7] After all, such a requirement may chill the competition it seeks to foster due to the uncertainty it would generate. The significance of economics is rather determined by the fact that it assists in the formulation of legal tests that incorporate presumptions, filters and benchmarks which are economically sensible for the application of the competition rules.[8]

In this regard, economics plays a significant role in the context of Article 102. Particularly, it provides a body of accumulated knowledge to rely on when designing the legal rules for the assessment of the unilateral conduct of dominant firms, or when deciding to qualify or refine the initially designed rules.[9] Economic analysis has in fact assisted the EU courts over the years to develop presumptions, identify benchmarks and define the conditions under which certain practices may be abusive. In this sense, the tests that the EU courts have devised for the legal evaluation of dominant firms' practices under Article 102 reflect economic thinking, and thus economic analysis is firmly embedded in the relevant case law.[10]

[7] Michael Pardo and Ronald Allen, 'Juridical Proof and the Best Explanation' (2008) 27 Law and Philosophy 223; Penelope Papandropoulos, 'Implementing an Effects-based Approach under Article 82' (2008) Concurrences 1, 3.

[8] Gunnar Niels, 'The Article 82 Discussion Paper: A Comment on the Economic Principles' (April 2006) <https://www.oxera.com/wp-content/uploads/2018/03/The-Article-82-discussion-paper.pdf> accessed 7 April 2020, 3; David Bailey, 'Presumptions in EU Competition Law' (2010) 31 ECLR 362, 368.

[9] Colomo (n 3) 6.

[10] Wouter Wils, 'The Judgment of the EU General Court in Intel and the so-called "More Economic Approach" to Abuse of Dominance' (2014) 37 WC 405; Paul Nihoul, 'The Ruling of the General Court in *Intel*: Towards the End of an Effect-based Approach in European Competition Law?' (2014) 5 JECLP 521, 530. cf James Venit, 'Case T-286/09 *Intel v Commission* – The Judgment of the General Court: All Steps Backward and No Steps Forward' (2014) 10 EC J 203; Patrick Rey and James Venit, 'An Effects-Based Approach to Article 102: A Response to Wouter Wils' (2015) 38 WC 3; Alison Jones and Brenda Sufrin, 'The European Way—Reflections on the Intel Judgment' (2015) 1 CLPD 32; Christian Ahlborn and Daniel Piccinin, 'The Intel Judgment and Consumer Welfare—A Response to Wouter Wils' (2015) 1 CLPD 60, arguing that the case law on Article 102 stands at odds with mainstream economic analysis insofar as the relevant legal tests are formal.

Economic analysis, however, is not a panacea for the design of legal tests concerning the assessment of potentially anticompetitive practices. The reasons are linked to both the nature of the discipline of economics and the features pertaining to the process of competition. First, economics is a social discipline that does not and cannot give absolute truth, despite the fact that it gives a false sense of precision.[11] In this connection, lawyers are often blind to the fact that economics is not an exact science, because of the illusion of certainty displayed by economic models.[12] Second, the ability to quantify the outcomes of the competition process for the application of the competition rules is inherently limited in practice.[13]

With regard to economics as a discipline, there are a plethora of competing economic theories that are debatable by nature, and thus it is not a monolithic discipline.[14] In this regard, each economic theory follows different basic principles and makes divergent normative assumptions and recommendations about how competition policy should regulate markets.[15] Moreover, different economic models may be used even within the same economic theory, resulting in diverging approaches and contradicting insights into the economic reality

[11] Thomas Piketty, *Capital in the Twenty-First Century* (HUP 2014) 32 and 574, stressing that economics is a social discipline, despite its 'appearance of scientificity', and criticising the 'immoderate' use of mathematical models by economists.

[12] Heyer (n 6) 378; Patrice Bougette, Marc Deschamps and Frédéric M. Marty, 'When Economics Met Antitrust: The Second Chicago School and the Economization of Antitrust Law' (2014) GREDEG Working Paper 2014-23 <https://ssrn.com/abstract=2470429> accessed 6 April 2020, 25, arguing that the certainty given by economic models is an illusion, and that their high degree of sophistication risks leaving one with a false sense as to their accuracy and precision.

[13] Heyer (n 6) 379, arguing that economic theory does not have all the answers with regard to the highly imprecise enterprise of competition law enforcement.

[14] See Eleanor Fox in Claus-Dieter Ehlermann and Laraine Laudati, *European Competition Law Annual 1997: The Objectives of Competition Policy* (Hart Publishing 1998), Panel Discussion on Competition Policy Objectives, 11-12; Roger Backhouse, *The Puzzle of Modern Economics: Science or Ideology?* (CUP 2010); Jonathan Schlefer, *The Assumptions Economists Make* (Belknap Harvard 2012); Barak Orbach, 'How Antitrust Lost Its Goal' (2013) 81 Fordham Law Review 2253; Ha-Joon Chang, *Economics: The User's Guide* (Pelican 2014), 3-5, 111-64 and 451-60.

[15] For a concise analysis see Giorgio Monti, *EC Competition Law* (CUP 2007) 53-88.

prevailing in markets.[16] Finally, all economic models merely give an approximation of economic reality.[17] There is no single model that accurately depicts reality insofar as the employed economic data are based on assumptions and are therefore inherently imprecise.[18]

Turning to the outcomes of competition, they are not a zero-sum game. Being an open process with results that cannot be known in advance, competition is characterised by likelihood scenarios.[19] Any attempt thus to conduct an in-depth market analysis and quantify the exact effect of a particular business practice is inherently limited. That is also why competition law itself is only about approximations. That is, competition law incorporates proxies, presumptions and abstract concepts, which are legal constructions aiming to achieve optimal compromises in terms of enforcement.[20] Hence, there are no perfect solutions, ie, the optimum level of intervention is purely theoretical.

These compromises are ultimately the result of the economic principles and assumptions that a competition law regime follows. These principles and assumptions, in turn, are determined by the normative and institutional choices made regarding competition law within a legal order. Put it simply, it is the objectives pursued by competition law and the existing institutional framework that dictate the economic theories that will be relied on, and

[16] Simon Bishop, 'Snake-Oil with Mathematics is Still Snakeoil: Why Recent Trends in the Application of So-Called "Sophisticated" Economics is Hindering Good Competition Policy Enforcement' (2003) 9 EC J 67, 72.

[17] Edith Loozen, 'The Requisite Legal Standard for Economic Assessments in EU Competition Cases Unraveled Through the Economic Approach' (2014) 39 EL Rev 91, 108.

[18] ibid 97. For example see David Teece, 'Next-Generation Competition: New Concepts for Understanding How Innovation Shapes Competition and Policy in the Digital Economy' (2012) 9 JLEP 97; Ronald Cass, 'Antitrust for High-Tech and Low: Regulation, Innovation, and Risk' (2013) 9 JLEP 169, highlighting the difficulty of predicting behaviour and competitive outcomes in dynamic and complex technology markets that are characterized by rapid changes.

[19] Friedrich Hayek (Marcellus Snow tr), 'Competition as a Discovery Procedure' (2002) 5 Quarterly Journal of Austrian Economics 9.

[20] Ekaterina Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart Publishing 2010) 501.

not *vice versa*.[21] Hence, any economic statement or theory must be compatible with both the constitutional foundations of the relevant competition rule and the institutional setting within which it must be enforced.

In the context of Article 102, therefore, economic analysis does not specify the normative content of the prohibition laid down in the provision.[22] This is determined by the EU Treaties, which, as explained in chapters 2 to 4, demand a multi-goal and holistic approach to abuse of dominance. Not any and every economic analysis is thus relevant for the design of the legal tests to be applied to dominant firms under Article 102.[23] Rather, only economic analysis that assists in the formulation of legal rules that both promote the objectives pursued by Article 102 and are consistent with EU's broader socio-political concerns and institutional realities is relevant.[24] As illustrated in chapters 4 and 5, the EU courts have been relatively successful in designing economically sensible legal rules for Article 102, namely rules that are in conformity with the EU Treaties' constitutional mandates while also respecting the existing institutional framework.

Overall, the relevance of economic analysis is undeniable in the interpretation of the concept of abuse of dominance. However, the role of economics in this regard is restrained by the rule of law and is guided by EU's constitutional and institutional realities. There is indeed

[21] Anne-Lise Sibony, *Le Juge et le Raisonnement Économique en Droit de la Concurrence* (LGDJ 2008) 431-501, arguing that any economic statement must be complemented with a normative aspect.

[22] Thomas Eilmansberger, 'How to Distinguish Good from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Anti-competitive Abuses' (2005) 42 CML Rev 129, 137, arguing that economic analysis is correctly denied any decisive influence regarding the determination of the normative content of Article 102; David Gerber in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law: A Reformed Approach to Article 82 EC* (Hart Publishing 2008) 6, arguing that '[t]he normative role of economics is the one that creates problems'.

[23] Monti, *EC Competition Law* (n 15) 88, emphasising that the economic analysis must be based upon the normative foundations of EU competition law.

[24] Giorgio Monti, 'Article 82 EC: What Future for the Effects-Based Approach?' (2010) 1 JECLP 2, 6, arguing that economics cannot be the sole factor informing the interpretation of Article 102.

more than one approach to Article 102 that can be characterised as being an economics one, but any attempt by the EU institutions to advocate a novel economic paradigm must keep on respecting these limitations.

II. Commission's Review of Article 102

In the early 2000s, the Commission launched a major project in which it reviewed the interpretation and enforcement of Article 102 and advocated for a 'more economics approach'. This section describes the different stages of the Commission's review of the law and practice of Article 102 so as to illuminate the objectives and the outcome of this process. Having a clear view on these background issues will subsequently allow the evaluation of the end result of this process, namely the Priorities Paper, which seemingly crystalized the Commission's modern approach to abuse of dominance control.[25]

A. Background

The process of reviewing Article 102 was unofficially initiated in June 2003.[26] It appears that the frequent and multiple complaints against the approach adopted by the Commission and the EU courts to unilateral conduct control made the review of Article 102 a pressing need.[27]

Article 102 had been left behind compared to Article 101 and EU merger control, in that the Commission had hitherto made no effort to issue any guidance for the application of

[25] Priorities Paper (n 1).

[26] The review process was unofficially initiated at the 8th Annual Conference of the European University Institute in Fiesole: Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2003: What is an Abuse of a Dominant Position?* (Hart Publishing 2006) 3.

[27] See eg Derek Ridyard, 'Exclusionary Pricing and Price Discrimination Abuses under Article 82: An Economic Analysis' (2002) 23 ECLR 286; John Kallaugher and Brian Sher, 'Rebates Revisited: Anti-competitive Effects and Exclusionary Abuse under Article 82' (2004) 25 ECLR 263; John Vickers, 'Abuse of Market Power' (2005) 115 Economic Journal 244; Competition Law Forum Article 82 Review Group, 'The Reform of Article 82: Recommendations on Key Policy Subjects' (2005) 1 EC J 179.

Article 102, as it had successfully done in these other areas of EU competition law.[28] In this regard, the guidance offered by the Commission on other areas of EU competition was coupled with an attempt to increase the reliance on economic analysis.[29] To the extent thus that one of the objectives of the review was to align the analysis conducted under Article 102 with the ones undertaken under Article 101 and merger control,[30] the Commission was invited to deploy more economic reasoning in the analysis of abuse of dominance.[31]

Indeed, the Commission and the EU courts were criticised for adopting a formalistic approach to Article 102, which was translated to mean an approach standing at odds with economic thinking.[32] The complaint was that the legal assessment of a dominant firm's conduct

[28] eg Commission, 'Guidelines on Vertical Restraints' [2000] OJ C291/1; Commission, 'Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements' [2001] OJ C3/2; Commission, 'Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements' [2004] OJ C101/2; Guidelines on the Application of Article 81(3) (n 4); Commission, 'Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings' [2004] OJ C31/5.

[29] Commission, 'Green Paper on Vertical Restraints in EC Competition Policy' [1996] COM(96) 721 final, paras 54-86; Commission, 'Green Paper on the Review of Council Regulation (EEC) No 4064/89' [2001] COM(2001) 745 final, paras 163 and 165. For an account of this see Anne Witt, *The More Economic Approach to EU Antitrust Law* (Hart Publishing 2016) 7-74.

[30] See eg EAGCP, 'An Economic Approach to Article 82' (Brussels, July 2005) (EAGCP Report), 4; Neelie Kroes, 'Exclusionary Abuses of Dominance: The European Commission's Enforcement Priorities' (SPEECH/08/457 at the Fordham University Symposium, New York, 25 September 2008), 4; Commission, 'Guidance on Commission Enforcement Priorities in Applying Article 82 to Exclusionary Conduct by Dominant Firms: Frequently Asked Questions' (MEMO/08/761, 3 December 2008), question 11.

[31] This has been a recurring objective until the very last phase of the review: eg Neelie Kroes, 'Preliminary Thoughts on Policy Review of Article 82' (SPEECH/05/537 at the Fordham Corporate Law Institute, New York, 23 September 2005), 6; Commission, 'Commission Publishes Discussion Paper on Abuse of Dominance' (IP/05/1626, 19 December 2005); Commission, 'Commission Discussion Paper on Abuse of Dominance: Frequently Asked Questions' (MEMO/05/486, 19 December 2005), question 4; Commission, 'Consumer Welfare at Heart of Commission Fight against Abuses by Dominant Undertakings' (IP/08/1877, 3 December 2008); Commission 'Guidance on Commission Enforcement Priorities in Applying Article 82: Frequently Asked Questions'(n 30), question 5.

[32] See eg Denis Waelbroeck, 'Michelin II: A Per Se Rule Against Rebates by Dominant Companies?' (2005) 1 JCLE 149; Simon Bishop, 'Pro-competitive Exclusive Supply Agreements: How Refreshing!' (2003) 24 ECLR 229; Jorge Padilla in *European Competition Law: A Reformed Approach to Article 82 EC* (Hart Publishing 2008) 7.

is based on the form of the practices instead of the competitive effects generated by them.[33] It was thus argued that the EU institutions condemn practices under Article 102 that produce no harmful effects on consumer welfare, which is unjustifiable from an economics perspective. This, in turn, led to the accusation that the enforcement of Article 102 is focused on protecting the dominant firms' rivals (irrespective of whether they are efficient) at the expense of consumer interest.[34]

Being aware of these criticisms, some Commission's officials tacitly endorsed them even before the publication of any official policy document.[35] Even so, the Commission initiated a formal reform process for what is now Article 102 with the aim to promote a more economics approach to abuse of dominance.

B. Draft Soft Law Documents

i. *EAGCP Report*

The EAGCP Report is the first document in relation to the reform of Article 102.[36] It was commissioned by the newly appointed Chief Economist and published in July 2005.[37] The EAGCP Report is not an official document of the Commission itself, nor a set of draft guidelines on the application of Article 102. Its publication was merely intended to trigger

[33] See eg Pinar Akman, 'Article 82 Reformed? The EC Discussion Paper on Exclusionary Abuses' [2006] JBL 816; Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart Publishing 2013) 220 ff, labelling this a 'dominance-plus-form' approach.

[34] See Eleanor Fox, 'We Protect Competition, You Protect Competitors' (2003) 26 WC 149, critically discussing this accusation. See also Liza Lovdahl Gormsen, 'Article 82 EC: Where are we Coming from and where are we Going to?' (2006) 2 CL Rev 5, 10; Philip Marsden and Liza Lovdahl Gormsen, 'Guidance on Abuse in Europe: The Continued Concern for Rivalry and a Competitive Structure' (2010) 55 Antitrust Bulletin 875, 891, linking EU's strict stance against dominant firms to the Freiburg Ordoliberal School.

[35] eg Kroes 'Preliminary Thoughts on Policy Review of Article 82' (n 31); Philip Lowe, 'Consumer Welfare and Efficiency: New Guiding Principles of Competition Policy?' (Speech at the 13th International Conference on Competition, Munich, 27 March 2007).

[36] EAGCP Report (n 30).

[37] The position of Chief Economist was created in 2003. See O'Donoghue and Padilla (n 33) 70, speculating that the creation of the position of Chief Economist was linked to the reform of Article 102.

public discussion for what appeared to be the Commission's new economics-based agenda for Article 102.

The stated aim of this document was to propose the injection of more economic thinking into the analysis of Article 102 so as to focus its enforcement on important competition harms, while preserving and encouraging efficiency.[38] In this regard, it included several revolutionary proposals which departed from the relevant decisional practice and case law.[39] This document, however, is of limited value because its content is theoretical economics. Particularly, the proposed approach to Article 102 shows little regard to the fact that it is a legal rule which must be enforced in an effective and timely manner.[40] It would indeed have been more helpful if the Report had attempted to translate its analysis into sound and workable proxies and benchmarks.

ii. *Discussion Paper*

A few months after the publication of the EAGCP Report, a discussion paper was published that was produced by the staff of DG COMP (the 'Discussion Paper').[41] The Discussion Paper officially launched the review of Article 102, but was an unusual step on the part of the Commission compared to its normal practice of producing a Green Paper.[42] This document was

[38] EAGCP Report (n 30) 4. See Akman 'Article 82 Reformed?' (n 33), describing the EAGCP as 'the most comprehensive study' in favour of a more economic approach to Article 102.

[39] eg EAGCP Report (n 30) 4, proposing the removal of dominance as an independent filter in the analysis of Article 102.

[40] See eg ibid 5-7.

[41] Commission, 'DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses' (Brussels, December 2005) (Discussion Paper).

[42] In this vein Liza Lovdahl Gormsen, 'Why the European Commission's Enforcement Priorities on Article 82 EC should be Withdrawn' (2010) 31 ECLR 45; Rousseva, *Rethinking Exclusionary Abuses*' (n 20) 361.

merely a 'Staff Discussion Paper' which was not published in the OJ and could not be treated as an authoritative source.[43]

The Discussion Paper shared with the EAGCP Report the aim of promoting a policy based on sound economics.[44] However, the Discussion Paper was more restrictive than its antecedent in two notable respects. First, it remained loyal to the *status quo* in particular by preserving the analysis of dominance as an independent and stand-alone filter in the assessment conducted under Article 102.[45] Second, the analysis of the Discussion Paper was restricted to exclusionary abuses and did not include other broad categories, such as exploitative and discriminatory abuses.[46]

Even so, the Discussion Paper met its objective of stimulating debate, as it lead to a wide consultation process where a broad spectrum of views were expressed by commentators, representatives of NCAs and stakeholders.[47] The Commission was fiercely criticised at the public hearing held in June 2006 for, among other things, not departing from the case law.[48] In fact, the Discussion Paper's approach to exclusionary abusive conduct resembles that of the EU courts. The explanation for this is quite straightforward: DG COMP's officials were aware

[43] Commission, 'Commission Publishes Discussion Paper on Abuse of Dominance' (n 31). See also Discussion Paper (n 41), para 7, stipulating that it does not create any legitimate interest and cannot be relied upon to provide guidance.

[44] See eg Commission, 'Commission Discussion Paper on Abuse of Dominance: Frequently Asked Questions' (n 31), questions 3 and 4.

[45] Discussion Paper (n 41), paras 1 and 20-50.

[46] ibid paras 1 and 51-53. See also Commission, 'Commission Publishes Discussion Paper on Abuse of Dominance' (n 31), promising that exploitative and discriminatory practices would be the subject of further work by the Commission in the future.

[47] For the written submissions see http://ec.europa.eu/comm/competition/antitrust/art82/contributions.html.

[48] For the public hearing's presentations see www.ec.europa.eu/competition/antitrust/art82/hearing.html.

that the reform had to remain in the mainstream in order to be consistent with EU law.[49] Otherwise, the end result of this process might infringe principles enshrined in the Treaties.

C. End Result: Priorities Paper

The end of this lengthy consultation process was marked by the adoption, in late 2008, of a guidance paper in which the Commission declared its enforcement priorities when dealing with exclusionary abuses under Article 102 (the 'Priorities Paper').[50] That is, according to the Commission, the document explains where the Commission will focus its resources when enforcing Article 102 rather than interpreting the law.[51] This is a situation without precedence, since the Commission had never employed similar labelling in the past.

Even so, placing the Priorities Paper in the context of the review process illuminates the reasons for the selected label. Particularly, the Commission was restricted by the EU courts' case law in its attempt to evolve its policy for Article 102. Producing substantive guidelines that would offer an interpretation of the law on exclusionary abuses was not an attractive option, since this would mean that it could do no more than describe the current state of the law.[52] Under these circumstances, the adoption of a document that would claim to set enforcement priorities was seen as a wise way to suggest that the existing law is unsatisfactory

[49] See eg Kroes 'Preliminary Thoughts on Policy Review of Article 82' (n 31) 2; Kroes, 'Exclusionary Abuses of Dominance' (n 30) 5; Commission 'Guidance on Commission Enforcement Priorities in Applying Article 82: Frequently Asked Questions' (n 30), question 3.

[50] Priorities Paper (n 1).

[51] ibid paras 2-3.

[52] European Parliament, 'Report on Institutional and Legal Implications of the Use of "Soft Law" Instruments' (A6-0259/2007, 28 June 2007), 4 (at points K, L and N), highlighting this point.

without directly challenging the EU courts' interpretation.[53] However, as explained further down in this chapter, the novelty of the Priorities Paper raises concerns as to its legal status.

An exhaustive discussion of the substantive content of the Priorities Paper goes beyond the scope of this thesis.[54] It is worth, however, mentioning three important features. First, just like the Discussion Paper, the Priorities Paper covers only exclusionary abuses,[55] thus insisting on the idea that 'it is better to prevent than to cure'.[56] Second, it is drafted as substantive guidelines and mentions all the categories of exclusionary conduct that have been found to be abusive in the case law. In this regard, the Priorities Paper's title is misleading, since nothing is really prioritised.[57] Finally, third, the content of the Priorities Paper is generally consistent with the case law on exclusionary abuses with certain notable exceptions.[58] The most remarkable one in this regard is the proposed approach to rebates offered by dominant firms.

The next section focuses on the Priorities Paper's approach to rebates explaining that it embraces a shift of economic paradigm, which is incompatible with both fundamental rule-of-law principles and EU's constitutional and institutional peculiarities.

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[53] In this vein see John Temple Lang, 'A Question of Priorities: The European Commission's New Guidance on Article 82 is Flawed' (2009) 8 CLI 3; Liza Lovdahl Gormsen, 'The European Commission's Priority Guidelines on Article 82 EC' (2009) 14 Communication Law Journal 83, 84.

[54] The content of the Priorities Paper has generally been discussed under varying angles: see eg Ariel Ezrachi, 'The Commission's Guidance on Article 82 EC and its Effects Based Approach: Legal and Practical Challenges' in Ariel Ezrachi (ed), *Article 82: Reflections on its Recent Evolution* (Hart Publishing 2009); Axel Gutermuth, 'Article 82 Guidance: A Closer Look at the Analytical Framework and the Paper's Likely Impact on European Enforcement Practice' (CPI, February 2009) <https://www.competitionpolicyinternational.com/file/view/5809> accessed 7 April 2020; Marsden and Gormsen (n 34); Martin Gravengaard and Niels Kjaersgaard, 'The EU Commission Guidance on Exclusionary Abuse of Dominance - and its Consequences in Practice' (2010) 31 ECLR 285; Rousseva, *Rethinking Exclusionary Abuses'* (n 20) 353-430.

[55] Priorities Paper (n 1), para 7.

[56] Kroes 'Exclusionary Abuses of Dominance' (n 30) 3.

[57] In this vein Monti, 'Article 82 EC' (n 24) 5. Contrast Richard Whish and David Bailey, *Competition Law* (7th edn, OUP 2012) 176, arguing that it is no more than what it says it is, ie a guidance on the Commission's enforcement priorities.

[58] cf Pinar Akman, 'The European Commission's Guidance on Article 102 TFEU: From Inferno to Paradiso?' (2010) 73 MLR 605, 629, arguing that the Priorities Paper mainly summarises the existing case law.

III. 'More Economics Approach': Rebates as a Case-Study

The legal analysis of rebates granted by dominant firms under Article 102 is a fascinating area of EU competition law in particular because it is the area where the Commission made the most significant efforts to alter the current state of the law.[59] This is the reason why it is the focus of the analysis in this section. In this context, the meaning and consequences of the 'more economics approach' to rebates will be explored, followed by a more elaborate description of the Priorities Paper's proposed test. Subsequently, an analysis of the challenges raised by this new approach will be provided. Finally, this section concludes by presenting the defective legal nature of the Priorities Paper.

A. The 'More Economics Approach' to Rebates

i. *Meaning and Consequences*

In an attempt to identify a more economically viable filter for the assessment of rebates under Article 102, the Priorities Paper employs a specific application of the rationale of predation.[60] Particularly, the so-called 'more economics approach' to rebates that the Priorities Paper advocates is based on a specific quantitative tool to assess whether such conduct is abusive, namely the as-efficient competitor ('AEC') test.[61]

The AEC test is designed by economists to denote that what really matters in rebate cases is whether the dominant firm is charging prices which are above its own production costs or not. If the prices are above the dominant firm's costs, equally efficient rivals will not be squeezed out by the dominant firm's pricing policy, since such rivals have more or less the

[59] See Priorities Paper (n 1), paras 37-45.

[60] ibid paras 23-27 and 37-45.

[61] ibid para 39.

same production costs as the dominant firm. Contrariwise, if the dominant firm sells below its production costs, then this will squeeze out from the market an equally efficient competitor.

The underlying idea of the AEC test is to condemn only those rebates offered by dominant firms that have the ability to exclude from the market an AEC. This is conceptually correct insofar as it underlines that the objective of competition policy is not to protect competitors that are less efficient than the dominant firm.[62] That being said, the definition of AECs needs not to be based purely on static cost-efficiency terms. Particularly, AECs may be defined as the dominant firm's competitors that are as attractive to consumers 'from the point of view of, *among other things, price, choice, quality or innovation*'.[63] Such an understanding of AECs suggests a wider policy ambition for Article 102, which reflects the wider consumer harm potentially generated by anticompetitive practices of dominant firms. This approach of the AEC principle is fully in line with the EU courts' case law as described in chapter 4.

On the contrary, the AEC test endorsed in the Priorities Paper implies that Article 102 pursues a narrow consumer welfare objective, which is operationalised via a direct demonstration of harmful consumer effects relating to price increases and output reduction. This entails that Article 102 would apply solely to prevent increases in prices and restrictions of output resulting from the exercise of market power by dominant firms. In other words, a unilateral trade practice would only be abusive if there is a likely price increase or output restriction. By limiting the measurement of the impact of rebates in the effects on price and output, a whole set of potentially harmful effects on consumers are ignored, thereby revealing a narrow understanding of consumer harm.

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[62] Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles Article 102* (OUP 2011) 73.

[63] Case C-413/14P *Intel Corp. v Commission* [2017] ECLI:EU:C:2017:632, para 40 (emphasis added). See similarly Priorities Paper (n 1), para 6.

In this regard, the stance that the Commission advocates adheres to a specific economic paradigm, namely the Chicago School's neoclassical economic paradigm.[64] Particularly, in line with the Chicago School paradigm, the Priorities Paper's proposed approach to rebates limits the objectives pursued by Article 102 to consumer welfare defined in monetary terms.[65] Hence, the hallmark of this approach is that the only legitimate objective of Article 102 is to promote consumer welfare understood as allocative efficiency.[66] As a result, only factors susceptible of measurement are taken into count to the exclusion of non-quantifiable factors, such as consumer choice, unrestricted market entry, dynamic efficiency, innovation, and public policy considerations.[67]

The ultimate consequence of following through a Chicagoan approach might be far-reaching. In particular, the basic principle of the Chicago approach that markets normally cure themselves, and thus competitive outcomes are less likely with government intervention, would inevitably implicate a much less intrusive and aggressive enforcement of Article 102.[68] In fact, Chicagoans generally emphasise that false convictions (over-enforcement) are systematically worse than false acquittals (under-enforcement).[69] In their view, moreover, dominant firms' behaviour that is not based on competition on the merits is likely to attract new entry, thus the

[64] Bougette, Deschamps and Marty (n 12) 7.

[65] Richard Posner, 'The Chicago School of Antitrust Analysis' (1979) 127 University of Pennsylvania Law Review 925; Herbert Hovenkamp, 'Antitrust Policy After Chicago' (1985) 84 Michigan Law Review 213, 226-9

[66] Bougette, Deschamps and Marty (n 12) 20.

[67] Eleanor Fox, 'The Politics of Law and Economics in Judicial Decision Making: Antitrust as A Window' (1986) 61 NYU L Rev 554, 583.

[68] Frank Easterbrook, 'Workable Antitrust Policy' (1986) 84 Michigan Law Review 1686, 1701.

[69] Frank Easterbrook, 'The Limits of Antitrust' (1984) 63 Texas Law Review 1, 2-3 and 15. cf Thomas Lambert, 'The Limits of Antitrust in the 21st Century' (2020) University of Missouri School of Law Legal Studies Research Paper 2020-06, <https://ssrn.com/abstract=3533549> accessed 2 April 2020, 9-10, arguing that this claim is too categorical.

market itself is the best remedy against concentration of market power.[70] Hence, the policy prescription under this economic paradigm is to abandon most abuse of dominance cases.[71]

Consequently, the 'more economics approach' is the adhesion to an economic theory claiming that Article 102 should control only the practices that are allocatively inefficient, while also urging for a minimalist enforcement of the provision. This is an approach that is favourable to dominant firms, but it is also one that the EU courts have refused to embrace. In this regard, the rupture that the Priorities Paper attempts to achieve by advocating the AEC test for the assessment of rebates refers chiefly to a shift of economic paradigm rather than to an increased reliance on economics.

ii. *Proposed Legal Test*

Before analysing the multiple challenges raised by this new economic paradigm, a comprehensive explanation of the operation of the AEC test must be provided.

In this regard, the Priorities Paper states that 'the likelihood of anti-competitive foreclosure is higher where competitors are not able to compete on equal terms for the entire demand of each individual customer'.[72] The reason advanced is that a conditional rebate granted by a dominant firm may enable it to use the 'non contestable' portion of the demand of each customer as leverage to decrease the price to be paid for the 'contestable' portion of demand.[73] The Priorities Paper then goes on to claim that the Commission intends to investigate

[70] Posner (n 65) 928.

[71] Fox 'We Protect Competition' (n 34) 153, describing with a critical tone the presumption of non-intervention under which US antitrust law has for many years been enforced.

[72] Priorities Paper (n 1), para 39.

[73] ibid.

whether the dominant firm's rebate is capable of hindering expansion or entry of AECs by making it more difficult for them to supply part of the requirements of individual customers.[74]

Under this test, the Commission must first estimate the 'relevant range', which is the part of the demand that a particular customer is likely to switch away from the dominant firm to a particular competitor.[75] Following this, the Commission is required to calculate the 'effective price', ie the price that the competitor will have to offer in order to compensate the customer for the loss of the conditional rebate.[76] In this connection, the 'effective price' that the competitor will have to match is the dominant firm's normal (list) price minus the rebate the customer loses by switching its supplies, calculated over the relevant range of sales and in the relevant period of time.[77]

The Priorities Paper stipulates that a distinction must be drawn between incremental rebates (given only on purchases above the threshold set by the dominant firm for granting the rebate) and retroactive rebates (given on all purchases made after the threshold is reached).[78] The test is quite straightforward for incremental rebates, since the relevant range is normally the incremental purchases that are being considered, ie the increased purchases above the threshold. Put simply, for the assessment of incremental rebates it is sufficient to consider the price that a competitor must offer to match the price resulting from the rebate for the purchases made beyond the threshold.

[74] ibid para 41.

[75] ibid.

[76] ibid.

[77] ibid.

[78] ibid para 42.

The same test is somewhat more complicated when applied to retroactive rebates. One must first estimate the 'contestable share', ie assess how much of a customer's purchase requirements could realistically be switched to a competitor.[79] Then, one must calculate the 'relevant range', ie estimate the part of the demand that the customer is likely to switch to a competitor, which may differ from the 'contestable share'. Subsequently, one must estimate the price that the competitor must offer for that relevant range in order to match the dominant firm's 'effective price' and compensate the customer for the loss of the rebate.

According to this test, a rebate is 'normally' lawful if the 'effective price' of the dominant firm for the 'relevant range' is above its LRAIC.[80] If, however, the 'effective price' is below AAC, the rebate scheme is, as a general rule, capable of foreclosing an AEC.[81] Finally, where the 'effective price' is between AAC and LRAIC, the Priorities Paper provides that:

> the Commission will investigate whether other factors point to the conclusion that entry or expansion even by equally efficient competitors is likely to be affected. In this context, the Commission will investigate whether and to what extent competitors have realistic and effective counterstrategies at their disposal […].[82]

Overall, a potentially dominant firm conducting a self-assessment of its rebate schemes must pursue the following steps. First, it must estimate the quantity that its client is likely to purchase from it and the corresponding quantity that the same client is likely to buy from its competitors. In this regard, the dominant firm would have to identify, *inter alia*, the range of products that a competitor is able to provide. Then, it must calculate the price that a competitor would have to offer in order to incentivise the client to buy from the competitor rather that the dominant firm, thus challenging its rebate. After the identification of that price, the dominant firm must

[79] ibid.

[80] ibid para 43.

[81] ibid para 44.

[82] ibid.

compare it to its own production costs in order to ensure that an AEC can viably compete despite the rebate. If the price is above its costs, this means that an AEC would be able to compete. If, however, the price is below the dominant firm's production costs, the dominant firm's rebate scheme may push out from the market an AEC, and that is when the Commission would intervene.

B. Challenges

i. *Practical and Legal Challenges*

The AEC test is a sophisticated test on paper that makes perfect sense with perfect numbers. However, its operation raises a series of practical and legal challenges.[83] First, in practical terms there is no such thing as perfect numbers, and thus the functionality of the AEC test is challenging. As a result, second, the AEC test is divorced from basic legal principles that should underpin the application of any legal rule. It is therefore an unworkable test that directly challenges the rule of law.

First, it is impossible for a dominant firm to anticipate the outcome of a case *ex ante*.[84] To start with, there is no way to calculate with anything approaching precision the 'contestable share' and the 'relevant range'.[85] Both these notions are vague and to a large extent subjective, and thus cannot be known to the dominant firm. The persisting question is how a dominant firm would be able to estimate *ex ante* the units that its client would potentially purchase from its competitors. The only possible way to do this is to ask its client. Similarly, in the absence of collusion it is practically impossible for a dominant firm to evaluate *ex ante* the pricing and

[83] For a list of objections to the AEC test see Temple Lang 'A Question of Priorities' (n 53) 4-5.

[84] Jonathan Jacobson, 'A Note on Loyalty Discounts' [2010] Antitrust Source 1, 8.

[85] Temple Lang 'A Question of Priorities' (n 53) 4.

range of products that a competitor has the capacity to produce. Yet, the Priorities Paper's approach to rebates depends heavily on detailed information on rivals' costs and sales.[86]

Moreover, the AEC test advocated in the Priorities Paper is assuming a single competitor and a single customer. But what if the dominant firm has, for example, thirty competitors: would the dominant firm be required to conduct this complex analysis thirty times for each of its clients? The answer should certainly be in the negative because this is an impossible task insofar as the 'contestable share' and the 'relevant range' differ from one customer to another and from one competitor to another. In this regard, despite the fact that the Priorities Paper claims that it intends to provide 'greater clarity and predictability' and to assist firms in the self-assessment of their behaviour,[87] it does not suggest how these firms could possibly calculate essential elements of the AEC test.

Second, carrying out the AEC test is also challenging in *ex post* situations.[88] Particularly, the Commission would have to carry out an extensive cost accounting exercise of the operations of the dominant company in order to figure out whether its costs of production on this particular product and in these particular circumstances are around or below the price it was charging after granting the retroactive rebate. This might appear to be a simple task in the context of a dominant firm that offers only one product. However, the data can be

[86] cf Pinar Akman, 'The Reform of the Application of Article 102 TFEU: Mission Accomplished?' (2016) 81 ALJ 145, 157.

[87] Priorities Paper (n 1), para 2.

[88] See eg *Intel* (Case COMP/37.990) [2009] D(2009) 3726 final, paras 1002ff, Intel submitted to the Commission an AEC test, which demonstrated that its rebates were not capable to foreclose an AEC, but the Commission reached the opposite conclusion while applying the same test. Hence, a disagreement over the variables that must be used for the application of the AEC test may lead to contradictory outcomes.

interpreted in more than one way;[89] it is not usually true to say that there is only one right way of allocating costs and that all other methods are wrong.

In any event, most dominant firms get to be and remain dominant by supplying a large number of different products. Conducting a cost accounting exercise with a large complicated company, which produces a wide variety of products, is challenging. Such a dominant firm would, for example, spend a large amount of money on R&D. Accordingly, the Commission would have to identify these costs and allocate them to the various products that the dominant firm is producing. In this connection, the Commission would have to allocate not only the R&D costs that resulted in successful products, but also those that turned out retrospectively to be fruitless. This exercise becomes even more complex when conducted with a firm that is both multi-product and conglomerate, ie produces a variety of products and is active in more than one industry. This increases the danger of consuming a large amount of resources for cases that are not worth it.[90]

Overall, the AEC test contradicts the fundamental principle of legal certainty and imposes a *probatio diabolica* on dominant firms. In this regard, the AEC test lacks the reasonable predictability that would allow dominant firms to assess in advance the legality of their conduct and depends heavily on information that the dominant firm cannot be expected to possess. Moreover, the test creates insurmountable obstacles to the private enforcement of Article 102 insofar as national courts would have to assess rebates granted by dominant firms on the basis of the AEC test.[91] Finally, the AEC test is liable to consume a large amount of the

[89] In this vein see Case C-23/14 *Post Danmark A/S v Konkurrencerådet* [2015] ECLI:EU:C:2015:343 (*Post Danmark II*), Opinion of AG Kokott, para 66.

[90] ibid. Similarly Wils 'The Judgment of the EU General Court in *Intel*' (n 10) 430-1.

[91] Ariel Ezrachi, 'The European Commission Guidance on Article 82 EC: The Way in which Institutional Realities Limit the Potential for Reform' (2009) Oxford Legal Studies Research Paper 27/2009 <http://ssrn.com/abstract=1463854> accessed 13 February 2020, 27-28.

resources and time of the competition authorities for cases that are not worth it. This would, in turn, lead to under-enforcement and/or delays in dealing with cases.

ii. *Constitutional Challenges*

The legal challenges posed by the AEC test are not limited to the ones stemming from the practical unworkability of the test. The AEC test raises also serious legal challenges in view of the constitutional peculiarities that affect the interpretation and enforcement of Article 102. Particularly, the AEC test for the assessment of rebates, as advocated in the Priorities Paper, is focused exclusively on whether the rebates in question allow firms to raise prices and reduce output. As such, the AEC test contradicts the constitutionally mandated multi-goal and holistic approach to Article 102.

With regard to the multi-goal approach to Article 102, the AEC test, first, ignores the fact that Article 102 pursues two ultimate objectives, namely the integration of the internal market and the protection of consumer interest. Indeed, the AEC test only reflects consumer welfare, thus the objective of market integration is disregarded. Second, it only prohibits conduct that is detrimental to consumers in monetary terms, thereby taking an unduly narrow view of the benefits of undistorted competition. This view is incompatible with the multi-goal approach that the EU Treaties demand and sets aside a whole set of potentially harmful effects deriving from dominant firms' practices.

The AEC test also fails to show consideration for the constitutionally required holistic approach to the interpretation of Article 102. First, it contravenes the holistic approach to Article 102 by ignoring equality-related concerns and other public policy considerations, since the only legitimate criterion is allocative efficiency. Second, it contradicts the holistic approach insofar as it aims to alter the Commission's enforcement philosophy to a less interventionist one. On this issue, it was explained in chapter 3 that the holistic approach justifies an aggressive

enforcement of Article 102, because this recognises that economically significant market power contributes to wealth inequality.

The AEC test therefore embraces an economic paradigm that is incompatible with the objectives and broader policy concerns of Article 102. It is indeed no coincidence that both the Commission and the EU courts refrained from endorsing the Priorities Paper's AEC test for rebates in their respective decisional practice and case law.

Starting with the Commission, it has followed a rather curious hybrid approach to the assessment of rebates under Article 102. First, the current pattern in the Commission's decisional practice is to rely on both the long-standing case law of the EU courts and a supplementary AEC analysis of the rebates under investigation, which consists of a cherry-picking application of the AEC test advocated in the Priorities Paper.[92] Second, the Commission's own Legal Service have tended to downplay the legal relevance of the Priorities Paper in proceedings before the EU courts by arguing primarily on the basis of the established principles followed in the EU courts' case law.[93] Hence, the Commission quite reasonably exhibits lack of confidence in applying the Priorities Paper's AEC test for rebates, due to its constitutional and substantive flaws.[94]

[92] See eg *Prokent/Tomra* (Case COMP/38.113) [2006] C(2006) 734, paras 271, 285, 333 and 335-45; *Intel* (COMP/37.990) (n 88), paras 920-25 and 1002ff; *Qualcomm (Exclusivity Payments)* (Case AT.40220) [2018] C(2018) 240.

[93] Frédéric Louis and Cormac O'Daly, 'Unfulfilled Promise: Is the Commission's Guidance Going the Way of the Dodo?' GCR (15 August 2017).

[94] See also Akman 'The Reform of the Application of Article 102 TFEU' (n 86) 202-8, elucidating that this is also reflected in the increased use of commitment decisions by the Commission.

Turning to the EU courts' case law, while the judgment in *Post Danmark I*[95] was celebrated as supporting the Commission's policy position,[96] subsequent judgments explicitly rejected the 'more economics approach' to rebates as outlined in the Priorities Paper. Particularly, both the General Court and the Court of Justice in *Tomra*, as well as the General Court in *Intel* held that the AEC test is superfluous and defective in relation to the assessment of rebates under Article 102.[97] According to the EU courts, the test proposed in the Priorities Paper is not wide enough to capture instances of abusive exclusionary practices, and would thus lead to false acquittals.[98] In these judgments, therefore, the EU courts explicitly declared their disagreement with the Priorities Paper's push towards a predatory pricing reasoning in rebate cases.[99]

In its most recent rulings, however, the Court of Justice has admitted the relevance of the AEC test, recognising that it may, 'on principle', be a relevant proxy in rebate cases under Article 102. Specifically, in *Post Danmark II* the Court of Justice held that, although the AEC test may be regarded as 'one tool amongst others',[100] it is not a legal prerequisite and is even inappropriate in certain cases for evaluating a rebate scheme under Article 102.[101] Similarly, the Court in *Intel* concluded that, if the Commission relies on an AEC test, the General Court

[95] Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECLI:EU:C:2012:172 (*Post Danmark I*).

[96] Ekaterina Rousseva and Mel Marquis, 'Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU' (2013) 4 JECLP 32, 50.

[97] Case T-155/06 *Tomra Systems ASA and Others v Commission* [2010] ECLI:EU:T:2010:370, paras 219, 269-71 and 289; Case C-549/10P *Tomra Systems ASA and Others v Commission* [2012] ECLI:EU:C:2012:221, paras 68, 74 and 79-80; Case T-286/09 *Intel Corp. v Commission* [2014] ECLI:EU:T:2014:547, paras 80, 103, 144-6 and 150-1.

[98] T-286/09 *Intel* (n 97), paras 88 and 149-53.

[99] See especially ibid paras 99-10 and 152, distinguishing between the analysis of exclusivity rebates and the one conducted in margin squeeze and low pricing cases. Similarly C-23/14 *Post Danmark II*, Opinion of AG Kokott (n 89), para 68.

[100] Case C-23/14 *Post Danmark A/S v Konkurrencerådet* [2015] ECLI:EU:C:2015:651 (*Post Danmark II*), paras 58 and 61.

[101] ibid paras 56 and 59-60. Similarly *Post Danmark II*, Opinion of AG Kokott (n 89), paras 71-72.

must engage with it when reviewing the Commission decision.[102] Nonetheless, accepting the AEC test as a relevant proxy is a far cry from adopting the test proposed in the Priorities Paper as the sole legal test to be applied to rebates under Article 102.[103] In this regard, the EU courts have never endorsed the idea underpinning the AEC test, according to which Article 102 only prohibits conduct that is detrimental to consumers in terms of prices.[104]

All in all, the AEC test run counter to the constitutionally demanded multi-goal and holistic approach to Article 102. Being aware of this, both the Commission and the EU courts have refrained from incorporating it as a stand-alone legal test for the assessment of rebates under Article 102.

iii. *Institutional Challenges*

The Priorities Paper also raises concerns relating to EU's institutional framework insofar as it disregards both the institutional balance within EU's legal order and the described in chapter 5 institutional setting within which Article 102 is to be enforced. In this regard, the Commission additionally failed to act in accordance with the general principle of sincere cooperation to the extent that the content of the Priorities Paper is inconsistent with the EU courts' case law, and thus purports to functionally amend Article 102.

Starting with EU's institutional balance, according to the exigencies of the EU Treaties, '[t]he *essential elements* of an area shall be reserved for the *legislative act*'.[105] The Council is the legislative organ in the area of competition law, and thus it is for the latter to enact

[102] C-413/14P *Intel* (n 63), paras 138-47.

[103] Similarly Anne Witt, 'The European Court of Justice and the More Economic Approach: Is the Tide Turning?' (2019) 64 Antitrust Bulletin 172, 209.

[104] eg C-413/14P *Intel* (n 63), para 40.

[105] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), art 290(1)(b) (emphasis added).

regulations or directives that would give effect to Article 102.[106] Moreover, the CJEU is entrusted with the interpretative monopoly with regard to the meaning of EU law, and hence the last word on the legal interpretation of Article 102 lies with the Court of Justice.[107] As to the Commission, it requires delegated authority to adopt acts in the area of competition law that may only concern non-essential issues, and must respect the EU courts' interpretation.[108]

Having said that, as explained in relation to rebates, the content of the Priorities Paper goes beyond the case law, thereby attempting to functionally amend Article 102. Particularly, the Commission derogated from established case law by means of guidelines while not involving in its reform EU's key legislative bodies, namely the Council and the European Parliament.[109] As a result, it exceeded the limits of the powers conferred on it by the Treaties, and, by doing so, disregarded its duty of loyalty toward the CJEU and the Council.[110] In this regard, the Commission's choice to name the document 'enforcement priorities' potentially aggravates its infringement insofar as this is a *manœuvre* aiming to relax the tension between the Priorities Paper and the case law. Hence, the Commission operated as the decisive

[106] ibid art 103(1) in conjunction with art 289(2)-(3). To that effect see Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others* [2012] ECLI:EU:C:2012:544, Opinion of AG Kokott, para 30.

[107] Consolidated Version of the Treaty on the European Union [2012] OJ C326/13 (TEU), art 19(1) in conjunction with TFEU (n 105), arts 267(3) and 344.

[108] TFEU (n 105), art 290(1)-(2). See also Bo Vesterdorf, 'Economics in Court: Reflections on the Role of Judges in Assessing Economic Theories and Evidence in the Modernised Competition Regime' in Martin Johansson, Nils Wahl and Ulf Bernitz (eds), *Liber Amicorum in Honour of Sven Norberg: A European for all Seasons* (Bruylant 2006) 519, pointing out that courts are the ultimate interprets of the competition rules.

[109] See TEU (n 107), art 10, establishing the principle of democratic representation; TEU (n 107), art 17, setting out the Commission's responsibilities. See also Jean-Paul Jacqué, 'The Principle of Institutional Balance' (2004) 41 CML Rev 383, 384, underlining that it is 'not acceptable for one institution to extend its powers unilaterally to the detriment of another institution'.

[110] ibid art 13(2). See eg Case 230/81 *Grand Duchy of Luxembourg v European Parliament* [1983] ECLI:EU:C:1983:32, para 37; Case C-2/88 Imm. *J. J. Zwartveld and Others* [1990] ECLI:EU:C:1990:315, para 17, holding that the duty of loyalty applies to the Member States as well as to the EU institutions.

lawmaker in this regard, acting outside its remit and in breach of EU's institutional balance and the principle of sincere cooperation.[111]

Even so, the Commission also disregarded the parallel competence that it shares with NCAs and national courts in relation to the enforcement of Article 102.[112] This enforcement structure entails that the Commission, the NCAs and the national courts must closely cooperate in order to ensure consistent interpretation.[113] In this regard, NCAs and national courts must, under their duties of sincere cooperation, take the Priorities Paper into account.[114] Yet, they must respect the EU courts' case law pursuant to the principle of supremacy. NCAs and national courts may thus take into account the Priorities Paper only to the extent that its approach is in conformity with the CJEU's case law. As if that situation was not complicated enough, the Commission's hybrid approach to rebates under Article 102 in its post-Priorities Paper decisional practice further perplexes things to the extent that NCAs and national courts cannot take decisions running counter to Commission decisions.[115] There exist thus a state of uncertainty which endanger the uniform interpretation of Article 102 at the national level.

In a similar vein, the divergent institutional settings and the diverse levels of experience and expertise in the different Member States set constraints on the capacity of NCAs

[111] cf Wolfgang Weiß, 'After Lisbon, can the European Commission Continue to Rely on "Soft Legislation" in its Enforcement Practice?' (2011) 2 JECLP 441, 442, arguing that the Commission's policy of issuing soft law texts to clarify fundamental issues of EU competition law contradicts the principle of democracy, which has been strengthened by the Lisbon Treaty.

[112] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 (Reg 1/2003), arts 1, 3(1), 4-6.

[113] ibid arts 11(1) and 15.

[114] ibid recitals 8 and 15; Commission, 'Notice on the Cooperation between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC' [2004] OJ C127/13, para 8. See also Case C-322/88 *Salvatore Grimaldi v Fonds des maladies professionnelles* [1989] ECLI:EU:C:1989:646, paras 18-19.

[115] Reg 1/2003 (n 112), art 16; Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECLI:EU:C:2000:689, para 57.

and national courts to engage in an AEC analysis.[116] Particularly, NCAs and national courts across the EU may engage in a selective application of the analysis proposed in the Priorities Paper, which would lead to legal uncertainty and trigger forum shopping.[117] It is indeed unreasonable to expect that NCAs and national courts in the different Member States would be able to comprehend and apply consistently complex quantitative tools.[118] Leaving aside therefore the fact that the Priorities Paper's AEC test is unworkable in practice, its complexity would suffice to legitimately argue that it is not compatible with the institutional setting within which Article 102 must be enforced. In this regard, the Commission arguably also violated its duty of sincere cooperation in the context of its relations with the Member States.[119]

Overall, by adopting the Priorities Paper, the Commission breached EU's institutional balance and disregarded the institutional setting within which Article 102 must be enforced. By doing so, it also failed to comply to its duty of sincere cooperation regarding its relations with both the other EU institutions and the Member States.

iv. *Priorities Paper's Legal Status*

The Priorities Paper is a soft law instrument of *sui generis* nature which is said to operate as a statement of prosecutorial discretion. The *sui generis* nature of the Priorities Paper coupled with the challenges posed by the proposed AEC test for rebates raises concerns relating to its legal status.

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[116] Ezrachi 'The Commission's Guidance on Article 82' (n 54) 61.

[117] ibid 63. See also Geert Goeteyn and Gaetano Lapenta, 'The Italian *Unilever* Judgment on Exclusive Dealing: Helpful Clarification or Misguided Limitation of the Court of Justice's *Intel* Ruling?' (2018) 9 JECLP 590, documenting that the Italian courts consider that the AEC test is an irrelevant proxy for outright exclusivity agreements. Particularly, the national courts in Italy consider that the conclusions of the Court of Justice in *Intel* concern only exclusivity rebates.

[118] Nihoul 'The Ruling of the General Court in *Intel*' (n 10) 530; Ezrachi 'The European Commission Guidance on Article 82' (n 91) 27-31.

[119] TEU (n 107), art 4(3).

The Priorities Paper is of *sui generis* nature with regard to both its form and its substance.[120] From a formal perspective, it is a novel instrument in that it has not been adopted in the form of a Notice or of Guidelines, but as a Communication.[121] This is neither a legal act envisaged in Article 288 TFEU nor an instrument recognised by the case law as containing 'rules of practice'.[122] From a substantive perspective, the Priorities Paper is also a novelty insofar as its content is said to be about enforcement priorities, and not about substantive guidelines.[123]

That being said, the question of whether the Commission has the authority to indicate *ex ante* which categories of practices it will prioritise when enforcing Article 102 was answered in the affirmative by virtue of the *Automec* authority.[124] In this judgment the General Court held that 'setting priorities within the limits prescribed by the law […] is an inherent feature' of the Commission's administrative activity.[125] However, *Automec* cannot be regarded as an authority for the adoption of the Priorities Paper.[126]

Particularly, first, the Priorities Paper is about providing substantive guidelines for Article 102 rather than setting priorities in the way that it is understood in *Automec*. Indeed, the Commission's review had the clear aim of reframing the concept of abuse and the Priorities

[120] Ezrachi 'The Commission's Guidance on Article 82' (n 54) 57.

[121] O'Donoghue and Padilla (n 33) 75.

[122] *Salvatore Grimaldi* (n 114), para 18; Joined Cases C-189, 202, 205, 208 and 213/02P *Dansk Rørindustri and Others v Commission* [2005] ECLI:EU:C:2005:408, para 209; Case C-167/04P *JCB Service v Commission* [2006] ECLI:EU:C:2006:594, para 207; Case T-73/04 *Le Carbone-Lorraine v Commission* [2008] ECLI:EU:T:2008:416, para 70; Case C-520/09P *Arkema SA v Commission* [2011] ECLI:EU:C:2011:619, para 88.

[123] Priorities Paper (n 1), paras 2-3.

[124] Case T-24/90 *Automec Srl v Commission* [1992] ECLI:EU:T:1992:97.

[125] ibid para 77. To the same effect see eg *Ufex* (n 45), para 88; Case T-229/05 *AEPI Elliniki Etaireia pros Prostasian tis Pnevmatikis Idioktisias AE v Commission* [2007] ECLI:EU:T:2007:224, paras 38-40. See also Commission, 'Notice on the Handling of Complaints by the Commission under Articles 81 and 82 of the EC Treaty' [2004] OJ C101/65, para 8, codifying the case law.

[126] cf Gormsen 'Why the Enforcement Priorities on Article 82 EC should be Withdrawn' (n 42) 46.

Paper is drafted as substantive guidelines mentioning all the categories of exclusionary conduct that have been found to be abusive in the case law. In this regard, the argument by certain distinguished lawyers that the case law and the Priorities Paper do not overlap is not persuasive.[127] Second, the recognition of the Commission's discretion to prioritise cases is not unlimited.[128] Above all, it must act within the limits prescribed by the law and respect the CJEU's interpretation of Article 102; and in this connection, the Priorities Paper is inconsistent with the case law on rebates. Hence, despite the misleading title and the caveat stating that it 'is not intended to constitute a statement of the law',[129] the Priorities Paper is about providing substantive guidelines.

Being a soft law instrument that provides interpretative guidelines, the Priorities Paper is deprived of legally binding force in that it is not binding on the CJEU, the NCAs and national courts.[130] Soft law instruments, however, are generally regarded as providing for 'rules of conduct which are designed to *produce external effects*'.[131] These effects refer to the fact that the Commission imposes a limitation on itself obliging it to treat these rules as instructions that it cannot depart from in an individual case without giving reasons for doing so.[132] In this regard, the Priorities Paper may produce legal and practical effects of crucial importance. In fact, the

[127] Wils 'The Judgment of the EU General Court in *Intel*' (n 10), arguing that the case law stipulates a legality test while the Priorities Paper provides for a prioritisation test, and thus no conflict exists between these two. This view is shared by a highly respected body of opinion: see eg Whish and Bailey (n 57) 176.

[128] eg Case C-119/97P *Union française de l'express (Ufex), formerly Syndicat français de l'express international (SFEI), DHL International and Service CRIE v Commission* [1999] ECLI:EU:C:1999:116, paras 89-95.

[129] Priorities Paper (n 1), para 3.

[130] *Grimaldi* (n 114), para 16.

[131] Case C-397/03P *Archer Daniels Midland Co. and Archer Daniels Midland Ingredients Ltd v Commission* [2006] ECLI:EU:C:2006:328, para 91 (emphasis added).

[132] ibid; Case T-7/89 *SA Hercules Chemicals NV v Commission* [1991] ECLI:EU:T:1991:75, para 53; *Dansk Rørindustri* (n 122), para 211; *JCB Service* (n 122), para 208; *Le Carbone* (n 122), paras 70-71. cf Case C-310/99 *Italian Republic v Commission* [2002] ECLI:EU:C:2002:143, para 52, holding that soft law text constitute 'a useful point of reference'.

significance of soft law texts has grown considerably following the establishment of a decentralised system for the enforcement of competition law.[133] As underlined by AG Kokott in *Expedia*:

> [the guidance provided by the Commission's soft law texts] contributes to the fundamental aim of applying as effectively and uniformly as possible throughout the European Union [Articles 101 and 102 TFEU]. At the same time it supports the creation of equal competition conditions ('level playing field') in the internal market and also enhances legal certainty for the undertakings concerned.[134]

Having said that, however, for such a non-binding text to produce legal effects it must also exhibit certain additional substantive features. First, it must be in conformity with primary and secondary EU law,[135] as well as with established jurisprudence.[136] That is, a soft law measure is valid only if it does not contradict the CJEU's interpretative choices. Second, a soft law instrument produces legal effects only to the extent that this serves the promotion of the protection of legitimate expectation and the principles of equal treatment and legal certainty.[137] Hence, the legal source of the Commission's obligation to follow its soft law provisions is these fundamental principles of law, which occupy a prominent position in EU law.

The lack of these features prevents the Priorities Paper from producing the legal effects of soft law instruments. First, the Priorities Paper departs from the case law at the very least in relation to the assessment of rebates. Second, it does not produce legitimate expectations and is unable to serve the principles of equality and legal certainty. To start with, reliance on the

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[133] Oana Ştefan, 'European Competition Soft Law in European Courts: A Matter of Hard Principles?' (2008) 14 ELJ 753, 758-62, documenting the remarkable increase in the number of references to soft law instruments in the case law post-2000.

[134] *Expedia* (n 106), Opinion of AG Kokott, para 37.

[135] eg *Dansk Rørindustri* (n 122), para 252.

[136] eg ibid para 261; Case C-407/04P *Dalmine SpA v Commission* [2006] ECLI:EU:C:2007:53, para 142.

[137] See eg *Dansk Rørindustri* (n 122), paras 211-13; *JCB Service* (n 122), paras 208-9; See also *Expedia* (n 106), Opinion of AG Kokott, paras 26-43, helpfully describing the legal status and effects of competition soft law texts and summarising the relevant case law.

principle of the protection of legitimate expectations is unacceptable if no precise assurances are given by the authorities that they will act in a particular way.[138] In this regard, the Priorities Paper does not give assurances that a firm's conduct will go unpunished if it does not fall within its scope.[139] Moreover, a dominant firm cannot invoke the right of equal treatment to protest that the Commission did not focus its resources on pursuing another's firm exclusionary behaviour, because the announcement that intervention against certain practices will be an enforcement priority does not imply the lawfulness of other practices.[140] Finally, the Priorities Paper fails to serve the principle of legal certainty; if anything, it has led to more confusion than clarity. Particularly, it introduces new concepts but provides a limited account of them, while the (un)lawfulness of a dominant firm's practice depends heavily on information that is typically unknown to it. This is damaging to legal certainty especially because dominant firms are unable to foresee whether their conduct is in conformity with the law; and foreseeability is particularly important in the context of a regime which requires firms to conduct a self-assessment of their commercial practices.

In any event, the Priorities Paper may still be of practical significance unless and until it is formally withdrawn.[141] The tension between the case law and the content of the Priorities Paper may indeed be irrelevant for the undertakings and their legal advisers when deciding to

[138] T-286/09 *Intel* (n 97), paras 161-6. To that effect see Case T-273/01 *Innova Privat-Akademie v Commission* [2003] ECLI:EU:T:2003:78, para 26; Case T-99/04 *AC-Treuhand AG v Commission* [2008] ECLI:EU:T:2008:256, para 163.

[139] Priorities Paper (n 1), para 3.

[140] T-286/09 *Intel* (n 97), paras 161-6. To that effect see eg Case *Innova Privat-Akademie* (n 138), para 26; *AC-Treuhand* (n 138), para 163. In this vein see Manuel Kellerbauer, 'The Commission's New Enforcement Priorities in Applying Article 82 EC to Dominant Companies' Exclusionary Conduct: A Shift towards a More Economic Approach?' (2010) 31 ECLR 175, 185. Contrast Akman 'The European Commission's Guidance on Article 102' (n 58), 625-6.

[141] See eg Case T-148/89 *Tréfilunion SA v Commission* [1995] ECLI:EU:T:1995:68, para 142. However, the practical significance of the Priorities Paper is obscured insofar as it disregards the purpose of guidelines, which is to enhance transparency and accountability, provide a clarification of the law, ensure consistency of enforcement, and increase legal certainty.

consult it. This is because it indicates the Commission's threshold for intervention. From a practical standpoint, if the Commission decides to pursue cases on the basis of a particular test, companies and their legal advisers would immediately attempt to understand it and bring themselves into line with it. In that connection, consulting guidelines is now *routine* for stakeholders, and few undertakings would challenge the Commission's policy in lengthy and costly appeal proceedings.[142]

All in all, the Priorities Paper has no particular legal status. It has no binding legal force and cannot produce the legal effects of soft law instruments either. Neither *Automec* nor *Grimaldi* may act as authorities for the Priorities Paper to be taken into consideration, since it does not meet the requirements laid down in either of them. It seems therefore that keeping the Priorities Paper alive causes unnecessary confusion.[143]

IV. 'Natural' Limitations of Article 102 and Economic Perceptions

The analysis in this thesis revealed that there are certain 'natural' limitations to the interpretation of Article 102, which stem from EU's peculiar constitutional and institutional framework. The analysis of the challenges posed by the Priorities Paper and its proposed test for rebates, in turn, helped to uncover that these limitations also dictate the proper role of economics in the interpretation of Article 102. Particularly, economics assists in designing legal rules that would permit Article 102 to operate according to its constitutional role. To the extent that it fails to do so, economic analysis is irrelevant in the context of Article 102. Accordingly, a shift to a 'more economics approach' to abuse of dominance should be driven

[142] See eg Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others* [2012] ECLI:EU:C:2012:795, where the status and the application of the De Minimis Notice was challenged.

[143] Konstantinos Sidiropoulos, 'Enforcement Priorities Paper on Article 102 TFEU: Is a Title Enough to Overtake Constitutional Rules and Fundamental Rule-of-Law Principles?' (*EU Law Analysis*, 14 December 2015) <http://eulawanalysis.blogspot.co.uk/2015/12/enforcement-priorities-paper-on-article.html> accessed 10 May 2016, arguing that the Priorities Paper is constitutionally and substantively flawed.

by qualitative criteria, meaning that it should genuinely optimise the designed tests so as to better serve the EU Treaties' mandates.

Economic reasoning must thus assist in the formulation of legal rules serving the constitutionally required multi-goal and holistic approach to Article 102 while taking into account the complex institutional setting within which the provision is to be enforced. With regard to the multi-goal and holistic approach, the legal rules must enable Article 102 to pursue its economic objectives and simultaneously avoid undermining policies of socio-political nature that promotes EU's commitment to a highly competitive social market economy. As to the institutional setting within which Article 102 is to be enforced, the designed tests must show consideration for the complex institutional relationships within and between the EU institutions and the complicated processes of decision-making at both the EU and national level. In this constitutional and institutional context, the employed tests must remain clear so as to permit Article 102 to effectively and consistently pursue its objectives across the EU.

Economic analysis is directly relevant for the formulation of these legal rules in that it assists in developing presumptions, identifying benchmarks and defining the conditions under which certain practices may be abusive. In this sense, economic reasoning links facts according to their economically relevant causality so as to strengthen the legal justification process. Economic analysis is thus integrated into legal thinking essentially being part of the overall legal reasoning.[144] Having said that, however, different economic paradigms will lead to diverging outcomes in a given case.[145] Particularly, different economic theories follow dissimilar principles and often make contradictory recommendations about how competition policy should regulate markets. Accordingly, economic analysis cannot play a self-standing

[144] Sibony (n 21) 29.

[145] Fox 'The Politics of Law and Economics' (n 67) 586, stressing that economics is not value-free.

role in the design of the legal rules for the assessment of the unilateral conduct of dominant firms but must be guided by the constitutional and institutional realities in the EU. Article 102 therefore cannot rely on economic perceptions that are not consistent with these realities, since doing so would be at odds with the core of its normative content.

The analysis of the 'more economics approach' to rebates that the Priorities Paper advocates showed that it does not take sufficient account of these limitations. Particularly, the AEC test is based on an economic paradigm that is not in line with the multi-goal and holistic approach to Article 102, being thus unsuitable to satisfactorily serve the provision's constitutional role. In any event, the exceedingly complex nature of the proposed test undermines the functionality and effectiveness of Article 102 in view of the intricate institutional relationships within and between the multiple administrative and judicial bodies that are involved in the application of the provision. As a result, the Priorities Paper's AEC test fails to deliver any meaningful improvement to the assessment of rebates under Article 102. It seems therefore that the Commission's zeal for injecting more economic analysis made it oblivious to the absurdity of bestowing a self-standing role for economics in the interpretation of Article 102.

As to the EU courts' case law on Article 102, it is not divorced from economic reasoning. There are many legal statements in the case law that incorporate economic reasoning. An example of such a statement is the following:

> where an undertaking in a dominant position directly or indirectly ties its customers by an exclusive supply obligation, that constitutes an abuse since it deprives the customer of the ability to choose his sources of supply and denies other producers access to the market [146]

[146] Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECLI:EU:T:1994:246 (*Tetra Pak II*), para 137.

This statement explains why exclusivity and tying arrangements are undesirable from an economic point of view when implemented by dominant firms. Particularly, it highlights the harmful economic effects to consumer interest, namely the reduction of consumer choice and the artificial restriction of market entry, concluding that such arrangements would, in principle, be abusive. This approach is based on the assumption that the dominant firms' preference for these practices and their potential impact on the market are the product of market power, rather than being the result of competition on the merits.[147] This approach incidentally protects SMEs where a dominant firm invests in an exclusionary fight to eliminate SMEs' economic freedom rather than investing in superior performance. This is an economic approach that is justifiable under a socially committed market economy as the competition rules must ensure a performance-based competition. Moreover, by incidentally protecting SMEs, Article 102 indirectly promotes the SMEs' beneficial by-products of improved distribution of income, employment growth, and overall social balance, thereby ensuring consistency with the constitutionally required holistic approach.

It has been explained in chapters 4 and 5 that both the constitutional peculiarities of the EU and the institutional framework within which Article 102 is to be enforced dictate the design of clear rules for the assessment of the unilateral conduct of dominant firms. Indeed, the current legal tests successfully operationalise the multi-goal and holistic approach to Article 102 across the EU because of their reliance on presumptions that form clear rules. These presumptions are based on economic knowledge which is expressed through simplified legal arguments and explanations. Hence, the designed tests for the assessment of unilateral practices of dominant firms are formal. This, however, should not be seen as problematic insofar as all

[147] See eg ibid para 213; Case T-201/04 *Microsoft Corp v Commission* [2007] ECLI:EU:T:2007:289, para 1088; Case T-66/01 *Imperial Chemical Industries Ltd v Commission* [2010] ECLI:EU:T:2010:255, para 315, holding that these practices 'are not based on an economic transaction which justifies this burden or benefit'.

legal rules are by definition formal.[148] Legal rules must be formal in order to be administrable and predictable, and hence in conformity with fundamental rule-of-law principles.[149]

This is important since in the context of the Commission's review of Article 102, the 'form-based approach' of the EU courts was contrasted to an allegedly superior 'more economic approach' to abuse of dominance. This thesis stands in favour of the EU courts' 'formal approach' to the extent that the 'more economics approach' alludes to an economic paradigm that is incompatible with the objectives and broader policy concerns of Article 102, and neglects EU's institutional setting. This is not to deny the capability of economics to ameliorate the approach to Article 102. The emphasis is rather on the fact that increased reliance on economics should be driven by qualitative criteria, namely genuinely enhance the enforcement of Article 102 in relation to its constitutional role and the institutional realities in which it is enforced.

Consequently, there are inherent limitations to the interpretation of Article 102 stemming from EU's constitutional and institutional peculiarities. In this regard, more economic analysis may be injected into the interpretation of Article 102 only if it can be translated into clear and workable legal rules that are consistent with EU's constitutional foundations and institutional realities.

[148] Similarly Richard Whish, '*Intel v Commission*: Keep Calm and Carry on!' (2014) 6 JECLP 1. cf Wils 'The Judgment of the EU General Court in *Intel*' (n 10) 422, stating that 'it is difficult to see what could be wrong with [classification in the context of Article 102].

[149] cf Lianos (n 3) 35, maintaining that '[c]lassification is inherent in the legal process'.

CONCLUSIONS

This thesis has identified the constitutional and institutional characteristics of the EU that influence the interpretation of the concept of abuse of dominance under Article 102. From a constitutional perspective, the starting point is that the content of Article 102 must be determined through analysis of its role in the scheme of the EU Treaties. Indeed, the provision has historically been conceived as part of a system that is employed as a means to achieve the broader objectives set out in the Treaties and the EU courts have generally interpreted it in light of the general spirit of the Treaties. As to the institutional framework within which Article 102 is to be enforced, the current enforcement scheme is primarily set out in Regulation 1/2003, which envisages the involvement of various decision-makers and the uniform interpretation of Article 102. This calls for aligning the capacity of multiple enforcers embedded in diverging institutional settings with the aspiration of preserving an effective decentralised system of enforcement with uniform interpretation and predictable outcomes.

After inquiring into the constitutional structure of the EU, it became clear that the constitutional aim of Article 102 is not to protect competition against any distortions resulting from dominant firms' conduct, but to avoid competition from being distorted in such a way that it would prevent the achievement of the Treaties' broader objectives. The thesis, therefore, found that the EU Treaties mandate a multi-goal and holistic approach to Article 102, meaning that there are multiple objectives and values external to market competition that are relevant to the interpretation of Article 102. Hence, the designed legal tests for the assessment of the unilateral conduct of dominant firms must enable Article 102 to pursue its economic objectives and simultaneously avoid undermining EU's policies of social nature.

As regards the objectives of Article 102, it has been established that it pursues a plurality of goals and that the ultimate objectives are the protection of the integrity of the

internal market and the protection of consumer interest. The EU courts give effect to the EU Treaties' requirements through the teleological method of interpretation and by measuring the distortion of the competitive process via multiple consumer-related proxies. Having discussed these authorities, the thesis proposed a framework for understanding the objectives pursued by Article 102. In this regard, it has been argued that there is a multi-level hierarchy of goals. At the vertical level, at the top of the hierarchy are the two ultimate objectives pursued by Article 102, namely the integration of the internal market and the protection of consumer interest. These goals are propelled through the intermediate goal of the protection of the competitive process, which, in turn, is protected through the use of proxies, such as, for example, consumer choice, consumer welfare, efficiency and economic freedom. However, there also exists a hierarchical relationship at the horizontal level (ie, between the two ultimate goals of Article 102), where the objective of market integration appears to be higher-ranking. In any event, Article 102 has a multitude of intermediary goals and a twin ultimate goal promoted through the protection of the competitive process.

These *stricto sensu* objectives of Article 102 is not the end of the story. Particularly, specific clauses in the EU Treaties mandate a holistic approach to the interpretation of Article 102. This entails that socio-political values external to market competition may affect both the interpretation and enforcement of Article 102 and its *ad hoc* application. In this context, two distinct techniques for incorporating such values into the analysis of Article 102 have been identified. The first technique incorporates specific socio-political values in the analysis of Article 102 in an indirect manner. Under this technique, inequality-related concerns generally guide the interpretation and enforcement of Article 102. However, considerations unrelated to market competition also come directly into play in Article 102, exceptionally leading to the *ad hoc* exclusion of its application. Both techniques reflect the holistic approach to Article 102 insofar as they allow socio-political concerns unrelated to market competition to find their way

into the analysis of Article 102. Even so, the indirect relevance of equality and the *ad hoc* nature of the considerations that may exclude the application of Article 102, clearly preclude the possibility of viewing them as objectives pursued by Article 102.

This thesis argued that the only way to operationalise these constitutional requirements when applying Article 102 is to rely on presumptions that form clear legal rules. Particularly, Article 102 is constitutionally required to pursue the objectives of integrating the internal market and protecting consumer interest, while also being consistent with EU's social policies. This entails that dominant firms' behaviour may be analysed with respect to a broad range of concerns. In practical terms, however, this would be an impossible task if the designed rules failed to simultaneously ensure conformity with the economic goals pursued by Article 102 and consistency with EU's constitutional values. Therefore, designing clear legal rules for the assessment of the unilateral conduct of dominant firms do not merely serve predictability and administrability; more importantly, it secures the functionality of the constitutionally demanded multi-goal and holistic approach to Article 102, thereby serving the core of the provision's normative content.

The thesis has also mapped out the institutions involved in the decentralised enforcement of Article 102 so as to illustrate the complex institutional framework within which the provision is to be enforced. This framework includes the Commission with its complicated decision-making processes, and the multiple enforcement authorities existing in the Member States with their diverging institutional models and procedures. Therefore, there are multiple enforcers embedded in divergent settings, and all the administrative and judicial bodies that are involved in the application of Article 102 must abide by the constitutionally demanded multi-goal and holistic approach to the interpretation of abuse of dominance. This unveils the mismatch between the complicated institutional setting and the necessity of ensuring effective enforcement and uniform interpretation of Article 102.

The complex institutional setting within which Article 102 is to be enforced also dictates the formulation of clear rules for the assessment of the unilateral conduct of dominant firms. Indeed, this institutional framework produces certain elements of uncertainty that can only be remedied through the design of clear legal tests under Article 102. The absence of clear rules for the evaluation of a dominant firm's conduct would put at risk the efficient decentralised enforcement of Article 102. This is the result, *inter alia*, of the existing institutional and procedural diversity at national level, as well as the fact that Member States are permitted to impose stricter rules in relation to unilateral restrictions of competition. This setting is prone to diverging interpretations of Article 102, which may lead to the lack of a level playing field for dominant firms across the EU.

Consequently, both the constitutional peculiarities of the EU and the institutional framework within which Article 102 is to be enforced dictate the design of clear rules for Article 102. More importantly, there are inherent limitations to the interpretation of Article 102 which stem from EU's constitutional and institutional peculiarities. In this regard, the discussion documented that the legal tests that the EU courts employ reflect the constitutional requirements of a multi-goal and holistic approach to Article 102, while also showing consideration for the complex institutional setting within which the provision is to be enforced. The current legal tests successfully operationalise the multi-goal and holistic approach to Article 102 across the EU because of their reliance on presumptions that form clear legal rules.

There was, however, an increasing pressure to move to a more economically inspired approach to Article 102. In this context, the Commission reviewed the law and practice of the prohibition of abuse of dominance, advocating a shift of economic paradigm rather than an increased reliance on economics. One may wonder why the Commission advocated a shift of economic paradigm insofar as the existing legal tests allow Article 102 to operate according to the constitutional role imposed on it by the Treaties. A clear-cut answer as to the motivating

force cannot be given. It is, however, undeniable that the ‘more economics approach’ to Article 102 serves powerful interests, most notably those of dominant firms. Even so, the Commission’s efforts to introduce the ‘more economics approach’ disregarded the proper role of economics in the interpretation of Article 102, thereby leading to a myriad of constitutional, institutional, legal, and practical challenges.

The limitations to the interpretation of Article 102, which stem in particular from EU’s peculiar constitutional and institutional framework, inform and restrict the injection of economic analysis into Article 102. In this regard, more economic analysis may be injected into the interpretation of Article 102 only insofar as this can be translated into clear legal rules that are consistent with EU’s constitutional foundations and institutional realities.

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